



Evaluation of the Public Defence Service Pilot

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Final Report

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Preface

This report has been prepared for Legal Services Agency by Sonia Ogier and Richard Tait and peer reviewed by Nick Davis from Martin, Jenkins & Associates Limited (MartinJenkins).

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Executive summary

Introduction

This evaluation has been conducted in accordance with the requirements of section 83 of the Legal Services Act 2000, and in addition, assesses whether the Public Defence Service (PDS) pilot represents value for money. Evaluation questions include:

- Has the pilot maintained or improved quality of criminal legal aid services?
- Has the pilot restricted access to justice either by:
 - limiting in practice the ability of criminal legal aid clients to access service except under the pilot?
 - denying lawyers outside the pilot 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?
- Has the pilot affected other parts of the justice system such as court processes, other schemes, and the legal profession?
- Does the pilot represent value for money?

Approaches and Limitations

The evaluation is based on a review and synthesis of the body of evaluation work conducted by Victoria University of Wellington's Crime and Justice Research Centre (CJRC). Our brief was to draw on this material to make an independent summative assessment of the pilot against the statutory evaluation criteria, to the extent possible. In addition, we were asked to review the results of a value for money assessment of the pilot undertaken by the Legal Services Agency (LSA). We were not asked to undertake our own analysis of the pilot and, consequently, the views and opinions expressed in this report are dependent on the accuracy of the information provided to us for this purpose.

Overview of Public Defence Service Pilot

Legal aid is a scheme funded by the government which pays a lawyer's fees if a person cannot afford a lawyer to represent them for proceedings that may entail representation at court.

Criminal legal aid is available for people charged with a criminal offence. Prior to the PDS pilot, all legal aid lawyers were private lawyers. They were paid a fee by the LSA, based on their experience level and the type of proceeding for which their services were employed.

PDS was established in May 2004 as an in-house criminal legal aid service taking up to one third of the criminal legal aid caseload in the Auckland and Manukau District Courts. The pilot's salaried staff includes the Public Defender, lawyers and support staff. The pilot therefore introduced a mixed model of legal aid service delivery to New Zealand. The pilot will finish in May 2009.

Findings

Quality of legal aid services

PDS is intended to maintain or improve the quality of criminal legal aid services in the Auckland and Manukau courts. The quality of service received by recipients of criminal legal aid under PDS is not directly observable so the evaluation focused on three proxy indicators: client experience, case handling and outcomes, and stakeholder perceptions. The evaluation finds that on all indicators PDS has maintained or improved the quality of legal aid services.

Access to justice

The Act requires the pilot to ensure that, in practice, people are able to access criminal legal aid services other than through PDS. In other words, legal aid clients must be able to choose a non-public provider if they wish. In addition, the Act requires that the pilot does not deny lawyers outside the pilot the opportunity to offer the service, either generally, in relation to the place where the pilot is operating, or in relation to the client group the pilot is directed at. The evaluation finds that, during the pilot, clients opt to choose a lawyer to represent them in 55% of cases, and overwhelmingly choose private lawyers 76% of the time. Further, there has been no unusual change in the pattern of private lawyers leaving or beginning practice in the pilot area. The evaluation finds that PDS has operated within a competitive market: defendants have the right to choose, and private lawyers have not been denied the ability to practice.

Other effects on the justice system

PDS cases tend to result in a greater use of guilty pleas, less changes of pleas and leads to fewer substantive hearings. These patterns cannot be explained by factors that are known to influence both pleas and case path (e.g. offence type, seriousness, offender history), indicating that there is something particular about PDS cases that lead to these results. These features of PDS cases will affect the amount of time required in court. This will represent substantial savings to courts.

PDS has the potential to provide mentoring and training opportunities for junior lawyers. Stakeholders and private lawyers believe that the mix of senior and junior staff within PDS offices could be utilised to provide opportunities for junior staff to be mentored and gain

necessary experience, as salaried employees. Given the perceived shortage in mentoring and training opportunities for junior lawyers, PDS has the potential to address this shortfall.

Whilst private lawyers have expressed concern that PDS has the potential to limit private practice, the data shows that this has not happened in the pilot area. PDS lawyers have not always met duty solicitor hour service standards. The CJRC evaluation findings do not explore the impacts of PDS under delivering its target duty solicitor hours on the Duty Solicitor scheme. There is no evidence that PDS has adversely affected the legal profession or had any effect on other legal aid schemes.

Value for money

The methodology the LSA has taken to determine the efficiency of the pilot appears to be appropriate. The evaluation finds that the PDS model has generally been more efficient than the private sector for the duration of the pilot, with lower average case costs in three of the four years of the pilot. Given this and the fact that PDS has at least maintained the quality of criminal legal aid services without having obvious adverse effects on the Justice system, the pilot in our view has represented good value for money during the pilot period.

Conclusions

The evaluation finds that PDS has complied with the principles of the Legal Services Act 2000, does represent value for money, and has (or has the potential) to have a number of positive effects on the legal aid system and wider criminal justice system.

