



CRIME AND JUSTICE RESEARCH CENTRE

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The Public Defence Service Pilot Evaluation: Interim Report One

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Disclaimer

The evaluation of the Public Defence Service Pilot was commissioned by the Legal Services Agency. This report has been prepared by the authors and the views expressed in it are those of the authors and do not necessarily represent the views of the Agency.

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Executive Summary

On 3 May 2004 the Public Defence Service (PDS) pilot started providing legal services in Auckland and Manukau in relation to the criminal legal aid scheme and the duty solicitor scheme. The Legal Services Act 2000 requires that the pilot be evaluated. In June 2004, the Legal Services Agency (LSA) commissioned researchers based at the Crime and Justice Research Centre at Victoria University to carry out the four and one half year evaluation.

The LSA established an evaluation advisory group to oversee the evaluation, the objectives of which are to assess:

- 1 whether the pilot meets its primary aims of providing high quality, consistent, independent, value for money services to legally-aided persons;
- 2 the extent to which the pilot complies with the principles set out in paragraphs a) and b) of section 81 of the Legal Services Act; and
- 3 the effect of the pilot on other parts of the justice system such as court processes, other schemes and the legal profession.

This first interim report provides some preliminary findings to date in relation to the evaluation objectives. It is limited to preliminary findings about the PDS pilot in its first eleven months of operation – from May 2004 to March 2005 inclusive. It includes the initial views of some lawyers in private practice and some other stakeholders about the establishment and operations of the PDS. The report also includes some figures about the volumes and mix of cases assigned to the PDS up to March 2005 but not about the costs of these cases.

While the findings are of a preliminary nature, it is hoped that they can usefully contribute to providing input into ongoing improvements in relation to the PDS, and identifying key issues for the evaluation and lessons learned for the LSA that will help shape the remainder of the evaluation.

Initial views of some lawyers in private practice and other stakeholders on the PDS establishment and operation

The report records some private and public lawyers' perceptions of each other's motivations and behaviour. Many of their perceptions – on both sides – may be based on false assumptions, but they need to be addressed due to their potential for destabilising the mixed model and undermining faith in the legal services system as a whole.

The contrasting views of some private lawyers, the PDS, LSA and other key stakeholders reveal that the PDS pilot faces several important challenges. With regard to career paths, for example, if the pilot does not offer junior lawyers special inducements, such as training and mentoring and an ability to link highly focused work experience to increased opportunities to rise through the listing categories, it is unlikely

to succeed. However, if PDS does offer junior lawyers special inducements of this type, it will generate complaints of unfair competition from the private bar.

Likewise, some lawyers in private practice believe the PDS pilot may be thwarted in its efforts to exercise a leadership role due to pressure on it to contain costs. In addition, private lawyers' scepticism and, in some cases, hostility toward the PDS, could make the diffusion of innovations from the PDS pilot to private practice providers quite difficult.

The different perceptions of some private lawyers, PDS and LSA raise questions about whether the PDS's two high-level outcomes can be pursued simultaneously, or whether quality of representation and value-for-money should be viewed as competing principles to be traded off against each other, as the private lawyers tended to argue. The LSA workshop participants discussed this problem of trading off quality and efficiency, while the PDS workshop participants were more inclined to see quality and efficiency as complementary goals.

Private lawyers participating in the logic workshops did not explore how lessons learned from the PDS pilot about a law-firm model of criminal defence services might influence their own business development plans. If part of the PDS's mission is to demonstrate professional leadership, LSA will need to consider ways of communicating these lessons so that private lawyers will perceive them as relevant.

Some of the comments from some private lawyers suggest that they may not all have an accurate understanding of legal aid policies. The Agency may wish to consider how to improve this.

In addition, LSA might consider providing targeted, refresher education for listed lawyers about the conditions, and possibly reviewing the conditions, under which existing rules allow file sharing, and payments to junior lawyers working alongside seniors. Furthermore, the Agency may wish to explore options for assignment of cases to chambers, and other less conventional, but potentially promising practices.

Another issue worthy of further review from LSA is the categorical listing system, aspects of which are viewed as impediments to good practice by both private lawyers and PDS managers. In particular, criteria for moving up a category might be due for review.

Volume and mix of cases assigned to the PDS pilot

In its first eleven months the PDS pilot was allocated 2017 assignments, almost all on rotation. The percent of total criminal legal aid cases assigned to the Auckland and Manukau PDS offices were 25.0% and 26.9% respectively, both less than the 29% maximum limit set for the PDS in its first year of operation. The percent of on rotation cases assigned to the Auckland and Manukau PDS offices were 48.8% and 44.4% respectively, both less than the 50% maximum limit set for the PDS.

Over the same period, the number of category 1 and 2 assignments allocated to the PDS pilot appears to be running lower than forecast, while the number of category 3 assignments appears to be running close to that forecast. This is offset slightly by the

30 category 4 assignments allocated to the PDS pilot appearing to be slightly higher than forecast.

Input into ongoing improvements in relation to the PDS

Increasing assignments as preferred lawyer

The proportion of assignments taken on by the PDS as preferred lawyer in the first eleven months was very small at about 2-3 percent of total assignments. Two-three percent is lower than LSA expected.

Clients' perceived inability to nominate a particular PDS lawyer may act as a barrier to them nominating the PDS as their preferred lawyer. This, in turn, makes it difficult for the PDS to build up its preferred lawyer base. If, indeed, it is common for preferred lawyer nominations to remain with the nominated PDS lawyer, it may be useful for this point to be communicated to the PDS' potential clients.

Key issues for the evaluation and lessons learned for the LSA

Monitoring the PDS workload

Some private sector lawyers in the workshops and some stakeholders we interviewed expressed concern about the PDS's potential heavy workload given their lawyer numbers and category ratings. Time will tell whether the number and distribution of category ratings among PDS lawyers is appropriate to the volume and category of cases assigned to PDS, or whether some modifications are required to either their maximum caseload or caseload mix. Certainly, it is something that LSA and the evaluators need to monitor closely over the duration of the pilot.

Comparing the PDS with private sector lawyers - measurement difficulties

The issue of a 'level playing field' bears further examination. Many of those stakeholders whose views we obtained as part of this interim report were uncomfortable with the prospect of comparing value-for-money across the PDS and the private bar because comparable units of measure are so difficult to define, and the structures of delivery are so different. An added difficulty is our current inability to source any information about actual costs of private sector lawyers undertaking criminal legal aid work. However, if we are to learn whether or not the PDS model adds value to legal services, some types of comparisons are necessary.

One possibility might be to promote the development of partnerships among sole practitioners who could accept bulk-funded contracts for legal services. This would enable LSA to compare performance under three types of arrangements – sole private practitioners, bulk-funded private partnerships, and PDS, which might defuse some of the concerns about a level playing field and focus attention instead on the details of comparing and measuring performance across three neutral types of management and governance arrangements.

Many private lawyers think that the more legitimate comparison is between defence and the Crown generally (balance of arms), and between PDS as a firm and Crown Law. This, in turn, raises questions about the appropriate model for PDS as a firm.

Regardless of measurement difficulties, the issue of quality assurance emerges from this first interim report as an area for ongoing work. The evaluators suggest that the LSA will need to find better ways of monitoring and enforcing performance standards among contractors if it wants to improve service quality overall. One option is for the Law Society to play a larger role in quality monitoring. Another option might involve closer networking between PDS and the private bar.

In addition to reporting on the pilot's implementation phase, this first interim report begins to identify the types of information that may be useful for better understanding of the PDS specifically and the business of legal aid services in general.

The evaluation extends over four and one half years. The full evaluation findings are not expected to be reported to the LSA until December 2008.

Chapter 1 Introduction

1.1 Background

1.1.1 Background to the decision to pilot an in-house legal service

Most overseas jurisdictions with legal aid regimes similar to the New Zealand system, including Australia, England and Wales, Scotland, and Canada have a history of operating a mixture of publicly and privately-provided legal aid systems. Until very recently in New Zealand criminal defence services to legally aided clients were provided solely through listed private sector providers contracted to the Legal Services Agency (LSA).

1.1.2 The establishment of the Public Defence Service pilot

In March 2003 Justice Minister Phil Goff agreed to the establishment of the Public Defence Service (PDS) Pilot. The LSA then carried out the detailed design and establishment of the service, consulting with the relevant stakeholder groups – notably the New Zealand Law Society (NZLS), the Criminal Bar Association (CBA) and the Auckland District Law Society (ADLS).

A short history of the establishment of the PDS from August 2002 to July 2004 follows:¹

Feasibility study

26 August 2002	LSA Board agrees that a feasibility study into alternative forms of legal aid services should be undertaken.
November 2002	Agency completes its consultation paper <i>the Feasibility of Piloting an In-house Legal Practice</i> and seeks comments from stakeholders.
28 February 2003	Agency reports to Minister of Justice on outcome of the feasibility study. It recommends that an in-house criminal pilot be established at the Auckland and Manukau Courts.

The feasibility study favoured a criminal in-house service, as against a family in-house service, for the following reasons:

- cost analyses using Agency data indicated more favourable outcomes for a criminal in-house service, mainly because assumptions about caseload could be made with greater certainty; and
- responses to the Agency's consultation paper confirmed initial findings that an in-house family service would involve a number of complexities over and above those present in a criminal service.

¹ The chronology was provided by the Agency to help give a picture of the development process. The Agency prepared it for its own purposes of recording actions and communications related to the establishment of the PDS pilot.

Preliminary costing analyses also indicated cost efficiencies were possible with the bulk contracting of specified family law matters. However, international commentators on bulk contracting stressed the need for extensive preparatory work on a contracting framework, standards and benchmarking. LSA considered that these requirements would present some risks in implementing bulk contracting at this stage.

There were two main reasons for the decision to pilot the criminal in-house service, PDS, in the Auckland and Manukau District Courts. Firstly, the Agency's cost analysis favoured an Auckland/Manukau combination, mainly because the high number of cases allowed for greater cost efficiencies. In addition the relatively high percentage of 'in rotation' assignments meant greater certainty of caseload, and therefore less business risk, in the initial stages of the service. Secondly, the pilot would provide the opportunity to test service delivery across two large courts with a range of differences in their operation, including caseload type and client profile.

Setting up the pilot

April – May 2003	Consultations with stakeholders.
20 May 2003	Agency publishes and distributes a consultation response to submissions made on the consultation paper.
June 2003	Agency adopts the name the Public Defence Service pilot.
August 2003	Cabinet approves funding for the pilot and its evaluation. Cabinet approves a yearly appropriation to bulk fund the PDS.
29 October 2003	Agency announces the appointment of the Public Defender, Michael Corry.
9 February 2004	Evaluation Advisory Group is established.
1 April 2004	Wider reference group for the evaluation is established.
5 April 2004	Request for Proposal for PDS evaluation sent out.
3 May 2004	PDS opens – first assignments received.
14 June 2004	Crime and Justice Research Centre at Victoria University selected by the Evaluation Advisory Group as the research team for the evaluation.
July 2004	Statement of Service published for the PDS.

Throughout the period of the establishment of the PDS there was ongoing dialogue with stakeholders. Some key areas of concern related to a lack of early consultation with the profession before decisions were taken by the Minister of Justice and whether the LSA had complied with its statutory obligations in its planned establishment of the pilot.

During its establishment the PDS encountered a hostile reaction from some local providers.

1.1.3 Objectives of the Public Defence Service Pilot

The primary objective of PDS is to:

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

In addition, PDS aims to:

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

In accordance with these objectives, the PDS has the discretion to test different approaches during the five year period of the pilot (May 2004 to April 2009) in the Auckland and Manukau Courts.

1.1.4 Statutory requirements

The Legal Services Act 2000 includes statutory requirements in terms of the principles to apply to pilot plans (s81) and the evaluation of pilot plans (s83). These are:

s81 Principles to apply to pilot plans -

- a) that the pilot will maintain or improve the quality of the delivery of the relevant service; and
- b) that the pilot will not have either of the following results:
 - i) that people requiring the service cannot, in practice, obtain the service except under the pilot; and
 - ii) that lawyers outside the pilot are denied, in practice, the opportunity to offer the service, either generally, or in relation to the place where the pilot is operating, or in relation to the client group the pilot is directed at.

s83 Evaluation of pilot plans -

- 1) Every pilot plan must be evaluated, and the evaluation must address, in particular,
 - a) the extent to which the pilot complies with the principles set out in paragraphs (a) and (b) of section 81; and
 - b) the effect of the pilot on other parts of the justice system, such as court processes, other schemes, and the legal profession.
- 2) The Minister must present a copy of every evaluation of a pilot to the House of Representatives within 6 months of the Minister's receipt of the evaluation.

1.1.5 The evaluation of the PDS pilot

The LSA established an evaluation advisory group to oversee the evaluation, the objectives of which are to assess:

- 5 whether the pilot meets its primary aims of providing high quality, consistent, independent, value for money services to legally-aided persons;
- 6 the extent to which the pilot complies with the principles set out in paragraphs a) and b) of section 81 of the Legal Services Act; and
- 7 the effect of the pilot on other parts of the justice system such as court processes, other schemes and the legal profession.

The evaluation is to obtain information about:

- the set-up and implementation of the PDS pilot;
- the operation of the PDS over the pilot period;
- how legal aid cases are dealt with pre-pilot and during the pilot period (broken down into public and private legal aid provision for the Auckland and Manukau courts separately);
- the impact of the pilot on the justice sector;
- meeting cultural and other needs of clients;
- other impacts of the pilot; and
- implications for piloting in other court locations and jurisdictions.

The Crime and Justice Research Centre was commissioned by the LSA to carry out the evaluation. The evaluation has both implementation and outcome components and stretches over four and one half years.

1.2 Public Defender Schemes Overseas

Public defender services have been established in many overseas jurisdictions, and there has been quite a bit of evaluation research on some of these services. In designing the research for the New Zealand evaluation, we have reviewed information that has been provided to us about this overseas experience and research.

We have specifically reviewed material with respect to public defender services that are part of criminal legal aid delivery in Scotland, England and Wales, Australia, Canada, and the United States.

Each of these schemes, like the pilot project in Auckland and Manukau, is a mixed model for the delivery of criminal legal representation that has some combination of the following elements:

- publicly funded salaried lawyers operating out of public defender offices providing criminal legal representation to means-tested clients;
- publicly funded private practitioners providing such representation to means-tested clients on the basis of an established fee schedule (referred to in some jurisdictions as “judicare”); and

- publicly funded salaried lawyers and/or private practitioners acting as “duty counsel” to address the immediate needs for representation of otherwise unrepresented defendants appearing in court for the first time on a criminal charge, regardless of their private means.

1.3 Evaluation approaches of Public Defender Schemes overseas

We have not yet obtained detailed descriptions of all the evaluation projects from which we have reviewed findings so far. The ones for which we do have such information, however, disclose quite a variety of approaches to this kind of research.

Evaluations typically focus on most or all of the following issues:

- What are the relative costs and economies of different schemes for the provision of legal representation? (cost-effectiveness)
- What quality and consistency of legal representation does the scheme achieve? (quality assurance)
- To what extent does the scheme achieve equitable access to such representation for criminal defendants, irrespective of their ability to pay for it? (equitable access)
- What impact does the scheme have on the quality of justice achieved in the criminal process? (impact on justice)
- What impact does the scheme have on defendants’ freedom of choice in securing effective legal representation? (impact on client choice)
- What impact does the scheme have on the independence of legal representation for defendants? (impact on independence of the bar)
- What impact does the scheme have on the willingness of lawyers to engage in criminal defence work? (impact on criminal defence labour pool) and
- What is the level of client satisfaction with respect to the legal representation received through the scheme? Does this vary according to whether the legal representative is a salaried lawyer or a private practitioner? (client satisfaction).

1.4 Some evaluation findings of some public defender schemes overseas

An initial observation of the literature is that evaluators and reviewers of legal aid delivery models frequently refer to the interests and tensions surrounding the delivery models. Currie put it this way²:

2 Currie A. (2000). Legal Aid Delivery Models in Canada: Past Experience and Future Developments. University of British Columbia Law Review: 33: 285-315.

'In Canada, and elsewhere, delivery models have become burdened with a set of vested interests that have obscured the issues of cost and quality of service with rhetoric and ideology'.

1.4.1 Scotland

The Scottish Public Defence Solicitors' Office (PDSO) was established in central Edinburgh in 1998. The Office was set up with no more than six solicitors who were employed on fixed salaries over a five year period to provide criminal legal aid for clients. A sample of clients facing summary prosecution in Edinburgh Sheriff or District Courts were directed to use the PDSO (and were not eligible for legal aid through private legal practitioners).

An evaluation of the Scottish scheme³ compared some 2,600 criminal cases undertaken by the PDSO and private defence solicitors based in the same area on:

- cost effectiveness;
- the quality of the service;
- client satisfaction; and
- the impact of the rest of the criminal justice system.

Cost effectiveness

The evaluators found little difference in the costs between the two services over the five year period. The PDSO was substantially under used by accused directed to use their service during its first two years.

Quality of the services

The criminal justice professionals interviewed as part of the evaluation were of the view that PDSO lawyers were much like other private defence lawyers, and that the PDSO's quality of advocacy was much the same as that of other law firms.

PDSO cases were more likely to be resolved at an earlier stage than comparable cases undertaken by private defence lawyers. PDSO cases were also more likely to result in a conviction. Once convicted, the sentences imposed on PDSO cases were similar to those imposed on comparable cases undertaken by private defence lawyers.

Client satisfaction

Clients who were directed to use PDSO had lower levels of trust and satisfaction with PDSO compared with clients using private defence lawyers.

Impact on the rest of the criminal justice system

The fact that PDSO cases were more likely to be resolved at an earlier stage was estimated to have reduced court and prosecution costs relative to comparable cases undertaken by private defence lawyers.

3 Goriely T, McCrone P, Duff P et al. (2001). The Public Defence Solicitors' Office in Edinburgh: An Independent Evaluation. Edinburgh: Crown Copyright.

