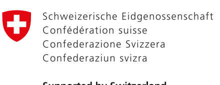

Development and Implementation

of the Peer-to-Peer Quality Evaluation within the National System of Free Legal Aid Provision in Ukraine

2020

This Report was prepared in respect to develop the system of quality control of the provided free legal aid (both primary and secondary) within the national free legal aid system of Ukraine. It was designed by the request of the Coordination Centre for Legal Aid Provision. The Report contains description of the proposed quality control system for civil and administrative cases, overview of best practices from other countries. It also covers national legislation and procedures review and peer review implementation environment, recommendations, and conclusions.

The Report was prepared by Alan Paterson, Professor, CPLS, Strathclyde University School of Law, Scotland, within the framework of the United Nations Recovery and Peacebuilding Programme (UN RPP) with the financial support of the governments of Denmark, Sweden and Switzerland.

We also would like to acknowledge the personal role of Oleksandr Baranov, Director of the Coordination Centre for Legal Aid Provision, a.i., Svitlana Malinovska, Head of the Legal Assistance Quality Control Department of the Coordination Centre for Legal Aid Provision, and Serhii Drelinskyi, Deputy Head of the Legal Assistance Quality Control Department of the Coordination Centre for Legal Aid Provision, Oleksandr Deineko, Head of the International Cooperation Unit, Coordination Centre for Legal Aid Provision, as well as other colleagues of the Coordination Centre for Legal Aid Provision, regional and local centres of free secondary legal aid provision, colleagues from the national and international NGOs, and judges, who took part in the interviews, whose support and inputs contributed to the completion of this Report greatly.

Research direction, its overall supervision, editorial suggestions and substantive contributions were made by Ivan Honcharuk, Rule of Law and Access to Justice Specialist, United Nations Recovery and Peacebuilding Programme.

The views, observations, findings or recommendations put forward in this document are those of the author and should not necessarily be taken to reflect the views of the UN and the governments of Denmark, Sweden and Switzerland.

The United Nations Recovery and Peacebuilding Programme is implemented by four UN agencies: the United Nations Development Programme (UNDP), the UN Entity for Gender Equality and the Empowerment of Women (UN Women), the UN Population Fund (UNFPA) and the Food and Agriculture Organization (FAO).

Twelve international partners support the Programme: the European Union (EU), the European Investment Bank (EIB), the US Embassy in Ukraine, and the Governments of Denmark, Canada, the Netherlands, Germany, Norway, Poland, Sweden, Switzerland and Japan.

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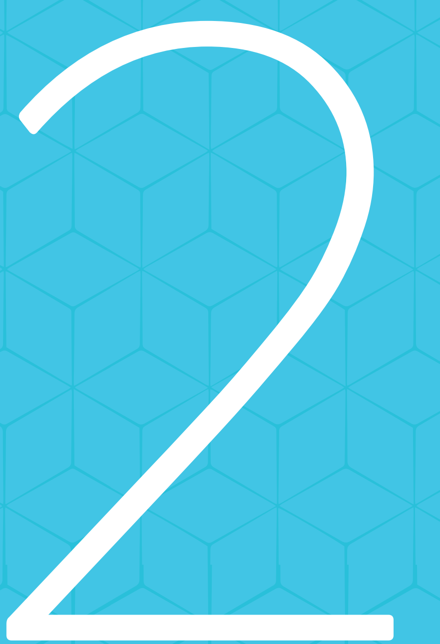
1

Method
of the Study

Project outline

This assessment covers as follows:

- the production of an Inception Report,
- the conduct of interviews with up to 20 stakeholders as to the aspects of quality assurance and pilot peer review programme,
- the examination of a sample of legal aid files,
- clarification as to the scope and nature of the Free Secondary Legal Aid (FSLA) peer review pilot conducted in Ukraine in 2019,
- the establishment of a working group of stakeholders,
- the development of a methodology and tools for peer review for Free Primary Legal Aid (FPLA) and FSLA,
- consideration of the numbers of files and providers to be included into the pilot peer review programme in the second half of 2020,
- consideration of the need for recruitment and training of further peer reviewers,
- organisation of a meeting with the working group to comment on the peer review criteria and assessment protocol, and
- the production of the Final Report.



Overview of Practices

Overview of Practices

2.1 Inception report

The International Consultant (IC) assessed the operation of peer review as an institution in the United Kingdom, Australia, Netherlands, China, Chile and Ireland, and therefrom produced information necessary to implement peer review into the quality management system for free primary and secondary legal aid in Ukraine. Drawing international networks and contacts the IC emailed and video-conferenced with the experts in Belgium, Chile, China, England and Wales, Ireland, the Netherlands, Moldova, the Netherlands, New Zealand, Scotland and South Africa, thus, data was obtained from 13 jurisdictions which have or are practising the aspects of peer review. The Inception Report (see Annex 1) contains the most up to date overview of peer review globally (dd. August 2020). As such it contains a number of interesting findings:

- The spread of peer review now extends beyond a handful of common law countries who in the past were typically more easily able to manage the problems of legal professional privilege which has inhibited the spread of peer review, and includes civilian countries such as Chile, China, Quebec, Moldova, and the Netherlands;
- Major opponents to the spread of peer review are not states, legal aid boards or the public, but professional legal associations, who traditionally, as part of the professional project articulated by Abel[1] have offered the state competent professionals as part of the tacit "bargain" which conferred "self-regulation" on the profession.[2] However, experience suggests that legal pro-fessions, with few exceptions, have under-delivered in terms of Quality Assurance.(QA).[3] Usually QA has been seen by the legal profession globally as little more than Entry qualifica-tions, Continuing Professional Development and Complaints. As discussed in the Inception Report these are ineffective methods of QA since they are either (a) too indirect a proxy for quality of performance, or (b) too reactive (c) too dependent on client assessments of compe-tence and (d) too focused on individual cases rather than systemic assessment. Nevertheless, to accommodate professional sensitivities, where possible, efforts should be made to involve pro-fessional associations when plans are being made to introduce pilot peer review programmes;
- Peer review means professional peers exercising professional judgement as to the work of their peers. The use of peers is necessary to gain the trust and respect of those being quality assured, unless the level of competence of peers as a whole is not seen as particularly strong. Former peers, judges or prosecutors are usually not viewed as peers by those being assessed;
- Where peer review based QA programmes have been in place for a period of years, or when a cycle of reviews of the whole profession has been completed, the programme should be re-assessed for criteria or marking practices that are not working effectively, as Chile and South Africa have done in recent years;

1. R. Abel, "The Decline of Professionalism "49 (1986) Modern Law Review 1

2. A. Paterson, "Professionalism and the Legal Services Market" 3 (1996) International Journal of the Legal Profession 137.

3. It may be for this reason that the UNODC Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes, recommends that quality standards in legal aid cases are best entrusted to an independent legal aid body working with the relevant professional association rather than in the hands of the professional association alone. https://www.unodc.org/documents/justice-and-prison-reform/HB_Ensuring_Quality_Legal_Aid_Services.pdf

- Peer review can be used equally effectively on the files of private lawyers and those of salaried staff attorneys, but there may be subtle differences. Thus, the requirement that the peer review-er be "independent" of the practitioner, means, in relation to private lawyers under contract, that the peer must have no connection with the practitioner being reviewed nor be a competitor of them – namely a practitioner from another part of the jurisdiction. "Independence" for staff attorneys means that their supervisors should not peer review them, but that supervisors in part time practice in another part of the country may do so.

- Peer review is overwhelmingly used as a way of driving up standards over time rather than a method of excluding poorly performers from the provider base. However, it can also be used in an endeavour to change the culture of the providers as China has done e.g., to encourage providers to become more client-centred;

- Peer review is not used simply to assess legal aid lawyers, but in the Netherlands and Quebec it is used by private profession and, in one or two jurisdictions, by Civil Society Organisations (CSO);

- In most jurisdictions operation of the peer review has been hampered or suspended by COVID-19;

- Peer review programmes are becoming more transparent. The criteria are published on the websites of the legal aid bodies, as guidance manuals on the interpretations given by reviewers to the criteria and operation of the marking scheme; and guidance manuals on setting up peer review programmes from scratch have also begun to emerge. In several jurisdictions, annual reports as to the operation of peer review have begun to be posted on websites.

See a full version of the Inception Report in Annex 1 to this Report.

2.2 Interviews with key stakeholders

This phase of the project involved the International Consultant (IC) in interviewing up to 20 key stakeholders identified by Coordination Centre for Legal Aid Provision (CCLAP) over a two-week period covering aspects of quality assurance and peer review in Ukraine. Following consultation with both the IC and the National Consultant (NC), CCLAP and UNDP list was finalised with two judges, Acting Director of the CCLAP, three Free Legal Aid Centres (FLAC) contracting private lawyers, 2 CSO lawyers from East Ukraine, 3 peer reviewers in 2019 pilot project, 3 quality managers from regional FSLACs, 6 local FLACS directors and 2 staff lawyers. In terms of Oblasts, 3 came from Luhansk, 3 from Donetsk, 2 from Dnipro, 3 from Zaporizhzhia and 3 from Zhytomyr. The interview schedules were developed by the International Consultant and approved by the NC and CCLAP. A small number of interviewees showed that the sample of interviewed providers was not sufficiently randomised or substantial to be considered representative of the most of population they were drawn from. Typically, the interviews would last for 40-50 minutes. The principal findings of the interviews were:

- Staff lawyer standards and competence was not thought to be markedly different from those of contract attorneys of similar experience, nevertheless the attorney's monopoly of certain aspects of external work in civil and administrative cases gave them greater experience on a long-term basis. The inexperience of many staff lawyers is linked to the high turnover in staff attorneys as well as to the restrictions on work they are allowed to do.

- Staff lawyers are at a considerable disadvantage since they do not have the ability use the full range of rights and independence means, as attorneys, for instance, to submit letters of inquiry with the legal authority

conferred on the contract lawyers to force the recipients to reply, to reply in strict time limits. Only contract attorneys may do this.

- In relation to FPLA, much of the advice is given orally. Since the telephone advice is not audio or video recorded the quality of the advice given cannot be monitored very effectively. During lockdown one or two centres of their volition have used “mystery shoppers” to evaluate the quality of oral advice, but its wider use has not welcomed by staff attorneys.

- FSLAC directors tended to see their role primarily as an experienced friend and mentor to staff lawyers, there to assist with difficult cases or questions. They prefer this aspect of their role and find it hard to combine with quality monitoring and discipline which tends to suffer as a consequence. Very few complaints are received against staff lawyers from legally aided people.

- Quality managers who had staff generally felt able to monitor the work of staff lawyers even though it is not technically in their job description and their remit does not extend to observing staff lawyers in court or speaking to their clients in relation to them, but only to deal with complaints against staff attorneys. However, they did not feel that they had sufficient resources or time to monitor FPLA advice from staff lawyers delivered by online tools or orally.

- The interviews with contracting private attorneys were less rewarding because those were predominantly criminal, but not civil and administrative attorneys. Interviews with CSO lawyers cast light on the relationships between CSO organisations and the FLACs.

- Peer reviewers were generally positive about 2019 pilot peer review programme, appreciative of their training and had not found the task of reviewing 5 files per attorney particularly difficult. There was a request that they receive feedback from the Expert Commission as to whether their reports were sufficiently detailed. No difficulties with the FSLA criteria were mentioned or with the assessment protocol, however examinations of several marked assessment forms revealed that some reviewers needed further training in the assessment protocol, e.g. using the N/D score where “1” might have been more appropriate; failing to penalise several “N/D” scores; being reluctant to give a “3” mark for a criterion and yet being quite happy to give a “4” mark for a file in which there were no criteria with “3”s.

- Most respondents saw few difficulties in introducing a pilot peer review programme in the Eastern Ukraine. Nobody mentioned additional stress for staff lawyers from operating in the region which was practically a conflict zone or from acting for the IDPs. Nor was client confidentiality or data protection seen as posing a problem either. All of the lawyers interviewed were familiar with the quality procedures drafted by the CCLAP to equate to the quality standards agreed between the NBA and the MoJ.

3

National Legislation and Procedures

Review and Peer Review Implementation Environment

National Legislation and Procedures Review and Peer Review Implementation Environment

Very soon after the FLA programme was introduced in Ukraine in 2013, a pilot peer review project was conducted for the report Free Legal Aid System in Ukraine: The First Year of Operation Assessment.[4] The pilot and peer review concept in general were criticised by the National Bar Association (NBA), mainly for "violating the principle of attorney-client confidentiality", stipulated by Article 22 of the Law of Ukraine "On the Bar and the Practice of Law" , and "violating the independence of barristers", and independence of the legal profession (guaranteed by the Constitution of Ukraine)[4], as well as relevant provision of the Bar Ethics Code. Nevertheless, enough had been done to indicate that files of Ukrainian attorneys provided an adequate basis for file-based peer review and 2016 Report[6], commissioned by the Council of Europe (CoE) and aimed at assessing the Legal Aid system of Ukraine in the light of the Council of Europe standards and best practices, which concluded that there was nothing in Ukrainian law and professional ethics that would forbid independent attorneys to look through the files, particularly closed ones, if the client consented to their inspection in writing, privacy secured and for quality assurance purposes. Therefore, the CCLAP Report recommended to take initial steps towards implementing peer review in criminal legal aid cases in Ukraine. In 2017, CCLAP accepted this recommendation.

The LA Law establishes the FSLA attorney's/lawyer's duty to "provide high quality legal aid to the extent as Quality of the Provision of Free Secondary Legal Aid in Criminal Proceedings were approved by the NBA in 2013 and the Ministry of Justice (MoJ) in 2014, coming into force on July 1, 2014. The QS in FSLA civil and administrative cases were adopted by the MoJ on December 21, 2017. In 2019, the CCLAP recast the QS for civil and administrative cases into equivalent procedures or protocols to make them more easily applicable to staff lawyers and paralegals employed in the FLACs and Bureaus. The importance of the QS and the protocols is that they form the basis for the criteria which lie at the heart of the file-based peer review.

In 2018, the Council of Europe commissioned further work from one of the original experts[7] on introducing peer review in Ukraine which led to (a) the CCLAP seminar in Kiev in May 2018 on peer review and (b) a delegation from Ukraine coming to Edinburgh to study the operation of peer review in Scotland in June 2018 that included high-ranking members of both CCLAP and NBA. Not long after, the Commission on Expert Legal Assessment (the Expert Commission) was established by the CCLAP, based on the model of the Scots Quality Assurance Committees. Its membership included CCLAP staff, experienced NBA lawyers and attorneys working within the legal aid system, as well as human rights NGOs. At this stage the NBA's interest in modernising the quality control of legal aid provided by the NBA was confirmed as well, and it agreed a Memorandum of Understanding with the CCLAP and various CSO organisations and a conception of a pilot peer review project was adopted and in February 2019.