Introduction

This evaluation of the Legal Service Agency's (LSA) Public Defence Service (PDS) has been conducted in accordance with the requirements of section 83 of the Legal Services Act 2000 (the Act), which requires that every pilot plan must be evaluated. Under the Act, any such evaluation is required to address:

- (a) the extent to which the pilot complies with the principles set out in paragraphs (a) and (b) of section 81 of the Act:
 - 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:
 - 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; and
- (b) the effect of the pilot on other parts of the justice system, such as court processes, other schemes, and the legal profession.

This evaluation also makes an assessment of whether the PDS represents value for money.

Approach and limitations

This evaluation is based on secondary information provided by the LSA to MartinJenkins, predominantly in the form of the third interim evaluation report produced by Victoria University of Wellington's Crime and Justice Research Centre (CJRC) in February 2008. That report incorporates findings from previous evaluation work and represents the most up-to-date assessment of the PDS.

Our brief was to draw on available evaluative material to make an independent assessment of the Public Defence Service pilot against the statutory evaluation criteria. In addition, we were asked to review the results of a value for money assessment of the pilot undertaken by the LSA. We were not requested to undertake our own analysis of the pilot and, consequently, the views and opinions expressed in this report are dependent on the accuracy of the information provided to us.

Overview of the Public Defence Service pilot

Legal Aid context

Legal Aid is a scheme funded by government which pays a lawyer's fees where a person cannot afford a lawyer to represent them in court.¹ There are two kinds of legal aid: criminal and civil/family. Criminal legal aid is available for people charged with most criminal offences. Civil/Family legal aid is available for private disputes and non-criminal disputes that may go to court.

Legal Aid is delivered by approved legal aid lawyers listed with the LSA. They are paid a fee by the LSA for each case. Listed lawyers are eligible to deliver services to legal aid clients within the constraints placed on them by their Criminal – Proceedings Category.² This system aims to ensure that the experience of legal aid lawyers is matched with the seriousness of the alleged offence and the complexity of the proceedings.

Criminal defendants can apply for legal aid prior to their attendance at court or on the first day at court. In the latter case, the court duty solicitor provides free legal help on the first day and assists the defendant to apply for legal aid. When applying for legal aid, potential recipients either choose a lawyer to represent them, or, if no preference is expressed, LSA grants officers will allocate a lawyer on rotation. The rotation system allocates assignments to lawyers with appropriate experience and case categorisation.

Prior to the introduction of the PDS pilot, all approved legal aid lawyers were private lawyers.

Public Defence Service pilot

The PDS pilot was established in May 2004 by LSA as an in-house criminal legal aid service. It is headed by the Public Defender and employs salaried criminal lawyers, along with support staff, to take on up to one third of criminal legal aid cases in the Auckland and Manukau courts. The pilot concludes in May 2009.

The objectives of the PDS pilot are to:

- provide high-quality, consistent, independent, and value-for-money services to legally aided persons;
- improve system flexibility and provide opportunities to test different approaches to meeting cultural and other needs of clients;

¹ Access to legal aid is subject to certain eligibility criteria.

² There are four Criminal – Proceedings Categories which govern which cases legal aid lawyers are permitted to undertake Category 1 (4) cases are the least (most) serious and complex.

- improve the LSA's understanding of issues facing private practice lawyers when providing legal services to the public; and
- provide opportunities to test new and innovative approaches to management of legal services, and to encourage the development of areas of expertise.

The pilot is a new way of organising the provision of criminal legal aid defence that creates a mixed model of private and public provision. While the pilot changes the mix of criminal legal aid provision, it is not intended to:

- reduce the quality of services provided
- lower the level of access to justice
- deny private lawyers the ability to practice

Summary of key PDS features

- PDS is a stand-alone service within the LSA, with its own separate structure
- It is headed by the Public Defender who has overall responsibility for PDS staff and reports directly to the LSA Chief Executive
- The pilot operates in the Auckland and Manukau District Courts and may undertake work in the Auckland High Court, the Court of Appeal, and the Supreme Court
- Legal aid clients in the pilot area continue to have the ability to nominate preferred lawyers, whether private or public
- Clients who do not nominate a lawyer are allocated either a public or private lawyer by rotation. PDS is limited to 50% of all rotation cases
- PDS initially employed 19 staff (15 lawyers) but this has grown to 28 staff (22 lawyers) over the life of the pilot
- There are 2 PDS offices located near the Auckland and Manukau District Courts
- PDS has not marketed its services
- The pilot is limited to a maximum of one third of the total criminal legal aid caseload within the pilot courts. This equates to approximately 3,324 approved cases per year over the lifetime of the pilot
- Since commencing in 2004, the pilot has handled an average of 2,398 cases per year, representing 24% of the total criminal legal aid caseload in the pilot courts
- The pilot deals mainly with the least serious category of criminal legal aid cases (90% of its cases are category 1)

Quality of criminal legal aid services

Has the pilot maintained or improved the quality of criminal legal aid services?

Section 81 of the Act requires LSA pilots to maintain or improve the quality of the relevant service. This requires an evaluation of whether PDS has maintained or improved the quality of criminal legal aid services in the Auckland and Manukau courts during the life of the pilot.