1.4.2 England and Wales

The first Public Defender Service office in England and Wales was opened in Liverpool on the 14th May 2001. Another seven offices have since been established in Middlesbrough, Swansea, Birmingham, Cheltenham, Pontypridd, Chester and Darlington. Unlike the Scottish scheme, there has been no system of directing clients to use the Public Defender Service.

The reasons given for establishing the four year pilot Service included

- providing independent, high quality and value-for-money criminal defence services
- providing examples of excellence in the provision of criminal defence services
- providing benchmarking information to be used to improve the performance of the contracting regime with private practice suppliers
- recruiting, training and developing people to provide high quality criminal defence services and
- sharing with private practice suppliers best practice, in terms of forms, systems, etc., developed within the Service.

Only the first research report⁴ is currently available. It is limited to a comparison in six areas of the conduct of Public Defender Service lawyers and private practice lawyers in relation to their work advising, assisting and representing suspects at police stations (the investigation stage). The initial findings were somewhat mixed. They showed, for example, that

- Public Defender Service lawyers *'tended to have fewer of their investigation stage clients charged or summonsed for a criminal offence'*.
- Public Defender Service lawyers *'perform[ed] better in the adequacy of their police station pro forma, the layout of their files, timeliness of first contact with the client and appropriateness of advice given to clients on their strategy in police interviews'*.
- Private practice lawyers *'perform[ed] better in respect of legibility of files, the level of information on files, and the appropriateness of decisions to attend in person at the police station and at police interviews'*.
- Public Defender Service lawyers *'perform[ed] better in terms of the overall level of service provided and results achieved at police stations'*.
- *'There were regional variations in the assessment of quality of police station work, regardless of whether it was performed by Public Defender Service lawyers or private practice'*.

Subsequent reports will compare the costs and quality of the court work undertaken by Public Defender Service lawyers and private lawyers.

4 Bridges L & Sherr A. (2005). See <http://www.legalservices.gov.uk/criminal/pds/evaluation.asp>

1.4.3 Canada

Canada has experience delivering legal aid under a variety of models, including through public defender models, for over twenty years. On the evidence of research studies conducted in Canada until 2000, Currie⁵ concluded that salaried lawyers were less expensive than private practice lawyers in delivering criminal legal aid in that country. He also concluded that, for the most part, the quality of the criminal legal service provided by salaried lawyers was similar to that provided by private practice lawyers. The one dimension of quality for which salaried lawyers and private practice lawyers differed, was that salaried lawyers were found to plead their clients earlier in the criminal justice process.

1.4.4 Australia

A mixed system of legal aid service delivery operates in Australia. Public defenders represent legally-aided clients charged with serious criminal offences throughout New South Wales. Two states, Victoria and Queensland, have tendered casework services.

Through a tender process the Legal Aid Commission of Victoria selected six firms to participate in a franchising pilot. These firms were delegated to grant legal assistance in summary criminal cases being heard before the Magistrates Court to a scale of fees. Findings of an evaluation⁶ of the Victoria pilot included that:

- *‘Franchising can provide a high quality service to clients;*
- *... a satisfactory degree of accountability can be maintained provided the level of control is appropriately managed; ...*
- *post audit legal payment costs were similar to the 12 month period prior to franchising*
- *franchising would achieve minimal savings, based upon extending franchising to high referral firms’.*

In Queensland, nine law firms in three locations successfully tendered for blocks of cases of between 25 and 100 matters in a prescribed crime pilot. An evaluation of the Queensland pilot found that the cost benefits of tendering were *‘marginal’*, given the generally low level of fees and that *‘the minimal savings achieved with the tendering price were more than made up for by the cost of setting up an audit function’*.⁷

1.4.5 United States

There are a variety of different criminal legal aid delivery systems operating among, and sometimes within states, as well as at the federal level in the United States. In no state

5 See footnote 1 in this Chapter.

6 As summarised by J Hodgins in *Surviving Fiscal Cuts: The Purchaser-Provider Paradigm and Beyond*. See <http://faculty.law.ubc.ca/ilac/Papers/08%20Hodgins.html>

7 See footnote 5.

or jurisdiction within the United States are salaried public defenders the only way of delivering criminal legal aid services. Private lawyers always play a role too.

Akester⁸ examined some of the United States systems to identify the characteristics of good, or bad, salaried defence services. His report identified four key elements of a public defender system:

- Accountability and structure. He found that *'the most effective and respected public defender systems were those where there was an independent body mediating between the government and the service'*.
- Resources and funding. He found that all the state funded public defender systems they examined were under-resourced.
- Caseload and protection against overload. He found that all the state funded public defender systems were *'subject to case overload when set against national independently –validated measures'*.
- Quality control (including training and support). He observed that in some states cases may *'pass to the private bar, which often has low funding caps per case, and poorer quality'*.

1.5 This report

This first interim report provides some preliminary findings to date in relation to the evaluation objectives (see section 1.1.5). It is limited to preliminary findings about the PDS pilot in its first eleven months of operation – from May 2004 to March 2005 inclusive. It includes the initial views of some lawyers in private practice and some other stakeholders about the establishment and operations of the PDS. The report also includes some figures about the volumes and mix of cases assigned to the PDS up to March 2005 but not about the costs of these cases.

While the findings are of a preliminary nature, it is hoped that they can usefully contribute to providing input into ongoing improvements in relation to the PDS, and identifying key issues for the evaluation and lessons learned for the LSA.

The evaluation itself extends over four and one half years. The full evaluation findings are not expected to be reported on until December 2008.

In the remainder of this first interim report, Chapter 2 describes the methodology we have used to date. The views of LSA and PDS staff regarding what the PDS pilot is expected to accomplish and how it is meant to do so (Chapter 3) are contrasted with the views of some lawyers in private practice about how the pilot is measuring up against its own theory (Chapter 4). Chapter 4 also gathers some initial views of private practice lawyers about how the pilot is being implemented, how it is affecting the justice system thus far, and what effects they expect to see in the future. Chapter 5 presents some views from some of those people on the inside closely involved in the PDS's

8 Akester K. (2001). Public Defenders: Learning from the US experience. London: JUSTICE

implementation. It also provides some initial caseload and case mix assignment figures. Chapter 6 presents the views of some other key stakeholders about, for example, their perceptions of the quality of the service provided by PDS pilot in its initial phase. The first interim report ends with some initial observations on the first 11 months of the PDS pilot.

Chapter 2 Evaluation methodology

2.1 Introduction

Evaluators at the Crime and Justice Research Centre, Victoria University of Wellington, together with a group of specialist advisors, were commissioned by the Legal Services Agency (LSA) to undertake an evaluation of the Public Defence Service (PDS) Pilot in June 2004.

The evaluators are guided by the ethical guidelines of the Association of Social Science Researchers and the following principles:

- Respect for all who participate;
- The selection of evaluation methods that are appropriate to the values and beliefs of the cultural and ethnic groups involved in the research;
- The need for the research to benefit the various groups that participate in the research;
- The need for the research to have integrity, to be independent and to provide reliable and accurate information; and
- An acknowledgement of ownership of the information imparted to the evaluators by the research participants resulting in a reciprocal relationship which is enhanced by returning information and analysis to research participants.

The Standing Committee of the Human Ethics Committee, Victoria University of Wellington, approved our application for ethical approval of the evaluation in August 2004. Their approval extends to December 2008, the end date for the evaluation.

The LSA established an Evaluation Advisory Group for the evaluation. Membership of that group comprises an independent evaluator and representatives from the following stakeholder groups:

- Auckland District Law Society
- Criminal Bar Association
- Legal Services Agency
- Ministry of Justice
- Ministry of Pacific Island Affairs
- New Zealand Law Society
- Ngati Whatua and
- Public Defence Service.

2.2 The purpose of logic workshops generally

Virtually all government policies and programmes are designed to meet multiple objectives through specified mechanisms, such as organisation and delivery of a service. Some programme objectives are written into legislation, while others are understood tacitly. As programmes mature, additional worthy objectives may be discovered and embraced by programme staff, based on experience and deepening

understanding of the programme's environment. In addition, experience with a programme often reveals new and unexpected ways in which the programme seems to be serving (or not) its intended clients and meeting (or falling short of) its objectives.

Dynamic programme evaluation attempts to capture as much of this learning as possible through varied data collection methods. Logic analysis is one such method. It focuses on eliciting information from key sources about a programme's multiple and evolving objectives and its various mechanisms for meeting those objectives, as well as identifying developments in thinking about possible perverse effects and sources of risk. Programme staff and policy designers are particularly rich sources of information about a programme's intended objectives and mechanisms of action, while stakeholders tend to be particularly good at pointing out risks and design flaws. Information drawn from these two sources adds up to a programme's 'intervention logic,' which is an overly technical-sounding term for a graphical depiction of the core rationales for and against a particular policy or programme.

Although efforts are underway in New Zealand and other countries to encourage greater use of logic analysis at the programme design stage of policymaking, it is most commonly used in ex post evaluation to acknowledge the importance of understanding how programme rationales (both pro and con) evolve and change over time and with experience. Although the official definition of a programme's 'success', and the related performance indicators that evaluators measure against, must be drawn from official sources such as statutes or statements of service, it is often illuminating to see how programme staff, policy designers, and relevant stakeholders define success and failure in practice. This provides a platform for exploring how staff and stakeholders perceive what the programme is actually doing relative to what it is meant to do.

2.3 The logic workshops with LSA and PDS staff

The purpose of the logic workshops with LSA and PDS staff was to work with them to construct a coherent and comprehensive vision of what the PDS is expected to accomplish and how it is meant to do so.

Two internal logic workshops were conducted – one with managers and staff of the LSA in Wellington and one with managers of the PDS in Auckland in late January 2005. Both workshops were facilitated by an academic facilitator (Dr Karen Baehler, School of Government, Victoria University of Wellington) and supported by a note taker (Judy Paulin).

The workshops ran as structured brainstorming sessions in which participants examined a wide variety of issues associated with both the theory and reality of running a 'mixed model' of criminal defence services for legal aid clients. The LSA workshop was particularly productive due to good attendance and participants' willingness to challenge prevailing views, debate assumptions, and probe below the surface of the logic. Although the PDS workshop involved only three participants, all of them managers, it produced a robust discussion of key issues, particularly those related to implementation.

The workshop findings and Figure A are presented in Chapter 3.

2.4 The logic workshops with the private bar

Logic workshops were held with some local legal aid lawyers in private practice to gain their views about how the PDS pilot is being implemented, how it is affecting the justice system thus far, what effects they expect to see in the future, and how the pilot is measuring up against its own theory.

Our aim was to conduct workshops with a representative group of private sector lawyers of all category ratings undertaking criminal legal aid work in the Auckland and Manukau courts.

In November 2004, the evaluators were provided with a list of the names and contact details of 205 private sector lawyers undertaking criminal legal aid assignment work in the Auckland and Manukau courts that year. We divided this list into two – Auckland and Manukau – based on the area in which an individual lawyer undertook the greater number of assignments.

In mid December we invited 117⁹ (or 57%) of these lawyers to attend a workshop at a venue near the court in which they undertook the greater number of assignments. Invitation letters were accompanied by a letter from the LSA conveying the support of the LSA, the Auckland District Law Society, the Criminal Bar Association and the New Zealand Law Society for the evaluation. Lawyers were asked to select a workshop from a choice of three workshops spread over two days, and post their response to the Crime and Justice Research Centre in a reply-paid envelope by late January 2005.

Lawyers wishing to participate in the evaluation were sent a letter confirming their place on a particular workshop. Those who had not responded by late January were phoned to remind them about the workshops and to elicit a response where possible.

In total, twelve workshops were scheduled over the first two weeks of February 2005. However, only nine workshops were needed to accommodate the 34 lawyers (or 29% of those we invited) who agree to participate and attended a workshop.

Table 2.1 compares the categorisation of workshop participants with those private practice lawyers we invited and with the list of private practice lawyers as a whole.

⁹ From the Auckland list we excluded those lawyers from outside Auckland who undertook three or fewer assignments that year, and also excluded two lawyers on the Evaluation Advisory Group. We then invited every second name on the Auckland list. We invited everyone on the Manukau list.

Table 2.1 Percentage of private practice lawyers undertaking criminal legal aid work who were on the list, were invited to attend workshops, and attended workshops according to their highest category rating

Category ¹⁰	% on list (N=205)	% invited (n=117)	% attended (n=34)
1	19	19	15
2	20	21	29
3	23	29	24
4	38	31	32
All categories	100	100	100

The proportions of category 1 and 2 lawyer invited to attend the workshops matched their proportions on the list. Category 3 lawyers were slightly over-represented and category 4 lawyers slightly under-represented among the invitees compared to those on the list.

The proportion of category 3 lawyers attending the workshops roughly matched their proportion on the list. Category 1 and 4 lawyers were slightly under-represented and category 2 lawyers were slightly over-represented at the workshops compared with their proportions on the list.

Tables 2.2 and 2.3 provide detailed breakdowns of the categorisation of those who were invited against those who attended the workshops in Auckland and Manukau respectively.

Table 2.2 Number and percentage of private practice lawyers undertaking criminal legal aid work who were invited to attend workshops in Auckland, and who attended workshops there according to their highest category rating

Category	N invited	% invited	n attended	% attended
1	9	15	1	6
2	12	19	5	29
3	16	26	5	29
4	25	40	6	35
All categories	62	100	17	99

Seventeen private practice lawyers participated in workshops in Auckland. Category 2 lawyers were slightly over-represented and category 1 lawyers slightly under-represented among Auckland workshop participants relative to those invited.

¹⁰ A lawyer must apply for and be approved as a provider of criminal legal aid work at a particular category rating. The rating is based on his or her legal experience and competence. Category 1 is the lowest category rating and Category 4 is the highest category rating. A lawyer may undertake any criminal legal aid work up to and including his or her category rating.

Table 2.3 Number and percentage of private practice lawyers undertaking criminal legal aid work who were invited to attend workshops in Manukau, and who attended workshops there according to their highest category rating

Category	N invited	% invited	n attended	% attended
1	13	24	4	24
2	13	24	5	29
3	18	33	3	18
4	11	20	5	29
All categories	55	101	17	100

Seventeen private practice lawyers also participated in workshops in Manukau. Category 4 lawyers were slightly over-represented and category 3 lawyers slightly under-represented among Manukau workshop participants relative to those invited.

Each workshop was facilitated by an academic facilitator (Karen Baehler, School of Government, Victoria University of Wellington) and supported by a note taker (either Judy Paulin or Nicolette Edgar from the evaluation team). Workshops were catered.

Each workshop began with a facilitated exercise in which participants discussed how the PDS ideally is intended to improve the delivery of criminal legal aid services. Private practice lawyers’ views were sought about how the PDS actually works in practice, including a discussion of implementation issues and how difficulties or risks related to the PDS were being dealt with. Their opinions were also sought on the impact of the PDS pilot on them, their clients, the legal aid process and provision, and the broader justice sector. The programme logic diagram produced in the internal workshops (an earlier version of Figure A provided in Chapter 3) was presented to the lawyers in most of the workshops and used to elicit their comments about various rationales for PDS, based on their experiences to date with the mixed system and their expectations.

As a back up to the facilitated exercise, the evaluators had prepared supplementary questions on the topics the evaluators wanted to ensure were covered at each workshop (Appendix 1). In the event, lawyers’ discussion almost always ranged unprompted across the topics we wanted covered, and we had little need to resort to our prepared questions. Each workshop lasted approximately two hours.

The general tone of these workshops was respectful, courteous, and frank, but also wary of the facilitators’ allegiances and purposes. Although many participants had serious grievances to air (particularly so in Manukau), and some groups were more aggressive than others, participants presented their arguments by and large in a reasoned way and avoided ad hominem attacks. Many of the participants emphasised that their interest in PDS was larger than its effect on their personal incomes and business prospects. They wanted us to know that they are motivated by concerns about the future of the criminal justice system in general and the welfare of the individual ‘punters.’

At nearly all of the workshops, participants spent time airing their scepticism about the evaluation process itself, including the commonly held, fatalistic view that the

government will at least continue PDS, and probably expand it, regardless of the evaluation's results. They generally dismissed consultation as '*window-dressing*' and rejected the notion of a 'pilot,' calling the permanent institutionalisation of PDS a '*fait accompli*'. They criticised government for not consulting more extensively at the policy design stage. Several participants reported conversations with colleagues who had declined our invitation to participate in these workshops because they felt it would be a '*waste of time*'.

By the end of the workshops, however, participants often seemed quite happy to have come, and many (particularly in Auckland) said they felt their views had been heard. Many seemed to enjoy the intellectual give-and-take of ideas and arguments during the sessions, and some lingered after the workshops to chat further. The small gift offered at the end of each workshop – wine or a book voucher – generated quite a lot of good will.

Analysis of the workshop data focused on identifying and articulating general threads and themes. Quantitative analysis of content was not possible, because content analysis must be done against verbatim transcripts. The sessions were not taped and transcribed for reasons of cost and to encourage frankness on the part of participants.

The findings from the logic workshops with private practitioners are presented in Chapter 4.

2.5 Interviews with some other stakeholders

The purpose of these interviews was two fold:

- to elicit more detailed information about some aspects of the PDS's implementation from those closely involved with its set up and
- to gain the views of some other stakeholders – for example, judges, police, community law centres and court staff – regarding the aspirations, operation and impact to date of the PDS pilot.

We invited some staff from PDS and from LSA (including consultants) to be interviewed for the evaluation. These people were invited for their particular specialist knowledge or experience in helping with the set up of the PDS offices. The content of these interviews was more specialised than that with reference group members, with most of these people choosing not to offer a view on the quality of the PDS itself.

The LSA provided the evaluators with a list of names and contact details of 42 reference group members¹¹ of the PDS pilot. Given their anticipated differences of view points about the PDS, we chose to interview them separately in greater depth.

In February 2005 we invited all members by letter to take part in an interview for the evaluation. Our invitation letter was accompanied by a letter from the LSA providing members with a short update on the evaluation and encouraging their participation in it.

¹¹ Excluding PDS staff.

