

PART B

THE RESEARCH QUESTIONS

CHAPTER 3

THE AVAILABILITY OF EXPERIENCED PRACTITIONERS TO UNDERTAKE LEGAL AID WORK

INTRODUCTION

This chapter summarises our findings in relation to research question 1:

What change, if any, has there been in the availability of experienced family and criminal law practitioners in private practice to undertake legal aid work as a result of changes to legal aid in Queensland in the last five years?

By ‘experienced’, we mean:

- practitioners who are accredited specialists;
- practitioners with five years’ post-admission experience, at least half of which has been in Family or Criminal Law; or
- practitioners with two years’ post-admission experience, more than 75% of which has been in Family or Criminal Law.

We begin by summarising the evidence obtained by interview, including telephone interviews with some solicitors known to have stopped doing legal aid work in the last five years. We then present some corroborating data from publicly available statistics and other sources.

In summary, we are confident in saying that there has been a flight from legal aid work by experienced solicitors in Queensland over the last five years, and that this can be attributed to the changes under review. Indeed, there may be reason to think that the flight is about to turn into a stampede (see below and chapter 6). The detailed patterns and explanations are different in family law and criminal law, as we shall see, but the broad picture is much the same for both. From the point of view of the assisted person, the result of these changes has been a reduced choice of practitioners willing to do

such work, together with a reduction in the seniority and experience of such practitioners.

FAMILY LAW PRACTITIONERS

Family law practitioners have adopted one or more of five strategies in response to legal aid changes over the last five years, each of which has relevance to the question of experience.

Abandonment

A significant number of solicitors have consciously opted to discontinue offering legally aided services. This is evident in the reduced numbers of firms appearing on the preferred supplier list compared with those previously willing to offer legal aid (see below). The introduction of the preferred supplier concept seems to have been the occasion for a number of firms to make the decision to abandon legal aid altogether.

Abandonment by itself need not imply a reduction in the expertise available to legally aided clients: it is possible that those abandoning legal aid work have been the ‘fringe players’, rather than the experienced practitioners. Indeed, improving rather than decreasing the experience of legal aid practitioners was one of the objectives of the preferred supplier scheme. However, this hypothesis was not borne out by what we were told. We spoke to a number of highly regarded, experienced, practitioners in Brisbane who have abandoned legal aid work within the last five years. The most commonly cited reasons were: the reductions since 1992 in rates of remuneration for legal aid work, and the ‘hassle’ of dealing with LAQ (including frustrations arising from ‘merits’ decisions being made by legally unqualified LAQ staff). Many of these practitioners worked in larger CBD firms, who may have been amongst the first to have found legal aid unprofitable; they may also be the firms with more sophisticated accounting and reporting techniques than most firms, providing the management information to permit that business decision to be made.

The solicitors we spoke to who still offered legal aid services told us that many of their peers in other firms had given up legal aid work; and a partner in one specialist family

law practice told us that theirs was ‘one of the last’ specialist firms in Brisbane to reconsider their position with respect to legal aid.

This general picture needs to be qualified in a number of respects. First, it is possible that the firms making the decision to abandon legal aid have been predominantly the ones with CBD premises and the associated high overheads. It may be that firms, or practitioners, with more modest suburban or rural premises, may find legal aid can be made to pay (although we found much evidence to suggest abandonment amongst even suburban and rural practitioners: see below). Second, some experienced practitioners in those firms that have abandoned legal aid work, have decided to continue doing separate representative work¹. They justify this on the basis that it is considered to be prestigious work, and, because it is work that is effectively done *pro bono*, it discharges a sense of obligation to the community.

Scaling back

Most of the practitioners interviewed who still did legal aid work said that they either had reduced, or were planning to reduce, the proportion of legal aid work they did. These solicitors said that they had more or less explicit business plans to this effect. The reasons given were lack of profitability and an unwillingness to continue to deal with LAQ (again, the ‘hassle factor’, and the frustrations arising from legally unqualified staff at LAQ making decisions as to legal merits of a case). However, it was noticeable that the solicitors in this group had experienced an increase in the proportion of legal aid work undertaken by their firm over the last five years. One hypothesis is that this group had, perhaps unwittingly, been picking up more legal aid work (either because others were abandoning it, or because their firms were expanding

¹ A Court may order that the child be separately represented in proceedings in which the child’s best interests are the paramount, or a relevant, consideration: S.68L Family law Act 1975 (*Cth*). Separate representation of children is a Commonwealth priority under the current State/Commonwealth Funding Agreement; but the relevant guideline (Guideline 1) makes it clear that there is no expectation that assistance will be given in every case in which a child representative is appointed, and that non-assisted parties will be expected to contribute to the cost of the child representative. The child representative’s costs are capped at \$15,000 under the Commonwealth guidelines, a policy which cannot be undermined by court orders for costs against legal aid authorities: see *Re JJT and others, ex parte Victoria Legal Aid* [1988] HCA 44). See also *Re David (No.2)* (unreported) on orders for costs against a non-assisted party, contributing to the costs of the child representative.

during this period, or both) and that they have only recently noticed this trend and its implications for profitability.