The quality of service received by recipients of criminal legal aid under the PDS is not directly observable. In drawing conclusions about whether the pilot has maintained or improved the quality of criminal legal aid services, we focus on three proxy indicators:

- Client experiences
- Case outcomes
- Stakeholder perceptions of service quality

Client experience

If there were differences in the quality of service delivered by private legal aid lawyers and salaried PDS lawyers, then we might expect clients of these respective groups to report different experiences of legal aid representation. In practice, however, evaluation work by CJRC has shown that clients of both groups report similar experiences and satisfaction with services. This conclusion holds for the following aspects of service quality:

- Ability to contact lawyer
- Ease of contact with lawyer
- Length of time spent with lawyer
- Lawyer's comprehension of their case
- Lawyer's ability to listen to their client
- Receipt of police information from lawyer
- Lawyer's discussion of police information with client
- Effectiveness of communication with lawyer
- Lawyer's advice
- Management of expectations of outcomes
- Quality of lawyer's representation
- Lawyer's level of care about what happened in the case

Overall, clients are satisfied with their legal aid representation. In fact, 82% of all clients interviewed by CJRC would use the same lawyers again. PDS clients and clients of private lawyers were equally likely to say this.

In sum, from the perspective of legal aided persons, PDS lawyers and private lawyers provide a similar quality of service.

Case Handling and Outcomes

If there were no differences in the quality of service delivered by private legal aid lawyers and salaried PDS lawyers, then we might expect there to be no difference in the handling and outcomes of cases after controlling for certain case-specific factors (e.g. the nature of the charge, offending history).

Statistical analysis of conviction rates during the first six months of the pilot found no significant difference between PDS and private provision. This finding is robust when analysed by assignment type, case category and court. For example, while the conviction rate was slightly higher in Manukau (79%) than Auckland (74%), it did not differ between providers in each court.

Further, once factors such as offence type and seriousness, number of charges, and the criminal history of the offender are taken into account, there is no significant difference between PDS and private cases with regard to the type or length of sentence.

There was no significant difference between PDS and private providers in terms of case disposal times during the first six months of the pilot, after taking account of factors such as case mix, defendant type and whether the case involved a preferred lawyer.

As part of the CJRC evaluation, private lawyers expressed a concern that PDS cases would result in poorer case outcomes because PDS lawyers would advise clients to enter more guilty pleas than private lawyers would advise. This practice is considered by some lawyers not to be in the interest of clients. While the CJRC evaluation did find that PDS cases were more likely to have a guilty plea as the first plea (47%) than private cases (36%), there was less difference (though still a statistically significant one) in the proportion of guilty pleas at the end of the case (77% compared with 72%). While worthy of further exploration, given the similarity of case outcomes, this is not obviously an indication of poorer quality service by PDS. Indeed there are a number of plausible reasons for this that are consistent with good rather than poor practice.

In sum, based on CJRC statistical analysis, there is no evidence to indicate that PDS and private cases result in different outcomes, which suggests there is a similar quality of service by PDS and private providers. It should be noted, however, that this conclusion is based on analysis for the first six months of a five year pilot.

Stakeholder perceptions

If there were problems with the quality of service delivered by salaried PDS lawyers, then we might expect professional stakeholders (e.g. judges, prosecutors, other lawyers, probation staff, grants officers, community representatives etc) to rate the quality of PDS services negatively. Similarly one might expect private legal aid lawyers to rate the quality of PDS services negatively. Indeed, CJRC reported that at the outset of the pilot, the attitudes of private lawyers towards PDS ranged from 'cautious support to hostility'. The more extreme views held by some private lawyers were that PDS would lead to lower quality of representation for legal aid clients.

Two years into the pilot, CJRC evaluators asked stakeholders and private lawyers to rate the quality of PDS along a number of dimensions including:

- Physical appearance
- Conduct at court
- Courtesy levels
- Preparation of cases
- Advocacy skills
- Timeliness
- Consistency of service

Key stakeholders generally held very positive views about PDS and some considered that PDS lawyers had lifted the professionalism of the private bar. More than eight in ten stakeholders interviewed rated their appearance, conduct at court, courtesy levels and preparation of cases as very good or good, and more than seven in ten rated their advocacy skills, timeliness and consistency of services as good or very good.³ Positive comments provided by stakeholders included:

They provide an excellent service in all aspects of their work (Court Manager)

In general [they provide a] much better service delivery than other legal aid practitioners (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)

The entire culture that is presented is one of complete professionalism. It's astounding that they were able to get the right people (Judge)

³ These figures have been calculated excluding those respondents who answered "don't know".

Predictably, when surveyed by CJRC, private lawyers held less favourable views about the quality of PDS services. Private lawyers were most positive about PDS lawyers' courtesy levels, appearance, conduct at court and interactions with private practice lawyers and were most negative about their duty solicitor work. However, comments by private lawyers suggest that views are diverse:

As far as I can see the PDS lawyers are excellent, diligent, hard working, competent, and superior – vastly so in many cases, to the non-PDS lawyers

From my experience in having seen PDS lawyers in court I would assess the abilities of current staff as average. Most counsels employed are very junior.