We followed our invitation letter with a phone call or an email in an attempt to set a time for an interview with stakeholders during March 2005. We indicated that while our preferred mode of interview was by phone, we were willing to interview them face-to-face if this was their preference. Members were able to nominate another person from their organisation on the basis that the nominated person had greater interaction with the pilot.

A small number of invitation letters were returned unopened, and in some instances reference group members had moved to other positions and it was no longer appropriate for them to participate in the evaluation. With a larger number of reference group members, we could not secure a suitable interview time despite our repeated attempts to do so. In some instances we sensed a nervousness and reluctance of members to be interviewed for the evaluation on the basis that they did not wish to share their views with us for fear of jeopardising their ongoing relationships with the PDS.

The interview guide we used as the basis for most of the interviews is attached as Appendix 2. We incorporated review comment provided by the PDS Evaluation Advisory Group and from some of our specialist evaluation advisers into the guide. Those members who agreed to be interviewed were sent (mostly by email) the guide without the prompts in advance of the interview.

We conducted interviews with 27 stakeholders during March and April 2005, with most interviews taking about 30 minutes. Those with judges, LSA staff (including consultants), and PDS staff were conducted in person. One group interview consisted of an informal discussion with four PDS lawyers in the Auckland office around lunch time. All other stakeholders were interviewed by phone.

All except the interviews with judges were conducted by Judy Paulin who took almost verbatim notes of stakeholders' responses during the interviews. The interviews with judges were conducted by Professor Philip Stenning and were taped with the judges' permission.

The following table provides a breakdown of the 27 key stakeholders we interviewed according to the groups they represented and the label we have attached to exemplary quotes in Chapter 6.

Table 2.4 Number of stakeholders according to the groups they represent

Group	number	label attached to quote
community law centres	3	other
correctional managers	2	official
court managers	2	official
District Court judges	4	Judge
LSA (including consultants)	4	LSA
Maori Law Society	1	other
NZ Law Society	1	other
NZ Police/Crown prosecutors	4	prosecutor
PDS	5	PDS
Te Puni Kokiri	1	official
total stakeholders	27	

Stakeholders' responses (of JP's notes and selected transcriptions from the tapes) were entered onto computer for analysis.

All those we interviewed indicated that they would like to receive a summary of the evaluation findings in due course.

The findings collated from these interviews are contained in Chapters 5 and 6.

Chapter 3 Workshops with the LSA and the PDS

3.1 Introduction

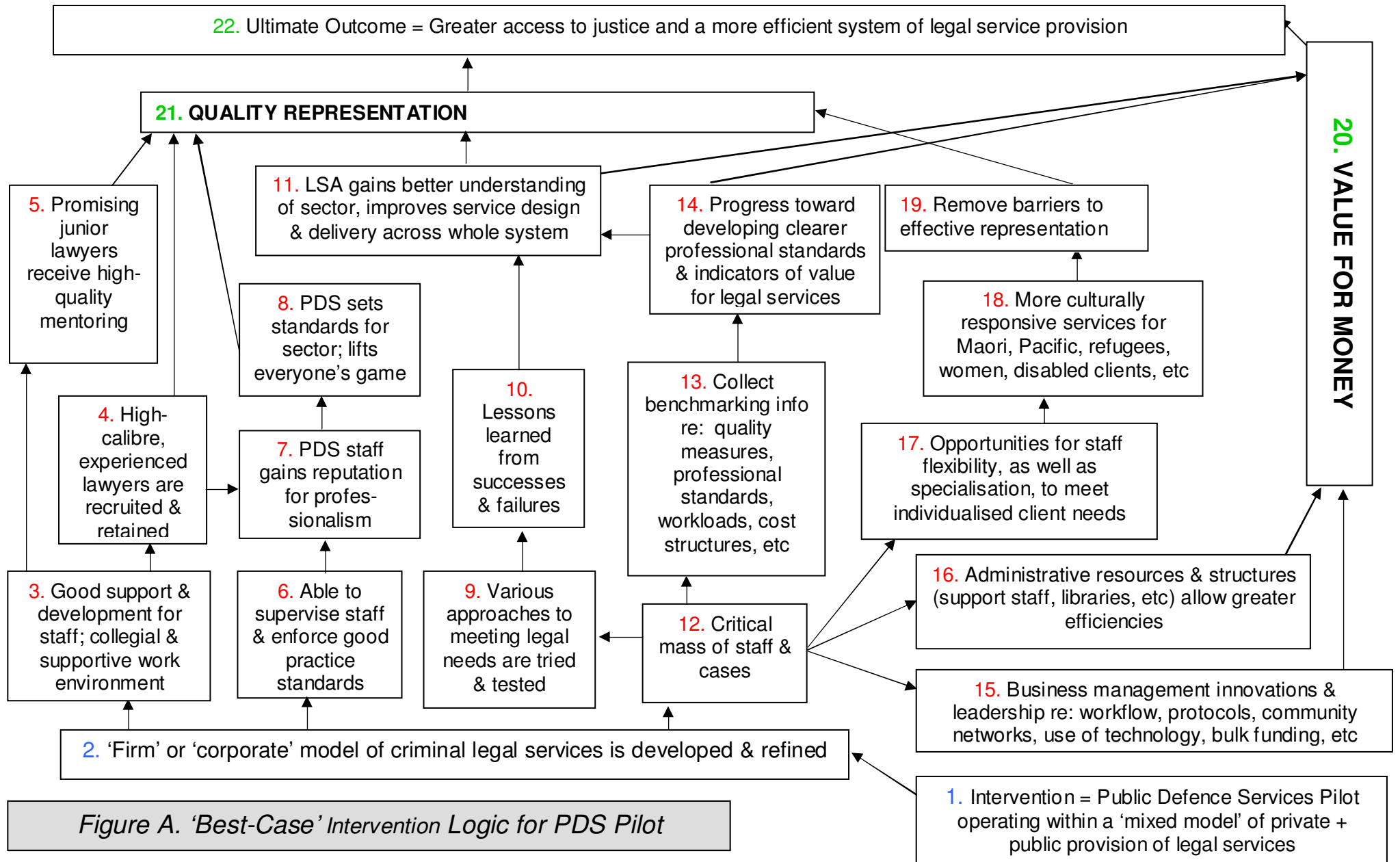
This chapter presents the findings from two logic analysis workshops with LSA and PDS staff to construct a coherent and comprehensive vision of what PDS is expected to accomplish and how it is meant to do so. Information elicited from staff in these workshops reveals a complex web of rationales supporting the public defence pilot. This web of rationales, presented and explained below, may be a valuable product in its own right: Policy staff may find it a helpful framework for thinking about policy design issues associated with future pilots or designing possible refinements of the current pilot. In addition, operational staff may find it a useful framework for considering management issues and/or communicating the organisation's expectations and mission to staff.

The results presented below provide a conceptual foundation for both the implementation and outcome components of the evaluation by constructing a richer and more detailed definition of what 'success' would look like for PDS against the backdrop of a mixed legal services model. Thus, the logic model provides a benchmark for examining operations and results at each phase of the pilot, and for comparing actual results with intended results.

3.2 Our findings

The model sketched in Figure A summarises key messages from the two workshops concerning the pilot's essential programme logic, or theory of action. The model consists of five distinct rationales that link the notion of a PDS pilot to the final outcomes of greater access to justice and more efficient delivery of legal aid services. These rationales draw together much of the formative thinking that led to the design of the pilot, as found in early policy papers, as well as subsequent thinking about where and how the pilot is in fact fitting into the justice systems in Auckland and Manukau.

The diagram may be interpreted as a 'best-case scenario' for PDS. If all of Figure A's hypothesised chains of outcomes were to eventuate, the programme would be highly successful.



3.2.1 The ultimate outcome (Figure A, Boxes 20 – 22)

LSA workshop participants agreed that the ultimate purpose of PDS is to contribute to two high-level outcomes, value-for-money and quality representation for clients. There was lively discussion around the interpretation of key phrases, such as whether people's '*legal needs were met*' at the point that legal representation was provided or whether access to particular legal outcomes was required. And if outcomes are expected, what should these be? For example, does good representation mean that the defendant is acquitted, or that the defendant is convicted and doesn't offend again? In the end, participants chose to express the high-level outcomes in terms of quality and consistency of legal representation, which provides greater access to justice, and a system of legal services provision that delivers value for money.

With quality and value for money identified as top outcomes, natural questions arose about how to define and measure these characteristics. Is quality measured by outcomes – acquittals, convictions, sentences, etc – or by other features? Where quality is concerned, participants also discussed the proper allocation of responsibility between LSA and the profession, as represented for example by the Law Society: Who should define quality standards? Who should monitor actual practice? Who should intervene, and how, when quality falls below the threshold? These issues could not be settled in the workshop, but they were acknowledged as items for further examination.

3.2.2 The intervention being modelled (Figure A, Box 1)

Internal workshop participants emphasised that the PDS pilot is NOT about comparing and contrasting pure models of public monopoly v private provision of legal services. Instead, through PDS, government is piloting a mixed or hybrid model in which a public defence '*firm*' operates alongside and in cooperation with independent, private practitioners.

Within the hybrid model, participants in the PDS workshop saw competitive advantages to the way in which the PDS had been funded and established as including:

- freedom from the pressure of rain-making (i.e., developing a client base);
- freedom from billing;
- attachment to a single court (in contrast with some private lawyers whose names are on rosters in Auckland, Manukau, North Shore & Waitakere); and
- freedom to talk realistically with clients about earlier guilty pleas.

More broadly, PDS workshop participants perceived the mixed model as providing for '*checks and balances*' in a '*free and democratic society*'. A public monopoly over defence legal services may not be desirable, according to these groups.

This hybrid perspective naturally raises certain questions:

- What is the optimal proportion of public v private provision within a mixed system? If PDS were to be expanded, how much expansion would make sense? Moreover, would it be better to promote uptake of PDS's most effective practices among private sector lawyers rather than pushing for expansion of PDS itself?

LSA and PDS staff did not answer these questions directly, but noted the importance of the questions.

- Exactly what role can and should PDS play within the mixed system? LSA staff noted various international examples in which public defenders specialised in ‘*hard cases*’ that private practice lawyers would not want to take on, but they expressed a general preference for a wider brief at this early stage in PDS’s development, including criminal cases of all types. As discussed in Chapter 4, the external workshops with lawyers also shed valuable light on this question of alternative models and roles.

Discussion in the PDS workshop tended to focus on what PDS must do to succeed and make its mark on the Auckland and Manukau courts. Toward that end, the participants touted the PDS’s competitive advantages due to the way in which it had been established and the firm model adopted. From PDS’s perspective, these are the necessary ingredients for an effective public legal services firm, which they are keen to build.

3.2.3 Importance of the ‘firm’ or ‘corporate’ model (Figure A, [Box 2](#))

Casual observers might categorise PDS as yet another public bureaucracy, but LSA and PDS staff have come to see it as a variant on the law firm. This concept was not well developed at the design stage of the pilot; it has emerged over time as policy designers and implementers have learned more about the opportunities that PDS presents for innovation in the delivery of legal aid services. They spoke of the exciting potential for a ‘*firm model*’ of defence legal services to improve both efficiency and effectiveness through:

- flexibility and economies of scale that accompany a critical mass of cases, including access for PDS lawyering to time-saving and quality-enhancing administrative resources and structures, such as support staff, library resources, technology, etc;
- collegial interaction among staff;
- sharing of information among staff;
- training and mentoring of junior lawyers;
- diffusing and enforcing good practice standards among staff;
- trialing innovative approaches to workflow, use of technology, linkages with other social agencies, etc;
- enhancing staff performance through well-designed organisational and management structures; and
- being able to spend more time on each case, thanks for administrative support.

There was not time to flesh out this model fully in the workshops, but the distinctions between governance structures – bureaucracy v firm – and their relevance and relative suitability to PDS, deserve further examination. It is interesting to observe that virtually all of the rationales for the pilot flow from, and depend upon, the firm model of service provision (box 2).

Relevance of the firm model for private providers was briefly mentioned, and deserves further exploration.

PDS managers feel that some of the restrictions imposed on the pilot may constrain their ability to fully implement the firm model. Chief among these is the categorised criminal listing system. Whereas private practice lawyers can acquire the experience needed to advance through categories by taking private clients, junior PDS lawyers can gain experience only 'under the wing' of a senior lawyer, of which PDS has only three. In addition, the listing system prevents PDS from hiring qualified, experienced private practice lawyers who have not been listed. As one participant said, '*we can only employ people from the pool that is being criticised*' (i.e., currently listed providers). The categorisation system and other restrictions are a source of considerable frustration for PDS managers, who are confident that they can both improve quality and increase efficiency in legal services provision if only they can have a fair go. As discussed in chapter 4, private lawyers also have concerns about the categorised listing system for criminal legal aid.

3.2.4 Rationales

Workshop participants identified several overlapping streams of logic that link PDS to the ultimate outcomes of quality representation and value for money. The PDS management workshop focused on issues around professional leadership and good business management, while the LSA management/staff workshop focused on a broader picture of PDS's role within the sector. The general streams of logic may be summarised as follows.

PDS: A training ground (Figure A, **Boxes 3-5**)

A key element of PDS's strategy is to attract promising young lawyers by offering them a collegial and well-supported work environment with ample opportunities to learn the trade and advance in their profession. According to one PDS workshop participant, 'PDS has really good people; we have some real stars. We are looking forward to how they'll develop. We have given them an undertaking that we will give them as much assistance as we can.'

PDS: Sector leader (Figure A, **Boxes 6-8, 12-19**)

Both LSA and PDS staff described opportunities for PDS to provide models of good practice in the provision of legal services to publicly aided clients. They identified several potential channels through which PDS might push the frontiers of service delivery in this area and exert leverage within the sector, including:

- development and diffusion of management innovations gained from operating on a law-firm model of defence legal services (**Box 15**);
- definition, demonstration, and measurement of professional good practice standards (**Boxes 12-14**);
- increasing cultural sensitivity within PDS (through staff training and supervision) and setting higher standards for cultural sensitivity within the larger sector (**Boxes 18-19**);
- development of specialised services to meet particular client needs (**Box 17**); and
- vigorous recruitment and training of legal services lawyers (but note the obstacles presented by the listing system, mentioned above).

PDS: Channel of information and opportunities for organisational learning (Figure A, Boxes 9-15)

LSA staff noted that the process of operating and managing PDS contributes significantly to the agency's understanding of its role within the legal services environment, including both challenges and opportunities for improvements in service delivery, all of which help LSA do its job better. In the current fashions of public management terminology, we might call this an enhanced opportunity for 'organisational learning.'

Organisational learning depends upon PDS's ability to experiment with various innovative approaches on both the business management side and the good practice side of legal services. Bulk funding was mentioned several times as one example of an innovative approach that might be worth trying.

Workshop participants noted a few problems with the organisational-learning rationale: PDS might be considered an unnecessarily expensive and intrusive way of gathering information and promoting learning. Also, if information and learning are the chief purposes of PDS, some may ask why the pilot should continue after the necessary information has been gathered, and why it needs to take such a high percentage of total cases. Finally, PDS is meant to be an independent agency rather than LSA's eyes and ears.

PDS: Government's R&D unit for legal services

Taken together, the organisational-learning and sector-leadership rationales create a vision of PDS as a kind of research and development (R&D) unit for government's legal services function. Some of the lessons learned from the experiment may be relevant for private practice lawyers as well. Participants in the internal workshops noted specific features that make this role possible, including:

- a critical mass of lawyers and cases, which allows greater flexibility in the use of resources and greater ability to run mini-experiments in which different practices are tried within PDS and their results compared (Boxes 2, 9, and 12);
- centralised control of procedures and systems, leading to greater consistency in services (Box 6);
- centralised administrative resources and structures that can support staff and generate efficiencies (Box 16);
- professional reputation (Box 7); and
- cross-fertilisation between the private and public systems (Box 1).

PDS: Lifting everyone's game through competition? No.

LSA workshop participants distanced themselves from the argument that PDS would lift the legal services game by increasing levels of competition among providers. Three contrasting points were employed to cast doubt on the pro-competition argument:

- 1 There was already plenty of competition among private legal aid lawyers prior to PDS's establishment;
- 2 The salutary effects of increased competition have not been proven; and

- 3 Legally aided services do not constitute a proper market because LSA controls all aspects of the business and lawyers don't compete for in-rotation cases.

In contrast with the PDS workshop participants, participants in the LSA workshop were particularly wary of policy rationales that either rely on second-guessing what motivates private sector lawyers to perform or call attention to what some perceive as PDS's competitive advantages. LSA staff on average believe that PDS's positive impacts are more likely to come through R&D-type channels of influence, rather than through competition. They noted that embracing a pro-competitive rationale for PDS may be unproductive because the concept of fair competition between private and public legal services providers encourages endless debates about what constitutes a level playing field. It was noted that such debates are particularly difficult to resolve when the key players are organised and managed in qualitatively different ways – one as a firm and the others as sole practitioners.

Chapter 4 Views of Lawyers in Private Practice

4.1 Introduction

This chapter summarises the views of 34 lawyers in Auckland and Manukau who attended one of nine workshops held there in February 2005.

The purpose of these workshops was to gather the views of some legal aid lawyers in private practice working alongside the PDS about how the pilot is being implemented, how it is affecting the justice system thus far, what effects they expect to see in the future, and how the pilot is measuring up against its own theory. The results may be used to inform LSA's thinking about possible refinements to the Auckland/Manukau pilot as well as flagging design issues and risks associated with possible future pilots. They paint a vivid picture of one portion of the legal environment in which PDS is operating – the criminal bar – and, therefore, set the scene for both implementation and outcome components of the evaluation. Together with the results from the LSA and PDS logic workshops, these results provide a conceptual foundation for the evaluation by constructing a richer definition of what 'success' or 'failure' would look like for PDS against the backdrop of a mixed legal services model.