In May 2019, a further delegation from CCLAP and the NBA visited London to see peer review in operation there. However, soon afterwards the NBA had a change of heart and withdrew from co-operation over the peer review project, effectively disbanding the Commission on Expert Legal Analysis. Moreover, as the NBA still viewed the peer review as the violation of its Ethics Code, threats of harsh disciplinary actions, up to disbarment, were reported against those attorneys, who would decide to participate in the peer review project anyway. Despite this in December 2019 the President of Ukraine issued a Decree No. 837/2019 stating that "The Cabinet of Ministers of Ukraine shall take actions…before December 31, 2019 to improve the quality standards of free legal aid

4. Free Legal Aid System in Ukraine: The First Year of Operation Assessment, pp.49-51. Despite these limitations the pilot peer review found that the performance of the vast majority of FLA lawyers were assessed as "satisfactory" or "good". The lawyers who were examined had positive feelings on peer review.

5. The Constitution of Ukraine, https://www.kmu.gov.ua/storage/app/imported_content/document/110977042/Constitution_eng.doc

6. Mr Peter van den Biggelaar, Ms Nadejda Hriptievschi, Professor Alan Paterson, Mr Oleksandr Banchuk and Mr Hennadii Tokariev, Assessment of the free secondary legal aid system of Ukraine in the light of Council of Europe Standards and Best Practices (Council of Europe, 2016) https://rm.coe.int/16806ff4a8

7. Professor Alan Paterson, Strathclyde University, Scotland.

by introducing a peer review mechanism for the quality of legal aid provided". Thereafter, on 28 December 2019 the Cabinet of Ministers proposed an amendment to the law on legal aid, providing inter alia for a mechanism for external independent quality assessment of free legal aid provided by an advocate using a peer review tool, and an external independent quality assessment commission of free secondary legal aid.

For the CCLAP, however, the NBA's withdrawal of support from the Commission's pilot peer review project for criminal legal aid meant that the focus had to shift to the implementation of the first stage of a pilot peer review programme checking the quality of legal aid provided exclusively by FLAS staff lawyers of the legal aid system in civil and administrative cases. As part of this the CCLAP developed its protocols/procedure for providing free legal aid by staff lawyers for FSLA. These protocols/procedures are based on the principles of the rule of law, legality, independence in selection of tactics for representing the client's rights, confidentiality, avoiding conflicts of interests, prioritizing the client's interests, competence and fair practices of the Centre's employee when performing his/her professional duties. Interviews conducted for the UNDP in 2020 revealed that staff lawyers were familiar with these protocols and were able to critique aspects of their operation. Soon after the EC developed report forms for the FPLA and the FSLA cases containing criteria derived from the protocols, integrated with a marking system based on the Scots Peer Review Assessment Protocol. The criteria included "completeness of the FSLA provided ", "compliance with procedural time limits", "compliance of FSLA with the applicable law" and "proper preparation for participation in the case". These report forms were accompanied by the documents entitled "Procedure for evaluating the quality of the FPLA by employees of local centres for FSLA" and "Procedure for evaluating the quality of the FSLA by employees of local centres for FSLA". These procedural documents state that the EC will select lawyers to be peer reviewed, how often they are to be assessed and how many files are to be assessed. There are also provisions as to the recruitment and training of the reviewers, the material that will be assessed (client files and the client's application for FSLA) at the request of the EC Secretary, which are sent to the reviewers by the EC Secretary. The reviewer then compiles a report form for each file submitted by the EC Secretary, and these reports are shared with the members of the EC.

The EC has nine members,[8] including, representatives from CCLAP, the Quality Division, data division and two representatives from FLACs in central oblasts.

In addition to the procedural and assessment protocols and report forms, the EC was responsible for recruiting peer reviewers. The EC circulated the FLACs with details of the competition to recruit peer reviewers setting out the required criteria: 5 years' experience as a litigator, motivation, and proper credentials. The EC checked the documents and then consulted with Directors of the FLACs, to check the reputation of the applicants, whether they had complaints against them, how they worked with clients etc. Each applicant was evaluated and then interviewed. Each member of the EC got to ask a question of the applicant, and there was separate voting for each applicant by a simple majority. There was no quota, they appointed every candidate who had appropriate levels of skill whom they had the resources to train. Initially there were nine lawyers (quality managers + contracted lawyers), one deputy director of a regional FLAC (a lawyer himself) and two FLAC directors. They did not feel that that was enough and a further 21 have since been recruited. The bulk of the reviewers constitute experienced legal aid stuff (attorneys-department heads and deputy directors of FLACs) with a number of contracted attorneys, to ensure diversified evaluation. These 30 reviewers took part in the 2020 pilot.

The CCLAP's 2019 review pilot did not cover all the territory of Ukraine, rather randomly collecting 31 files (8 FSLA and 23 FPLA) from staff lawyers of 7 oblasts, to ensure that no conflict of interest would be present. Since it was CCLAP's first attempt at peer review, the aim was to see what systemic problems existed in the legal aid provided by staff lawyers, so on average one case per lawyer was selected (depending on their main activity as between FSLA and FPLA). The Expert Commission chose lawyers who provided both written advice and legal representation in Court to get full picture. Then they chose lawyers in FLACs who had different numbers and types of case, those FLACs with the highest amounts, the lowest amounts and those in the middle. Since the number of cases processed was relatively low, all 31 files were subsequently double marked and reviewed by the Expert Commission. Following the recruitment of the peer reviewers the EC arranged for the reviewers to receive two days of training consisting of a study of the

8. Five lawyers / advocates and four staff attorneys.

evaluation methodology, prepared by the Commission, evaluation criteria and forms, as well as trying out their practical application on several exemplary files, under the guidance of the Commission. Subsequent discussions among the reviewers and with the Commission have helped to develop a more unified approach to defining and applying the evaluation criteria, so, in the absolute majority of cases, experts later showed similar results when provided with cases for double marking.

When the EC received the reports on files from the peer reviewers, there were four options for the EC: a) Approve, b) Fail (with recommendations for training or special incentives), c) Send for re-evaluation or double-marking and d) rejection of the assessment and to make its own decision. At first, they were unsure as to the consistency between reviewers in their use of the review tools, however, in recent months, following advice from the IC, the EC has introduced blind double marking of all files. Where the two reviewers agree on the mark, this is accepted by the EC. If their marks differ then the EC will make its own decision. By this means the EC has been able to cover all of the caseload, which otherwise might overwhelm them. Once a mark for the files has been achieved the EC will engage with the staff lawyer in question by sending an abstract from the Commission's decision and the Report to the Director of the corresponding Centre who will immediately inform the employee.

In general, the EC has been using the initial reports from reviewers to try to detect systemic problems from which to advise the CCLAP as to the possible solutions. To date all of the problems uncovered have been in relation to FPLA. The reviews revealed that different staff lawyers understood the same procedures in quite different ways. In particular the findings included (a) failings in the assessment of written advice including the lawyers' absence of understanding of how to properly apply the Procedure for legal aid provision (namely to put more of the advice in writing) (b) a need was discovered to pay more attention to drafting the protocol of client-lawyer legal position coordination,(including stating what the client's actual problem was and what the lawyer's actual advice to the client was) (c) to decrease the amount of legal terminology and unnecessary information in consultations (too often the legal advice reads like a legal article referring to all kinds of legislation, the Constitution or court decisions that have no real relevance to the client's problem, and which is incomprehensible to the client), (d) a need to record any additional information discovered during the giving of advice) and (d) to promote alternative dispute resolution. On all of these the CCLAP is collating advice to send out to the local FLACs. Due to the systemic nature of the problems, the Commission temporarily ceased its assessment activities and decided to conduct online seminars for the regions to explain the proper application of the Procedure and ways to solve other systemic problems. Lawyers were told that they should be more precise in what they write, give the address of the organisation that has to be written to, and to give proper attention to detail. Their advice should be directed at the client's particular problem not some general discussion of Constitution or laws that are not relevant. All staff lawyers have been covered by these seminars. Already there are signs from more recent reports that the CCLAP instructions on systemic problems are being heeded.

As for the FSLA, no systemic problems were discovered. Those that were detected were solved through the provision of personal recommendations to the particular attorneys.

4

Proposed System

4.1 Method

Establishment of a pilot peer review programme requires the development of a number of constituent elements which are discussed in the thematic section of the Inception Report (see Annex 1):

1. At an early stage it is necessary to establish an Expert Commission or Quality Assurance Committee to have oversight of the pilot project;
2. A consideration of the practitioner population to be assessed, broken down by work context (state salaried and /or private), specialism, and geographic location, before determining the sample size;
3. An identification of the types and numbers of files to be assessed during the pilot, including the numbers of files per practitioner.
4. A determination of the length of the pilot project.
5. Provision for the recruitment of peer reviewers, numbers thereof and the training required.
6. Identification and testing of the criteria and report form
7. Development of an Assessment protocol
8. Development of a summary report form
9. Establishment of the outcomes of the peer review

4.2 Management and Administration of Peer Review

For peer review to operate in a jurisdiction there has to be a body, Commission or a Committee, that carries out administrative and management tasks associated with the programme e.g. devising the criteria and marking schemes, recruiting reviewers, arranging for their training and monitoring, assessing reports from the reviewers and liaising with the practitioners being assessed. The same is true for a pilot project. Decisions have to be made as to the parts of the country where the pilot will run, which practitioners, and what kinds of files (and how many) will be assessed. Even if these decisions are taken by the legal aid authority or the Ministry of Justice, a body will be required to implement these decisions on the ground.

4.2.1 Administrative bodies

Not infrequently the body responsible for the management and administration of the peer review is a legal aid authority itself or a quality audit unit within the legal aid authority.[9] In England & Wales peer review administration is handled by the Legal Aid Authority, but overall policy is in the hands of the MoJ. In Scotland there are three programmes, one for civil legal aid cases, one for criminal legal aid and one for children's legal aid. Each programme has its own administrator but each is also headed by the Quality Assurance Committee (QAC) which has three representatives of the legal aid authority, three from the lawyers' association and three lay members with an interest or expertise in quality assurance. To maintain consistency between the three QACs professional adviser to the programme sits on all three. The make-up of the QACs is not accidental, since the composition of each QAC reflects the fact that in Scotland the peer review programmes are a partnership between the Government, professional association and the legal aid authority. This maximises the acceptance of schemes within the profession and its ongoing funding by the Government whilst reminding the legal aid authority and professional association of their shared interest in professional standards of the providers as well as in ensuring that quality of legal aid work paid for by the Government remains high.[10]

In 2019, the Expert Commission modelled in part on the Scots Quality Assurance Committees, with similar remit and role, had become a pilot administrative body in Ukraine. The EC has nine members, including, representatives from the CCLAP, the Quality Division, data division and two representatives from the FLACs in central oblasts. However, efforts to invite members from the CSO were unsuccessful. It would seem to make good sense to retain this Expert Commission as the administrative body for 2020 UNDP pilot, but explore widening the membership e.g., by including a contract lawyer, a member of the Ukrainian Bar Association and a representative from the CSO with links in the Eastern Ukraine.[12]

It is **recommended** that the Expert Commission (EC) formally adopt the criteria, the FSLA and the FPLA report forms and assessment protocol agreed by the CCLAP. The EC is also responsible for selecting the peer reviewers and providing training for them.[13] The EC for the peer review pilot should also ensure that reviewers have a protocol outlining their duties (and type of the report they are expected to produce). It should also stress the importance for reviewers to respect confidentiality of the lawyer's files they review, to protect data of the individuals named in the files, and to take corresponding actions if the file reveals the practitioner's professional misconduct.

Finally, it is **recommended** the administrative body:

a. sets the pass mark for the pilot files. This will probably be "threshold competence" or "accepta-ble";

b. confirms the numbers and types of files to be examined if this has not been agreed between CCLAP and UNDP;

c. devises a programme for carrying out the pilot (e.g., which oblasts, which staff lawyers' files - and how many, if this has not been agreed between CCLAP and UNDP;

d. implements the agreed monitoring programme for reviewers and their marks (to ensure con-sistency) and -. the general running of the pilot.

9. See Inception Report

10. See QUAL-AID report op.cit. 16

11. Five lawyers / advocates and four staff attorneys.

12. Another option is to retain the existing composition of the Expert Commission; however, the risk must be that if this was done there might be a difficulty in persuading the Expert Commission to accept the proposals for change contained in this report.

13. The recruitment and training of the peer reviewers will be dealt with in greater detail below (4.3.7 and 4.3.8)

4.2.2 Programme Administrator

A key person in any peer review pilot is the administrator who is appointed by the administrative body to run the programme on a day-to-day basis. This person:

- liaises with the reviewers on an ongoing basis;
- organises the reviewers' refresher training sessions in conjunction with the person or body charged with monitoring the work of the reviewers;
- implements a plan for selecting practitioners to be assessed and the terms of such assessment;
- liaises with the practitioners on the files selected for review, identifying the reviewer and the place of the files assessment;
- selects the reviewer(s) from the reviewer panel required to assess the practitioner (taking care to avoid conflicts of interest) and liaises with the reviewers concerning the practitioner and files allocated to them, monitors the progress being made by the reviewer with the review, and provides feedback from the administrative body on reviewers' reports where appropriate;
- keeps track of the files allocated to the reviewers, ensuring that correct files have been sent, that they are complete and, in a form, fit to be assessed.
- collates reports from reviewers to be then placed before the EC (preferably in a way that ensures confidentiality and protection of personal data of clients whose files were reviewed).
- corresponds with practitioners on the matters arising out of the review or on the outcomes of the reviews after the determination by the administrative body,
- maintains records on the reviewers' scoring to be passed to the person in-charge of monitoring the consistency of performance of the reviewers.
- Arranges any follow up reviews where initial review had failed.

4.3 FPLA and FSLA Peer Review Tools

Under this assignment, was contracted to develop a peer review methodology and tools for the evaluation of free primary and secondary legal aid procedures, instructions, methodologies, evaluation tools, training materials and the like, for peer reviewers and methodological expert materials for their further use. Also, the working group was established at the start of the interviews. It was to be organised by the CCLAP with support from the UNDP, the IC and the NC and its remit was to provide feedback on the peer review methodology and instruments. Unfortunately, the complexities of the task meant that working group was not established until the week of its first, (and possibly only one) meeting when methodology and tools had largely been completed. That said, the IC's challenge in developing the peer review methodology for the files of Ukraine's FLA staff lawyers was greatly assisted by the 2019 pilot project on peer review developed by the CCLAP. The existence of this pilot project (itself modelled on the Scots form of peer review) simplified the ICs task in further adapting peer review to the work of Ukraine's FLA staff lawyers.

The IC's starting point was the Procedures (and the Protocol) and the report forms containing the criteria. Having studied these and the marking scheme, the IC and the NC examined a number of files and completed report forms used in 2019 pilot project. From there, drawing on the interviews, the findings of the Inception Report and the concept of "client-centred lawyering" the IC revised the criteria and report form for the FSLA cases and adjusted them further in discussion with CCLAP and the NC. Again, drawing on the interviews and the background materials the IC revised the criteria and report form for FPLA cases, and adjusted them further in discussion with CCLAP and the NC. The IC then produced a detailed assessment protocol (based on that currently in use in Scotland, China and New Zealand) covering the concept of the pass mark, the marking of individual criteria, the overall marking of files and the marking of the 5 files taken at random for a particular provider. The IC drawing further on the Inception Report drafted proposals for a summary report form for the reviewers and recommendations as to the risk-based selection of practitioners and files for the pilot project in the 5 oblasts selected for the pilot. On 24th July the IC and NC together with the UNDP and representatives from the CCLAP held a seminar with the working group to discuss peer review and quality assessment of FLA cases. Hopes that the working group might be able to read and apply the criteria to a specimen case in advance were only partially realised and the members of the working group found it difficult to operationalise the criteria and marking scheme as easily as had been hoped. Nonetheless their critique of the lawyer's performance in the case were largely derived from matters covered by the criteria. It was felt that the seminar had served part of its purpose in obtaining relevant feedback and it was hope that the criteria for FLAS cases could be partially reviewed in the light of the working group discussions.