I have had both good and bad experiences with PDS lawyers, in my view no different to the independent bar.

Their trainees are thrown into the deep end – some flounder in defended hearings.

Summary

Our interpretation of this evidence is consistent with PDS having maintained or improved the quality of criminal legal aid service in the Auckland and Manukau courts.

Access to justice

Has the pilot restricted access to criminal legal aid or denied lawyers the opportunity to provide it?

The Act requires the pilot to ensure that, in practice, people are able to access criminal legal aid services other than through PDS. In other words, legal aid clients must be able to choose a non-public provider if they wish. In addition, the Act requires that the pilot not deny lawyers outside the pilot 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.

PDS was designed to operate as an alternate provider of legal services for legally aided persons to private sector lawyers within the pilot area. The intention was not to monopolise the provision of legal aid by a public provider or to create a situation where ongoing private provision of legal aid was not sustainable.

The design of the pilot itself restricted its ability to have these adverse effects. For example, PDS can undertake no more than one third of criminal legal aid cases in the Auckland and Manukau courts and, within the one third limit, no more than 50% of cases available on rotation. This reflects the intention to operate PDS within the private market where defendants have choices about who can represent them.

This section considers:

- the ability of defendants to choose between PDS or private representation
- the allocation of cases to both private and PDS lawyers for rotation cases
- opportunities for private lawyers to represent criminal legal aid clients

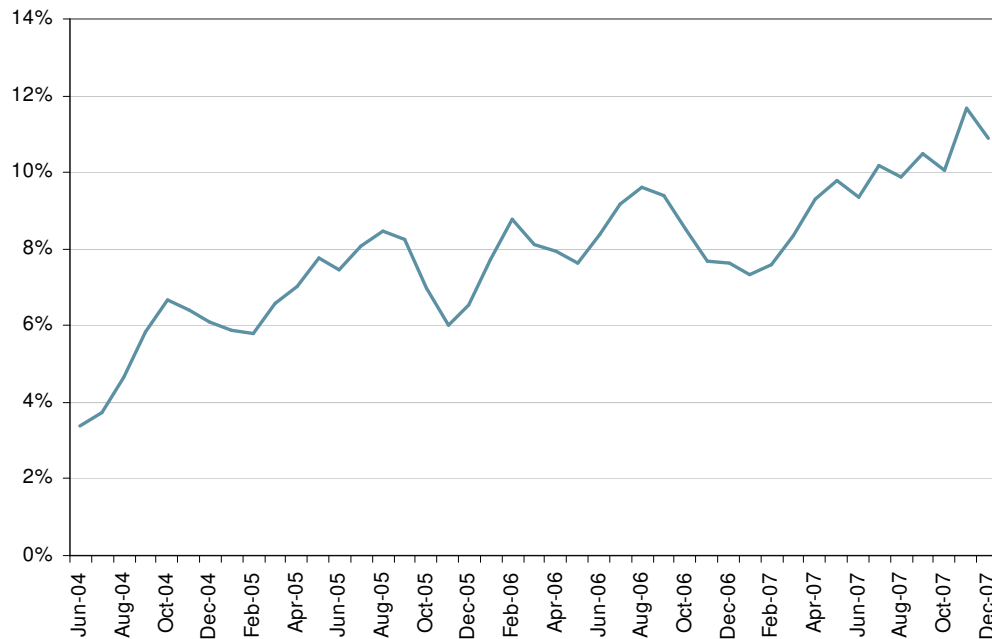
Clients ability to choose private representation

Under the legal aid programme, clients are permitted to choose a lawyer to represent them (preferred lawyer). Under the pilot, either a private or PDS lawyer may be chosen.

When selecting preferred lawyers, clients overwhelmingly select private lawyers. From May 2004 to December 2007, 52% of criminal legal aid assignments to lawyers at the Auckland and Manukau courts were undertaken by preferred providers, of which 92% were lawyers in private practice. Private lawyers have tended to obtain a higher proportion of their cases through client choice under the pilot than before (63% during, compared with 49% before), owing to the assignment of a significant proportion of rotation cases to PDS (see below).

Further, as shown in Figure 1, PDS gradually increased its 'market share' of total preferred assignments over the course of the pilot, possibly reflecting growing awareness of the pilot amongst criminal defendants. Nevertheless, at the end of 2007 approximately 90% of total preferred assignments were still allocated to private lawyers.

Figure 1: Percentage of PDS cases through preferred assignments



Source: The Public Defence Service Pilot Evaluation Third Interim Report, Appendix Table A7.1.

The evidence is consistent with the view that clients are able to exercise choice regarding providers of legal aid services and that PDS has not denied private lawyers opportunities to practice criminal legal aid in the pilot jurisdictions.

Allocation of rotation cases

Where clients do not choose a preferred lawyer, grants officers allocate lawyers on the basis of case category and experience of lawyers, availability, and whether the PDS target has been met.