4.2 Our findings

4.2.1 Overall assessment of PDS

Legal aid lawyers in private practice who participated in the workshops expressed a wide range of views and rehearsed a variety of arguments concerning PDS, its prospects for success, and its current and future effects on the legal services sector in the pilot sites. Attitudes ranged from cautious support to hostility. Some participants entertained the possibility that PDS might make positive contributions to the sector, while others offered what can only be described as doomsday scenarios, in which PDS lowers the quality of representation for legal aid clients and eventually destroys the private criminal defence bar.

The diversity of comments and themes presented cannot be distilled to a single, clear, consistent position, and therefore, the views of this stakeholder group have been presented here in some detail. However, it is safe to say that if we arrayed the various comments along a continuum and weighted them by frequency and intensity, the balance would tip in a decidedly negative, oppositional direction. On average, participants viewed PDS as either an unproductive irritation, a distraction from the sector's core business, or an active source of harm to both the private bar and, ultimately, to legal aid clients. None of the participants endorsed the best-case scenario depicted in Figure A (Chapter 3). Instead, the workshops systematically refuted most of the rationales presented in that diagram and then painted their own, decidedly gloomier picture.

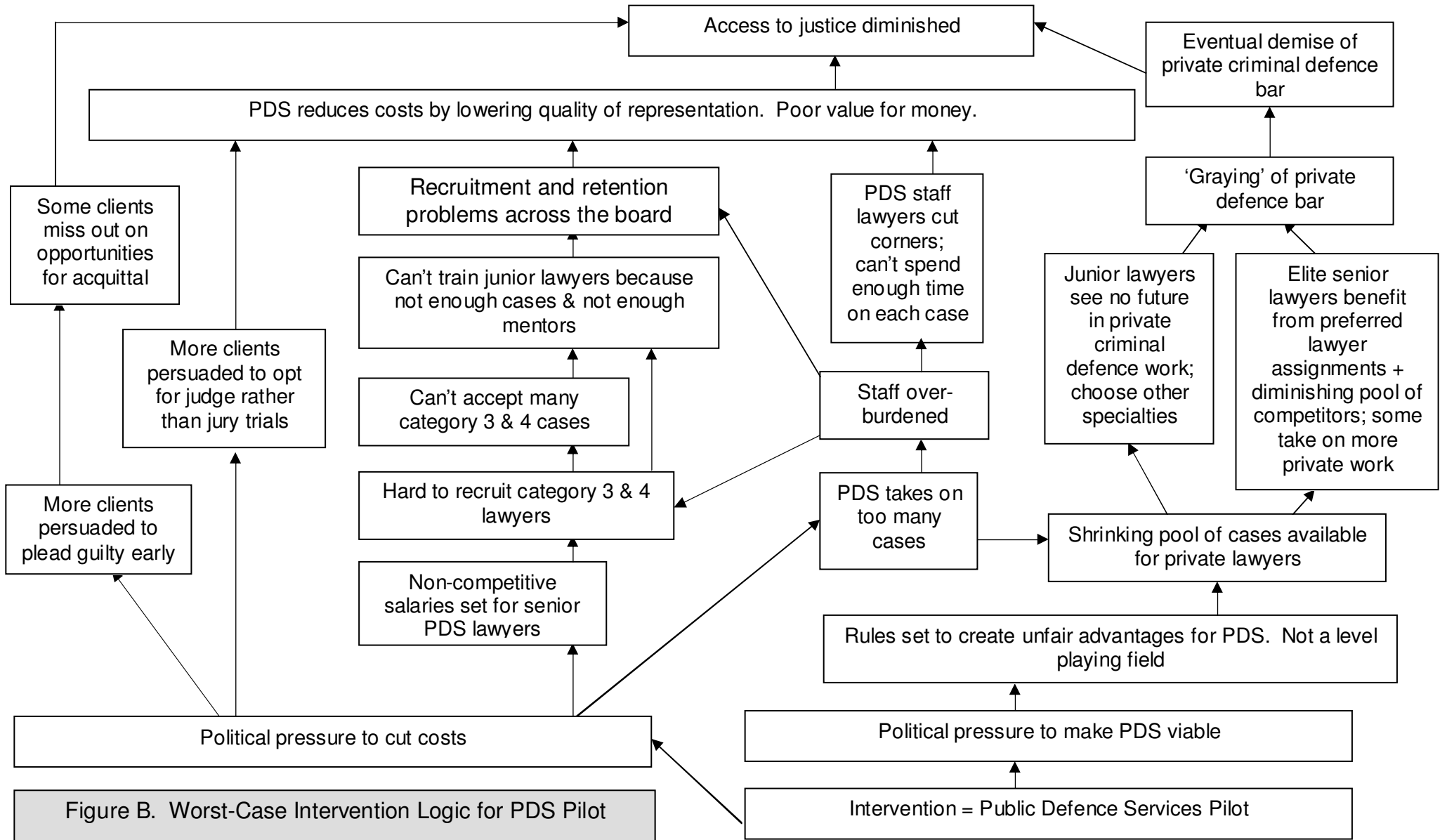
Themes from the workshops are developed in detail below. The key messages that emerged include the following.

According to participants in the private bar workshops:

- Quality and cost are competing, rather than complementary, values.
- PDS cannot succeed in delivering the same quality of legal services provided by the private bar for the same or less cost.
 - Private legal aid lawyers already operate on a shoestring and the job cannot be done more cheaply without compromising quality.
 - Criminal defence work is a craft rather than a production process; therefore, it does not lend itself to economies of scale or firm-based management efficiencies, except perhaps around a few components of summary casework.
- Political pressures to reduce legally aided services costs will force PDS to take on too many cases and cut corners.
 - They felt that evidence of this was already coming to light, particularly in Manukau.
- The pressure on PDS lawyers to ‘*serve two masters*’ – i.e., the interests of the client and the interests of the employer (government) – threatens to compromise their independence.
- By removing \$2.5 million in legal aid case work from the Auckland and Manukau courts, PDS is not only cutting the incomes of individual lawyers, but also, and more importantly, disadvantaging particular groups within the bar disproportionately (most notably junior lawyers, women, and solo parents) and discouraging newly minted lawyers from specialising in criminal defence work.
- There are problems to be addressed in the sector around training of junior lawyers, and around ‘*cowboy*’ lawyers in particular and quality in general, but PDS is not the best vehicle for addressing these.
 - However, participants felt that PDS was contributing modestly to the training of junior lawyers at present.
- PDS will not make a positive contribution to the sector as currently configured, but alternative models of a public defence system are worth considering.

There were exceptions to the overall pattern of negative assessment. In about a third of the workshops, participants entertained the possibility that PDS will contribute positively by (1) providing a training ground for new lawyers (but note problems with this, discussed below), (2) providing information that LSA can use to improve its rules and systems, and/or (3) generating marginal efficiency gains and cost savings around low-category cases. In addition, four individual participants expressed genuine support for PDS, saying that they hoped the pilot succeeds. Two of these individuals expressed their support in the presence of the group, while the other two made their points in side conversations with facilitators and notetakers immediately following the workshops. Three participants stated that they would consider working for PDS if various changes were put in place.

Figure B illustrates some of the major themes that emerged from these workshops, and represents the 'worst-case scenario' for PDS because it combines multiple streams of complaints and risks. It is useful as an aggregated summary of private practice legal aid lawyers' main concerns, but should not be interpreted as the average participant's holistic view



4.2.2 Alternative models

Workshop participants who opposed the pilot were asked if any model of a public defender system could win their support. In other words, how might the PDS be redesigned to play a more productive role in the legal services sector? In answer to this question, several competing models were presented:

- a) The Crown Law model describes an arrangement in which a whole firm is hired to deliver criminal defence services, under contract to the government. The selected firm would also retain its private clients. Some liked the idea that private firms would tender for the bulk contract, thus creating accountability via contestability. One participant noted, however, that this approach was impractical because legal aid work is not cost-effective for firms.
- b) The specialised or ‘boutique’ model of PDS would accept a significantly smaller number of cases and concentrate on serious indictable offences, particularly the hardest, most complex cases. It would recruit high-calibre, highly experienced lawyers who would be attracted by the opportunity to spend ample time on interesting cases and avoid the pressures and inconveniences of finding clients. This model would be relatively expensive on a per case basis, due to high salaries and a demanding caseload. This model would focus on quality representation rather than efficiency or cost savings, helping set high professional standards and providing an excellent training ground for junior lawyers.
- c) The ‘factory’ or ‘widget’ model describes an arrangement in which PDS would brief out cases involving indictable offences and concentrate staff time on the other end of the case spectrum – i.e., low-level summary cases and other types of more routine work that afford opportunities for management efficiencies. This model could deliver cost savings and perhaps provide some low-level training opportunities for the profession. According to these workshop participants, relevant routine activities include:
 1. Summary work
 2. Police court
 3. Duty solicitor
 4. Bill of rights call-outs in lower categories
 5. Status hearings
 6. Pre-depositions up to full discovery.

Several workshops endorsed the widget model on the grounds that (1) contracting out cases involving indictable offences ensures independent counsel in big, high-visibility, high-stakes cases;¹² (2) the private bar would be more welcoming of a PDS that does its fair share of grunt work; and (3) government might save money. However, others questioned whether PDS could survive long with this brief because ‘*no one would want to work there.*’ According to workshop participants, junior lawyers are interested in working at PDS solely for the training opportunities that it provides, and if these were to disappear, so would recruitment. One possible solution to this dilemma would be to include mentoring obligations in the contracts for independent counsel on big cases.

¹² They drew a parallel with the Crown’s practice of contracting out cases involving charges against police in order to avoid apparent conflicts of interest.

Several participants predicted that the widget model is the direction in which PDS will be forced to move due to the challenges of recruiting and retaining experienced staff.

4.2.3 Themes

Following are the main points that we heard repeated across these workshops. Some are direct responses to the rationales for PDS presented in Figure A or to the evaluation team's supplementary questions (see Appendix), while others reflect participants' own issues and agendas.

Quality of PDS services

Overall, participants *'expect PDS lawyers to be no better and no worse than anyone else'* unless they get overloaded with cases, and then *'quality will drop.'* They expected *'the same bell-shaped curve'* of performance from PDS as from the private bar unless the good PDS lawyers leave to start their own practices and the mediocre ones are left behind.

Auckland workshop participants acknowledged that the Public Defender was promoting service quality as a key selling point for PDS, but they worried that he would find it difficult to recruit good staff because of low pay and status, particularly relative to the Crown Law office. Taking a job with PDS is viewed as *'a sign of professional failure or surrender'* for an established lawyer, according to some participants, and this will interfere with recruitment of senior staff. In contrast to this view, three participants in various workshops expressed their own willingness to work for PDS under the right circumstances.

Participants who had seen PDS staff in action offered some positive comments. For example, Auckland PDS lawyers were described as *'nice, hard-working people,' 'keen,' 'earnest,'* and *'congenial.'* They were generally characterised as disproportionately young and inexperienced. The bottom-heavy staffing arrangement led lawyers in Auckland to speculate that PDS would not be able to take on *'the really hard cases,'* as one *'would expect a public defender's office to do.'* In both Auckland and Manukau, participants worried that PDS would quickly become overworked at the higher categories, and that once the experienced staff get *'locked up in trials, the office will fall over.'* A few raised questions about whether the Public Defender's corporate experience would translate well into murder trials and the like.

Participants also reported that they had observed some poor practice by PDS lawyers, particularly in Manukau. These included: keeping clients waiting¹³; tendency to remand clients on first appearance (which contributes to court backlogs and is therefore frowned upon); PDS lawyers ducking duty solicitor obligations (in Manukau mostly) by asking others to cover for them or clocking in for only the last hour of the day¹⁴; impersonal tag-team style representation of clients, so that clients don't really know *'who their lawyer is'* when *'files are being chucked around'* among staff¹⁵; too many PDS lawyers all sitting

¹³ One Manukau participant reported that on one day, out of 13 clients in the cells who had not been processed, 10 were being represented by PDS.

¹⁴ Workshop participants perceived this as costing the government twice: once for the bulk payments made to PDS and again to cover the costs of the relieving lawyer.

¹⁵ According to participants in one Manukau workshop, the problem of inconsistent representation is aggravated by the fact that the preferred lawyer system does not allow clients to request a particular PDS lawyer by name. If the

around waiting with files, when one person could cover it all; *'chronic lateness problems in the Manukau court are being made worse by the PDS lawyers, who are falling into the old lateness trap'*; specific mistakes, such as failure to apply for name suppression in a high-profile trial. Participants also reported that they knew about clients who had complained about their PDS lawyers or asked to be reassigned.

Particular concerns were expressed in Manukau about overwork within PDS, leading to poor performance. *'They either need more staff or fewer cases'* in order to provide quality service. PDS lawyers *'always appear rushed,'* which may affect their ability to win the trust of clients.

It is interesting to note that the professionalism of PDS lawyers, which judges have evidently commented upon, is perceived by private practice legal aid lawyers as over-valued busy-work. Manukau workshop participants complained about a *'gung-ho'* attitude on the part of PDS lawyers, which was manifested in an apparent campaign to change certain norms of practice in the Manukau court – particularly related to *'leaving paper trails'* and *'starting paper wars'*. The example given in two workshops was around written submissions regarding bail. Judges tend to *'fawn over'* these types of practices, participants reported, because written submissions make the judges' job much easier – they are *'spoon fed'* and don't have to bother listening to oral submissions. But private lawyers argued that written submissions do not translate into better results for clients. In addition, they eat up valuable defence counsel time; they are harder for private lawyers to produce (compared to PDS lawyers) because most private lawyers don't have support staff; and they *'dumb down'* the oral advocacy skills of lawyers. Participants resent the efforts of PDS to create meaningless new expectations on the part of judges and to *'turn lawyers into paper pushers rather than advocates'*.

Workshop participants discussed the challenges of measuring service quality. Some felt that results for clients – verdicts and sentences – were the only legitimate measure, while others felt that a case could be well represented but still end in a poor result because of factors outside the lawyer's control. In these cases, they felt that other quality indicators were needed to accurately assess counsel's performance, but they struggled to specify what the other indicators should be because of the craft-nature of criminal defence work.

Quality in general

Some participants felt that pre-PDS arrangements for ensuring quality representation had been working quite well because market forces, alongside the Auckland District Law Society's complaints process, by and large delivered tolerably consistent quality of legal aid services. Those who held this view typically opposed PDS on principle, because they viewed it as unwarranted intervention in a pretty good system.

Others argued that maintaining consistently high-quality representation in criminal defence work was an ongoing problem, particularly with respect to *'cowboy'* defence lawyers who overcharge and don't give good service to clients. Those who held this

client writes down the name of a particular PDS lawyer on the form, the case will be assigned to 'Michael Corry' who will assign it to one of his staff.

view acknowledged a need for increased discipline within the sector based on effective enforcement of professional standards.

Regardless of where participants stood on this debate, however, none felt that PDS was likely to improve quality and consistency of service, because (1) the PDS lawyers themselves were no better or worse than anyone else (and many are still *'learning the ropes'*), according to participants, and (2) the assignment of cases via roster means equal access to new business for competent and incompetent lawyers alike.

Some participants reported that there was a perception that many legal aid lawyers in South Auckland specialise in criminal defence work, take only grant-funded clients, and operate almost entirely off the in-rotation rosters. This perception is misplaced since very few, if any, lawyers operate in this way. However, if the perception was indeed true, then such lawyers would be avoiding all forms of market discipline. Identifying incompetent practitioners depends entirely upon LSA's monitoring procedures and the Law Society's complaints process. Even if PDS succeeds in delivering good representation in its share of cases, external workshop participants felt that the problem of consistent quality in legal aid practice – particularly the problem of cowboys – would need more systematic attention.

Efficiency and value for money

This topic was a major theme in all of the workshops. Many participants expressed the view that government was exclusively motivated by the desire to save money through PDS, but most did not believe that it would succeed in doing so. Overall, the prevailing view was that PDS cannot deliver the quality of service provided by the private bar for same or less money. They argued that the only way for PDS to achieve efficiencies was to take on more cases per staff person or per dollar of funding, and, according to most workshop participants, this would lead inevitably to poor service for clients. There will always be a trade-off between quality and cost, in their view, because *'good criminal defence can't be done cheaply.'*

In contrast, other participants speculated that PDS might succeed in saving money through a combination of more and less legitimate conditions and practices: PDS doesn't have to worry about invoicing LSA for their time. They have administrative and institutional supports to improve efficiency (this provides modest support for parts of the firm-model rationale in Figure A). They can press for quicker resolution of cases through guilty pleas.

With regard to the firm-model rationale, some participants acknowledged possible benefits of working in a corporate arrangement, including collegiality, staff support, and a positive environment – a *'refuge'* from the adversarial and competitive atmosphere of the court. They compared these with the benefits of working in chambers during large trials: You have a place to meet clients; senior and junior counsel can collaborate more closely; personal and professional safety is enhanced if you can consult with other counsel about difficult matters; and support staff are available to handle administrative matters. Participants did not discuss whether criminal defence lawyers in private practice ought to consider more cooperative, firm-like arrangements, perhaps due to the widespread misperception that sharing of files is forbidden by LSA.

Participants' views on the prospects for greater efficiency under PDS seem to depend upon their descriptions of the nature of criminal defence work. Although some participants entertained the idea that a firm might achieve efficiencies around the routine, preparatory aspects of big cases, others said that this so-called routine work must be done by the primary lawyer in order to prepare him/her adequately for the trial. Most participants said no, efficiencies are not possible, because what counts is *'the individual judgment and integrity of the lawyer'*; *'that's what the client or LSA is buying.'* According to this line of argument, defence law is a highly individual and hands-on business; it is, therefore, hard to rationalise, particularly where indictable offences are concerned. Although the greatest expenses come in long criminal trials, these are the hardest places to economise.

Some participants thought that efficiencies and economies of scale were more likely to be gained in family court work and civil cases, which involve more boilerplate tasks, according to these participants. Some also perceived that the bulk of public costs are on the family/civil side¹⁶: So, *'why not focus cost-saving measures [like PDS] there,'* instead of in criminal work?