4.3.1 Assessment criteria

As indicated in the Inception Report the starting point for the development of the criteria which lie at the heart of the peer review are the notions of acceptable or good practice held by reputable practitioners in the fields of legal practice to be assessed. In Ukraine the starting point was the QS in the FSLA civil and administrative cases accepted by the NBA and adopted by the MoJ on December 21, 2017, which were subsequently recast by the CCLAP in 2019 as procedures or protocols for staff lawyers employed in the FLACs and the Bureau. Quality Standards and protocols are based on the principle of the rule of law, legality, independence of advocacy, confidentiality, avoidance of conflicts of interest, dominance of client's interests, corruption prevention, competence, and integrity in the performance of the lawyer's duties. As such the QS and protocols resemble checklists of mandatory (model) actions which FLAS lawyers and attorneys must take at every stage of a civil proceeding should certain issues arise. This ranges from conducting a confidential initial interview with the client and from objecting on the client's behalf to procedural rulings by the judge to gathering all the relevant information concerning the client which relates to the case. Procedures or protocols for staff employees in the FLACs and the Bureaus are even more client-centred, starting with a timeous confidential interview, advice as to the strength of the client's case leading to a protocol setting out the client's legal position, appropriate information gathering, keeping the client properly and timeously advised on progress, advice on termination of employment, appropriately preparing for and implementing the client's reasonable instructions in relation to court hearings, including the gathering of all relevant evidence (including expert evidence where required), participating in the hearing, advising on appeal and in all cases taking due consideration of any disabilities or language difficulties that the client may have.

The criteria may be generic or specialist – tailored for particular fields of law or applicable to the whole of civil and administrative law. The CCLAP's 2019 pilot chose the broader approach and it is **recommended** that the UNDP pilot do so also. The criteria used in peer review may be chronological – starting at the first client interview and ending with the termination of the case – or thematic, for example, fact and information gathering, advice giving and preparation, interaction with third parties, or ethical considerations. Like the 2019 pilot it is **recommended** that the UNDP pilot should take a largely chronological approach. The criteria should consider whether the action taken was timely, correct, appropriate (and appropriately communicated), and helpful to the client in the circumstances. Criteria can be aimed at all aspects of the process and outcome; communication issues; client care; legal competence; appropriateness of advice (including ethical issues); completeness of advice; clarity, correctness and timeliness of advice (taking adequate instructions and providing initial information concerning future actions, including client meetings); effective negotiation; appropriate preparation for advocacy and appearance in court; management systems, strategy and resource allocation, professional discipline

threshold requirements, appropriate strategy formation and execution; and adequate staff supervision and case management. As will be seen this is very close to the steps contained in the CCLAP protocol and procedures. The more criteria you have the longer the process takes and the harder it is to mark consistently. Similarly, the fewer the criteria used in the assessment instrument, the more files that can be assessed by reviewers in any given time period. However, if this process is taken too far it is likely to reduce the consistency of judgement, in turn reducing its validity. To achieve a happy medium takes trial and error but international experience suggests that the optimum number of criteria for reviewers to work with (if they are to mark consistently) is no more than 30 and possibly rather fewer.

To keep the number and length of the criteria in check whilst ensuring their acceptability to the legal community to be assessed requires a focused approach on limited aspects of service by peer reviewers. It is useful to seek to avoid friction with the professional associations (who can see external forms of quality assurance as moving onto their territory). As we have seen the CCLAP did involve the NBA closely in 2019 pilot peer review project, however, in the end the NBA chose to withdraw their co-operation with the pilot. It follows that whilst it would make sense to involve other stakeholders in the Expert Commission which will have oversight of the UNDP pilot, these should not include the NBA at this juncture.

As for the phrasing of the criteria, it is **recommended** that these should be framed in a way that allows the answer to be scaled e.g., from 1-3 where "1" indicates the performance failure to meet the required standard, "2" indicates that the standard was met and "3" indicates that the practitioner/provider has surpassed himself/herself. Standard criteria as follows:

"How effective were the lawyer's initial fact and information gathering skills, to include identification of any key evidence required and taking of steps necessary to obtain it?"

"Was the client given accurate and appropriate advice in non-technical language regarding the legal issues raised in the case and the possibility that the case might be unsuccessful and what cost there might be to the client if the case was lost?"

These criteria focus on the client and it would be fair to say that "client-centred lawyering" lies behind the model of peer review that has been implemented in most jurisdictions. Finally, peer review is not like an unseen examination. It is not designed to catch out the lawyers who are being assessed, but to encourage them to practice in an effective and appropriate manner. Accordingly, it is important that the staff lawyers being assessed in the pilot are familiar with the criteria and the marking scheme that will be used to assess them. For this reason, in South Africa, China, England and Scotland the legal aid authorities make the criteria widely known. Indeed, in England and Scotland there are on-line peer review practice manuals indicating in detail what the criteria are, and how they are applied by the peer reviewers.[14] Accordingly, it is **recommended** that the staff lawyers in the 5 oblasts in the UNDP pilot are provided with the criteria and assessment protocol as soon as possible.

4.3.2 FSLA criteria and report forms

From the procedures and protocols a series of criteria were then derived, cast as a series of questions which could be scored against a simple marking scheme. In drafting the FSLA criteria for civil and administrative cases the IC drew on the Procedures, the criteria used in 2019 pilot and the Scots criteria in civil cases (which are also the basis for the criteria in China, Moldova and the Netherlands). The 24 suggested FSLA criteria for the 2020 pilot are in chronological order:

14. Detailed guidance with all criteria is available online at:
https://www.slab.org.uk/export/sites/default/common/documents/profession/Criminal_quality_assurance/New_Crim_QA_Criteria_29_Oct_2018.pdf
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620110/independent-peer-review-process-guidance.pdf
More in-depth discussion of peer review criteria can be found in Paterson and Sherr "Peer Review of Legal Aid Files: A Toolkit for the National Legal Aid Centre in China" (British Council and NLAC, 2016)

Initial Meetings

1

Was the client dealt with in a timely manner:

by the Centre's employee (hereinafter "provider" holding a confidential meeting with a Client within 5 working days after issuing the order on authorizing an employee of the local centre for free secondary legal aid provision (hereinafter – "FSLA") to provide such aid?

3 2 1 N/D N/A [see Procedure 3.2]

(b) by the provider complying with all other procedural time limits when providing FSLA?

3 2 1 N/D N/A

2

Is there any information in the Client's file regarding a note of agreed action and approximately how long this might take?

3 2 1 N/D N/A [see Protocol]

3

Was the client given accurate and appropriate advice regarding:

(a) the potential case, including whether it is arguable and did the client accept the provider's advice?

3 2 1 N/D N/A [see Protocol]

(b) the client's eligibility for exemption from the payment of court fees?

3 2 1 N/D N/A

In these criteria references to "accurate" includes both factually and legally correct. References to "appropriate" include ethically appropriate and in terms of good legal practice.

4

(a) How effective were the provider's initial fact and information gathering skills, to include identification of any additional information required from the client?

3 2 1 N/D N/A [see Protocol]

Did the provider take measures to collect any further necessary evidence OR assist the client in collecting the relevant evidence?

3 2 1 N/D N/A

Continuing work

5 Did the provider advise the client accurately and appropriately throughout the case as to:

(a) the relevant acts of law relating to the dispute?

3 2 1 N/D N/A

(b) any clarifications from the authorized bodies?

3 2 1 N/D N/A

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6 If the FSLA is engaged in the drafting of procedural documents,

(a)were the requirements of procedural legislation met when drafting procedural documents?

3 2 1 N/D N/A

(b) was the client accurately and appropriately advised as to the contents of the procedural document?

3 2 1 N/D N/A

(c) was the client accurately and appropriately advised as to the procedure for submitting a procedural document, the consequences of its consideration, and the client's procedural rights and obligations?

3 2 1 N/D N/A

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7 Did the provider take all necessary measures to:

(a) secure a claim or evidence?

3 2 1 N/D N/A

(b) renew missed time limits?

3 2 1 N/D N/A

(c) defer/spread liability for court fees?

3 2 1 N/D N/A

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8 Did the provider communicate appropriately and in a timely fashion with the client and others, throughout the case, after the initial meeting?

3 2 1 N/D N/A

9	Did the provider advise, where appropriate, (a) of the possibility of reaching a settlement agreement and consequences thereof? **3 2 1 N/D N/A** (b) on alternative options, such as mediation? **3 2 1 N/D N/A** (c) on the need for appropriate experts, other reports or for a contract lawyer, and any costs that might be associated with these? **3 2 1 N/D N/A** (d) on other possible procedural costs (court fees, judicial expertise costs and other procedural costs), as well as other expenses related to certain legal facts finding or registration of title documents, etc. **3 2 1 N/D N/A**
10	Did the provider (a) participate in actual court hearings, when appropriate OR **3 2 1 N/D N/A** (b) take an active part in court hearings based on documents only (filing necessary petitions, applications, objections, participating in legal debates, etc.)? **3 2 1 N/D N/A**
11	Did the provider advise the client accurately and appropriately as to the client's options to appeal and its possible outcome? **3 2 1 N/D N/A**
12	Did the provider take all reasonable steps to address any issues relating to the age, disability, gender, language, race, religion and sexual orientation which arose in the course of the case? **3 2 1 N/D N/A [see Procedure 3.2 and 3.26]**

These characteristics are important to satisfy the Expert Commission that cases are properly taken on and that the client has not been disadvantaged because of any of the above characteristics. In addressing this, the reviewer should consider language difficulties, access difficulties and cultural issues.

Overall mark for file 1 2 3 4 5	Having considered each of the individual criteria, including those applicable throughout the case, the reviewer should allocate an additional mark for the file as a whole. The overall score for the file also takes account of the diligence and productivity of the provider in delivering FSLA, as well as the effectiveness of his/her action.
Comments on file/case overall	The reviewer should provide brief comments on the case. Those should focus on any criteria on which a score of 1 or a N/D is provided. If applicable, the reviewer should explain why a «fail» score has been given for the file and suggest areas for improvement and ways in which these might be achieved. These comments will provide an initial indication to the provider/ supervisor involved as to any particular issues that require to be addressed. Where any high scores are given, these should also be drawn to the provider's/ supervisor's attention.

4.3.3 FPLA criteria and report forms

As with FSLA the criteria for FPLA are derived from the Procedures document, the criteria used in 2019 pilot and the Scots criteria in civil cases (which are also the basis for the criteria in China, Moldova and the Netherlands). The criteria reflect the fact that although a significant proportion of the FPLA is delivered orally, the lack of tape recordings means that the quality of the FPLA can only be assessed against the written records retained by the staff lawyers. The twelve recommended criteria for the 2020 FPLA pilot are in chronological order taking into account: collecting the client's personal data, obtaining the client's consent to the processing of the data and clarifying the procedure for providing FPLA; ascertain the client's legal problem, offer to review any relevant documents; assist with obtaining a specialist in domestic violence cases; assisting with submitting citizens' applications; identifying the type of PFLA being sought and whether the client wishes to receive it in writing or orally; after using Wiki Legal Aid, provide the client with up to date information, or a drafted non-procedural document; provide advice on legal issues in writing within 10 days of the appeal date in the required format. When re-drafted in a client–centred set of questions the form looks as follows:

Completeness of FPLA provided

1 How effective were the provider's initial fact and information gathering skills, to include

(a) identification of any additional information required from the client?

3 2 1 N/D N/A

and (b) an offer to review the client's documents the appeal is based on.

3 2 1 N/D N/A

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2 Did the provider

(a) deliver appropriate form of FPLA

3 2 1 N/D N/A

(b) enter it correctly into the IDAS

3 2 1 N/D N/A

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3 Did the provider advise the client accurately and appropriately as to:

(a) the relevant law

3 2 1 N/D N/A

(b) any clarifications from the authorized bodies?

3 2 1 N/D N/A

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8 When engaged in a consultation/clarification on legal issues/drafting a legal document did the provider:

(a) make appropriate references to style documents or civil agreements

3 2 1 N/D N/A

(b) put forward appropriate suggestions, conclusions, options or recommendations regarding possible solutions to the legal issue raised by the client?

3 2 1 N/D N/A

(c) where appropriate, take active steps to resolve the client's problem?

3 2 1 N/D N/A

Compliance with FPLA time limits

6 Did the provider comply with all relevant time limits when delivering FPLA?

3 2 1 N/D N/A

Accessibility of FPLA provided

7 Was the consultation/clarification on legal issues/legal document drafted in a simple and accessible form and information presented in a logical and consistent way?

3 2 1 N/D N/A

8 Did the provider take all reasonable steps to address any issues relating to the age, disability, gender (including domestic abuse), language, race, religion and sexual orientation which arose in the course of the case?

3 2 1 N/D N/A [see Procedure 2.3 and 3.26]

These characteristics are important in satisfying the Expert Commission that cases are properly taken on and that the client has not been disadvantaged because of any of the above characteristics. In addressing this, the reviewer should consider language difficulties, access difficulties and cultural issues.

Overall mark for file 1 2 3 4 5

Having considered each of the individual criteria, including those applicable throughout the case, the reviewer should allocate an additional mark for the file as a whole. The overall score for the file also takes account of the diligence and productivity of the provider in delivering FPLA, as well as the effectiveness of his/her action.

Comments on file/case overall

The reviewer should provide brief comments on the case. These should focus on any criteria on which a score of 1 or N/D is provided. If applicable, the reviewer should explain why a «fail» score has been given for the file and suggest areas for improvement and ways in which these might be achieved. These comments will provide an initial indication to the provider/ supervisor involved as to any particular issues that require to be addressed. Where any high scores are given, these should also be drawn to the provider's/ supervisor's attention.

4.3.4 Assessment Protocol

As will be seen each criterion in the FPLA and FSLA assessment forms attracts a mark of 1-3 or N/D (no data) or N/A (not applicable). Similarly, the final, overall grade for a file range from 1-5. The details are set out in the Assessment Protocol document. (see Annex 5).

Peer review necessarily involves practising peers exercising their professional judgment as to what a reasonably competent lawyer would do in a case. It is not an objective science, but involves subjective interpretation. Inevitably this leads to marker variation. The aim of this assessment protocol (and also of double marking and of the monitoring of reviewers' marking over time) is to keep the level of subjectivity within reasonable boundaries.

All files are marked by reviewers against a set of criteria and guidelines approved by the Expert Commission on a marking scale from 1 to 3 where 1 indicates "below acceptable standard", 2 "meets the acceptable standard" and 3 "exceeding acceptable standard". In practice "2" is a broad category and "1" or "3" are narrower categories/ marks (i.e., "2" is most common mark of the 1-3 possibilities). There are two further scores: "N/D" meaning "No data/insufficient information on file to score against the criterion" and "N/A" meaning that "A criterion is Not Applicable to this particular case".