During the pilot period, 40% of rotation cases were allocated to PDS.⁴ Private lawyers were therefore assigned more than half of all rotation cases. While the pilot has in practice significantly reduced the share of rotation cases allocated to private lawyers in the pilot

⁴ PDS were assigned 38% of rotation cases in the Auckland court and 43% in the Manukau court.

jurisdictions, private lawyers have not in practice been denied the opportunity to offer criminal legal aid services on a rotational basis.

Private lawyers continue to operate

Private lawyers expressed concern to CJRC that the pilot would 'reduce the total number of private legal aid lawyers in the pilot sites because of the lack of work to go around.'⁵ This concern does not appear to have been borne out in the CJRC evaluation:

- Private lawyers continue to represent the majority (76%) of criminal legal aid cases in the pilot jurisdictions and their share of total pilot cases has changed little since the pilot began.
- A study tracking private lawyer caseloads before and during the pilot found that the average annual caseload for private lawyers has fallen from 38.5 pre-PDS to 35.9 post-PDS. While statistically significant, this represents a reduction of less than 7% in average annual caseload.
- The study also found that 10% of private legal aid lawyers in the pilot area ceased practicing legal aid within the first three years following the introduction of PDS, compared with 12% cessation of practice in Christchurch over the same period.

Summary

Our interpretation of this evidence is that PDS has allowed people to access criminal legal aid services other than through PDS, and has not denied lawyers outside the pilot the opportunity to offer the service.

⁵ Source: CJRC, PDS Evaluation Third Interim Report (2008)

Other effects on the justice system

Has the pilot affected other parts of the Justice system such as court processes, other schemes, and the legal profession?

Effect on court processes

PDS is likely to have a number of positive effects on court processes primarily because the CJRC evaluation finds that PDS cases tend to involve⁶:

- Greater use of guilty pleas and less changes of pleas; and
- Fewer substantive hearings.

Greater use of guilty pleas, and less changes of pleas

The CJRC evaluation found that PDS cases were more likely to have a guilty plea as the first plea (47%) than private cases (36%), there was less difference (though still a statistically significant one) in the proportion of guilty pleas at the end of the case (77% compared with 72%).

When all pleas are considered, more PDS cases result in 'all guilty pleas' and less PDS cases have 'at least one change of not guilty plea to a guilty plea'. This pattern is maintained even when factors that may explain differences, such as different case mixes, are accounted for.

Table 1: Summary of all pleas in the case by provider

Plea summary for all pleas in case	PDS	Private
All guilty pleas	38%	28%
At least one 'not guilty' plea, with no plea changes	21%	22%
At least one 'not guilty' plea, with at least one plea change to guilty	35%	45%
No pleas recorded	6%	5%
Total	100%	100%

Source: The Public Defence Service Pilot Evaluation Third Interim Report, Table 5.3

⁶ Based on analysis of first 6 months of pilot

The greater use of guilty pleas and less changes of pleas reduces the length of court processes and affects the case path (i.e. the type of hearing a case follows). The CJRC evaluation did not quantify the effect of this.

Less substantive hearings

Cases may follow a number of case paths including jury trial, pre-jury, summary defended, part-defended, and undefended. The CJRC evaluation found that PDS cases are more likely to be resolved without proceeding to a substantive event compared to private cases, that is, PDS cases result in more undefended case paths and less summary defences, pre-jury, and jury trials. This finding is maintained even when factors that could explain differences (e.g. offence group, seriousness of offence, single and multiple-charge cases, first offenders and repeat offenders) are accounted for.

Table 2: Distribution of case path by provider type⁷

Provider	Jury trial	Pre-jury	Summary defended	Part-defended	Undefended
PDS	3%	5%	19%	40%	33%
Private	4%	7%	27%	43%	19%
Baseline	4%	6%	32%	36%	22%

Source: The Public Defence Service Pilot Evaluation Third Interim Report, Table 5.5

The CJRC analysis found that whilst the difference in the proportion of undefended cases can be partly explained by the larger proportion of guilty pleas, PDS cases were still more likely to be resolved without proceeding to a substantive event.

These results have significant implications for the effect of PDS on court processes as case processing, jury trials, depositions hearings and defended hearings all take more time than undefended cases and status hearings.

Effect on legal profession

This evaluation identifies two ways stakeholders believe PDS may affect the legal profession:

- PDS has the potential to provide mentoring and training for junior lawyers; and
- PDS has the potential to limit private practice in the pilot area.

⁷ This analysis is based on cases occurring during the first 6 months of the pilot

Mentoring and training junior lawyers

Stakeholders believe that junior lawyers need mentoring and training opportunities to develop their professional skills. Traditionally, mentoring and training opportunities for junior lawyers have been either through working at Crown Law, or working for senior private lawyers who are willing to provide mentoring. Stakeholders believe that the latter route is particularly difficult for junior lawyers because the LSA does not pay junior lawyers working under seniors in legal aid cases. Consequently, young lawyers often have to volunteer their time to gain relevant experience and training.

Stakeholders, including private lawyers, believe that PDS has the *potential* to provide an additional avenue for junior lawyers seeking development opportunities. PDS has the ability to provide mentoring and training for junior lawyers because by utilising the mix of senior and junior staff employed and creating a collegial, well-supported work environment, junior lawyers will be able to gain the necessary experience as salaried employees. As one stakeholder explained, PDS could provide 'ample opportunities to learn the trade.' In addition, private lawyers endorse the potential for PDS to provide this support and create opportunities to 'fast track' junior lawyers.