The barristers tended to regard the steady abandonment of legal aid work as part of the natural life cycle of family law work at the Bar: legal aid was a good way of getting started, but was gradually abandoned as more private work came in. However, there is evidence that those senior members of the Bar who are still prepared to do legal aid work, perhaps out of a sense of obligation, are reviewing that commitment, and may abandon it. We were told that the introduction of capped funding for trials, in particular, may persuade some barristers that they would be better off leaving their diaries free in the hope that some private work will turn up, rather than commit themselves to a trial which is only part-funded, and even when funded, is funded at what is considered an unrealistically low daily rate. Solicitors told us that they were experiencing increasing difficulty in finding Counsel willing to take on legal aid trials that were not fully funded, and they expected the situation to worsen as more cases became subject to the capping regime.

Lower service levels

Another strategy we encountered was to maintain existing commitments to legal aid work while deliberately scaling back the level of service given to legally aided clients. This was the case with one solicitor we spoke to, who, for reasons of geographical location, was unlikely to be able to develop a substantial private practice, and for whom, barring a wholesale move from the area, a significant reduction in legal aid work was not feasible. The strategy in this firm was to set strict limits to the amount of solicitor time available for client consultation, and to be more 'directive' of the client generally. This deliberate reduction in service level was not thought of in itself to place the client at a disadvantage, but clearly altered the dynamic of the lawyer/client relationship.

These remarks deserve to be set in a wider context. There is evidence that legally aided clients are disadvantaged by comparison with the privately funded client, as a result of matters over which the lawyers have no control: see chapter 4. To the extent that reduced levels of service could be said to be a disadvantage, then the policy of

solicitors in this group is compounding the clients' disadvantage. Equally, however, it could be argued that solicitors in this group had little choice but to pursue this policy, given the evidence (discussed in chapter 6) that for many solicitors, legal aid remuneration may not even cover the costs of staying in business. For such solicitors, the chances of making legal aid pay lay in streamlining service delivery, and in cutting out the 'frills' that might be offered to privately funded clients.

New procedures

Another group of solicitors said that they were able to make legal aid pay (ie, recover costs and an element of profit) through being 'properly organised' and having 'legal aid friendly' procedures in place. The streamlining and reduced service levels, just discussed, may be part of this strategy.

'Juniorisation'

A consistent trend, evident in the responses of all those involved in legal aid work, is that there has been a 'juniorisation' of legal aid work - that is, that legal aid work is increasingly being done by junior practitioners.

Juniorisation takes a number of forms:

- Experienced practitioners refuse to take on legal aid work (see 'Abandonment' and 'Scaling back', above), so that legal aid work finds its way to more junior practitioners.
- Senior practitioners agree to take on legal aid work, but then delegate that work to junior, and lower paid, members of staff. Where this happened, it was explained partly by a need to reduce the perceived costs of delivering legally aided services, and partly as a way of 'cutting the teeth' of junior practitioners (although 'burn out' amongst these junior practitioners was a frequently cited phenomenon). However, there was some evidence of experienced practitioners hanging on to legal aid work. There were two reasons for this, one financial and one demographic. The financial reason was that a more experienced practitioner could do the work more efficiently, and so increase the profitability (or reduce the cost to the firm) of doing legal aid

work. The demographic reason was that a practitioner whose expertise is in family law, and whose family law practice, for reasons of geography, includes a significant proportion of legally aided clients, can hardly avoid doing a significant amount of legal aid work, save by abandoning family law work altogether.

- The fact that funding for Counsel at interim hearings is now extremely rare² has meant that parties are represented either by solicitors, or by junior counsel under ‘certificate-splitting’ arrangements where solicitor and counsel share the legal aid fixed fee for an interim matter (\$880). Given the low remuneration available to Counsel under this arrangement, it was thought unlikely that experienced Counsel would undertake such work.
- The lack of full funding for trials has meant that experienced counsel are now very unlikely to take legal aid matters. In this respect, members of the Bar now have the Bar Association’s approval to refuse to accept a brief that is inadequately remunerated³. As we have seen, even those experienced Counsel with a principled commitment to legal aid work may in future reconsider that commitment. Although the full effect of capping have yet to be felt, it seems likely that further ‘juniorisation’ of legal aid trials will result.