One of the key attributes of skilled peer reviewers is their ability to infer in situations where there is insufficient direct evidence that a particular criterion has been met, to deduce from indirect evidence e.g., a letter later in the file or a representation made subsequently in Court or statements in the Court's judgment, that the criterion was indeed complied with, although there is no file note or letter at the time to indicate that it has been. In other words, the frequency of "N/D" scores depends partly on the ability of the peer reviewers to infer (reasonably) from other material on the file that a particular criterion has very probably been met, even though the more usual forms of direct evidence of compliance with the criterion may be absent. However, it is only permissible to deduce that something necessary has been done if there is something real on the file that suggests this is so.

To allow evidence to be inferred from the file, reviewers should read the whole file through once BEFORE commencing the marking of the criteria, rather than marking the criteria as they go. Where possible reviewers should read several files of the same provider and then review the overall marking of the criteria and the file to ensure that they are marking the files consistently. Reviewers should keep adequate notes of their decision-making in relation to each file, in case the double marker (where there is one) reaches a different result (see procedural note below).

There is a final Overall Mark criterion for the file as a whole which is marked on a 1-5 scale basis.

5	**«Excellent».** Provider evidences excellent practical and legal skills and in-depth knowledge. No shortcomings are identified.
4	**«Good».** Provider evidences good practical skills and legal knowledge, all significant requirements are met; minor shortcomings are identified that do not affect outcomes.
3	**«Acceptable».** Provider evidences acceptable practical skills and legal knowledge, most of the requirements are met; the identified shortcomings do not affect outcomes; with additional work, it is possible to improve the quality.
2	**«Conditionally unacceptable».** Provider fails to evidence some of the necessary practical skills and legal knowledge, some significant requirements are not met; the identified shortcomings affect outcomes; however, with additional work, it is possible to improve the quality.
1	**«Unacceptable».** Provider fails to evidence the necessary practical skills and legal knowledge, most of the significant requirements are not met; significant shortcomings are identified; quality improvement is possible with constant monitoring.

The 1-5 mark is arrived at from the reviewer's professional judgement as to the overall acceptability of the work done by the staff lawyer in the case. The mark is NOT attained additively from the scores on the other criteria, or as an average of those scores. However, there should be some relationship between the scores on the individual criteria and the overall mark for the file. A file that receives nothing but "2" for each criterion should not be classified as more than "3" for the overall file unless the reviewer can claim that all the "2" marks for individual criteria are "High 2s". A clear "4" seems to need at least two marks of "3" on the individual criteria, however this works both ways. If a file receives several "3"s on individual criteria and no "N/Ds" or "1"s then it should normally get 4.

For every criterion on which a score of 1 is returned the reviewer should write or type notes at the end of the Report Form under the "Comments" heading, indicating why a score of "below acceptable standard" has been recorded for that criterion. (In the case of the Final Overall Criterion, notes should be provided if a score of 1 or 2 is recorded).

Where a score of 3 is recorded on an individual criterion (or 4 or 5 in the case of the Final Overall Criterion) the reviewer will have the option of indicating in the Comments section why the performance is considered to be particularly meritorious.

There will be occasions where it is unclear whether the appropriate score for a criterion is 1 or N/D. The view in the United Kingdom is that in these cases a N/D should be recorded but in practice the presence of 3 or more "N/D" scores should be commented on adversely in the Comments section at the end of the Report Form and should generally lead to the file failing unless the two of the "N/D" scores are really in relation to the same flaw. The number of acceptable "N/D" scores in Ukraine will be decided based on the results of the peer review pilot in the Eastern Ukraine.

Similarly, there will be occasions where it is unclear whether to award a score of 2 or N/D for a criterion. It is suggested that if there is nothing on the file, but equally nothing to suggest that the criterion has not be complied with, AND nothing hinges on it, then "2" would be appropriate rather than "N/D".

What is an overall pass mark for a provider? If there are only 5 files then normally one file can be failed, but if two are failed than the provider should fail, unless the reviewer provides a justification why the provider should nonetheless pass e.g., the three passing files are substantial ones whilst the failing ones were short FPLA files. This suggests that the pass mark is around 70%.

A series of incidental points have arisen in other countries:

Question 1: What guidance should we give to reviewers as to when a case reveals too many "N/D" scores?

It is suggested that reviewers should comment adversely at the end of each case report form at the number of "N/D" scores where: (a) it is not possible to tell what is happening in the case for significant periods of time because nothing is recorded on the file (b) the N/D scores are sufficient in number and area to indicate systematic problems in file management or (c) normally where there are 3 or more N/D scores in a case. As a guideline if there are 3 or more "N/D" scores and the reviewer does not recommend that the file should fail, the reviewer should explain in some detail in the report form why he/she has exercised his/her professional judgment in that way.

Запитання 2: What guidance should we give to reviewers as to when a case should fail overall?

It is suggested that reviewers should give an overall fail mark to a case in respect of fails against individual criteria where: (a) the criterion is a crucial one in the case because it is a "showstopper" e.g., missing a crucial time limit (b) the "1" scores are sufficient in number and content to indicate systemic problems in case handling or (c) normally where there are 3 or more "1" scores in a case or 3 or more "N/Ds" OR where there are 3 or more "1" or "N/D" scores in total.

In considering whether advice is appropriate, the reviewer should pay attention to the circumstanc-es of the case and the level of information available to the staff lawyer and take into account ethical, practical, tactical and legal considerations.

In considering whether advice is accurate, the reviewer should consider whether it is factually and legally acceptable.

4.3.5 Selecting the subjects of review

Traditionally, legal aid authorities have selected practitioners for review on several bases. It is commonplace for the selection to include a proportion that are selected purely on a random basis – to persuade the practitioners the authorities are being even-handed. However, nearly all peer review schemes also allow risk to play a part.[15] It is only sensible where there is a review cycle over several years (e.g., in South Africa, Chile or Scotland) to focus some reviews on the higher producing centres or practitioners. These may be centres that handle large volumes of legal aid cases, or large volumes of legal aid cases for vulnerable clients (e.g., immigration or mental health). Alternatively, performance in other audits or a high levels of client complaints may be risk factors. Again, once a peer review programme has been going for a while then firms that perform well will not be reviewed as regularly as those who do less well (this risk- based approach has been adopted in Chile, Scotland, New Zealand and South Africa). That said, focusing quality control on risk can create distortions to the system and may incentivise attempts to manipulate the review process through e.g., file tampering. Random selection counteracts this but can be inefficient. In practice the solution seems to be have combination of random and risk.[16]

In a pilot exercise it depends whether the project has the resources to cover all staff lawyers in the relevant oblasts, or only a proportion thereof. If it is the latter, then it still makes sense to use a mix of random and risk factors if robust risk data is available. In 2019 pilot of FSLA the Expert Commission chose lawyers who provided both written advice and legal representation in Court to get a full picture. Then they chose lawyers in local FLACs who had different numbers and types of case, those local FLACs with the highest amounts, the lowest amounts and those in the middle. In the absence of robust risk data as to the type of clients in the caseload or practitioner performance audits (including complaints), a selection based on the client load makes sense. However, given that both FPLA and FSLA are being assessed, there would be no need to confine assessment to staff lawyers who did both advice and representation. In the UNDP pilot in 2020 it is proposed to look at another five oblasts, partially intertwined with those previously examined, but based on different local FLACs, so to better underline the specifics of those dealing with the population that suffered from the military conflict. These will be the government-controlled areas of both Donetsk and Luhansk oblasts and Dnipro, Zaporizhzhia and Zhytomyr oblasts for cases where ex-combatants received services of the Free Legal Aid System]. The proposal is to assess up to 92 lawyers (one third of the lawyers in the five oblasts). These lawyers will be chosen at random but stratified by geographic distribution. Currently it is proposed to concentrate on lawyers who do both FPLA and FSLA, however, it is **recommended** that consideration also be given to including a group of lawyers who only do FPLA alone as well as those who do both in the pilot.

4.3.6 Selecting files for review

The aim of the selection process is to get a representative sample of the provider's work. This may require a random sample to be stratified according to the different types of work the provider does. Clearly the more files are examined the fewer providers can be covered in a set period, assuming that the peer reviewers' capacity remains static. In different jurisdictions the number of files assessed varies, sometimes depending on the area of law being assessed, however, the important issue is that there are sufficient files to gain a fair and balanced picture of the quality of work done by the provider or practising unit. In New Zealand and in Scotland the initial review of civil files involves 5 files per lawyer to be marked in half a day with an accompanying summary report.[17] Alternatively where there is robust data as to clients and their case type, it may be feasible to assess a proportion of clients' files (10% is the figure in Scotland) who are thought to be potentially vulnerable (e.g., immigration or mental health clients). Where the files are mainly in hard copy format a safe method has to be devised to enable the files to be transferred to the reviewer(s) that are assessing the files and to get them back to the provider. Further, as in South Africa the risk is that once the random files have been identified the lawyer or unit being reviewed will be tempted engage in "window dressing" to improve the files. The second risk is that files go astray in the transfer process. Partly to reduce this risk, and partly to assess completed as opposed to partial files in peer review, usually the files

15. Risk can be to the legal aid authority or to the client.

16. For a further discussion of this see the QUAL-AID Report at p. 32 and Boersig and Davenport, "Distributing the legal aid dollar- effective, efficient and quality assured?" ILAG conference paper, Ottawa, 2019

17. New Zealand Ministry of Justice, Audit and Monitoring: Operational Policy (May 2018) 9
https://www.justice.govt.nz/assets/Documents/Publications/Audit-and-monitoring-policy2.pdf

selected will be closed or completed files – as in China. However, in Scotland in civil cases it is possible that a reviewer will be sent files that are ongoing, or live, since this enables a picture to emerge as to the quality of up-to-date practice amongst lawyers as opposed to what it was like a year or sometimes several years earlier.

In 2019, CCLAP pilot, FPLA written standards have not been fully implemented yet, so the number of corresponding files was limited; both FSLA and FPLA were chosen randomly, while adhering to the principle of avoiding the conflict of interest.

In the UNDP 2020 pilot it is planned to review files of 1/3 of lawyers present in the oblasts, while ensuring the proper geographical distribution of the dataset. 5 files per lawyer will be reviewed, with roughly 60% of files looked at being FSLA and 40% FPLA Depending on the data available some account might be taken of the mix of caseload taking account of the vulnerability of the clients (risk). With 92 lawyers and 5 files per lawyer the base point for assessment is 460 files which should be representative of the 5 oblasts and enable the comprehensive testing of the methodology, criteria, report forms, assessment protocol and training effectiveness, thus enabling them to be enhanced, if necessary, for the future. However, in a pilot peer review where the reviewers are unused to the criteria, report form, summary report form and assessment protocol a robust measure of double marking is called for, and accordingly it is so **recommended**. (In Scotland the figure is 25%, with experienced reviewers). In addition, since the reviewers are still relatively inexperienced there would be merit in having each reviewer's assessments to be double marked for the first third of the pilot. This would increase the workload to 600 files.

It is unclear how long it takes to read an average set of 5 FLAS files in civil and administrative law cases in Ukraine. The stakeholder interviews produced varying estimates however, on the basis of experience in other jurisdictions as reviewers get more familiar with the criteria and the marking protocol the time taken for the review exercise falls significantly. In Scotland, normally, five files can be assessed and the forms completed in half a day. Early projections suggested that an allowance be made for each FSLA taking 3 hours and each FPLA taking 1 hour including writing a report, making a total of 11 hours to review 5 mixed files. However, that was the time taken to do a report based on a single file. International experience suggests that the time for 5 files by the same practitioner will not take 5 times that for a single file. Further, over a six-week period it is expected that reviewers doing a reasonable level of work would increase their speed. This would suggest that 5 files in Ukraine and reports might be done in one working day (7.5 hours). If this is correct there may be leeway for additional files to be covered. It is recommended therefore that consideration should be given as to whether more files should be assessed, in the same time period, perhaps with more double marking. One other way of approaching double marking would be to have single marking for simple files and double marking for more complex files. This is a further way of mitigating the risks of subjective judgment in peer review, but much will depend on how identifiable and how numerous complex cases are.

4.3.7 Identification and selection of reviewers

The concept of peer review is based on the assumption that those best equipped to assess the professional work of providers are other professionals with experience and skill in the same legal fields as the provider. Since judges and prosecutors do not practice in the same way as defence lawyers, they are not perceived as "peers" by those who are being assessed. It follows that using either prosecutors or judges to assess defence lawyers would be problematic However, peers may be specialists or generalists. Experience suggests that specialist reviewers tend to be tougher markers who more often apply higher standards than generalist reviewers. England has favoured specialist reviewers and Scotland has always preferred that peer reviewers be generalists. Nevertheless, in both countries the practice is to select reviewers after an open competition in which the posts are advertised as is the job description. In both countries such competitions have very largely attracted experienced practitioners who are respected in their field and who have frequently had experience in training and mentoring younger lawyers. In both Scotland and England newly recruited peer reviewers will have their own files reviewed by one or two existing reviewers (blind, double marking the files) before being approved to undergo training. During the training (see below) the reviewer will be shadow marking existing reviewers prior to full qualification.

Whether they are specialists or generalist the experience of the reviewer must be current, by which is understood that it must be less than year since the reviewer has ceased to practice law in the relevant legal field that he/she is reviewing. This test, which applies in England

and Scotland would be problematic if applied in Chile, Ireland or South Africa. This is because in these countries the reviewers are either full time reviewers attached to a special audit unit or full-time supervisors / managers who do not conduct any ongoing practice. Either way after a few years the reviewers may cease to be seen as peers by the lawyers they are assessing. This is exacerbated if the reviewers are paid more than legal aid lawyers, because then they may be perceived as an elite and the turnover for such posts (which would allow some freshening of the team) is a difficulty. This has already become a problem in Chile and may yet become so in South Africa.

Finally, the reviewer must be independent of the lawyer being assessed to prevent conflicts of interest or a situation of actual or perceived bias. Thus, in England and in Scotland the reviewer should come from different part of the country than the lawyer being reviewed, and have no connection (past or present) with the lawyer. As a further protection in Scotland the person being reviewed is informed as to the identity of the reviewer(s) and can object to their appointment. In countries with numerous staff lawyers this means that the reviewer should not be the manager or supervisor of the lawyer being assessed. Indeed, in South Africa a special Quality Unit was created with peer reviewers who were not supervisors and managers to prevent a conflict of interest arising between the manager of a Justice Centre being expected to have a well performing Centre and also be responsible for the independent review of subordinate staff where failure will reflect badly on his management skills.