The CJRC evaluation did not test whether PDS has provided mentoring and training opportunities to develop junior lawyers, therefore further work is needed to comment on whether PDS has affected the legal profession in this way.

Private practice

As noted on page 13, private lawyers expressed concern to CJRC that the Pilot would affect the legal profession by reducing the total number of private legal aid lawyers in the pilot sites, in essence because of the belief that there would not be enough criminal legal aid work in the pilot area to sustain both PDS and private lawyers.

Some private lawyers explained to CJRC that they had or expected to experience a reduction in criminal legal aid cases because of PDS.

I have lost well over half of my usual work with half the matters going to them now it is very hard to get more than a couple of cases a week (Private lawyer)

I anticipate that the PDS will force me to abandon legal aid within the next three years (Private lawyer)

The CJRC evaluation does not provide evidence to support this claim. During the pilot the number of criminal legal aid cases rose from 5,720 in 2004 to 11,393 in 2007 and private lawyers have consistently represented the majority (76%) of private criminal legal aid cases in that time.

Effect on other schemes

The Duty Solicitor scheme ensures that lawyers are available “on duty” at every District Court to provide free legal help, on the first day in court, for anyone who has been charged with a criminal offence and does not have their own lawyer. PDS lawyers, alongside private lawyers, undertake duty solicitor work at the Auckland and Manukau District Courts.

During the CJRC evaluation, some stakeholders (in particular legal representatives, grants officers and private lawyers), expressed concern about PDS lawyers’ performance of the duty solicitor role. In particular, they perceived that PDS lawyers:

- fail to turn up for duty solicitor work
- are frequently present for duty solicitor work only for short periods of time
- lack concentration on duty solicitor work when present
- substitute (more junior) lawyers within PDS
- get private lawyers to cover for them, and
- fail to undertake duty solicitor work on Saturdays.

PDS failed to meet its agreed performance standards for duty solicitor hours in its first two years of operation. In 2004/05, PDS completed 386 duty solicitor hours, less than the 440 minimum hours set in its Statement of Service and, in 2005/06, completed 1,220 duty solicitor hours, less than the 1,800 to 2,200 hours set. An LSA Board paper for the quarter ending 31 December 2005 anticipated that PDS would not be able to meet this performance target ‘due to staffing issues from delays in recruitment and allocation of resources to serious and lengthy trial matters⁸.’ In 2006/7 PDS met its duty solicitor hours service standards, completing 1,249 hours of a reduced performance target of 1,200 to 1,600 hours.

The evidence suggests that PDS has under delivered its target duty solicitor hours. The CJRC evaluation findings do not explore the impacts of PDS under delivering its target duty solicitor hours on the Duty Solicitor Scheme.

There is no evidence showing that PDS has affected other legal aid schemes i.e. civil legal aid, or the Police Detention Legal Assistance (PDLA) Scheme.

⁸ Report on the PDS against its Statement of Service. Quarter ending 31 December 2005.

Value for money

This section comments on the extent to which the PDS pilot has provided value for money compared with the private sector model. It considers the efficiency of the pilot by asking whether the PDS pilot delivers the desired outputs at the same or lower cost than private provision.

The methodology the LSA has taken to determine the efficiency of the pilot appears to be appropriate. However, in preparing this section we have not independently tested the validity of the LSA calculations and assumptions, nor have we audited the financial information provided. While we have no reason to doubt this information, we cannot reach unqualified opinions about the efficiency of the pilot for these reasons.

Case load, costs, and notional revenues

Cases finalised

Table 3 shows the number of cases finalised by PDS for each year of the pilot, by category.

Table 3: Cases finalised by PDS

Case Category	2004/2005	2005/2006	2006/2007	2007/2008*	% increase
Category 1 (simple)	1644	1910	1860	2056	25%
Category 2	75	86	81	100	33%
Category 3	59	90	89	100	69.4%
Category 4 (complex)	28	34	32	21	Relatively stable
Reassigned category 1-3 cases**	137	108	179	189	37.9%
Total	1943	2228	2241	2466	26.9%

* Actual year to date to 31 March 2008

** Cases reassigned to PDS from private lawyers

Category 1 cases account for the greatest absolute increase in cases finalised over the pilot period. While numbers of cases in Categories 2 and 3 are relatively low compared with Category 1, their numbers have also increased disproportionately over time. The number of cases in Category 4 is small and has been more or less stable over the four year period. Changes in the case mix over time influence the notional revenue attributed to PDS.

PDS costs and revenues

PDS expenditure increased annually between 2004/05 and 2006/7, stabilising in 2007/08. Increases during the early years of the pilot primarily reflect increasing personnel costs due to:

- an increase in staff numbers in 2005/06, from 19 to 26
- staff progressing up through their salary bands over time, reflecting an overall increase in the seniority and experience of PDS staff over the period

Table 4 shows PDS expenses and notional revenue for the pilot period.