Corroborating evidence: Family work

The hypothesis that large numbers of solicitors have abandoned legally aided family work is confirmed by the reduced numbers now appearing on LAQ’s preferred supplier list. As already noted, this of itself tells us nothing about the experience of those still offering legal aid services; but we have reason to believe that, in Brisbane at least, a significant number of experienced practitioners have ‘dropped off the list’.

The patterns we identify here, of a withdrawal of experienced practitioners and a tendency to ‘juniorisation’, were corroborated by those we spoke to outside the private profession, in particular those working in Community Legal Centres (CLCs) and the Family Court. The CLCs told us that the network of firms to whom they could refer

² It seemed to be axiomatic amongst practitioners that there is now no such funding, but we were unable to find any policy document stating this to be the case (except in the case of Counsel for child representatives). In the end, we assumed that it was simply the legislation and application of an ‘unwritten law’ by LAQ.

legally aided clients was shrinking; that those that were left were working ‘ridiculous hours’ to make the work pay; that there was evidence in some firms of ‘juniorisation’ of work referred by a CLC; and that they could not be confident that those practitioners whom they trusted for referrals would continue to accept them. The Family Court also confirmed the tendency for legally aided court work (which is basically children’s work) to be done by junior practitioners, with separate representation being the exception to this rule.

CRIMINAL PRACTITIONERS

The practitioners interviewed said that experienced practitioners had become less available to handle legally assisted cases over the past 5 years. This was because either (a) firms with legal aid experience had decided to stop doing legal aid work or (b) there was increasing ‘juniorisation’ of legal aid work within firms. The most frequently cited reason for this trend was the lack of any increase in the fees paid by LAQ during the past 5 years⁴. As with family lawyers, the introduction of the preferred supplier scheme seems to have been the point at which a number of firms made the decision to move away from legal aid work⁵. As one practitioner put it: ‘The preferred supplier scheme has forced practitioners to make a conscious decision to undertake legal aid work as a business. It is no longer a social conscience issue.’

Nevertheless, there are a number of firms who are prepared to take on this work, with sound financial reasons for doing so. There appears, for example, to be a trend for criminal law firms to do high volumes of legal aid work whilst they were establishing their practice but then to move towards concentrating on privately funded criminal law

³ Rule 85 (c) Bar Association of Queensland Rules: ‘The fee offered on the brief must be acceptable to the barrister’.

⁴ For evidence of longstanding concern about the level of fees paid in Criminal matters, see National Legal Aid Advisory Committee, *Legal Aid For the Australian Community*, (1990) AGPS, Canberra, 151.

⁵ The impact of a decline in the availability of experienced practitioners to handle legally aided criminal law work is exacerbated by the fact that there is little or no scope for lawyers ‘speculating’ cases. Costs can not be awarded in favour of a successful defendant in Supreme Court or District Court proceedings. Sections 157 & 158 of the *Justices Act* provide for costs to be awarded to a defendant who successfully defends a Magistrates Court prosecution. However, the conditions which must be met before costs will be ordered are substantial. Practitioners indicated that costs were rarely awarded in the Magistrates Court.

work. As one practitioner put it: ‘There’s no legal work that pays worse than legal aid crime but there’s no legal work that pays better than privately-funded crime.’

We identified two main strategies being adopted by those firms who continue to do criminal legal aid work:

‘Juniorisation’ and Supervision

Several experienced solicitors indicated that they delegated legal aid work to junior members of staff but then closely supervised these staff to monitor their work and maintain their involvement in those cases. They did not do the work themselves because of low legal aid pay rates which meant they could not generate the income expected of them as either partners or senior employees. Some firms had detailed policies in place to ensure that cases of varying degrees of complexity received the right amount of experienced supervision.

These practitioners acknowledged that this ‘juniorisation’ of legal work could result in difficulties for legally assisted clients if supervision arrangements were not satisfactory. They maintained that the supervision arrangements in their practices were adequate although one interviewee expressed concern about juniorisation: ‘Inexperience can cause injustice. It can cause a person with a borderline case to go to jail.’