It follows that the peer reviewers in the UNDP pilot should be or have been selected in open competition, and have adequate, and continuing, experience and expertise to be recognised as a senior or well qualified peer. Although some could be contract attorneys or qualified lawyers in senior FLA positions (as was the case in 2019 pilot), to be seen as "peers" most should be staff lawyers or quality managers or supervisors). The 2019 pilot relied on staff attorneys/ lawyers with 5 years' experience as a litigator, motivation, proper credentials and a reasonable discipline record. Since some lawyers only do FPLA or FSLA there could be a case for differentiating between reviewers who specialise in FPLA and those who specialise in FSLA. However, since most staff lawyers have general competencies, maximum flexibility in deploying reviewers would suggest that they should largely be drawn from lawyers with a general competency. It would seem to make sense to draw the reviewers for the UNDP pilot from the 30 existing reviewers, and it is so **recommended**. As for numbers, even with a reasonable degree of double marking the total workload in the pilot is in the region of 600 files which (assuming the existing 30 reviewers are retained) amounts to 20 files per reviewer in six weeks. This should take around four working days in six weeks which should provide sufficient exposure to peer review to enable the reviewers to develop their skills and expertise as reviewers. If time permits (see 4.3.6 above) it is **recommended** that consideration should be given to increasing the number of new files assessed during the pilot or increasing the extent of double marking. Either way, in allocating files to the reviewers' care should be taken to ensure that no reviewer is appointed to assess lawyer's files he/she has any connection with.

4.3.8 Training and monitoring reviewers

Peer review is essentially the exercise of professional judgment by peers. This is necessarily subjective in nature, however, there are steps that can and should be taken to reduce the subjectivity in applying the criteria and the marking scheme. These include, using a limited number of criteria and a restricted range of marks for assessing them, and the extensive use of blind double marking. However, the primary route to keeping peer reviewer subjectivity within reasonable confines, is through training and monitoring – which is a strong feature in the UK peer review system. In the UK it consists of three days training by academic experts in peer review or very experienced peer reviewers who have been trained by such experts. Usually, the first two days run consecutively and six months later there is a third day of training. In between the reviewers will be shadow marking peer reviews in the normal way but always being blind double marked by a more experienced reviewer.

The purpose of the initial training is to introduce reviewers to the concept of quality and the range of methods of its assessment. Thereafter, they are introduced to peer review and to the criteria, taking each one in turn in some detail, and marking scheme and discussions are encouraged as to how those should be interpreted and applied. Thirdly the trainees are exposed to marking actual files, either in pairs or small groups (which rotate regularly), usually including existing reviewers, with the aim of (a) exposing them to differences of opinion and how these might be resolved and (b) fostering a collective consensus as to the interpretation of the criteria and as to the application of the marking scheme. The reviewers are also trained in the writing of summary reports on the files they have reviewed.

In Scotland, new peer reviewers have all their marks in the first six months double-marked by more experienced reviewers. After six months, they are shown their marks (and those of their colleagues) and then exposed to difficult files to discuss in small groups and collectively. The purpose of training is to enhance the certainty and consistency of the marking by reviewers both as individuals over time and as between the reviewer and his/her fellow reviewers. Thereafter, on an annual basis all reviewers will receive a day of refresher training at which their scores will be shown to themselves and to all the reviewers in their cohort. Merely demonstrating that a reviewer is out of line with his or her peers can usually either consciously or subliminally apply pressure on the marker to move towards the group average in failed files or distinctions.[18] Such procedures help to ensure that all reviewers are having their marking scrutinised in a way that seeks to reduce the gap between "tough" and "generous" markers.

Similar procedure exists in Ukraine, though it is much shorter due to the initial steps of the peer review concept implementation. When a new set of peer reviewers is recruited, they undergo a two-days training, provided by the Commission on Expert Legal Analysis. During the course of the training, peer reviewers are provided with the relevant regulations and documentation, examples of documents and reports, and the Commission's explanations of their provisions. The Commission then presents preselected and anonymised files (FSLA and FPLA) to the participants, who, in small groups, conduct their assessment. When finished, the results are compared and aligned to the Commissions' own assessment, to ensure the uniformity of practice. As these are the first waves of peer reviewers in Ukraine, there is no possibility of comparing with them with more experienced reviewers; instead, the Commission provided evaluation of their work and corresponding propositions during its meetings. According to the information provided by the CCLAP, annual meetings of peer reviewers, per the example of Scotland, are planned in future.

With respect to the UNDP pilot it is **recommended** that 30 peer reviewers who have already been trained by the existing Expert Commission should receive some additional training in (a) the revised FSLA and FPLA criteria and (b) the revised FSLA and FPLA report forms (c) the assessment protocol (particularly on the use of the "N/D" score) (d) in the completion of the summary report form and (e) how a new pilot is to be run (oblasts covered, staff lawyers covered, files scrutinised and duration of the pilot). It is further **recommended** that the Expert Commission should monitor the scores for each file and each practitioner given by reviewers and present them to the reviewers at the end of the pilot in a feedback session. As an additional mechanism to foster consistency of marking and application of the criteria it is **recommended** that each reviewer is blind double marked for the first third of the pilot project.

4.4 Reporting

As can be seen in Annexes 3 and 4, the reviewer's report form for each file contains (1) an introductory part, including the name of the firm or organization (FLAC or Bureau) being assessed, the name of the practitioner being assessed, an identifier number or client name for the work matter or file being assessed and the date of the evaluation. (2) a general part, including evaluation criteria and the marks for them (set out in paras 4.3.2 and 4.3.3 above) and (3) a final part, including the overall evaluation and conclusions for that file. In 2019 pilot the form for each file contained conclusions indicating the productivity and efficacy of the staff lawyer's actions when providing FLA together with the expert/reviewer's signature. This was understandable because often only one file was chosen from each practitioner. Where, as with the UNDP pilot it is proposed that the reviewer assesses a range of files from the same practitioner, it is recommended that instead of compiling conclusions and recommendations for each

18. Any file mark over a "3" constitutes a "distinction".

file, the reviewer compiles an overall summary form in which the evaluation from each file by that practitioner is transferred onto the form (using the "cut and paste" feature in WORD). This accords with the practice in peer review in the UK, China and South Africa. In those jurisdictions once a reviewer has completed the review of the files allocated to him/her for a particular practitioner, it is normal for reviewer to complete a summary report form electronically in WORD cutting and pasting the remarks and conclusion into it, before sending the summary form (together with each file report form) to the Administrator of the programme or pilot. What follows is a sample summary report form derived from the Scots model of peer review with suggested modifications for Ukraine.

4.4.1 Summary Report Form

Practitioner: Practice Unit:

Allocated Reviewer: Date:

Legal Aid Reference number	Subject matter / case type	FLA Type	Mark
File 1	Advice on contract issue	FPLA	3
File 2	Divorce	FSLA	4
File 3	Separation	FSLA	4
File 4	Personal injury case	FSLA	3
File 5	Advice on Immigration matter	FPLA	3

OVERALL Assessment of Quality of work on files reviewed	☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 please select
Comments on overall mark (if any)	These are good files. All passed and two of the files were scored above the norm.
Overall positive findings from files reviewed	There is good use of a case management system, good use of typed file notes. There is a good understanding and knowledge not only of the legal aid system but of the way it interlinks with the ongoing case.
Overall areas of concern from files reviewed	Communication to the client is sometimes sporadic, especially where there has been an interim court hearing.
Additional Comments on individual files	[Here the reviewer cuts and pastes the overall comments from each individual case report form].
Continuous Improvement (whether the practitioner has taken on board the feedback from the previous reviews).	In earlier reviews there was a tendency to have brief or no proper file attendance notes for meetings or phone calls with clients. This weakness has now been addressed.

4.4.2 Processing a report form

As the Inception Report indicates, once the report is completed, there are two options – either to have it checked or to send it directly to the provider to give the latter a chance to comment. The former approach typically involves sending it for checking and review to (a) another reviewer and/or a senior inspector (as occurs in Chile) or (b) to a Quality Assurance Committee (QAC), as occurs in Scotland. The latest approach, adopted in South Africa, is to send the report unchecked to the provider for comment and representations if (s)he/they wish so.

Especially in the early days of establishing a peer review programme or when conducting a pilot, there is a merit in building in a checking facility such as a QAC, primarily to ensure consistency between reviewers and their reports, and this is so **recommended**. However, whichever route the report takes, it is normal for peer review programmers to give the provider[19], either before or after checking, a chance to comment on, or object to, the findings and recommendations in the report. Depending on the practitioner's response the administrative body for peer review may (though it is relatively unusual) arrange for the representations to be considered by the peer reviewer who conducted the original review but this generally occurs only if there is a debate over matters of fact.

4.4.3 The role of the QAC or Expert Commission in assessments

Whilst reviewers are responsible for the initial assessment and report in relation to the practitioner, generally it is the administrative body which makes final decision in relation to the report and any representations or appeal that has been made by the provider, and it is so **recommended**. In Scotland it is considered to be a strength of the scheme that although reviewers make recommendations as to the outcome of the review, the final decision lies with the relevant Quality Assurance Committee, which

- Is responsible for liaising with practitioners about their review – especially from the perspective of continuous improvement, and dealing with any representations and comments from the providers.
- Acts as a consistency check since it sees all the reports and can moderate the marks of any reviewers who are felt to be outliers from the bulk of the reviewer cohort, thus reducing the impact of marker variation in generosity or toughness.[20]
- Uses 25% blind "double-marking" as a further safeguard against marker inconsistency.[21]
- Decides on the outcome of the review: (see next para).
- Takes responsibility for the publication of reports to the providers – including any mistakes or defamatory remarks about the provider.

Where the provider's files are double marked the Secretary to the Expert Commission should check the two sets of Reports. If there are significant disagreements between the reviewers e.g., one has failed several files and the other has not. The Secretary should ask the two reviewers to communicate with each other, having shown each of them the other's reports, with a view to discovering whether the two reviewers can reach an agreed score on the files and the provider. Thereafter the results of this discussion (whether a consensus is reached or not) should be given to the Expert Commission along with the original reports.

4.4.4 Outcomes

Peer review programmes which are simply designed to assure the state that legal aid providers are of an adequate quality can rely on a simple pass/fail outcome. On the other hand, if the objective of the programme is continuous improvement, it is more likely that the body administering the scheme will wish to see a range of possible outcomes as it is in Scotland:

- Good pass – the practitioner has been awarded a mark of 4 or 5.
- Pass – the practitioner has received a mark of 3 or 3 + (this will be accompanied by a detailed feedback to the provider as to the way to improve before the next review)
- Marginal pass – the practitioner has only just passed and will be subject to a further review within a year or so.
- Fail – the practitioner's files have failed, although sometimes only marginally. The practitioner may have achieved good outcomes for the clients or given accurate and appropriate advice to the clients, but the file documentation may be very poor, few notes from

19. In order to retain the profession's acceptance of the programme.

20. It is quite unusual for the QAC to change the grade recommended by the reviewer to the extent that the QAC fails a practitioner that the reviewer has recommended should pass or passes a practitioner whom the reviewer has recommended should fail. Where this occurs, the provider will be shown the reviewer's recommendations as well as the QAC's decision. Decisions by the QAC to vary the passing grade (either up or down) recommended by the reviewer are less unusual but still occur in less than 10% of cases.

21. As an additional safeguard against marker inconsistency, the QAC works with an academic consultant as professional adviser whose role is to monitor the marking of the reviewers and to debrief the reviewers on an annual basis showing them their scores and training them in order to increase consistency.

meetings or phone calls with clients, no evidence of proper preparation and the client communication may be minimal. This will almost always lead to an "deferred extended" review in 6-8 months in which the practitioner's files which have been worked on since the original failed review will be examined by two different reviewers, (probably on site) for signs of improvement and a clear indication that the provider has learned from the detailed feedback from the QAC/reviewer(s).

- Bad Fail – the provider has been awarded a mark of 1 or 2 (the bottom two fail grades). The QAC will usually order an "extended" review to take place within two weeks (where the fail is so bad that the practitioner is felt to be a threat to the public) or sometimes a "deferred extended" review after 6 months. Extended reviews are always conducted by two different reviewers and are usually on site. The reviewers will generally indicate files they wish to inspect (chosen at random) but they may inspect any legal aid file the practitioner has. Should a practitioner fail the "extended" review he/she will be provided with detailed feedback, offered with mentor services and sent to a "final" review within 6 and 12 months as from the date of the fail. Once again this will involve two different reviewers and will be done on site. As before, the QAC will be looking for signs of improvement since the date of the fail.

It is **recommended** that the Expert Commission follows the Scots model in having a range of outcomes which builds in an impetus towards continuous improvement over time. Where the practitioners fail their file review it is **recommended** that the Expert Commission should provide for detailed feedback to be sent to the practitioners followed by a re-assessment within a few months unless the fail is so bad as to suggest that there is a public risk from the practitioner, in which case it should occur much sooner. As in South Africa where there is a predominantly staff lawyer workforce, providers who fail their assessment should receive mentoring and support within their Centre (under Regional Office oversight). After several months the provider will be re-assessed on the work done since the first failure. In South Africa and Chile where the quality assurance programme is of long-standing nature, if the provider fails again, this can lead to the performance measures.[22] In a jurisdiction such as Ukraine where peer review is only a pilot, a second fail should lead to additional support measures, rather than discipline. Once a peer review programme is established, consideration should be given to a quicker second assessment even where the practitioner has marginally passed the initial review.

Finally, during the stakeholder interviews the pilot peer reviewers who were interviewed expressed a wish to receive feedback from the Expert Commission as to the quality of their assessments and marking. Especially in a pilot project it is **recommended** that such feedback is provided to the reviewers through the project Administrator.

4.4.5 Appeals or representations

In a pilot project where there are no serious negative consequences for practitioners who fail their assessment there is no need for an elaborate system of appeals or representations from the practitioner. However, in the interests of the morale of the staff, where a practitioner fails, there should be an opportunity for them to make representations concerning the outcome of the assessment or to request a re-assessment.

4.5 Risk Management

There is a number of risks that may arise when a peer review programme or a pilot thereof is established, namely:

a. The practitioners' files may get lost whilst being transported from the practitioner's base unit to the programme administrator or to the office of the peer reviewer. These risks can be met by relying on electronic files, or assessing completed files only or relying on a courier service specialist.

22. See details on the matter in the Inception Report para 3.7.7

b. Once the files are requested by the programme administrator, the practitioner or the unit may attempt to “improve” or window dress them before sending to the administrator. This risk can be met by insisting that the files are sent by the practitioner to the programme administrator in a very short period of time.

c. The reviewers misunderstand the criteria or assessment protocol. This risk is met by thorough training of the reviewers, follow up and refresher courses.

d. The reviewer is not independent of the practitioner being reviewed or is not experienced in cases he/she has been assigned to review. This risk is met by training and spot checks for reviewers and for the programme administrator.

e. The file review uncovers evidence of breach of the law. This risk is met by establishing protocols as to the steps required to be taken by the reviewers or the programme administrator if such issues arise.