Table 4: PDS expenses and notional revenue

PDS expenses and revenue	2004/2005	2005/2006	2006/2007	2007/2008 (forecast)
Expenses	\$1,832,982	\$2,474,496	\$2,758,588	\$2,754,646
Notional revenue (costs of private funding plus actual costs for Cat 4)	\$2,048,515	\$2,729,166	\$2,597,042	\$3,137,418
Notional surplus/deficit	\$215,532	\$254,670	-\$161,546	\$382,772

Approach to determining comparative cost of provision

The LSA estimated the comparative cost for private sector provision (equivalent to the notional revenue for PDS) as follows:

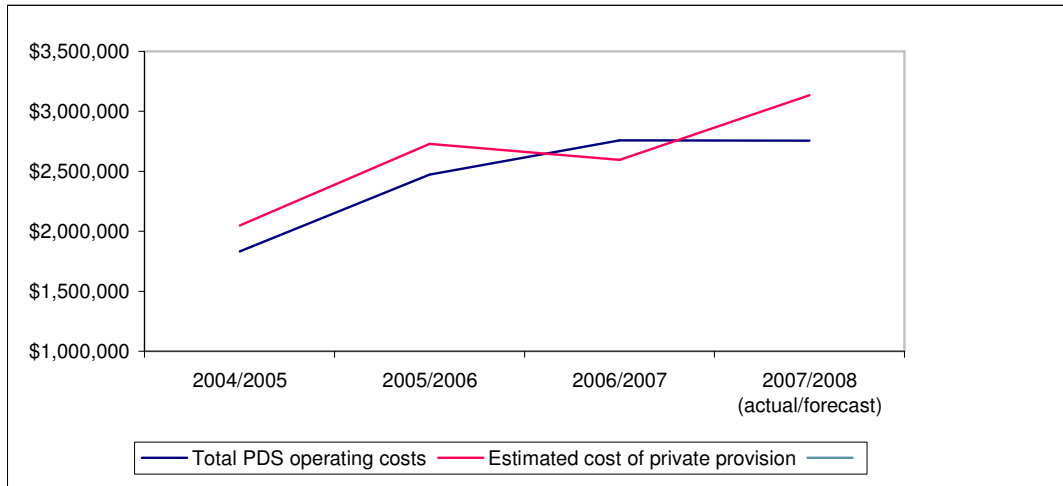
- Estimated private sector costs for case categories 1-3 were calculated by multiplying the number of cases finalised in a given period by private providers' average case cost for similar cases (in the same category) over the same period.
- Private providers average costs were calculated from data recorded in the LSA grants system. Specifically, average case costs were taken from all cases in the Auckland and Manukau courts. It comprises a yearly rolling average that is applied to all the cases for the year that match the specific court and case category.
- The LSA grants system includes a range of case costs within each category. Most case costs are clustered within a narrow range but there are some cases with costs far outside the normal bounds. The model therefore uses a restrictive average approach to avoid the skewing effect of these outliers.⁹

⁹ The restricted average uses threshold values, meaning that any provider case costs outside the threshold values are not included in the private provider average case cost calculation.

- Due to the unpredictable nature of category 4 costs, the LSA calculates the notional revenue generated for these cases by using actual solicitor hours billed for the case, rather than the approach outlined above. As category 4 cases represent a small number of cases and a low proportion of total pilot revenue, this is unlikely to materially affect the results of the value for money assessment.

Figure 2 compares the estimated private sector cost with actual PDS operating costs for the pilot period, holding the case mix constant. It demonstrates that estimated private costs have exceeded PDS costs for three out of the four years of the pilot. Possible reasons for this are discussed in more detail below.

Figure 2: PDS costs versus estimated costs of private provision



Average case costs

A comparison of estimated average case costs between PDS and the private sector (holding the case mix constant) can be made by dividing the annual PDS expenses and estimated private sector costs by the total number of cases finalised by PDS.

Table 5: Estimated average cost per case

Provider type	2004/5	2005/6	2006/7	2007/8 (forecast)
PDS	\$943	\$1,111	\$1,231	\$1,117
Private	\$1,054	\$1,225	\$1,159	\$1,272
% Cost differential (PDS/Private)	-11%	-9%	6%	-12%

Table 5 shows lower average case costs under the PDS model in three out of the four years measured. It is difficult to be precise about exactly why this is the case because average case cost is influenced by a number of factors:

- **Differences in underlying cost structure across the models.** The PDS model has a high semi-fixed cost element because it involves retaining salaried legal and support staff. In the short term, this cost is fixed regardless of the case load or productivity. This contrasts with the mostly variable (fees for service-based) cost structure for private provision. Given this, the relative efficiency of the two models depends on PDS staff utilisation rates (i.e. the number of notionally billable hours per month).
- **Productivity of individual PDS lawyers.** The more productive PDS lawyers are, the more cases they will be able to finalise within a given fixed salary budget. A higher number of cases finalised reduces average costs per case. Key drivers of individual lawyer productivity are likely to include the efficiency of the case load allocation process, the complexity of cases dealt with, and the individual lawyer's own experience and work ethic. We are unable to comment on comparative productivity between PDS and the private sector in relation to individual lawyers.
- **PDS caseload.** As noted above, finalising more cases within a given level of staffing (e.g. through higher staff productivity) will reduce costs per case under a model which has a proportion of fixed costs. Fewer cases finalised has the reverse effect. Therefore, below a certain threshold level of cases finalised, the costs per case for PDS can be expected to exceed the costs under a private model. This can be seen in 2006/07, when the number of cases finalised reduced at the same time as expenditure increased. In the following year, an increase in number of cases finalised had the opposite effect, returning average PDS case costs to below the cost of private provision.
- **PDS case mix and allocation amongst staff.** Average costs per case vary across case categories. If the experience level within PDS supports it, and assuming PDS lawyers are as productive as the private sector, undertaking more category 2-4 cases would decrease PDS's average per case costs because these cases attract higher notional revenue per case. However, it is also important to match case mix to skill level and composition. For example, it would be inefficient for junior staff to undertake higher complexity cases as they will spend more time on each case, reducing the potential PDS caseload and thereby increasing per case costs.
- **Complexity of the cases.** If PDS undertakes cases which tend to be more complex than the mean for the category (on which the notional private cost is calculated), then the average per case cost for PDS will rise compared to the estimated cost of private provision. In general, the average level of complexity between PDS and the private sector should be roughly the same, as the allocation of cases between the two models does not account for likely complexity. However, there is greater chance of variation away from the mean in categories where PDS is involved in lower numbers of cases.
- **The absence of a profit margin** for services provided by PDS.

The available data suggests that the PDS model is not intrinsically more efficient, however the calculation indicates that PDS has been relatively more efficient than private provision over the pilot period. In essence, the relative efficiency of the model requires a good match between the number and composition of cases (caseload and case mix), on the one hand, and the number and experience levels of lawyers employed on the other. This 'matching dynamic' can be expected to change over time. PDS is more likely to maintain its relative efficiency in an environment of relatively steady (or smooth changes in) case load and volumes. In particular, rapid reductions in volumes would have the potential to result in reduced efficiencies in the PDS model vis-à-vis private provision because of the inherently different cost structures.

We note that these conclusions are based on the aggregate bundle of cases finalised by PDS. It is not possible to comment on comparative costs in each individual case category as the data required for this analysis has not been provided to us. Further analysis might shed light on specifically why PDS has had lower average case costs for most of the pilot period.

Conclusions

Our brief was to draw on available evaluative material to make an independent assessment of the Public Defence Service pilot against the statutory evaluation criteria (which includes assessing the quality of PDS, access to justice, and the effects on the criminal justice system). In addition, we were asked to review the results of a value for money assessment of the pilot undertaken by the LSA.

The evaluation finds that PDS has complied with the principles of the Legal Services Act 2000.

Quality of criminal legal aid service

The evaluation finds that the quality of the delivery of legal aid services has been maintained or improved by PDS because:

- PDS and private clients have a similar experience of legal aid
- PDS and private clients have the same case outcomes (e.g. conviction rates and sentences)
- Stakeholders generally hold very positive views about PDS, and whilst private lawyers held less favourable views about the quality of PDS; their views were diverse.

Access to justice

The evaluation finds that PDS has allowed people to access criminal legal aid services other than through PDS and has not denied lawyers outside the pilot 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. This is evidenced by the fact that, during the pilot, legal aid clients have chosen preferred lawyers in 55% of cases, and when they choose representation, 76% of the time they choose private lawyers. In addition, legal aid cases have been allocated to both PDS and private lawyers. The number of lawyers leaving Auckland is comparable to other parts of the country, indicating no obvious effect of the pilot.

The evaluation finds that PDS has (or has the potential) to have a number of positive effects on the criminal justice system.

Court processes

PDS cases tend to result in a greater use of guilty pleas, less changes of pleas and leads to fewer substantive hearings. These patterns can not be explained by factors that are known to influence both pleas and case path (e.g. offence type, seriousness, offender history), indicating that there is something particular about PDS cases that lead to these results. The associated reduction in court time has the potential to represent substantial savings to courts.

Legal profession

PDS has the potential to provide mentoring and training opportunities for junior lawyers. Stakeholders and private lawyers believe that the mix of senior and junior staff within PDS offices could be utilised to provide opportunities for junior staff to be mentored and gain necessary experience as salaried employees.

Private lawyers have been concerned that PDS has the potential to limit private practice. The data shows that this has not happened in the pilot area.

Other schemes

PDS lawyers have not always met duty solicitor hour service standards. The CJRC evaluation findings do not explore the impacts of PDS under delivering its target duty solicitor hours on the Duty Solicitor Scheme. There is no evidence to suggest that PDS has had any effect on other legal aid schemes.

The evidence finds that PDS represents value for money.

The evaluation finds that the PDS model has generally been more efficient than the private sector for the duration of the pilot, with lower average case costs in three of the four years of the pilot. Given this and the fact that PDS has at least maintained the quality of criminal legal aid services without having obvious adverse effects on the justice system, the pilot in our view has represented good value for money during the pilot period.