There was also ‘juniorisation’ in relation to barristers, once again resulting from the pay rates for legal aid work. This occurred in several ways:

- As barristers gain experience, they can expect to receive larger amounts of privately-funded, more lucrative work. The relatively low level of fees available for some legally aid criminal cases makes this work less attractive to all but those junior barristers who are seeking to gain experience and to establish contacts with solicitors which may assist them in the future.
- The incidence of barristers ‘flicking’ matters to other barristers shortly before the start of a trial has increased. Several interviewees stated that experienced barristers were ‘overloading’ in an effort to ensure that they would always have trials running in court. It was suggested that barristers had no option other than to overload due

to the low level of fees paid by LAQ. As one barrister put it: ‘Legal Aid seem to calculate their pay rates on the basis that counsel can be in court every day. This just is not the case with trials turning to pleas or being adjourned due to some problem with witnesses.’

- Junior barristers are also undertaking increasing amounts of duty lawyer work for solicitors’ firms which have successfully tendered for legal aid contracts for such services. Solicitors indicated that the tender rates were too low to enable experienced practitioners to do this work.

Specialisation and volume

There is increasing specialisation in relation to legal aid work. Interviewees suggested that if a firm was to continue to do legal aid work, it would have to gear its systems to handle greater volumes of legal aid cases. As one put it: ‘Either you gear yourself towards legal aid work or you don’t do it at all.’ This trend towards specialisation in legal aid work, and towards volume, was also associated with ‘juniorisation’.

One practitioner stated that all criminal law firms were trying to increase the amount of privately-funded work they did. However, there is only a limited amount of such work which means that some firms have no choice but to rely on legal aid work. The ‘stepping stone’ factor referred to above means that much will depend on the relative age and profile of the firm. One practitioner said that ‘[p]rivate payers are the cake and legal aid is the icing. Five years ago, legal aid was the cake while private payers were the icing.’ Newer firms seeking to make their name are more likely actively to pursue legal aid work. More established firms are less likely to do legal aid work at all, or to be more selective about the legal aid cases they take on.

OTHER ISSUES RELATING TO AVAILABILITY OF EXPERIENCED PRACTITIONERS

The effect of tendering on availability

During the past five years, LAQ has implemented tendering arrangements for duty lawyer work as well as trialing the tendering of prescribed criminal law matters during 1995/96.

Tendering has enabled LAQ to reduce the price paid for duty lawyer services. It may have done so at the price of having less experienced practitioners responsible for representation of people seeking assistance from the duty lawyer. One interviewee referred to the fact that the last duty lawyer tender for Brisbane Magistrates Court saw a 4-firm consortium as the only bidder. The consortium firms often briefed relatively inexperienced barristers, 'short of work and hungry for experience', to do the duty lawyer work rather than doing it themselves. These firms were said to have tendered at a price which meant the duty lawyer work was being done at a loss but in anticipation of the consortium firms being able to increase the amount of prescribed crime legal aid work available to them. The decision of the Queensland Law Society to permit duty lawyers to refer cases to their own firms appears to have been important in encouraging specialisation of duty lawyer work.

During 1995/96, a Prescribed Crime Tendering Pilot was conducted by LAQ. One interviewee commented that the Tendering Pilot did not achieve significant savings because the fees paid in the criminal law area were already so low that the firms could not realistically tender to do the work at even lower prices. It was felt that criminal law was the wrong area for such arrangements. The evaluation of the pilot led to the LAQ considering the establishment of the preferred supplier system. The evaluation identified a problem with continuity of representation where people in need of legal assistance approached a non-tender firm and were then assigned to a firm holding an LAQ tender.⁶

Availability and preferred suppliers

The establishment of a preferred legal aid supplier scheme was first suggested by in-house staff interviewed as part of the evaluation of the criminal law tendering pilot

project. A key concern of those staff was that of continuity of legal representation, something which had been a problem with the tendering pilot. Interviewees from LAQ acknowledged that the establishment of the preferred supplier scheme had seen a number of firms with experience lost to the legal aid system. This was viewed as an unfortunate price of streamlining the administration of the legal aid panel.

One issue raised by the strategy of specialisation we have identified amongst criminal law practitioners, when combined with the establishment of the preferred supplier scheme, is how new, inexperienced practitioners will make their way onto the preferred supplier lists. This is likely to impact on the availability of experienced practitioners to do legal aid work in the future. As one practitioner put it, 'If you need experience to get on the list, how do you get the experience?'. Interviewees expressed concern that LAQ might make use of the fact that there will be firms wanting to join the preferred supplier scheme who would be prepared to further discount their fee rates to obtain a 'foothold' in the legal aid area. What about the experienced employee solicitor who leaves to establish their own practice? It was unclear how preferred supplier arrangements will deal with experienced practitioners in such a position.