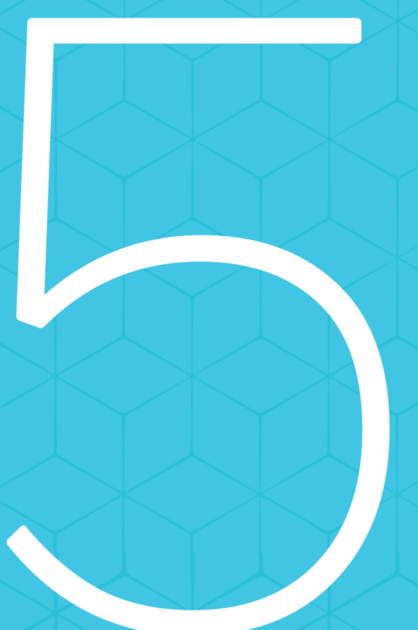
f. The peers are not respected by the practitioners because they are not seen as having sufficient expertise to command the confidence of those being reviewed. This risk is met by rigorous, merit-based selection of the reviewers and by ensuring that such reviewers carry on practise on a part time basis.

g. Resistance to peer review by the practitioners. This risk is met by consultation with the work force as to the purpose of the peer review pilot and explanations as to what happens if a staff lawyer fails a review twice.

h. Resistance from other stakeholders e.g., from the National Bar Association due to a perceived threat to the client’s confidentiality and privilege or to the data protection issues. This risk is met by ensuring that clients do consent to their file being quality assured by a third party and their personal data handled in this way.

i. Resistance from other stakeholders e.g., from the NBA because peer review is alleged to interfere with practitioner independence. This risk can be met by ensuring that the files assessed are all completed and thus no interference with the professional independence of the practitioner is involved.

j. Expenses. This risk can be mitigated by adjusting the length of time taken to review all the practitioners in a jurisdiction, or using a risk-based approach to the frequency of reviews. Where reviewers are already salaried employees of the FLAC system, the costs of peer review are also lowered.



Recommendations

Recommendation 1

An Expert Commission should be put in charge of running the pilot project. It is recommended that this body uses the criteria, FSLA and FPLA report forms and assessment protocol agreed by the CCLAP and the UNDP. The body would also recruit peer reviewers and provide training for them.

Recommendation 2

It is further recommended the Expert Commission should:

- set the pass mark for the pilot files. This will probably be "threshold competent" or "acceptable" but it need not be so;
- confirm the numbers and types of files to be examined unless the latter are agreed between CCLAP and UNDP;
- devise a programme for carrying out the pilot (e.g., which oblasts, which staff lawyers' files - and how many unless the latter are agreed between CCLAP and UNDP;
- implement the agreed monitoring programme for reviewers and their marks (to ensure consistency) and the general course of the pilot.

Recommendation 3

It is recommended that the criteria and assessment protocol are made available to the staff lawyers in 5 oblasts that are to be assessed in the UNDP pilot project.

Recommendation 4

It is recommended that the pilot peer review project seek to cover up to 92 lawyers with five randomly selected files each, in five oblasts, namely: Donetsk, Luhansk, Dnipro, Zaporizhzhia and Zhytomyr, making a base target figure of 460 files. It is further recommended that these lawyers be chosen at random but stratified by geographic distribution. It is also recommended that in addition to lawyers who do both FPLA and FSLA, consideration also be given to including a group of lawyers who do FPLA alone in the pilot only.

Recommendation 5

It is recommended that the pilot peer review involve a robust measure of double marking for files and reviewers. This would potentially increase the target workload to 600 files. Assuming that the pilot lasts for six weeks, it is recommended to consider more files for assessment, and probably with more double marking.

Recommendation 6

It is recommended that the peer reviewers in the UNDP pilot be drawn from 30 reviewers recruited for 2019 pilot and that they receive additional training in (a) revised FSLA and FPLA criteria (b) revised FSLA and FPLA report forms (c) the assessment protocol (and the use of the "N/D" score in particular) (d) in the completion of summary report forms and (e) the way a new pilot is to be run (oblasts and staff lawyers covered, files scrutinised and duration of the pilot).

Recommendation 7

It is recommended that the Expert Commission should monitor the scores for each file and each practitioner given by reviewers and present them to the reviewers at the end of the pilot in a debrief session. As an additional mechanism to foster consistency of marking and application of the criteria, it is recommended that each reviewer is blind double marked for the first third of the pilot project.

Recommendation 8

Given that the UNDP pilot proposes that the reviewer should assess a range of files from the same practitioner, it is recommended that instead of compiling conclusions and recommendations for each file, the reviewer compiles an overall summary form in which the evaluation from each file by that practitioner is transferred onto the form (using the "cut and paste" feature in WORD).

Recommendation 9

It is recommended that the Expert Commission should provide a checking function to ensure consistency between reviewers in their assessments and reports. Although reviewers are responsible for the initial assessment and report in relation to the practitioner, it is recommended that the final decision on the practitioner's scores should be made by the Expert Commission.

Recommendation 10

It is recommended that the Expert Commission follows the Scots model in having a range of outcomes which builds in an impetus towards continuous improvement over time. Where the practitioners fail their file review, it is recommended that the Expert Commission should provide for detailed feedback to be sent to the practitioners followed by a re-assessment within a few months unless the fail is so bad as to suggest that there is a public risk from the practitioner, in which case it should occur much sooner.

Recommendation 11

It is recommended that the Expert Commission monitor all aspects of the pilot project including:

a. the strengths and weaknesses it reveals as to the work of staff lawyers;

b. the degree of regional variation in relation to (a);

c. the consistency of the file and practitioner scores of the reviewers;

d. the use of the FPLA and FSLA criteria and forms as peer review instruments in Ukraine for assessing staff lawyers' files and cases.

e. the use of the assessment protocol;

f. the lessons emerging from the training programme for reviewers;

g. providing ongoing feedback to the reviewers as to the consistency of their interpretation of the criteria and the marking;

h. checking the consistency of the administrative body's marking and feedback to staff lawyers who are being assessed;

i. holding a debrief session with the peer reviewers remotely at the end of the pilot project;

j. producing a spreadsheet matrix of criteria and scores to identify the areas or FPLA and FSLA work where staff lawyers perform (1) most effectively and (2) least effectively with a view to providing training and remedial action.

6

Conclusions

Conclusions

In 2017, Paterson and Sherr asserted that "Peer review has established itself as a success story in a range of jurisdictions across the globe. It is expensive because it relies on highly experienced practitioners, but it has demonstrated its value as the gold standard in relation to the quality assessment and assurance."[23] Similarly, in 2019, Boersig and Davenport concluded that "International trends … indicate that peer review is the 'gold standard' of quality control."[24] Although EU funded research[25] has revealed that there is a range of vehicles that are used to assess the quality of the lawyer's work, most either assess input or structural variables or are flawed methods for assessing outcomes e.g. client satisfaction surveys or a complaints system. Peer review alone offers a way of harnessing subjective professional judgement with an objective set of criteria and scoring system to produce a proactive, systemic, risk-based form of assessment of the quality of lawyers' performance and of the outcomes they achieve. Additionally, peer review when harnessed to individual criteria in a spreadsheet can produce a unique set of data showing the areas of practice the profession (or that part that legal aid does) excels in and where it does not. The latter can then be targeted by training and continuous professional development. Peer review has further advantage over a complaints system that it can be more easily used to drive up standards over time, and even be used to nudge practitioners towards a change in culture namely, client-centred lawyering.

To introduce a pilot peer review programme in 5 oblasts in Ukraine including two in a conflict zone, will be a powerful statement of confidence by the CCLAP as to the competence of its more than 1,500 strong cadre of staff lawyers. Peer review exists in some form or another in at least 13 jurisdictions globally. The limitations of the current quality assurance regime for contract attorneys delivering FSLA which was critiqued in the Council of Europe's 2016 report[26] entail that in the longer term it is hoped that the MoJ and the NBA will devise an effective peer review programme for contract attorneys. For now, applying peer review to staff attorneys is the way to go. A successful pilot project for staff lawyers would pose a question as to why the NBA could not introduce a robust programme for contract attorneys.

24. Alan Paterson and Avrom Sherr "Peer Review and Cultural Change: Quality Assurance, Legal Aid and the Legal Profession" ILAG conference paper, Johannesburg, 2017). http://www.internationallegalaidgroup.org/images/miscdocs/Conference_Papers/Peer_Review_and_Cultural_Change.3docx_28APAS29.pdf

25. John Boersig and Romola Davenport, "Distributing the legal aid dollar- effective, efficient and quality assured?" ILAG conference paper, Ottawa, 2019. http://www.internationallegalaidgroup.org/index.php/conferenecs/ottawa-2019/conference-papers

26. S. Nikaratas and A. Limante, "Tools and Criteria for Measuring |Legal Aid Quality: Guidelines for EU Member States" QUAL-AID Report (Law Institute of Lithuania, 2018)16 https://www.jura.uni-frankfurt.de/75941968/QUAL_AID_Evaluation_of_Legal_Aid_Quality.pdf?

Annex 1

Inception Report

The international experience of applying peer review of legal services in the public sector and civil society institutions.

1. Introduction

1.1 Background

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems ('UN Principles and Guidelines'), adopted by the General Assembly in December 2012 in Resolution 67/187,[27] make it an obligation for Member States to put in place an accessible, effective, sustainable and credible legal aid systems, and to ensure the quality of legal aid services, in particular those provided at no cost. Sustainable Development Goal 16.3 is to "provide access to justice for all and build effective, accountable and inclusive institutions at all levels". Thereafter, the UNODC and UNDP conducted the Global Study on Legal Aid ('Global Study')[28] with a view to ascertaining how the obligation to provide legal aid to citizens Member States, as well as individual experts, was improving the quality of legal aid services. The Study recommended that the State authority responsible for delivery of legal aid should consider "enhancing the quality of legal aid services, including by developing performance and qualification standards for all legal aid providers", and encouraged global sharing of experiences, lessons learned and good practices.

The European Union in turn, sought to create clear minimum standards for Member States of the European Union in the area of legal aid. In 2013, the European Commission adopted the 'Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings.'[29] Section 3 on effectiveness and quality of legal aid establishes that "Legal assistance provided under legal aid schemes should be of **high quality** in order to ensure the fairness of proceedings. To this end, systems ensuring the quality of legal aid lawyers should be in place in all Member States." Again Directive 2016/1919 of the European Parliament and of the Council dd. October 26, 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in the European arrest warrant proceedings[30], establishes in Article 7 'Quality of legal aid services and training' that:

1. Member States shall take necessary measures, including with regard to funding, to ensure that: (a) there is an effective legal aid system that is of an **adequate quality**; and (b) legal aid services are of a quality **adequate** to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession.

A second strand in the quality assurance debate comes from the economists' demand that state funding for public services requires some kind of evidence that the public is receiving (1) services of an adequate minimum standard and (2) value for money for these funds, and this includes legal aid. Quality evaluation work in the medical and legal worlds of professional practice has tended to focus on four main measures or proxies for quality: Inputs, Structures, Process and Outcomes.[31]

Input measures refer to those things that the professional brings to practice before the work begins, such as educational attainment and training received. These measures are relatively easy to collect, but because they are indirect measures of quality at best, they generally have the least to offer.

Structure refers to the management of inputs in order to create an appropriate operating system and environment for the lawyers and other workers which leads to a good and effective work product for clients. However, such

27. Резолюція Генеральної Асамблеї 67/187 під назвою «Принципи та керівні положення Організації Об'єднаних Націй, що стосуються доступу до правової допомоги в системах кримінального правосуддя», додаток.

28. UNODC, UNDP, Global Study on Legal Aid, Global Report (2016), available online at http://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid_Report01.pdf Country Profiles are available at http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/global-study-on-legal-aid.html [hereinafter: Global study on Legal Aid].

29. Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings.

30. Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016. Available online in 24 languages at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L1919

31. See Richard Moorhead, Avrom Sherr, Lisa Webley, Sarah Rogers, Lorraine Sherr, Alan Paterson and Simon Domberger, Quality and Cost, (2001).

measures only facilitate the quality of performance in other aspects of professional practice, but they do not ensure it.

Process measures focus on the manner the actual work is done by the service providers and encompasses the appropriateness of such legal work, its effectiveness, its closeness to the stated wishes of the client (so far as these may be respected in all the circumstances) and therefore the lawyer's competence.

Outcome measures, as the name suggests, focus on the outcome or the result achieved by the service provider. This is perhaps the hardest of the four to assess since measures of success tend to be partly subjective.[32]

1.2 Methods of measuring quality

Assessing Input or Structural measures is normally relatively straightforward although issues of judgement can present themselves e.g., how to measure "experience" or what constitutes "adequate supervision". Process measures are less easy. One relatively common third-party measure of the process and outcome variables is the use of client satisfaction questionnaires or surveys.[33] These rely on the clients' perceptions of the quality of service they have received. However, the necessary gulf in expertise between the lawyer and the client (particularly the first-time client) creates an information asymmetry between them. Laypersons can tell if their lawyers have been attentive, sympathetic, empathetic and accessible - all important matters to the client – but they often cannot judge how good the outcome which the lawyer achieved for them was, or whether it took too long to achieve it or cost too much. To assess these requires the very knowledge that the client goes to the lawyer for in the first place. Civil legal aid clients will rarely know the relevant law or its application in practice or have any familiarity with courts or tribunals.

Clients therefore can safely be relied on to assess aspects of the client care which they have received, however, when it comes to assessing the quality of the results achieved in their case, the ability of professionals to influence client expectations through 'image management' renders them less useful as an objective measure of quality. In any event, such surveys tend to lead to relatively little variation in client responses – satisfaction rates tend generally to be quite positive, as far as their own lawyer is concerned.

The UN global study of legal aid found that the most frequently used measure of quality is the level of complaints raised against legal aid lawyers.[34] Yet where the complaint is made by a client it suffers from the same weakness as client satisfaction surveys – the problem of information asymmetry. Secondly, complaints against lawyers, in general, do seriously underreport the degree of dissatisfaction of consumers with their lawyer.[35] Third, complaints focus on the work of individual lawyers in particular cases. Quality assurance measures can look at a random cross sample of a lawyer's work to see whether any mistakes or weaknesses are systemic. This is a proactive approach to quality. Complaints are always reactive or retrospective.

32. See Richard Moorhead, Avrom Sherr and Alan Paterson "Judging on Results" 1 International Journal of the Legal Profession 191,200 (1994) and Tamara Goriely, "Contracting in Legal Aid: How much justice can we afford?", Proceedings of the International Legal Aid Group conference, Edinburgh, 1997.

33. A discussion of international studies using client satisfaction surveys as part of the assessment of the quality of poverty legal services can be found in Alan Paterson, Professional Competence in Legal Services (1990). See also Richard Moorhead, Avrom Sherr and Alan Paterson "What clients know: client perspectives and legal competence" 10 International Journal of the Legal Profession 5-35 (2003). The Free Legal Aid System in Ukraine: The First Year of Operation Assessment report also drew on client assessments at p. 47. A more up to date survey of client satisfaction amongst users of FLA can be found in the 2019 QALA client satisfaction survey: (http://qala.org.ua/wp-ontent/uploads/2019/09/1-16_UA.pdf)

34. UNODC Global Study on Legal Aid (2016)

35. Office of Fair Trading (2013) "Economic Research into Regulatory Restrictions in the Legal Profession", London: Office of Fair Trading: http://www.oft.gov.uk/ shared_oft/reports/professional_bodies/OFT1460.pdf

1.3 Peer review

The complexities and challenges in measuring the quality of legal services set out above have led many scholars to the conclusion that to assess effectively the quality of service provided by a lawyer requires a professional peer who is not a competitor of the lawyer being assessed (peer review).[36] Thus, the research[37] has established the reliability and validity of peer review demonstrating that it is likely to be the best available means for assessing the quality of legal work. It also has the merit of not merely providing a snapshot of the quality of work of legal aid lawyers at any given time, but enabling quality standards to be continuously enhanced.