According to participants in one workshop, defence lawyers in recent years have found it necessary to hire private investigators to compensate for problems with police investigative work caused by police budget cutbacks. They suggested that PDS might hire private investigative services in bulk, thereby achieving some cost savings. However, they also noted that PDS lawyers tended to *'just accept the evidence given to them by police'* without undertaking additional investigations – workshop participants saw this as an example of lower-quality service to clients.

Several participants noted the many difficulties associated with trying to compare costs between PDS and sole practitioners, including uncompensated hours, allocation of overheads, and differential tax rules for public v private businesses. The issue of uncompensated time was on many participants' minds. They argued that all competent defence lawyers donate unbilled hours to their cases.¹⁷ They observed that sometimes the inconvenience of billing and of seeking approval for additional costs is greater than the value of the additional payment. According to participants, LSA doesn't really know who does extra work and who does not, but practitioners know because they hear complaints and comments about colleagues' performance through clients and the grapevine.

A few participants decried what they saw as the continuing problem of a small number of unscrupulous lawyers who overcharge for cases. Savings could be made if these operators were controlled more effectively.

Independence

Participants generally expressed discomfort with the idea of defence lawyers working for a *'limb of government'* such as PDS. They wondered aloud if PDS lawyers' obligations to serve government will interfere with their obligations to be staunch client advocates. Participants made a point of not denigrating the professional ethics of

16 In fact, just over half of all legal aid expenditures are for criminal work.

17 One workshop estimated this at an average 25 percent of total hours, but with huge variation across lawyers.

individual PDS lawyers. Instead, they placed blame on the institutional forces set in motion by the PDS policy, which they believe compromise counsel's independence.

The issue of guilty pleas arose in every workshop. Most participants expressed concerns that government would quietly and indirectly pressure PDS staff lawyers to advise clients to opt for earlier guilty pleas as a way of reducing allegedly wasteful spending on counsel and courts in marginal cases. Although several participants in one workshop vigorously defended PDS staff, saying that they follow the same ethical principles that all other lawyers do, even these PDS defenders noted the vulnerability of younger, less experienced lawyers to subtle variations in ethical practice. Similar concerns were raised about pressure on PDS lawyers to prefer trials by judge rather than jury in order to economise.

Clients, too, perceive PDS as less than independent, according to participants in these workshops. They reported that some clients specifically request not to be assigned a public defence lawyer and refer to PDS staff as '*police lawyers*.'

On the flipside of independence, participants strongly resisted the idea that private lawyers' independence is compromised by their need to ensure repeat business. Private lawyers can be just as frank with clients as PDS lawyers, according to these groups, because they, too, receive most of their assignments randomly from the list. There are a few big-name lawyers who rely heavily on preferred lawyer assignments, but these lawyers build strong professional reputations by strictly pursuing their clients' best interests – by working hard to '*get the client off*' – not by trying to manipulate for repeat business or trying to find '*the truth*.' There are also a few lawyers who do well in the preferred provider system because they focus on marketing, according to participants.

Most but not all participants rejected the whole idea of '*repeat business*' and are of the view that most cases involve new '*punters*'. Some lawyers who practise in multiple areas will get the same families coming through for civil, criminal, and family matters, but this is rarely a large percentage of one's business.

Likewise, participants rejected the allegation that private lawyers purposefully prolong cases in order to maintain their income flow. Judges and many others applaud efforts to reduce wasteful use of court time, but clients have a right to '*play the system*,' as one participant said, and some proportion of clients will always reject their lawyers' advice about guilty pleas, etc. Although cases do get '*unnecessarily dragged out*' at times, participants noted that they had not seen any hard evidence of lawyers prolonging cases for economic reasons. They argued that the main causes of prolonged trials were laziness or poor judgment on the part of the lawyer (rather than greed) and stubbornness on the part of defendants. Some noted that the Crown is equally to blame for prolonging some cases.

Two of the workshops highlighted '*independence*' as the highest professional value for a lawyer. To these lawyers, independence means not working for anyone other than the client and having complete freedom to manage one's time and tasks as one sees fit, without needing to please a boss.

Effects on the private bar

Roughly half of workshop participants reported that their own incomes from legal aid work declined following introduction of PDS, more so in Manukau than Auckland. Some said this was not a problem because they replaced the lost income with private, fee-paying clients (mostly in Auckland), but others said that the opportunities for private work were quite scarce because there simply aren't very many defendants in South Auckland who can afford private fees. Some of the more senior lawyers in the workshops reported increases in their preferred lawyer assignments, and a few said that their total incomes had increased as a result of the changing case mix.

Workshop participants had different responses to their shifting market power vis a vis PDS. Many of them seemed to take it in stride, while others, particularly the less senior, '*bread-and-butter lawyers*,' tended to react with frustration and borderline hostility. One Manukau participant, who was particularly sympathetic to PDS, noted that much of the resentment from private lawyers could have been avoided if PDS had started on a smaller scale. Taking fewer cases would have reduced PDS's impact on private providers' workloads; it also would have quietened concerns about poor PDS performance due to overwork (see above).

Beyond the direct effects on income, all participants agreed that PDS was now, or soon would be, reducing the total number of private legal aid lawyers in the pilot sites, because there simply isn't enough work to go around. The Manukau participants named specific individuals who had shifted to one of the smaller courts outside the pilot zone, such as Papakura and Pukekohe. Lawyers who made such a move early are doing well, according to workshop participants, but those courts are now struggling to accommodate the influx of new lawyers. Other participants said they knew colleagues who were seriously considering an exit from the profession altogether. Manukau participants said that these disruptive effects could have been alleviated somewhat if PDS had hired more lawyers from the Auckland and Manukau pools. The perception is that locals were bypassed in favour of applicants from Taranaki, Wellington, etc, and this perception causes further resentment.

Several participants noted that the shifting of personnel across courts had been quite disruptive to the overall system, while others shrugged it off as a relatively minor irritation.

The argument about PDS's effects on the lawyer pool was a bit subtler in some of the workshops, where participants predicted that fewer young lawyers would choose criminal defence as a specialty area (due to PDS), thus leading to a steady '*graying*' of the private criminal defence bar and a widening gap in experience levels between those at the top and bottom. Most participants agreed that the biggest declines in market share were among junior lawyers who rely on summary cases, which PDS tends to absorb in larger quantities. Junior lawyers rely heavily on roster assignments because they find it hard to break into the preferred lawyer system. Many of those most intensely affected happen to be women, some of them solo mothers, who choose to stay in the lower categories because the work is more flexible.

One group in Auckland, it should be noted, felt that senior lawyers were being harmed by PDS competition to the same extent as junior lawyers, and that category 3 and 4

providers were losing just as many cases as the others. Likewise, some Manukau lawyers generally felt that lawyers at all levels were feeling the pinch.

Participants disagreed somewhat about the characteristics of the lawyers who were most likely to exit. A few believed that the less competent, poorer performing lawyers would be the first to go, thanks in part to the preferred lawyer system. Others warned that both highly competent and less competent providers would be lost as a result of PDS, particularly in lower categories, because the roster system does not discriminate between high and low performers.

There was a clear undercurrent of anxiety about PDS's ultimate impact on the private defence bar. A few of the more pessimistic participants bluntly predicted that PDS eventually would muscle-out all of the private practice legal aid lawyers, and replace the mixed system with a thoroughgoing public monopoly. Some felt that this was government's hidden agenda – to destroy the private bar altogether, while others thought that demise of the private bar would be the unintended, but nonetheless inevitable, effect of unfair competition.

Of course, many participants did not endorse this disaster scenario. A common alternative theme in several workshops was that government wanted greater control of the legal services sector in general, including private practitioners, and that PDS was one way of achieving this.

Unfair competition

When asked how a 33 percent cut in criminal legal aid cases could shut down the entire private criminal legal aid market, participants cited the additional factor of unfair competition due to LSA's differential treatment of PDS and the private criminal defence bar. Although some participants observed that a completely level playing field was probably impossible, most felt that every effort should be made to even the stakes.

The chief concern under this heading involved allegations that PDS lawyers either worked outside of their categories or were being fast-tracked to higher categories by LSA¹⁸ without having to 'pay their dues,' as private lawyers do, by taking on cases for free in order to gain experience. In particular, lawyers in Manukau referred to a particular formal complaint about PDS staff working outside categories. This complaint was not upheld, following investigation by LSA, but some workshop participants felt that the investigation had not been thorough enough and/or that its result had been preordained.

Participants also felt disadvantaged by the PDS's freedom to share files among staff and delegate bits of work to each other, which the external workshop participants believe they are barred from doing. Participants said they would welcome a rule change that allowed LSA to assign cases to a chambers rather than a particular lawyer, to enable file sharing. (Note, however, that participants also complained that file sharing and case delegation disrupts the continuity of client-counsel relationships.)

18 When such concerns were raised, the facilitators encouraged participants to report alleged category violations to LSA.

Vague comments were made occasionally about PDS lawyers not pulling their weight – for example, because they are perceived as not working out of normal hours.

Although participants were bothered by the perceived unfairness between PDS and the private bar, many agreed that the more germane point of comparison was between defence and Crown lawyers. When Crown Law contracts out a case, they observed, the lawyer's *'time is worth more, and his car even uses more petrol.'* Also, Crown contractors don't have to plead for compensation of extended hours, and are not constrained by a category system.

R&D or a Trojan horse?

Workshop facilitators introduced the idea that differences in operating rules for PDS v private lawyers might be viewed as an R&D-type experiment aimed at improving the whole legal aid system, rather than *'the thin edge of the wedge'* designed to sabotage the private legal aid community. In theory, lessons learned from PDS could even lead to increases in legal aid grants!

Participants in at least one workshop endorsed the idea that PDS might be marginally useful if it generates good information, which in turn leads government to consider other models of how a public defence service might operate and how LSA's own procedures might be streamlined. (See alternative models discussed above.)

Cultural sensitivity

This topic often generated the liveliest discussions as participants tried to outdo each other in finding synonyms for *'rubbish.'* The general theme of these retorts was that undue attention to cultural sensitivity runs the risk of diverting lawyers from the basic rule of good client relationships: Treat all clients fairly and respectfully, regardless of their cultural backgrounds. It also runs the risk of diverting lawyers from their core business, which is to know *'the facts and the law and understanding the system,'* that is *'what the lawyer brings to the table'* and what will benefit the client most. Cultural sensitivity might make the client feel good, they said, but it is less important than getting a good result for the client.

Everyone acknowledged the problem of language barriers and the value of matching clients with lawyers who speak the same language. When language is not an issue, however, most participants quickly dismissed the *'soft, cuddly'* view that clients benefit from having a lawyer who shares their ethnic background.

Notable exceptions to this view included one workshop in Auckland and one in Manukau where the participants believed strongly that cultural sensitivity is essential to providing a good defence in many cases. However, even these proponents of cultural sensitivity did not see how PDS could add value along this dimension. They argued that cultural sensitivity must be learned on the job, case by case, and with the help of mentors, not through corporate training programmes or *'management tricks.'* In their view, PDS lawyers were unlikely to be any better or worse than private lawyers in their capacity for such learning. The field of defence practice attracts people who enjoy working with a diversity of clients, participants argued, and therefore, we can expect most defence lawyers – public and private – to be especially strong on this score.

Cultural sensitivity is *'one of the core skills of a good defence lawyer,'* according to one senior participant, and PDS has nothing to teach the private bar on this count.

Participants noted the ethnic diversity of the PDS staff, but most did not expect this characteristic to translate into greater cultural sensitivity. Others noted that the private bar is also quite diverse ethnically. Indeed, participants in one Manukau workshop argued eloquently that the private bar's greatest strength is its diversity along many different dimensions – not only ethnically and culturally but also in terms of styles of practice, range of views, and strategic approaches. They contrasted the natural diversity of the private market with the uniformity of practice and ideology that inevitably accompanies public monopoly, in their view.

Levels of awareness and information about PDS

Participants generally expressed puzzlement about how PDS operates as well as a desire to understand the pilot better. They did not find the current communication vehicles useful because these were perceived as government marketing tools rather than reliable sources of information. They wanted to know *'how the place works'* on the inside.

Roughly half of participants seemed to understand the proportional allocations of cases to PDS. Others tended to overestimate PDS's share. A few complained about lack of access to this information, but others typically corrected them, noting that the allocations are clearly posted for those who are interested in checking. Workshop facilitators informed participants in all workshops about the allocation targets (i.e., up to one-third of all criminal legal aid cases and up to half of all in-rotation cases in the pilot sites) as well as actual allocations to date.

One of the Manukau workshops focused almost exclusively on the subject of transparency around the PDS office. These participants wanted more and better information not just about case allocation, but also around PDS staff salaries, terms of employment, categories held, audit practices, and other accountability arrangements. Hourly billing is a form of accountability for private practice legal aid lawyers, they argued, so why should PDS be exempt from this requirement?¹⁹

Career Paths

Participants discussed the inadequacy of existing training opportunities for junior criminal defence lawyers. To date, the only avenues for mentoring have been to land a position at Crown Law or to find a senior lawyer who will take you under his/her wing as a sort of apprentice. The latter path is especially difficult because LSA won't pay for a junior lawyer who is working under a senior; thus, junior lawyers are required to volunteer their time in order to gain experience and training. Participants said that they would like to see PDS fill the training/mentoring void, but noted that this will be difficult if PDS is operating on a *'mass production'* model.

The difficulties have to do with both recruitment and retention. Working for PDS could be an attractive choice for junior lawyers looking for mentoring, but only if there are

¹⁹ While the PDS is not subject to hourly billing, PDS lawyers do keep records of time spent on cases. This data will be used in the course of the evaluation.

enough senior lawyers around PDS to do the mentoring properly. If the mentoring is not available, the word will quickly spread and talented junior lawyers will not apply for PDS jobs.

Participants also predicted a high degree of churning among PDS staff, because talented, young lawyers are likely to stay only as long as needed to move up a category or two and build up a client base. Then they will quit to start their own practices. The combination of recruitment and retention problems will pose significant challenges for PDS management, according to participants.

Politics

Private practice legal aid lawyers clearly feel misunderstood and under-appreciated by the public. They feel that the public lumps defence lawyers in with the criminals whom they defend, and treats them all like *'legal footballs to kick around'*. Some workshop participants suggested that government established PDS in order to appear to be halting *'the gravy train'* for criminal lawyers who allegedly *'get fat off the public purse'* by *'defending society's dregs.'* Given the public pressure to *'beat up on'* unpopular lawyers, PDS was viewed as largely a *'feel good'* policy to make taxpayers think that they are getting more value for their money and exerting more control over lawyers and their income streams. They noted that governments of all persuasions are subject to the same public pressure to *'stick it to'* those *'greedy, freeloading'* defence lawyers.

Participants expressed the view that by the end of the five-year pilot, PDS will be so firmly entrenched that even a new government with different policy preferences could not terminate it. The current government surely will not allow the pilot to fail, or won't acknowledge failure if it occurs, according to most participants.

In sharp contrast to the entrenchment view, one participant predicted that PDS would fail because LSA would starve it of necessary resources as it does private practice legal aid lawyers. He and others worried that information gathered in the evaluation would be used not to improve the PDS programme but to justify cuts in compensation to private legal aid lawyers.

Recommendations from private lawyers

In the course of the workshop discussions, participants offered a variety of recommendations about how PDS and LSA should proceed in the future. These are reported here in no particular order:

- A panel of retired judges should be used to assign cases, rather than a roster, so that less competent lawyers are not treated equally to more competent lawyers.
- LSA should adopt the UK's pupillage system, which allows junior lawyers to be paid while they are assisting senior lawyers on a legal aid case.²⁰
- LSA should scrutinise requests for extended funding more closely, because some of these tend to be artificially inflated. Other such requests are quite legitimate, however, because current allowances for trial preparation are at a bare minimum.

²⁰ Note that LSA assignment policy allows for work to be undertaken on a case by more than one lawyer. In addition, provision exists for assignment of junior counsel in specific situations.

- Invite local private lawyers to an open house at the PDS offices so that they can learn about their business and have a look around.
- PDS should exert leadership in the area of peer review of professional performance and mentoring of junior lawyers.
- The duty solicitor scheme needs attention, in particular clearer supervisory protocols, better training for duty solicitors, greater transparency around the system, and regular reaccrediting of duty solicitors to weed out the incompetent practitioners.
- PDS should make more use of private investigators. It can purchase these services in bulk, thereby saving money and improving quality of representation for clients.
- Revise the caseload targets. Take a smaller percentage of total cases during the pilot phase so that private lawyers will be more accepting of their PDS colleagues.
- Allow private lawyers to share files and delegate bits of work to others.²¹
- Make PDS its own separate crown entity in order to increase institutional distance between LSA and PDS.
- Consider the alternative models for a public defender service listed under section 4.2.2.

21 See footnote 9.

Chapter 5 The establishment of the PDS

5.1 Introduction

This chapter presents some findings from interviews with some of those people closely involved in setting up the PDS offices. It also provides some caseload and case mix figures relating to the first 11 months of the PDS pilot and compares actual assignment levels against levels forecast by a LSA model for PDS budgetary purposes. It also describes some additional modelling activity the LSA is undertaking for the purposes of establishing pilot bench-marking information.

5.2 The establishment of the PDS offices

A history of the establishment of the PDS was provided earlier in Chapter 1 (see section 1.1.2, starting page 2).

5.2.1 Project management of the establishment of the PDS pilot

LSA appointed a Wellington-based project manager from November 2003 until May 2004 to oversee the establishment of the PDS pilot. She has a background in project management in the information technology (IT) field where project management is a strong discipline.

Following the development of a project plan, she reported weekly to a steering committee to whom she had easy access, and who responded quickly to address any issues she raised. She described her experience as *'One of the better projects I have worked on'* and as encountering *'Nothing that couldn't be handled'*. She thought the hardest part of her role was thinking about how to evaluate whether the PDS achieves its aims. To this end, she participated in workshops to identify the types of data that would be needed to support the evaluation in terms of calculating cost efficiency of cases. She then set up a new system so that data the LSA guessed might be needed would be available for the evaluation.