In the long run, a preferred supplier scheme may have an impact on the availability of lawyers willing to undertake work in the area covered by the scheme. A recent international review of the relative merit of salaried and private practitioner legal aid schemes suggests that there may be problems with contracting and preferred supplier arrangements. This is because 'in the second or third round [of tendering], it becomes more difficult to find qualified attorneys to bid. As a result, prices may rise.'⁷ The study goes on to say:⁸

Commentators have suggested that a major problem with contracted schemes is that, once a contract has been awarded, other lawyers in the area withdraw from

⁶ T. Prenzler *et al*, *Evaluation of Tender of Prescribed Crime Pilot Project*, Legal Aid Office (Queensland) 26 November 1996.

⁷ T. Goriely, *Legal Aid Delivery Systems: Which Offer the Best Value for Money in Mass Casework? A Summary of International Experience*, (December 1997), Lord Chancellors Department Research Series No. 10/97, 8.

that field of work. When the contract comes up for renewal, there are only a very limited number of bidders to choose from. If they demand much higher prices, there is little a contracting authority can do.

Legal services in rural areas

Fixed fees, capping and the preferred supplier scheme have impacted on the number of experienced country practitioners. We spoke to one practitioner in a small town whose firm had decided to drop out of the legal aid system in February 1998. He pointed out that the fixed fee and the capped amount for the file have to cover his fees and the fees of his town agents. He said that in the past a separate grant of aid had been available for town agents, however, this was no longer the case and that this policy “penalises firms in the country”.

He also added that in order to be a preferred supplier his firm would have to put a quality assurance system in place, make undertakings about the supervision of staff and take on the further work involved in the administration of the preferred supplier system. He stated that as the firm did not have an articled clerk or first or second year solicitor it could not make family law legal aid work profitable - in effect, this firm was unable to take advantage of the strategy of ‘juniorisation’.

This practitioner indicated that prior to the scheme, there were four firms in the town that were prepared to do some legal aid work, now there is only one firm. This means that in a family law matter, one client can have a local solicitor and the other client must travel at least 90km to the nearest solicitor. This could cause great inconvenience to assisted persons when often issues such as lack of transport and child care arise.

This firm had decided to do some pro bono work due to a commitment to social justice. They will see a client on an initial advice for about an hour, and help them fill out a legal aid application, if necessary. This practitioner indicated that they had estimated that it had previously taken about one and a half hours to have an initial

⁸ At page 64.

consultation with a client, complete the application, then deal with the administrative hassle of being sent requests for more information by LAQ etc, and none of that work was paid for in the grant of aid. This firm was seeking to replace its legal aid practice with better paid commercial work.

Concerns have also been expressed regarding the need to safeguard the access to legal aid services of people in regional Queensland. Community Legal Centre (CLC) workers from North Queensland said that there continued to be considerable goodwill from practitioners in their region towards providing legal services to those who cannot afford to pay. 'Even the bigger firms do legal aid but there is growing concern about fees.' However, CLC workers also said that there were fewer private practitioners prepared to take on legally aided cases and that this had impacted on their operations in a number of ways. As a result, people in isolated areas can face real difficulties in obtaining access to legal advice. CLCs in rural areas said that they frequently spent substantial time liaising with community workers in isolated communities in order to facilitate such access.

SUMMARY

The evidence presented in this chapter suggests that, in both family and criminal law, there has been a steady withdrawal of experienced practitioners on both sides of the profession from legal aid work over the last five years. This has taken the form of either (a) a withdrawal from legal aid, a decision that for many was made when the preferred supplier scheme was introduced or (b) a tendency towards what we have called 'juniorisation' amongst those lawyers who still do legal aid work. There are still experienced practitioners who do legal aid work, but we found that they were either (a) very selective about the work they do or (b) are actively reviewing or reducing the extent of their commitment to it.

However, we also found, especially amongst criminal lawyers, that there are rational reasons for continuing to do legal aid work: that it forms part of a natural 'life cycle' of a lawyer's, or firm's, work, and that it can act as a 'loss leader' for the firm's services in an area where there is lucrative private work to be had; or that, with proper organisation, procedures and appropriately managed 'juniorisation', legal aid work

could be made to pay its way. We found less evidence of any of these factors in family law work, apart from the 'life cycle' factor. Later in the report, in chapter 6, we return to the question of whether lawyers will want to continue to offer legal aid services at all and, if so, why.