Peer review has been defined in the literature[38] as "evaluation of the legal service provided against specified criteria and levels of performance by an independent lawyer with significant current practical experience in the areas being reviewed". This definition highlights a number of key points: the assessment is against set criteria. These in turn are derived from professional standards which are to be found in good practice manuals, from expert lawyers, stakeholders and professional associations (with final input by peer reviewers). Second there has to be a common and consistent marking scheme with a limited range (to encourage marker consistency). Third, the reviewer must be independent of the lawyers being assessed. This prevents the workmates, supervisors and competitors in the same geographic area or any practitioner they are related with, from conducting a peer review of a practitioner. Finally, the assessor must be a genuine peer, i.e., he/she has to have current practical experience in the same field of law as the lawyer being assessed. This excludes judges, prosecutors and former practitioners whose knowledge is no longer current from conducting peer reviews.

However, although peer review is the most effective way of measuring process and outcome variables it can be argued that a well-rounded quality evaluation is one that draws on a range of measures and procedures. The peer review studies conducted by Professors Sherr and Paterson and their team took this approach with peer review containing the basic assessment of process and outcome measures reinforced with model clients (actors who attended legal aid offices presenting an identical case in each office) and client satisfaction surveys. However, their results showed that neither model clients (which required peer review in any event) nor client satisfaction surveys added greatly to the wealth of information provided by the peer review.

Accordingly, when peer review was implemented in England and Wales and in Scotland over seventeen years ago, it was implemented as the principal quality assurance vehicle (although compliance audits are also conducted by non-lawyers of law firms' structural measures and file keeping and there are also occasional general surveys of public satisfaction). However, as will appear below, South Africa and Chile rely on file review by peers augmented by client satisfaction surveys, complaints data, independent audits, observation of courtroom performances and self-assessment reports. Their approach therefore relies on a basket of quality assurance measures to produce a report on quality of work done by the legal aid lawyer.

Peer review was first applied to legal aid lawyers, nearly twenty years ago, in the UK. Chile, South Africa and the Netherlands followed thereafter with pilots in Ontario, Finland, Moldova and Ukraine.[39] Recently, peer review has been used in programmes in Belgium, China, Georgia, Moldova, New Zealand and Quebec, and there have been preliminary discussions in Canada, Australia and Ukraine. Only in a handful of jurisdictions the peer review has been applied to lawyers or para-legals working in the NGOs or CSOs. These include, England and Wales, South Africa and Scotland.

36. John Boersig and Romola Davenport, "Distributing the legal aid dollar- effective, efficient and quality assured?" ILAG conference paper, Ottawa, 2019

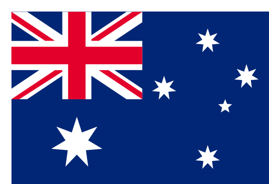
37. A. Sherr et al., Quality and Cost (London: The Stationery Office, 2001)

38. Paterson, A., "Peer Review and Quality Assurance" 13 (2007) Clinical Law Review 757; Sherr, A. and Paterson, A. "Professional Competence, Peer Review and Quality Assurance in England and Wales and in Scotland" 45 (2008) Alberta Law Review 151

39. A pilot peer review of FLA files was conducted for the report Free Legal Aid System in Ukraine: The First Year of Operation Assessment Ukrainian Legal Aid Foundation, International Renaissance Foundation and Ukrainian Helsinki Human Rights Union, URL http://issuu.com/irf_ua/docs/hr-2014-4_fin_engl/1).

2. National Summaries

2.1 Australia[40]



There are eight Legal Aid Commissions (LACs) in Australia (one for each of the six states and two territories). Each LAC is a statutory body independent of their Ministry of Justice. Legal aid is delivered through a mixed model, meaning that work is distributed between salaried in-house lawyers and private practitioners working at legal aid rates. Nationally in 2017-18, 29% of grants (43,723 cases) were dealt with in-house, while 71% (106,517 cases) were assigned to private lawyers. The mixed model in Australia is considered to have clear advantages: "Significantly, in-house lawyers provide important quality and price benchmarking, particularly for high volume services, while also specialising in areas of law that are generally not profitable for private practitioners. Conversely, private practitioners allow LACs avoiding conflicts, have a comprehensive spread of services (geographically and by law type), and allow for choice of lawyer in some cases. Thus, the challenge for LACs is to develop a sustainable and reliable model of work allocation that ensures a consistent level of quality and value for money whether clients receive legal services in-house or externally."[41]

LACs in Australia utilise a variety of quality control systems. The most commonly used systems are:

- Supervision and Mentoring: all in-house legal aid lawyers receive supervision, mentoring, and training. LACs maintain a balance of junior and senior lawyers, and use this structure to supervise and develop junior lawyers. In-house supervisors observe junior lawyers in court, review in-house files, and periodically hold case conferences to evaluate progress on large matters. Practice managers within LACs ensure quality through a range of activities including file audits, pre-trial conferences, in-court observation, judicial feedback, and feedback from in-house mentors. Through these activities, practice managers can ensure that all legal aid lawyers are performing high quality work while also fostering a culture in which lawyers strive to improve their own skills and those of their colleagues.

- Complaints: Legal Aid Commissions have complaint mechanisms which allow clients and community members to raise quality concerns about legal aid lawyers. These complaint mechanisms operate in addition to the Law Society and Bar Association complaint functions applied to all lawyers.

- Audit/Peer review: all jurisdictions undertake a degree of auditing/peer review of files. However, this is slightly misleading. Although the LACs have procedures in place for auditing private practitioners, in most cases the procedures do not measure the substantive quality of legal work. So, all LACs have the authority to perform file audits with respect to quality, but in practice this power is rarely used. Most audits instead focus on procedural matters such as the quality of file maintenance and compliance with billing procedures. In general, financial and performance audits are carried out by non-legal staff who are not in a position to assess the quality of work done. Audits are mostly carried out on a pass/fail basis, and in some cases, practitioners do not receive feedback if they pass the audit. Moreover, in order to pass a routine audit, the practitioner must keep the file in a way that shows evidence of key events, including:
  - That the lawyer made appropriate and timely contact with the client regarding their case;
  - That the lawyer communicated important matters to the client in an appropriate way; and
  - That the lawyer actually attended the court events.

"Consequently, a practitioner who undertakes the required work but performs the work to an unsatisfactory standard (for example, by giving inaccurate advice) may still pass a

40. Information obtained from ILAG National report (2019), Global Access to Justice Report (2020) and John Boersig and Romola Davenport, "Distributing the legal aid dollar- effective, efficient and quality assured?" ILAG conference paper, Ottawa, 2019.

41. John Boersig and Romola Davenport, "Distributing the legal aid dollar- effective, efficient and quality assured?" ILAG conference paper, Ottawa, 2019

routine audit. In this way, routine audits may sometimes fail to protect clients from low quality lawyers. This raises questions about the utility of these audits – in some ways, an audit process that only has a punitive function is a missed opportunity to promote continuous improvement and reward good practices. Substantive reviews of quality are rarely undertaken because of their high cost and low availability of senior lawyers capable of performing such a review."[42]

In recent years several LACs have begun to introduce peer review of files in order to monitor quality. Thus, Victorian Legal Aid (VLA) has developed detailed practice standards for each area of law,[43] which are then assessed by quality audits of files from different areas of law.[44] All panel practitioners may be subject to a quality audit, but in practice VLA undertakes a risk assessment before selecting panel practitioners to audit. This includes considering:

- practitioner experience
- practitioner or firm's volume of work and case costs
- other factors such as complaints, compliance check data, past performance and/or the outcome of a previous quality audit.

As VLA selects practitioners to audit based on a risk-based model, practitioners who achieve consistent excellent outcomes in their audits will be audited less frequently. Practitioners then receive feedback on their compliance with the practice standards and aggregate results are published on the VLA website.[45] There is a fourfold outcome grading from the audit:

1	Good practice – a practitioner's files demonstrate a very high standard of service quality with few practice standard issues identified
2	Good practice and education – a practitioner's files demonstrate a generally good standard of quality with some practice standard issues identified
3	Education – a practitioner's files demonstrate that you meet the minimum standard for legal practice work but with several issues identified
4	Quality Improvement Plan (QIP) – a practitioner's files have not met minimum standards with significant issues identified. The Quality Audit team will meet with the practitioner and develop a plan to assist the practitioner improve his/her service quality.

Similarly, Legal Aid Western Australia (LAWA) has implemented an Audit and Compliance Policy under which the LAWA undertakes integrated quality and compliance audits on private practitioners.[46]

2.2 Belgium

The legal aid office checks each legal aid provider's work after its completion for the purposes of qualification for payment. This is done through file audits by fellow lawyers. They assess whether the legal aid assignment has been carried out properly (quality control) or has not been carried out at all (effectiveness). It is an inspection to check that the legal aid lawyers have done what they needed to – a kind of "light-touch" review of the content and process steps that have been taken, rather than a rigorous, systematic and criteria-based peer review of the file. Additionally, there is "a cross control" by a group of auditors. This group consists of Flemish and French barristers who review a certain number of completed assignments depending on their field of specialisation. Where the auditors disagree about a case, the president of the Flemish or French legal aid office will make the final decision thereon.

42. John Boersig and Romola Davenport, "Distributing the legal aid dollar-effective, efficient and quality assured?" ILAG conference paper, Ottawa, 2019

43. Victorian Legal Aid, 'Section 29 Panels Conditions' https://www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels/panels-conditions

44. Victorian Legal Aid, 'Quality Audits' https://www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels/panels-conditions/quality-audits

45. For example: https://www.legalaid.vic.gov.au/about-us/news/indictable-crimes-first-quality-audit;
https://www.legalaid.vic.gov.au/about-us/news/child-protections-first-quality-audit-solid-result

46. Legal Aid Western Australia, Audit and Compliance Policy (December 2018) https://www.legalaid.wa.gov.au/sites/default/files/Audit_and_Compliance_Policy.pdf

2.3 Canada[47]

Canada is a country with 13 different legal aid plans ranging from judicare to salaried with most being mixed delivery programmes. Expenditure per capita has suffered as in Australia although it is a jurisdiction that is not afraid to innovate, particularly British Columbia where technology is playing an increasing role. Although Ontario experimented with a very early pilot on peer review using the UK model, peer review has yet to take off there. There is supervision of staff attorneys although it has not developed into a quality assurance programme as in South Africa or Chile. Due to the impact of COVID the interest in peer review and quality assurance has slipped into the background for the time being. That said in Quebec the Bar has introduced a variant on peer review as part of its quality monitoring. The Bar has established a Quality Services Office which is linked to, but separate from, the Discipline Office. The Quality Service of the profession groups the activities of the professional inspection, compulsory continuing of education as well as prevention and support to the profession. The Office is responsible for professional inspection visits and these now cover the quality of performance. The Office conducts inspection visits for accounting purposes, however there is a quite separate stream of professional inspection visits which are designed to assist lawyers to work more efficiently and to provide the highest quality services to their clients. The selection of members of the bar to be inspected is done randomly and announced through a letter to the lawyer. A self-assessment form has to be completed before the visit and the office may provide a list of recommendations following the analysis of the self-assessment form. The inspector has to be working in the same field of practice as the lawyer visited and the date of the visit is chosen by mutual convenience (approximately 4-6 weeks ahead).

During the three hours of visit the inspector will analyse 3 aspects of the lawyer's practice in the presence of the lawyer:

1. compliance with record keeping standards,
2. the lawyer's knowledge and skills,
3. administration and trust accounting.

The lawyer's competence is assessed in particular by the analysis of his files as well as by his answers to the questions the inspector puts in his fields of practice. A professional inspection report is completed by the inspector according to the standardised format. Thereafter, the Quality Service Office sends the lawyer a letter with recommendations for improvement. The Quality Office decides when the next professional visit is merited and support is to be offered to the lawyer in the shape of training, accounting and supervision. If inspection detects any misconduct, the latter is reported to the Discipline section of the Bar.

2.4 Chile[48]

The Public Defender´s Office (PDO) is a mixed delivery public legal aid service, covering all aspects of criminal defence in Chile, but does not handle civil cases. The public defenders are either salaried staff in the PDO offices or private layers or firms who bid for a contract to do a share of the public defence work in Chile. In all, public defenders typically handle 320,000 cases a year with 25% done by the salaried staff and 75% by private lawyers under contract. Established in 2001 the PDO was unusually well resourced and therefore in a position to develop a very elaborate, sophisticated and robust quality assurance system which pivots around peer review of public defenders' files (whether staff attorneys or private practitioners). At the heart is peer review of public defender files (partly influenced by the UK model of peer review), however it also includes external audits (largely quantitative and financial) complaints and self-assessment reports from the public defenders. In addition, the PDO now collects criminal defence indicators, service statistics and the results of regular user satisfacto-

47. Information derived from National Report to ILAG (2019) and a paper presented at CCBE seminar in Lisbon November 2019 by Maryse Belanger "Controlling Jurisdiction to Protect the Public: The Professional Inspection Visit Process"

48. Information derived from Ms Sofia Libedinsky of the PDO, Santiago and ILAG conference papers in 2015 and 2019 by Andres Mahnke and Sofia Libedinsky.

ry surveys. Today the PDO focuses on the integration of all these mechanisms into the management and operation of the public defender service to promote quality in defence.

The starting point was the establishment by the PDO of the general standards for the defence against which the performance of the public defenders would be assessed. The reviewers responsible for conducting the peer reviews are all former public defenders chosen for their skill and expertise. They are full time employees of the Department of Control, Evaluation and Complaints (DECR) which is based in the PDO headquarters in Santiago.

Each year a schedule for peer reviews is drawn up reflecting (a) any thematic issues that have arisen in a particular zone which require monitoring, and (b) a risk-based analysis for a prioritisation process. Risk factors that are taken into account are requests of the regional public defender, previous inspection results, length of time since last review, complaints, sanctions, being a new recruit and other potential risk factors. Prioritisation is required to optimise the use of a scarce human resource - 13 professional full-time reviewers who have to review the work of 640 public defenders. Once the schedule is established the peer reviewers examine background information for the local/regional office to be assessed and select 15 case files to form the sample for examination and outline the aspects they will review in more detail at the fieldwork stage. At the field work stage, the peer reviewer will visit the public defender who is being assessed to request 15 files, interviews the public defender, interviews the clients in the cases who are in prison, attends court hearings to observe the lawyer and requests audio records from previous hearings involving the public defender. At the end of the visit the peer reviewer will hold a feedback interview with the public defender and if there are problems will communicate those to the district defender and the zone inspector chief. The four grades are Compliant, Compliant with minor deficiencies, Compliant with major deficiencies or Insufficient.