The project manager identified the following factors as being key to the PDS pilot's successful establishment:

- The fact that the PDS implementation phase was set up formally as a project, and managed as a project in a disciplined way.
- The 'buy in' and support of the management. Management was described as *'positive, committed, and focussed. They put in some long hours but the hours overall were manageable'*.
- A good management accountant and good financial planning, management and reporting of the implementation and ongoing operation of the PDS pilot;
- The use of proper governance structures;
- Adequate resourcing;
- 'Just the right amount of constructive tension between the PDS pilot and the LSA head office'. This meant that they kept each other honest, and helped each other.
- The 'excellent calibre and ethnic mix of PDS staff';

- 'Excellent' initial training for PDS lawyers;
- The documentation of PDS office procedures; and
- The way in which granting procedures were reviewed, amended and distributed to accommodate changes in PDS.

5.2.2 Setting up the physical resources

The team leader of administration services at LSA supported the establishment of the PDS pilot by locating the necessary accommodation and purchasing for it a range of items from furniture through to consumables.

He prepared accommodation briefs setting out the PDS pilot's anticipated requirements in terms of:

- location (close proximity and within 1 km radius of the Auckland and Manukau District Courts);
- total floor area to accommodate staff (10-15 in Auckland, and 10 in Manukau) and visiting clients;
- type of premises, including considerations of access for disabled clients, and preferences in terms of air-conditioning, and sprinklers or smoke alarms; and
- fit out in terms of number of offices, open plan areas, meeting rooms, reception areas, and file rooms.

He also set out lessor responsibilities (eg partitioning, kitchen facilities) and PDS responsibilities (eg business signage, security), lease terms and commencement dates, rent reviews and car parks in the briefs.

LSA distributed the briefs to various contacts in November 2003 with the aim of finding suitable accommodation in both Auckland and Manukau that could be fitted out ready for its 3 May 2004 commencement date. The timeframe was met, with there being '*no particular issues other than the normal supply ones*'.

The team leader identified the following factors as being important ones in successfully setting up the physical resources for the PDS pilot:

- having an experienced property manager with knowledge of the legal business environment;
- establishing a good working relationship with the Public Defender who respected his knowledge and experience, and trusted him to allow him to get on with the job;
- needing to accommodate a relatively small number of staff (10-15). Little pockets of accommodation were more likely to be available.
- being able to use GSB contracts which meant getting reduced government prices for items; and
- setting up electronic order forms.

5.2.3 Recruitment and staffing

The first appointment was that of Mr Michael Corry to the Public Defender position in October 2003. He took up the position in November 2003. He is based at the PDS Auckland office.

A remuneration framework for lawyers and office staff was developed with assistance from Watson Wyatt. The Public Defender and the LSA human resources' manager, then set about recruiting lawyers and other office staff for both the PDS Auckland and Manukau offices.

Positions for 15 lawyers, including that of the Deputy Public Defender, were advertised nationwide prior to Christmas 2003. Positions for the business manager and other office staff were also advertised about the same time.

Approximately 60-70 people applied for the PDS lawyer positions. Mr Eddie Paul was appointed to the Deputy Public Defender position in March 2004 and took up the position on 1 April 2004. He is based at the Manukau office. Another 11 lawyers were recruited to the PDS team.

The PDS pilot is currently staffed by 13 lawyers. Three lawyers - the Public Defender, the Deputy Public Defender and one of their senior lawyers – hold a criminal proceedings category 4 rating²², seven lawyers hold a category 2 rating, and three lawyers hold a category 1 rating.

Mr Mark Bridgman, the business manager, was appointed to the PDS in January 2004. He is based at the Auckland office. Mark's role has changed significantly over time. Initially he was focused on office and systems establishment whereas now his role is more of an ongoing business one with its *'full set of challenges'*.

A support person was also appointed to each of the PDS Auckland and Manukau offices. In addition, a typist was appointed in response to lawyers' preferences for use of dictaphones over laptops. More recently, a law clerk was appointed to each of the PDS offices with the aim of increasing the efficiency and case handling capacity of PDS lawyers.

Employment contracts were offered for five years, with the same standard terms and conditions as those contained in the LSA human resources policy manual. Six month performance reviews held in November 2004, resulted in some salary increases and some bonus payments for some PDS staff.

The PDS pilot has experienced its first resignation - one of its Manukau office staff.

5.2.4 Office administrative and operating processes

As a new operation the PDS needed to establish in a short space of time its culture and values, its management approach, and its systems (such as its case management and financial systems); address work flow issues; and confront a backlash against them by some local lawyers in private practice.

The business manager's initial role included designing systems, setting up computers, and implementing the case management system, Complete Legal Office (CLO6). The CLO6 system stores case and client information and has a time recording facility. He

²² Based on his/her experience and competence, a lawyer may be rated according to one of four criminal proceeding categories, with 4 being the highest category.

described the system's installation as '*the biggest headache, a key frustration*' and '*more complicated and needing longer to implement than was imagined - although it was no different in this respect from other IT implementation processes*'. He rated CLO6 '5 out of 10' and described it '*as relatively cumbersome ... reasonably clunky ... has bugs, crashes and is not user friendly*'. There were problems with CLO6 in terms of its delivery and support to the point where some staff considered abandoning it in favour of alternative systems. While the CLO6 system's workflow component is unique, the PDS pilot has not made use of this feature.

He also mentioned some teething problems with the implementation of the electronic precedent document system and also with the digital dictation facility due to the network being unable to cope with voice transmissions. However, the problems were resolved and the network was connected with everyone installed in work stations by May 2004.

5.2.5 Staff training

All PDS staff started on 1 April 2004. The lawyers spent that month being inducted into PDS processes, attending a professional training programme complete with mock courts and video cameras organised by the Public Defender, and being given technical training on IT systems such as CLO6.

Their approach to ongoing training includes sending a representative lawyer from each office to local seminars (eg hosted by the District Law Society or Butterworths) and for these representatives to report back on the content of the seminars to their office colleagues.

5.2.6 Opening its doors

On 3 May 2004 the PDS – Ratonga Wawao a-Ture Tumatanui - started providing legal services from two offices in relation to

- the criminal legal aid scheme; and
- the duty solicitor scheme.²³

These services are provided at the Auckland High Court, Auckland District Court, Manukau District Court, Court of Appeal and the Supreme Court.

The Public Defence Service Pilot set out how it intended to operate in its Statement of Service for the purpose of ensuring '*ongoing clarity within the Agency and within the legal profession and the public generally on core responsibilities and requirements of the PDS in relation to other services and functions of the Agency*'.

5.3 Caseload and case mix assigned to the PDS

The Statement of Service sets out information related to assignments, caseloads and case mix, and budget figures.

The LSA is responsible for monitoring the progress of the PDS pilot on an ongoing basis. The evaluation is designed to supplement routine monitoring activity.

²³ The Statement of Service also includes the police detention legal assistance scheme among the PDS's legal services.

5.3.1 PDS caseload limits

The LSA operates a nationwide assignment policy where lawyers can be assigned criminal legal aid cases as a preferred lawyer nominated by the defendant or on rotation where the defendant expresses no lawyer preference. LSA assigns rotation cases and preferred lawyer cases to the PDS pilot each working day.

After discussions with the Auckland District Law Society and the Criminal Bar Association, LSA agreed to a phased implementation of the PDS pilot. In its first year, the PDS is permitted to take up to 29% of all assignments within each proceedings category (1-4) in the local courts. Within this, up to 50% of the number of available rotation assignments can be assigned to the PDS.²⁴

5.3.2 PDS caseloads and case mix in the first 11 months

Tables 5.1 and 5.2 show a breakdown of the number and percent of assignments taken on by the PDS pilot in its first 11 months of operation (May 2004 – March 2005) at Auckland and Manukau respectively²⁵.

Table 5.1 Number and percent of assignments taken on by the PDS Auckland office in its first 11 months

Category	N	Percent
1-2	1006	94.0
3	45	4.2
4	19	1.8
all categories	1070	100.0

Table 5.2 Number and percent of assignments taken on by the PDS Manukau office in its first 11 months

Category	N	Percent
1-2	882	93.1
3	54	5.7
4	11	1.2
all categories	947	100.0

A total of 2017 criminal legal aid assignments were taken on by the PDS pilot during May 2004 to March 2005, with about 94% of these assignments having a criminal proceedings category rating of a 1 or 2.

The volumes of assignments taken on by the PDS Auckland and Manukau offices over the first eleven months of their operations were roughly similar at 1070 and 947 respectively.

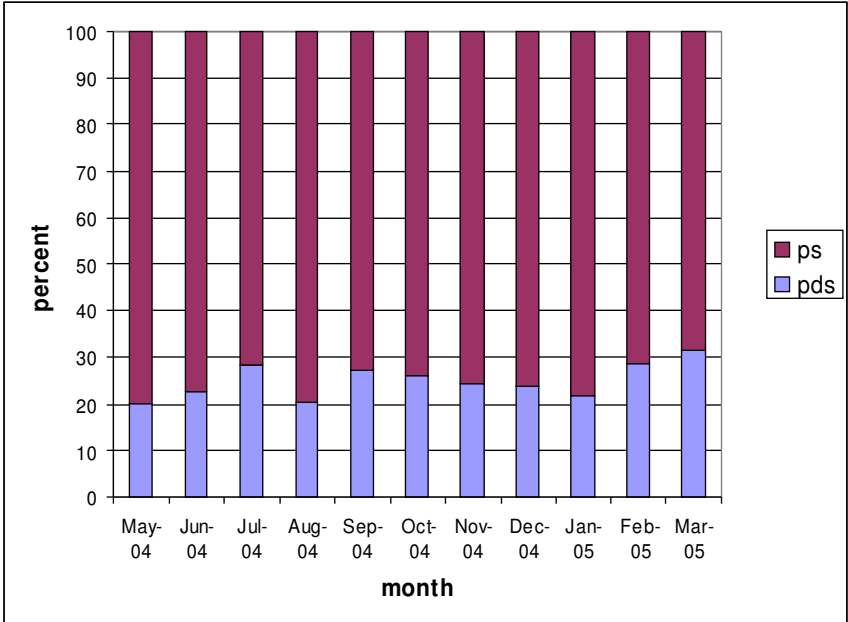
²⁴ The 50% is an average maximum figure. Thus, in some months more than 50% of on rotation assignments may be assigned to the PDS to make up for the months in which the PDS has taken less than the 50% maximum number of rotation assignments permitted.

²⁵ LSA supplied us with the data. LSA also publishes some assignment figures according to category type and lawyer type (PDS and private sector) on its website at www.lsa.govt.nz/manukau_report.htm.

In its first month, May 2004, 77 assignments were assigned to the Auckland office and 70 assignments were assigned to the Manukau office. The initial few months at the PDS were described as like *'letting air out of the tyre'*. It took about 3-6 months to build a caseload for each PDS lawyer. By about October 2004, everyone had *'a good day's work'* in front of them (averaging 60-80 open files/lawyer). There may have been some merit in taking a phased approach to recruitment of PDS lawyers from a workload perspective. However, an advantage of the approach taken of everyone starting together from day one was that it made training easier to organise and administer.

Figure 5.1 shows the percentage of total assignments taken on each month by the PDS and private sector lawyers in Auckland.

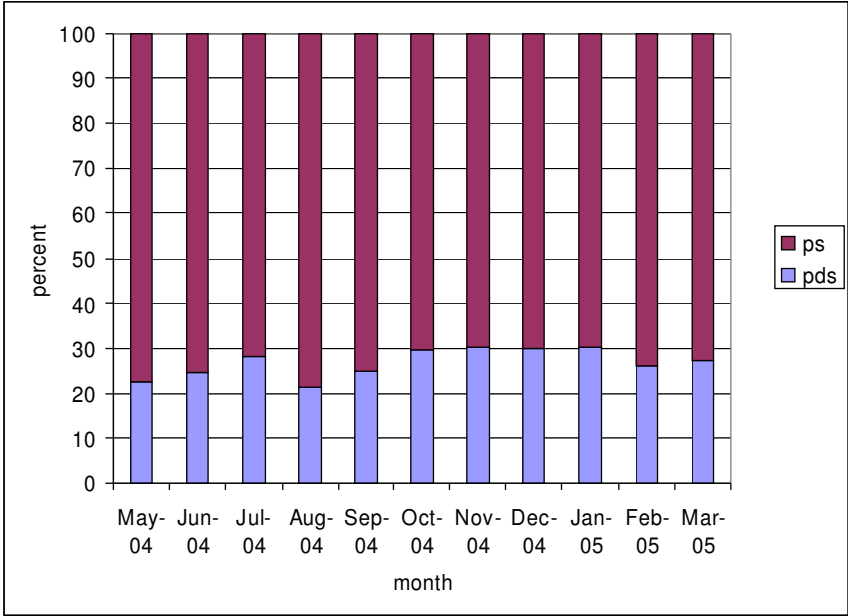
Figure 5.1 Percent of total assignments taken on each month by the PDS and private sector lawyers in Auckland



The percent of total assignments taken on by the PDS Auckland office ranged from a low of 20.2% in May 2004 to a high of 31.4% in March 2005. Over the 11 month period, the percent of total assignments taken on by the PDS Auckland office was 25.0%, lower than the overall average 29% limit set for the PDS in its first year of operation.

Figure 5.2 shows the percentage of total assignments taken on each month by the PDS and private sector lawyers in Manukau.

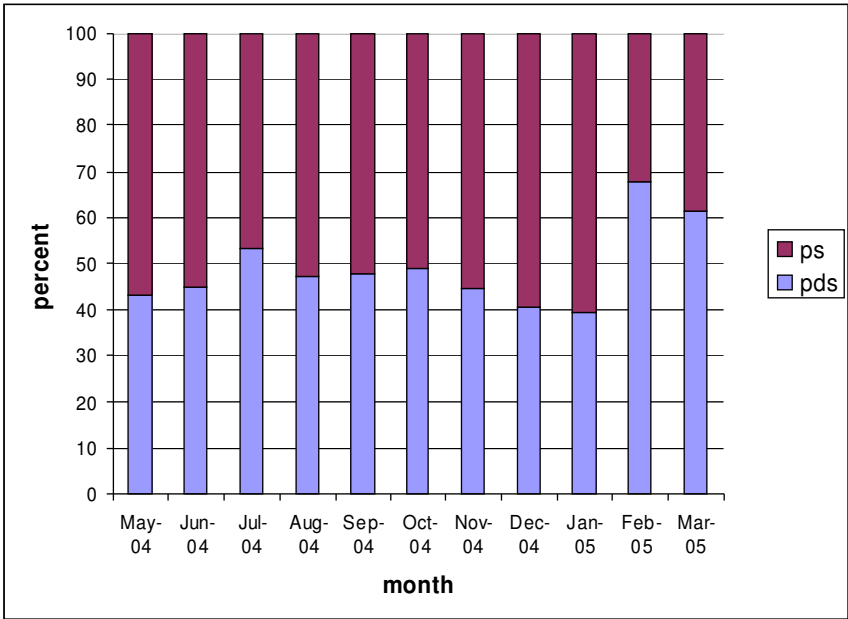
Figure 5.2 Percent of total assignments taken on each month by the PDS and private sector lawyers in Manukau



The percent of total assignments taken on by the PDS Manukau office ranged from a low of 21.2% in August 2004 to a high of 30.3% in November 2004. Over the 11 month period, the percent of total assignments taken on by the PDS Manukau office was 26.9%, again lower than the overall average 29% limit set for the PDS in its first year.

Next, Figures 5.3 and 5.4 show the percent of rotation assignments assigned each month to the PDS and private sector lawyers in Auckland and Manukau respectively.

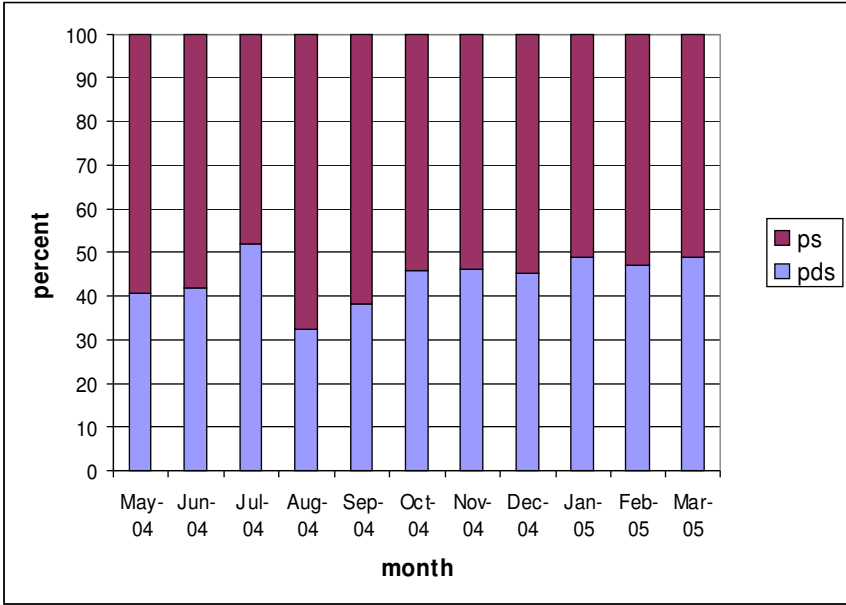
Figure 5.3 Percent of rotation assignments assigned each month to PDS and private sector lawyers in Auckland



The percent of on rotation assignments assigned to the PDS Auckland office ranged from a low of 36.9% in January 2005 to a high of 67.9% the following month. Alternatively, the percent of on rotation assignments assigned to private sector lawyers fluctuated each month from a low of 32.1% to a high of 63.1%.

Over the 11 month period, the percent of on rotation assignments assigned to the PDS Auckland office was 48.8%, lower than the overall average 50% limit set for on rotation assignments to PDS.

Figure 5.4 Percent of rotation assignments assigned each month to PDS and private sector lawyers in Manukau



The percent of on rotation assignments assigned to the PDS Manukau office ranged from a low of 32.5% in August 2004 to a high of 52.0% in the preceding month. Over the 11 month period, the percent of on rotation assignments assigned to the PDS Manukau office was 44.4%, lower than the overall average 50% limit set for on rotation assignments to PDS.

Next, Tables 5.3 and 5.4 present summary information regarding the number and percent of assignments over the first 11 months of PDS' operations. The figures are presented according to assignment type (on rotation or as preferred lawyer) and according to lawyer type (PDS and private sector lawyers). Table 5.3 presents some summary statistics for Auckland, and Table 5.4 presents the same statistics but for Manukau.

Table 5.3 Number and percent of assignments by assignment type taken on by PDS and private sector lawyers in Auckland

assignment type	PDS	private sector	row total
on rotation	933 or 48.8%	980	1913
as preferred lawyer	137	2239	2376
column total	1070 or 25.0%	3219	4289

Table 5.4 Number and percent of assignments by assignment type taken on by PDS and private sector lawyers in Manukau

assignment type	PDS	Private sector	row total
on rotation	878 or 44.4%	1098	1976
as preferred lawyer	69	1479	1548
column total	947 or 26.9%	2577	3524

To recap, the percent of total criminal legal aid assignments taken on by the Auckland and Manukau PDS offices during their first 11 months of operations were 25.0% and 26.9% respectively (Tables 3 and 4). These percentages are both less than the maximum 29% limit set for the PDS in its first year of operation.

The percent of on rotation assignments assigned to the Auckland and Manukau PDS offices over the same 11 months were 48.8% and 44.4% respectively (Tables 3 and 4). These percentages are both less than but close to the maximum 50% limit set for the PDS.

Assignments as preferred lawyer

'Preferred' lawyer assignments are assigned in the first instance to the Public Defender. According to the PDS Statement of Service, he may allocate the work to a PDS lawyer *'having regard to the area of the law and the category for which the PDS listed provider is approved'*.²⁶

Clients' perceived inability to nominate a particular PDS lawyer may act as a barrier to them nominating PDS as their 'preferred' lawyer.

There was some evidence of a slightly increasing trend over the first eleven months in the number of assignments taken on by PDS as 'preferred' lawyer each month. However, the percent of assignments taken on by PDS as preferred lawyer was still relatively low at 137 (or 3.2% of total assignments) in Auckland and at 69 (or 2.0% of total assignments) in Manukau.

5.4 Models, forecasts and PDS assignment levels

The PDS Statement of Service sets out revenue and expenditure figures and information pertaining to these figures are arrived at. The Statement says the PDS budget is prepared having regard to:

- *'Financial forecasts of the PDS for the duration of the PDS*
- *Forecasted client caseloads and case mix'*.

Thus, the Statement acknowledges that the annual PDS budget relies on estimates of caseload and case mix. The assignment levels are forecast for each category level from a LSA model.

²⁶ See section 8.3.1 (iii).

Tables 5.5 compares the predicted number of PDS assignments based on the experience of the first 11 months against the number of PDS assignments forecast for the PDS annually from a LSA model.²⁷

Table 5.5 Number of assignments allocated to the PDS in its first 11 months compared against forecast figures for the first year

Category	Forecast number of PDS assignments for first year	Actual number of PDS assignments in first 11 months	Predicted number of PDS assignments in first year based on first 11 months	% predicted compared with forecast
1-2	2469	1888	2059	83
3	108	99	108	100
4	31	30	33	106
all categories	2608	2017	2200	84

Based on the experience of the first 11 months of the PDS pilot, the number of assignments likely to be undertaken by PDS after its first year is predicted to be only about 84 percent of that originally forecast for the PDS annually. The variance appears to be among the numbers of category 1 and 2 assignments which make up the bulk of total assignments. The forecast appears to be very accurate for category 3 assignments, while slightly underestimating the numbers of category 4 assignments which require the most resource.

5.5 Costs

5.5.1 Costs of PDS

The LSA is monitoring actual costs against projected costs for the PDS pilot. The results of the monitoring will be shared with the evaluators at a later stage in the four and one half year evaluation.

The LSA has hired a management consultant to further develop Public Defence Service models. The purpose of the models – one each for Auckland and Manukau - is to calculate the actual and projected cashflow, profitability and the required resource mix for the PDS pilot. The models distinguish summary case workflows from indictable case workflows.

The models are designed to provide insights that allow the PDS to manage the number of assignments it accepts, estimate its future revenue²⁸ against projected costs, and analyse the performance of individual PDS lawyers and their offices against private providers. Outputs from the models include:

²⁷ Appendix 3 of the PDS pilot's Statement of Service contains forecasted numbers of assignments.

²⁸ 'Revenue' generated by the PDS is generated based on the average amount LSA would pay a private provider to take the assignment. Planning forecasts of PDS revenue and expenditure are provided in Appendix 3 of the PDS pilot Statement of Service.

- Resource management (eg average hours per lawyer per month to complete forecast cases, the number of lawyers required to process the forecast caseload)
- Caseload management (eg average caseload per lawyer, the number of summary cases to accept in order to keep lawyers at the desired level of productive time) and
- Revenue projections (eg estimated monthly revenue by lawyer level and duty solicitor work).

The models currently rely on some 'best guess' assumptions. Currently the profile of the time taken on each case needs to be analysed at a completed case level rather than at a task level, for example. The consultant suggests that PDS spend time validating the 'best guess' assumptions to ensure the model outputs are meaningful.

5.5.2 Costs of private sector lawyers

The evaluators are seeking information regarding the actual costs to private sector lawyers of conducting criminal legal aid work to compare with that of the PDS pilot.

They carried out a review of a sample of criminal legal aid files provided by the Auckland Grants Office in order to determine whether it was possible to use such files as a reliable source of information on private sector lawyers' actual hours spent working on a file. The review determined that it was not possible to do so since most private sector lawyers appeared to record the hours they could claim for rather than the actual hours they spent on a criminal legal aid case.

The evaluators need to explore other possible sources of information regarding the actual costs to private sector lawyers of conducting criminal legal aid work.

Chapter 6 Views of some other stakeholders

6.1 Introduction

This chapter presents some findings from our interviews with 27 stakeholders such as judges, PDS, police, community law centres and court staff regarding the aspirations, operation and impact to date of the PDS pilot. Not all the stakeholders we spoke to chose to answer all the questions.²⁹

6.2 Our findings

6.2.1 Knowledge of the public defence scheme

All the stakeholders we interviewed were aware of the PDS pilot. They had learned of the pilot from a variety of sources, for example, from LSA newsletters and its website, the Law Society, their involvement in consultative committees, and via presentations by the Public Defender.

About seven in ten stakeholders we interviewed knew of the PDS's ability to take up to one third of all criminal legal aid assignments within each proceedings category each day in the Auckland and Manukau courts. However, only about four in ten were aware of the PDS's ability to be assigned up to one half of the available 'on rotation' assignments within the one third limit of all assignments.

When we asked stakeholders 'What do you understand the public defence service pilot is aiming to achieve?' most of their responses reflected the high level outcomes of value for money and quality of representation identified for the PDS pilot by LSA and PDS staff (see Figure A). For example:

'[PDS is] there to assist matters to get through the court and to be more accountable in terms of time and costs, and to bring back to the legal service fraternity the sense of being professional, doing things professionally, being better prepared, and providing a better face to the community.' (Official)³⁰

'To improve and refine the service with due process and quality representation. What's critical is quality. In the past the service let the community down. It used new young lawyers who practised on our people - Maori and poor Pakeha and Pasifika.' (Official)

'A better and more economic service when people are charged with criminal offences. A better standard of legal advisors handling the less serious criminal charges.' (Judge)

²⁹ Appendix 2 provides the interview questions we posed.

³⁰ "Official" stakeholders we interviewed comprised court managers, correctional managers and a manager of Te Puni Kokiri. "Other" stakeholders we interviewed comprised community law centre staff and representatives from the NZ Law Society and the Maori Law Society.

'It will be wanting to achieve a delivery of legal assistance in criminal cases where the quality can be monitored or trialled or assisted and where efficiency will occur in and around areas of timeliness of pleas and decision making about the various processes that should take place in particular cases.' (Judge)

A small minority expressed the aims more simply and negatively as, for example:

'A cost cutting exercise.' (Other)

'A vehicle to rid the system of bottom feeders.' (Prosecutor)

'The Minister of Justice decided to do for ideological reasons.' (Other)

6.2.2 Advantages and disadvantages of the PDS pilot

All but one of the stakeholders who offered a view, perceived the PDS pilot to have some advantages. Many of the stakeholders perceived the likely advantages of the PDS pilot as being related to its perceived dual aims of providing value for money and a better quality of representation. For example:

'Much quicker disposal of cases. More competent counsel, not just interested in playing the system in the Auckland District Court.' (Other)

'PDS is not money driven. Its results orientated.' (PDS)

In addition, some described advantages of the PDS pilot in terms of the 'firm' or corporate model (Figure A, Box 2). For example:

'PDS have a team situation with easily identifiable offices with interview facilities and hierarchical structures ... PDS encourages clients to see them prior to the case to facilitate resolution compared with the Private Bar who don't have chambers so the court is their office.' (Prosecutor)

'The PDS has upped the level of professionalism and efficiency in the court with their processes and systems ... Very good systems in submissions on sentencing. Good IT. Access to legal precedents. Better systems than anyone else.' (Prosecutor)

'Administratively PDS has got one group under one person's control and responsibility.' (LSA)

'An ability to pour more effort into more serious category cases - to share them out, get different angles compared with lawyers in private practice who have to put up a case to LSA for a second counsel.' (PDS)

'It has the same advantages as for a big chambers. In emergencies it's easier for the PDS to put out the safety net for its customers. ... There's less chance in PDS of a person being wrongly remanded in custody due to a lack of counsel.' (PDS)

'It may be that the PDS may have better access to better resources in terms of forensic investigations, access more easily than individual legal aid lawyers may have, because they're centralised.' (Judge)

The PDS's single focus and their operating in defined courts were also perceived as an advantage. For example:

'That's their sole job. No other work, just public defence. ... They're not distracted ... You can tell the PDS lawyers because they have better factual knowledge of their defendants ... are better briefed, for example, from the family.' (Judge)

'PDS doesn't get caught up in the peripheral courts around Auckland compared with beginner lawyers who need to juggle the courts when they start out.' (PDS)

Most stakeholders also identified some disadvantages of the PDS pilot. Most of these related to their perception of the depth of the Service and the lawyers' workloads. For example:

'PDS lawyers are relatively inexperienced. They don't have the depth to handle the more serious cases requiring seniority and grunt.' (Other)

'My initial worry was a lack of competency, that it wouldn't attract people with the necessary ability because of the amount of money they're paid but I was wrong with that.' (Judge)

'PDS will be worked to death like a sausage factory. They will have no time to spend with clients/families. Clients will be locked in cells for longer. ... I'm concerned about the pressure of work on PDS. It's a big ask.' (Other)

A perceived inability of the PDS to compete with the private bar, a reduction in workload for the private bar, a perceived lack of independence of the PDS, a danger of a monopoly market for criminal legal aid work, and the PDS's 5-year life were some other disadvantages that stakeholders identified. An exemplary quote is provided of each of these perceived disadvantages in turn:

'I'm very sceptical that the PDS can compete. There's a temptation to compete on cost. It could mean cutting corners which are not in best interests of client. ... I've worked in a law firm that did criminal legal aid work. It was difficult to make it pay...' (Other)

'I'm aware of the private bar complaining they don't get same amount of work, that they have to do assignments before get paid whereas the PDS get paid as they go.' (Official)

'The defendants can perceive the PDS to be an arm of the state, like the police, and might say that they're not getting a truly independent representation.' (Judge)

'There's a danger that a major provider does most of the work.' (Prosecutor)

'I'm not sure what will happen beyond the pilot...' (Official)

6.2.3 Costs of the PDS pilot

The majority of stakeholders thought that the PDS would over time be able to provide a similar service at a lower cost than that provided by lawyers in private practice. Most, though, wanted to qualify their responses noting *'it really depends on their hourly rate'* (Other) or *'it might not work out [that way] in practice'* (Judge). Some chose to remind us at this point in the interview that the LSA's argument for the PDS's introduction had moved from an argument based on cost savings to one based on quality of representation.

6.2.4 Issues of independence

Most stakeholders thought that the PDS pilot was sufficiently independent of pressures from the State as funding body and employer. For example:

'I don't get the impression they are guided by any political will. They do the same job as any barrister. It's not an issue. The same could be said of private barristers being paid by the taxpayer.' (Prosecutor)

While some of the judges we interviewed spoke of the potential for such a system to be drawn into the bureaucracy, they thought that this had not happened in practice and attributed this to the personal qualities of the Public Defender. For example:

'I don't know what the constitutional wall between the Public Defender and the State is ... I don't know what the setup is, but I'm confident that Mike Corry is not a man to be pushed about. I can see how the system could become drawn into the bureaucracy if it wasn't properly safeguarded. The Crown solicitor achieves independence with proper safeguarding. Judiciary managers do it as well. If it was like a policeman having to fill traffic quotas each week it could be harmed.' (Judge)

'The Office is well served by Mike Corry who wouldn't commit that anyway. In theory it's a possibility. So many of these problems are theoretical. It used to be put to legal aid lawyers paid by the government. It never arose even though the government is prosecuting.' (Judge)

Two stakeholders thought the PDS was not sufficiently independent of the State, with one observing:

'The relationship between the PDS and LSA is very different from the Private Bar and LSA. It seems at times they're all one organisation. Their appearance is not one of independence.' (Other)

6.2.5 Implementation issues?

We asked stakeholders whether they had or knew of any issues relating to the set up of the PDS pilot. Recurring themes related to the way in which the PDS pilot was perceived as having been poorly communicated to lawyers and the tensions that had arisen between PDS and private sector lawyers. For example:

'[The establishment of the PDS] could have been better managed. It was unfortunate in the way it was done. It caused ill feelings between PDS and private practice lawyers. Better communication could have avoided the problems. ... Could have taken steps to work alongside private bar eg training, seminars, office opening.' (Other)

'It was very badly managed in respect of explaining the scheme to the professionals.... People in the Private Bar are complaining about the amount of assignments they've got. The complaints are far more vocal from Manukau because Manukau has a large Polynesian population, a high crime rate, a large amount of legal aid, and lot of lawyers rely solely on aid. The ushering in wasn't handled well.' (Judge)

'None, other than the tension among the ranks. They didn't want PDS lawyers in the solicitors' room at the court ...' (Official)

'A fair bit of animosity among the Auckland lawyers whose income was affected. No other issues.' (Other)

A related issue was that of a perception that the PDS was 'not a genuine pilot' and that PDS lawyers were favoured over the private bar not only in terms of assignments, but in some perhaps less obvious respects. These stakeholders cited the high profile cases assigned to PDS (*'Was it a coincidence that PDS got the murders?'* (Other)), the separate room for PDS at the Auckland court, and the behaviour of some court staff as evidence of favouritism.

One mentioned an issue related to the Manukau office being located on the first floor, less accessible for disabled clients.

Unlike those private sector lawyers participating in the workshops (Chapter 4), only one of this group of stakeholders mentioned issues in relation to the way in which PDS lawyers were undertaking duty solicitor work. His complaint was that the PDS lawyers could not be relied on in this respect and that the PDS had started giving away some of this work to other duty solicitors.

Stakeholders were asked about any issues they had or knew of around the way in which PDS lawyers were undertaking assignment work. Again, this yielded only one complaint related to a rumour that PDS was taking more than one third. The figures provided in Chapter 5 do not bear this out.

6.2.6 Perceptions of the quality of the legal service provided by the PDS

Most stakeholders thought that PDS lawyers provided a good service or better. Some of these thought the service provided by PDS lawyers had lifted the professionalism of the private bar. For example:

'It's upped the level of professionalism. It's put the acid on the rest of the lawyers to come up to their level.' (Prosecutor)

'It's raised the quality, you sense, in the ordinary summary work on sentencing. ... PDS has had a discernable impact on the outcomes of cases. They have done very well.' (Judge)

'Very good. It has changed a few of the practices of other barristers eg written submission for bail, for summary sentencing.' (Prosecutor)

'It's been quite refreshing to see a number of [PDS] lawyers that have an actual solid grip of information that's on the file...' (Judge)

Some expressed their views in terms of an absence of complaints about the quality of the PDS's service. For example:

'Has there been a string of complaints? No. Adverse quality? No. It's pretty good.' (Official)

Two stakeholders expressed concern about the PDS's workload. For example:

'My only concern is the sheer workload. I hope they don't become over worked.' (Judge)

One of the two stakeholders who expressed concern about the PDS's workload also expressed concerns about the level of supervision of some junior PDS lawyers and that they were not always present in court when their cases were called.

Stakeholders were hard pressed to nominate particular groups of legally aided criminal clients that they thought could be likely to be better represented through the PDS than by lawyers in private practice, or vice versa. The few that thought that PDS could better represent some groups nominated Maori clients and clients of other ethnic minorities for reasons of the ethnic mix of PDS lawyers and for their *'understanding and empathy with Maori'* (Other). The few that thought that the private bar could better represent some groups nominated some particular offence groups - serious murders, drug trials, and offences such as excess breath alcohol with their technical defences.

When questioned directly, stakeholders held mixed views about the quality of the PDS compared with lawyers in private practice in meeting the needs of Maori clients. On balance, they appeared to slightly favour the PDS over the private bar in this respect.

Stakeholders thought that there was little difference between the quality of the service offered by the PDS and the private bar in meeting the needs of Pacific clients and clients of other minorities. They thought the same was true regarding the quality of the service provided to clients with a mental illness.

6.2.7 Impact of the PDS pilot on others' workloads

About six in ten stakeholders thought the PDS pilot had had little or no impact on their current workloads.³¹ Court staff put this down to the sheer volume of cases that they

³¹ Most acknowledged elsewhere during the interview the impact of PDS in reducing the number of criminal legal aid assignments available to the private bar.

dealt with, whereas community law centre representatives were likely to view the PDS as an additional resource to whom they could refer their clients.

Two of four prosecutors thought that disclosure was done more efficiently with the PDS and two of four judges thought that PDS had had some impact in reducing court workloads by more efficiently disposing of cases. For example:

'It certainly has had an impact. It has allowed for the more efficient disposal of work. I find there are less remands with PDS, maybe because they have backup. They are increasing the output of court.' (Judge)

'I think it has. One of the problems ... is churning the files. With every appearance there's more work for the judge with no advancement of the case. With lawyers who bring their cases to a conclusion in timely way, as long as they're the right decisions, it makes a huge impact on the court, and my perception is that the PDS are doing that.' (Judge)

Stakeholders generally predicted the PDS pilot to have a similar impact on their future workload as on their current workload.

6.2.8 Other comments

Stakeholders were asked if they wished to make any other comments in addition to their responses to our particular interview questions. Those who offered some other comments did so along several lines. Some commented favourably on the introduction of the PDS. For example:

'I'm usually not an advocate of imports, overseas models. I think this one is an exception.' (Official)

'We're pleased the PDS is around on the scene and has introduced systems that have sped the system up. We like the people there. They're very cooperative.' (Prosecutor)

Some wished to see the pilot expanded by increasing the proportion of assignments the PDS could take or by spreading it to other courts or to other areas of work. For example:

'I think PDS should do all work clients can't pay for ie all criminal legal aid work. ...It's a marvellous idea for a court this size.' (Other)

'It's a pity about that 30% level. I wouldn't mind if it had come in at 100%. It would cut off the gravy train.' (Prosecutor)

'I should like to see the PDS continue for Manukau ... and extend it to other areas where the local bar has a monopoly.' (Official)

'If the pilot is deemed to be a success to provide a quality service for Maori and for Pacific, I think something like this should be looked at for the youth court.' (Other)

One cautioned it was still '*early days*' (Judge).

Finally, one stakeholder questioned the adequacy of the evaluation design, commenting

'How effective can the evaluation be? It's a system of apples and oranges. PDS acts quite differently. They've no red tape to get through.' (Other)

Chapter 7 Some observations to date

This first interim report provides some preliminary findings in relation to the evaluation objectives (see section 1.1.5). It is limited to preliminary findings about the PDS pilot in its first eleven months of operation – from May 2004 to March 2005 inclusive. It includes the initial views of some lawyers in private practice and some other stakeholders about the establishment and operations of the PDS. The report also includes some figures about the volumes and mix of cases assigned to the PDS up to March 2005 but not about the costs of these cases.

While the findings are of a preliminary nature, it is hoped that they can usefully contribute to providing input into ongoing improvements in relation to the PDS, and identifying key issues for the evaluation and lessons learned for the LSA that will help shape the remainder of the evaluation.

In its first eleven months the PDS has been allocated 2017 assignments, almost all on rotation. The number of category 1 and 2 assignments allocated to the PDS appears to be running lower than forecast, while the number of category 3 assignments appears to be running close to that forecast. This is offset slightly by the 30 category 4 assignments allocated to the PDS appearing to be slightly higher than forecast.

Over two thousand criminal legal aid assignments were assigned to 13 PDS lawyers, supported by six administrative staff, in the first eleven months. Three PDS lawyers hold category 4 ratings. Since the more serious cases may take more than one year to be processed through the criminal justice system, the full impact of the PDS assignment volume and case-mix on PDS resources may take some time to be felt.

Some private sector lawyers in the workshops and some stakeholders we interviewed expressed concern about the PDS's potential heavy workload given their numbers and category ratings. Overload has been described as '*by far the greatest danger*³² of salaried schemes in the United States, for example. Time will tell whether the number and distribution of category ratings among PDS lawyers is appropriate to the volume and category of cases assigned to the PDS, or whether some modifications are required to either their maximum caseload or caseload mix. Certainly, it is something that LSA and the evaluators need to monitor closely over the duration of the pilot.

The proportion of assignments taken on by the PDS as preferred lawyer in the first eleven months was very small at about 2-3 percent of total assignments. Two-three percent is lower than LSA expected.

Clients' perceived inability to nominate a particular PDS lawyer may act as a barrier to them nominating PDS as their preferred lawyer. This makes it difficult for the PDS to build up its preferred lawyer base. If, indeed, it is common for preferred lawyer nominations to remain with the nominated PDS lawyer, it may be useful for this point to be communicated to the PDS' potential clients.

32 Goriely T (1997) Legal Aid Delivery Systems. Which Offer the Best Value for Money in Mass Casework? A Summary of International Experience. London: Research Secretariat, Lord Chancellor's Department.

The qualitative analysis prepared for this report of the experience of the first eleven months illustrates important differences within the legal sector concerning the likely success of the PDS pilot, particularly between members of the private bar, LSA, and PDS, as graphically depicted in figure A (see page 20) and figure B (see page 30). These contrasting views, in turn, reveal deep differences in how various justice sector stakeholders who participated in the workshops view the nature of criminal legal aid work itself.

In common with PDS lawyers, most private defence lawyers in the workshops value their independence and see themselves as advocates for the disadvantaged whose sole focus is on '*getting the best result for the client*' within the boundaries of professional ethics and good practice. However, private defence lawyers also emphasise their self-reliance, by and large, and tend to treat with suspicion any mention of increased bureaucracy or centralised control of criminal defence practitioners. LSA staff and PDS managers focus on the interests of clients, too, but they also see criminal defence law as a potentially corporatist endeavour in which managerial knowledge may be brought to bear to improve both efficiency and quality. Other stakeholders reflected a mix of views about both the nature of criminal legal work and the PDS's likely success. The differences between these groups add up to a sort of cultural divide within the criminal legal aid sector.

The existence of this cultural divide helps to explain why private lawyers participating in the logic workshops did not explore how lessons learned from PDS about a law-firm model of criminal defence services might influence their own business development plans. The dearth of discussion on this topic may be due to an apparently widespread misperception among private lawyers that any collaboration around cases is prohibited by LSA. It also may be due to the differences in culture noted above. Either way, if part of PDS's mission is to demonstrate professional leadership, LSA will need to consider ways of communicating these lessons so that private lawyers will perceive them as relevant.

Some of the comments from some private lawyers suggest that they may not all have an accurate understanding of legal aid policies. The Agency may wish to consider how to improve this.

In addition, LSA might consider providing targeted, refresher education for listed lawyers about the conditions, and possibly reviewing the conditions, under which existing rules allow file sharing, and payments to junior lawyers working alongside seniors. Furthermore, the Agency may wish to explore options for assignment of cases to chambers, and other less conventional, but potentially promising practices.

Another issue worthy of further review from LSA is the categorical listing system, aspects of which are viewed as impediments to good practice by both private lawyers and PDS managers. In particular, criteria for moving up a category might be due for review.

The issue of quality assurance also emerges from this report as an area for ongoing work. Conversations with private lawyers helped reveal a missing step in figure A's logic, namely the fact that LSA will need to find better ways of monitoring and enforcing performance standards among contractors if it wants to improve service quality overall.

Although the sector-leader role identified for PDS may provide one channel of influence on quality, private lawyers challenge the way in which such leadership is being exercised, and everyone largely agrees that soft, information-based and role-modelling approaches are unlikely to have much effect on incorrigibles. One possible option is for the Law Society to play a larger role in quality monitoring.

Another option might involve closer networking between PDS and the private bar. Cooperative and collaborative approaches such as this – involving linkages among government agencies, among private contractors to government, and between public and private providers – are becoming increasingly fashionable in the social services sectors as well as in local government. The networking model's implications for legal services may be worth exploring.

Comparison of the two logic models (figures A and B) points to several important challenges for the PDS pilot. With regard to career paths, for example, figure A notes that if the pilot does not offer junior lawyers special inducements, such as training and mentoring and an ability to link highly focused work experience to increased opportunities to rise through the listing categories, it is unlikely to succeed. However, if PDS does offer junior lawyers special inducements in relation to movement through the listing categories, it is likely to generate complaints of unfair competition from the private bar, as noted in figure B.

Likewise, figure A identifies a leadership role for PDS as an ingredient in success, but figure B predicts that pressure to contain costs will prevent PDS lawyers from exercising such leadership. In addition, private lawyers' scepticism and, in some cases, hostility toward PDS, as expressed in the workshops, could make the diffusion of innovations from PDS to private practice providers quite difficult.

It is interesting to note private and public lawyers' perceptions of each other's motivations and behaviour. Whereas PDS lawyers believe that they are raising standards of practice in the courts by providing documentary support for many of their arguments, private lawyers see this as proliferation of meaningless paperwork. Whereas PDS lawyers value the fact that they are not required to build a client base or 'rain-make' business for their firm, private practice legal aid providers see freedom from rain-making and billing pressures as a source of unfair competitive advantage for PDS. Whereas PDS lawyers feel that freedom from financial pressures allows them to speak more frankly with clients about a case's prospects for success, private lawyers feel that lawyers on the government payroll face an inherent, freedom-constraining conflict of interest between their obligation to advocate on behalf of clients and their obligation to protect government's financial and other interests. Whereas PDS lawyers suspect their private colleagues of prolonging cases in order to bill more hours, private practice lawyers suspect their PDS colleagues of taking short cuts, such as advising earlier guilty pleas and opting for judge rather than jury trials, in order to minimise public costs.

Many of these perceptions – on both sides – may be based on false assumptions, but they need to be addressed due to their potential for destabilising the mixed model and undermining faith in the legal services system as a whole. In addition, the contrasting views raise questions about whether PDS's two high-level outcomes can be pursued simultaneously, or whether quality of representation and value-for-money should be viewed as competing principles to be traded off against each other, as the private

lawyers tended to argue. The LSA workshop participants discussed this problem of trading off quality and efficiency, while the PDS workshop participants were more inclined to see quality and efficiency as complementary goals.

The issue of a 'level playing field' bears further examination because it arose repeatedly in all of the workshops. Virtually everyone is uncomfortable with the prospect of comparing value-for-money across PDS and the private bar because comparable units of measure are so difficult to define and the structures of delivery are so different. However, if we are to learn whether or not a firm model adds value to legal services, some types of comparisons are necessary. One possibility might be to promote the development of partnerships among sole practitioners who could accept bulk-funded contracts for legal services. This would enable LSA to compare performance under three types of arrangements – sole private practitioners, bulk-funded private partnerships, and PDS, which might defuse some of the concerns about a level playing field and focus attention instead on the details of comparing and measuring performance across three neutral types of management and governance arrangements.

Many private lawyers think that the more legitimate comparison is between defence and the Crown generally (balance of arms), and between PDS as a firm and Crown Law. This, in turn, raises questions about the appropriate model for PDS as a firm.

The PDS pilot may be seen as one possible response to a classic 'principal-agent problem' faced by government in the legal services area. Principal-agent problems arise when a principal, such as government, needs to monitor and control the performance of its agents, such as private practice legal aid lawyers who serve public clients. As with virtually all principal-agent relationships, problems arise when the principal does not have sufficient information about or influence over its agents to ensure desired results. In the legal services sector, these problems arise because lawyer-client relationships are hard to monitor, service quality is difficult to measure, and billing does not necessarily reflect output; therefore, only the agents (the lawyers themselves), and to some extent their clients, really know what calibre of service is being provided and its true costs. This is a generic accountability issue faced by virtually all social service agencies that provide services through contractors. Private lawyers, as well as PDS and LSA staff, noted the centrality of this problem.

The PDS pilot provides a partial solution to government's principal-agent problem by giving government a new window on the coalface of public defence law and providing a steady stream of detailed information about the day-to-day business of providing legal services. The richness of this information contrasts with the more limited data available through the conventional levers of contract management. Information generated through the pilot is useful not only for refining PDS operations, but also for improving LSA's management of legal aid provision in general, including streamlining its own procedures for private providers.

In addition to reporting on the pilot's implementation phase, this first interim report begins to identify the types of information that may be useful for better understanding PDS specifically and the business of legal aid services in general.

Appendix 1

Workshops with private sector lawyers

Questions to supplement logic intervention discussions, as appropriate

A Private sector lawyers and PDS

What are your perceptions of the value of providing criminal legal aid services through PDS alongside similar services provided by you?

Prompt for value of mixed model approach, values in terms of improved cultural responsiveness & sensitivity towards clients, collection of benchmarking information to improve LSA's understanding of issues

Do you think that the PDS will be able to provide a similar service as yourselves at the same or lower cost? Why do you think this?

Note – The PDS is intended to be economically viable within five years.

As you probably know, in setting up the PDS pilot the LSA rejected the “level playing field” option. Instead it set up the PDS with a relative advantage through its assignment practice of assigning to it up to 50% of “in rotation” cases to up to one-third of all criminal legal aid cases in the Auckland and Manukau courts.

Were you aware of the proportions of “in rotation” cases and total cases set by LSA?

To what extent do you think the PDS impacts on your current workload?

To what extent do you think the PDS is likely to impact on your future workload?

Do you have any plans to change the areas in which you practice because of PDS? If so, can you share these (at a high level)?

B Independence of PDS

The PDS was set up as a stand-alone unit within LSA. Do you think that the PDS is sufficiently independent from pressures from the State (as funding body and employer)?

Prompt for any evidence of early guilty pleas etc.

C Interactions with PDS

Have you had any interactions with PDS lawyers? If so, what are your perceptions of the quality of the legal service PDS provides?

Prompt for quality of service as a whole, quality of lawyers & support staff, quality of processes, quality of outcomes in terms of proportions of guilty pleas & convictions, sentencing outcomes, any differences in cultural responsiveness & sensitivity towards clients and their families.

One dimension of quality of a legal service is the extent to which that service meets the cultural needs of its clients and their families/whanau. How do you think PDS is performing relative to yourselves in meeting the needs of

- Maori clients?

- Pacific clients?
- Other clients with English as a second language?

Prompt for knowledge of language & tikanga. Training. Links with translation service. Links with special interest advocacy groups.

Lawyers doing legal aid work are more likely to encounter clients with mental illnesses, clients who have experienced domestic violence, and so on. How do you think PDS is performing relative to yourselves in meeting the needs of clients with a mental illness?

Clients who have experienced domestic violence?

Prompt for training. Links with special interest advocacy groups.

D Implementation issues

Do you have any issues in relation to working alongside PDS lawyers doing duty solicitor work? If so, what are these? How have they been dealt with, or are being dealt with?

Do you have any issues (other than reduced workload) in relation to working alongside PDS lawyers doing assignment work? If so, what are these? How have they been dealt with, or are being dealt with?

Do you foresee any difficulties for the PDS in terms of the recruitment and retention of its staff? If so, what are these?

Have you any other issues in relation to the implementation of PDS? If so, what are these? How have they been dealt with, or are being dealt with?

Appendix 2

Public defence service pilot evaluation First round of key stakeholder interviews

1 Knowledge of the public defence service pilot

- a) What is your understanding of the public defence service (PDS) pilot scheme?
- b) What do you understand that the public defence service pilot is aiming to achieve?
- c) How did you learn about the public defence service pilot?
- d) As you may know, the Legal Services Agency operates an assignment policy where lawyers can be assigned cases as a preferred lawyer nominated by the defendant or on rotation. The Agency assigns rotation cases and preferred lawyer cases to the PDS each day. The Agency has allowed the PDS to take up to one third of all assignments within each proceedings category. Within this up to 50% of the number of available rotation assignments can be assigned to the PDS and 50% go to the private bar.

Were you aware that the PDS can take up to one third of all assignments?
yes/no

And within the one third, up to 50% of available rotation assignments?
yes/no

2 Views about the public defence service pilot

- a) What do you perceive to be the likely advantages of the public defence service pilot providing criminal legal aid services alongside similar services provided by lawyers in private practice?
- b) What do you perceive to be the likely disadvantages of the public defence service pilot providing criminal legal aid services alongside similar services provided by lawyers in private practice?
- c) Do you think that the PDS will be able to provide a similar service to that provided by lawyers in private practice at a lower, the same, or higher cost? Why do you think this?
- d) The PDS pilot was set up as a stand-alone unit within LSA. Do you think that the PDS pilot is sufficiently independent from pressures from the State (as funding body and employer)?

3 Establishment of PDS

- a) Do you have, or know of, any issues in relation to the setting up of the PDS? If so, what were/are these? How have they been dealt with, or are being dealt with?

4 The public defence service pilot

- a) What level of contact have you had with the PDS? In what capacity?
- b) Do you think there should be more or less contact with PDS? Why do you say this?
- c) What are your perceptions of the quality of the legal service PDS provides?
- d) Do you think there are particular groups of legally aided criminal clients who are likely to be better represented through the PDS than by lawyers in private practice? If so, which groups are these? Why do you think this?
- e) Do you think there are particular groups of legally aided criminal clients who are likely to be better represented through lawyers in private practice? If so, which groups are these? Why do you think this?
- f) One dimension of the quality of a legal service is the extent to which that service meets the cultural needs of its clients and their families/whanau. How do you think PDS is performing relative to lawyers in private practice in meeting the needs of:
 - (i) Maori clients?
 - (ii) Pacific clients?
 - (iii) Other minority clients, such as those with English as a second language?
- g) Lawyers doing legal aid work are likely to encounter clients with mental illnesses. How do you think PDS is performing relative to lawyers in private practice in meeting the needs of clients with a mental illness?
- h) Do you have, or know of, any issues around the way in which PDS lawyers are undertaking duty solicitor work? If so, what are these? How have they been dealt with, or are being dealt with?
- i) Do you have, or know of, any issues around the way in which PDS lawyers are undertaking assignment work? If so, what are these? How have they been dealt with, or are being dealt with?

5 Impact of the public defence service pilot

- a) How do you think the PDS pilot has impacted on your current workload? On criminal legal aid lawyers in private practice? On other justice sector groups?
- b) How do you think the PDS pilot is likely to impact on your future workload? On criminal legal aid lawyers in private practice? On other justice sector groups?

6 Any other comments?

Would you like to receive a summary of the evaluation findings? Yes/no