The peer reviewer completes an evaluation report assessing the compliance by the public defender with each of the criminal defence standards which thereafter can be fed into the national database. Every peer review report is reviewed by another peer (from a different zone office) to cross check the application of criteria and to provide a means of standardising the work of different zone offices. The report is also approved by the zone inspector chief. Public defender who has been assessed can appeal the assessment to the DECR. The sanctions for an Insufficient outcome in an assessment include technical supervision or removal from the legal aid register or dismissal as a public defender. At the end of each year every zone office issues a report of the overall findings of the peer reviews conducted in that zone during the year and identifies any recurrent findings. In 2014, the peer reviewers completed 271 inspections (156 were scheduled, 110 were thematic inspections and 5 were reactive). In all, they examined 2,713 files (2,337 in scheduled reviews, 345 in thematic inspections and 31 in reactive inspections). In the last three years the statistics is as follows:

Classification	2018	2019	2020[49]
Compliant with standards	46	52	13
Minor deficiencies	28	39	6
Major deficiencies	29	21	4
Insufficient	7	3	
Total Reviews	**110**	**115**	**23**

49. Reviews have been suspended due to COVID-19.

In 2018, the PDO decided to augment the peer review system, by a new quality assurance mechanism based on expert opinion, called "peer audit". It consists in hiring external recognized private lawyers with vast experience in criminal work, former judges or public defenders or prosecutors, so they could assess the public defenders' performance. These professionals have to attend hearings during 15 days, so they could obtain a direct feel for the dynamic of hearings in different areas. In addition, they have to check 50 cases, listen to audiotapes of hearings, interview clients, etc. In each report they must write an opinion regarding the performance of public defenders that took part in those cases and give a global opinion regarding each case defence performance. It allows the PDO to have information of the public service (quality assurance) from an expert point of view, independent and with vast experience. The peer audit and the peer review cover different aspects of service.

Peer review looks specific public defenders, selected on the basis of risk as stated above. Peer review also looks at recently hired public defenders and at defenders that have not been inspected in a long time. So, this instrument focuses on a segment of the public defence service's performance, but not on a region or a part of the country, in particular. On the other hand, the peer audit is designed to look at an area or region and according to that samples of cases are devised, which allow DECR to have a bigger look and understanding of the defence service deliver in an area. In this audit, caseload is analysed and the review looks at the work of all the lawyers in an area rather than one defender in particular. These two systems are complementary in their aims because the combination provides DECR with a global perspective of public defence performance in areas, regarding different steps of the process, types of cases and more in deep analysis of the performance of individual public defenders as well. There is one final advantage of the external peer auditors – they can in part remedy a perceived weakness that had emerged in the internal peer review programme, namely that that the peer reviewers employed in the DCER, whilst originally highly experienced and esteemed practitioners are now quite a few years away from current practice.

In 2019, peer audit revised 800 cases leading to 552 observations covering more than 160 public defenders. For each of the zones there were 15 days of peer audit looking at more than 100 hearings per zone, 1,600 hearings in all. The PDO is working to integrate the peer review system with peer audits: This is being done with the objective of complementing the results of both regarding quality assurance. The PDO has a catalogue of conducts that give poor results and deficiencies in both systems, and is endeavouring to incorporate both in an electronic platform that will allow the PDO looking at peer reviews and peer audits together.

In terms of other quality measures, the PDO collects data on a range of indicators throughout the criminal process. Some of these indicators are incorporated in the contract conditions for private lawyers in order to be able to pay them for the performance of their duties. These include (a) control indicators e.g., those that measure the regularity of the service and accomplishment of the service such as % of interviews with accused in bail, % of interviews with accused in jail, time of data entry into the system, and correction of the data entry to the system and (b) variable payment indicators e.g., those that illustrate activity of the advocate above the norm and encourage a behaviour that is considered positive to achieve. Examples of these are: % of favourable results in oral hearings, % of favourable results in abbreviated trial, % of not guilty pleas in simplified procedure, % of favourable results in simplified judgment, % of reviews of pre-trial custody.

2.4.1 External Audits of client satisfaction

Since 2009 the PDO has been conducting periodic customer satisfaction surveys, measuring the performance of its lawyers. A standard questionnaire is used to enable comparisons over time. Today the measurements are made quarterly, and the results are shown for zones and types of work enabling targeted remedial work to be done. This information has enabled DECR to determine which are the relevant variables that best measure client satisfaction (for each cluster) and regarding this information to recommend specific improvements that will enhance the client experience.

2.4.2 Quality Management

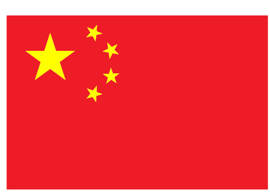
The PDO has developed a Defence Quality Management

Model, and within it a Global Quality Index which is a tool that combines qualitative and quantitative measurements associated with the dimensions of quality and which integrates all the various quality measures through a software package which enables the PDO to identify the potentialities and weaknesses in the management of services in the zonal PDOs.

2.4.3 COVID-19

Peer review work has been reoriented to work remotely. From the PDO information system the PDO is checking the number of clients in pretrial detention, looking at clients' statements, their prior records and the audio tapes of hearings.

2.5 China[50]



In the past 15 years primary and secondary civil legal aid have expanded dramatically. Primary help is provided through legal aid offices spread across the country with the target of allowing the whole population access to such an office within an hour. The offices receive clients off the street and run a call centre which is part of the national hot line service "12378" which is staffed by private lawyers acting pro bono. Legal aid service providers are qualified lawyers; full-time personnel of qualified legal aid institutions and grass-roots legal service workers can also participate in legal advice and civil legal aid services. However, local government may set up different admission mechanisms for legal aid providers according to different types of cases.

At present, a unified national quality supervision, evaluation and guarantee system has not been formed. In 2017, the National Legal Aid Centre (NLAC) of the Ministry of Justice built a National Centre of Legal Aid Case Quality Evaluation and Demonstration at the Hangzhou Legal Aid Centre, actively promoting the construction of a case quality evaluation system and a case quality control system, and improving peer evaluation standards. Generally speaking, the quality supervision of legal aid is the responsibility of legal aid centres around the country. The legal aid centre examines and supervises the case by means of case file evaluation, attendance at the trial, follow-up of recipients, evaluation by judges and prosecutors, etc.. Among them, case file evaluation is the most important means of supervision. That is, the legal aid centre will make requirements for the filing materials submitted by legal aid lawyers (e.g., they must submit review, interview transcripts, defence statements, etc.) in criminal cases; the staff of legal aid agencies will evaluate the quality of their aid services and grant aid subsidies accordingly through the evaluation of these archived file materials. Peer evaluation system has gradually become a popular means of quality testing.

NLAC began pilot peer reviews of files using the UK system of peer review in around 2014 having received information as to the operation of the UK system through attending International Legal Aid Group (ILAG) conferences. In the early stages of the China–EU Access to Justice Programme an international legal aid seminar was held in Beijing from which it emerged that implementation of the UK style peer review had encountered problems. Accordingly, under the aegis of the China-EU Access to Justice programme Professor Alan Paterson led an all-China workshop on Quality Assurance in 2015 and next two years (with Professor Avrom Sherr) he led three China-wide training programmes for administrators and peer reviewers from all across China in UK style peer review for NLAC.

Early pilots had revealed that Chinese Legal aid lawyers and their files tended to concentrate on judges and courts and less on the needs and expectations of clients. The leaders of NLAC concluded that they would like Chinese legal aid lawyers to emulate the development in the US and the UK of the last 20 years, namely the advent of "client-centred lawyering". This change of lawyer culture from "the lawyer knows best" had taken nearly two decades in the West but NLAC was hoping that the peer review of legal aid files could be used to embed a new culture somewhat more quickly. By developing the peer review

50. Information derived from China National Report Global Access to Justice Project 2020, British Council, ILAG conference papers 2015, 2017 and 2019.

criteria in China along UK lines the lawyers' files would be assessed against criteria that focused on interaction with the client, taking the latter's instructions and the advice given to the client. The decision was taken to introduce the UK style peer review with criteria modelled on those from the UK (and Scotland in particular) and the Scots marking system, in two pilot provinces, Henan and Shanxi, funded by the China – EU Access to Justice programme. To facilitate this a peer review training workshop was organized in Zhengzhou, Henan province in March 2015 led by Professors Paterson and Sherr, two architects of the operation of the UK style peer review. Primary focus of this workshop was to demonstrate how to train peer reviewers and to carry out initial training of those reviewers in the UK style on closed Chinese files. Following this workshop, the lawyer reviewers from Henan and Shanxi carried out a further exercise using modified Scots criteria and the Scots marking system on 100 Henan and 100 Shanxi closed civil legal aid files in May 2015. This acted as a baseline setting exercise for subsequent peer review assessments in these provinces. The Professors returned to Beijing in June 2015 to conduct further training. This workshop reinforced the conclusion from March 2015 Zhengzhou workshop that the UK style peer review training for Chinese legal aid lawyers can be effective and that modified Scots/UK style criteria and the Scots marking system can be applied successfully to Chinese files.

The next step for the NLAC was to test the modified criteria and marking scheme in ten provinces. In addition, Professors were commissioned to produce a toolkit to assist the NLAC in rolling out peer review in provinces in the future. Entitled "Peer Review of Legal Aid Files: A Toolkit for the National Legal Aid Centre in China" it was published by the NLAC and the British Council for the China EU Access to Justice programme in 2016.[51] It provides an A to Z of steps and institutions required to introduce and run effective peer reviewing modelled on the UK approach.

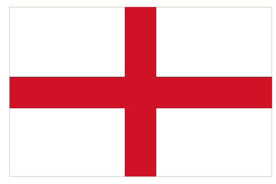
In August of the previous year the NLAC indicated that that civil legal aid quality criteria had been presented to the All-China Lawyers' Association (ACLA), who were 'very happy and impressed with them.' The NLAC went on that whereas the old peer review criteria which had been used in the original [pre-EU] pilot peer review programme 'could be counted in the tens (of requirements) but without addressing what the lawyer is actually doing on the client's behalf, the new criteria 'focus on the relationship between the lawyer and the client. There are only 10 plus criteria, but all focus on what the lawyer does for the client'. New criteria were published in October 2015 and, although a number of small changes had been introduced, a set of 13 criteria endorsed by the ACLA with enthusiasm, were not substantially different from the Scottish/UK based criteria which had been refined in the Zhengzhou and June 2015 Beijing workshops. At the next workshop in Beijing in March 2016 feedback was obtained from the reviewers trained in the previous year, who were receiving refresher training. One of them observed:

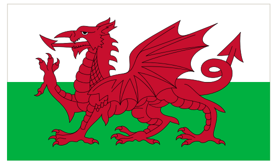
"13 criteria basically addressed two major aspects: the attitude and skills of the lawyer. Being "client-focussed" is an ethical issue, he said. Attitude was demonstrated in the file, the notes made and evidence got. Advocacy before the court and court performance could be assessed from the degree and quality of preparation for trial and whether the process and procedure were properly followed. Skill covered everything that was done, not only highlighting the more obvious areas of work."

In 2016, the Ministry of Justice extended the scope of the trial to 15 provinces with its own resources. A national pool of 130 peer reviewers has been established who provided cascaded training to many more reviewers and in 2017, the trial was further extended to include all provinces. Paterson and Sherr's training seminars and plenary lectures culminated in the UN/ China International Seminar on Access to Legal Aid in Criminal Justice Systems, Guangzhou, China January 2018. It was announced then that the decision had been taken by the Ministry of Justice to extend civil peer review to all of China and that pilot initiatives in criminal legal aid peer review had commenced. It is understood that peer review is now being practised in every province in China, but more so in the wealthier provinces.

51. (British Council and NLAC, 2nd November 2016 76pp)

2.6 England and Wales[52]





England and Wales are an overwhelmingly judicare model of legal aid delivery which has endured very substantial cuts in the last decade but nevertheless retains the largest legal aid budget globally of around £1.6 billion. It has only 30 or so salaried public defenders doing criminal legal aid no more than 150 salaried lawyers attached to law centres and several thousand solicitors attached to firms that have a contract with the Legal Aid Authority and a few hundred private barristers also doing legal aid. In the last 20 years England and Wales have moved from a situation where almost any lawyers registered with their professional body could provide legal aid to one in which a much smaller number of lawyers who specialised in legal aid work, have semi-exclusive contracts with the legal aid authority to provide a set amount of legal aid in a particular geographic area and field of law.[53] Neo-liberal economic ideas had become fashionable as well as a belief that many lawyers who did legal aid work on a judicare (case by case) basis were guilty of supplier induced demand (doing unnecessary professional work in cases at the expense of the state). Secondly, the elected right-wing UK government was committed to marketizing public services by entering into contracts with providers which were awarded an exclusive contract after a price tendering contest (usually guaranteeing that the cheapest, poorest quality bid would win). For both reasons what was needed was a robust method of assessing the quality of professional work. Accordingly, in 1993 Professor Avrom Sherr and Richard Moorhead from Liverpool University and Professor Alan Paterson from Strathclyde University were commissioned by the English Legal Aid Board to provide a report[54] on assessing and developing competence and quality in legal aid lawyers. That time there was no reliable, verifiable model for such an assessment. This report drew on work in other disciplines to demonstrate: (a) the potential for file auditing methods for assessing quality, (b) that performance was a continuum (at a time when quality in a professional context was seen as binary phenomenon), and (c) the difficulties in identifying reliable proxies for quality in legal services. In 1998 the same team was again commissioned by the Legal Services Commission (LSC) of England and Wales to evaluate the quality of work done by the lawyers and the 'not for profit' (CSO) sector, who held new legal contracts for civil work that had been allocated by the LSC.

The research[55] examined a range of quality measures including peer review, model clients, client satisfaction surveys and outcomes and tested them against each other on a substantial scale for the first time in a legal context. The fieldwork and analysis established the reliability and validity of peer review (with appropriate criteria, marking frameworks and training of assessors) demonstrating that it was likely to be the best available means for assessing the quality of legal work. Paterson and Sherr define **peer review** as "the evaluation of a service against specified criteria and levels of performance by an independent person with significant current or recent practical experience in the areas being reviewed."[56] The criteria referred stem from professional community, and consistent marking scheme is needed to reduce reviewer variation, and the independence of the reviewer avoids conflicts of interest. In practice reviewers in England and Wales are selected in open competition from the legal profession and there has never been a difficulty in recruiting candidates of calibre even though the position is part time and paid at legal aid rates. Finally, the assessor must be a genuine peer, i.e., he/she has to have current practical experience in the same field of law as the lawyer being assessed. This excludes judges, prosecutors and former practitioners whose knowledge is no longer current from conducting peer reviews. There was a recent scheme (QASA) designed to rank criminal advocates on a four-fold scale depending on the perceived difficulty of work (as in South Africa). This was not popular with the

52. Information derived from articles (see footnotes) and ILAG conference papers 2015, 2017 and 2019; LAA website.

53. In 2018, there were 2,800 contracts to provide civil legal aid, 360 to provide civil mediation and 20 to provide civil primary legal advice

54. Sherr, A., Moorhead R. and Paterson A., (1994) Lawyers- The Quality Agenda (London: HMSO/ The Legal Aid Board

55. A. Sherr et al., Quality and Cost (London: The Stationery Office, 2001)

56. Paterson, A., "Peer Review and Quality Assurance" 13 (2007) Clinical Law Review 757; Sherr, A. and Paterson, A. "Professional Competence, Peer Review and Quality Assurance in England and Wales and in Scotland" 45 (2008) Alberta Law Review 151 9

criminal lawyers or the judiciary (who would have been doing the assessment) and the scheme seems to have been quietly dropped. One difficulty with the scheme is that full time judges are not peers for criminal defence lawyers and in any event would not have accepted the level of monitoring for marker consistency that peer review in the UK requires.

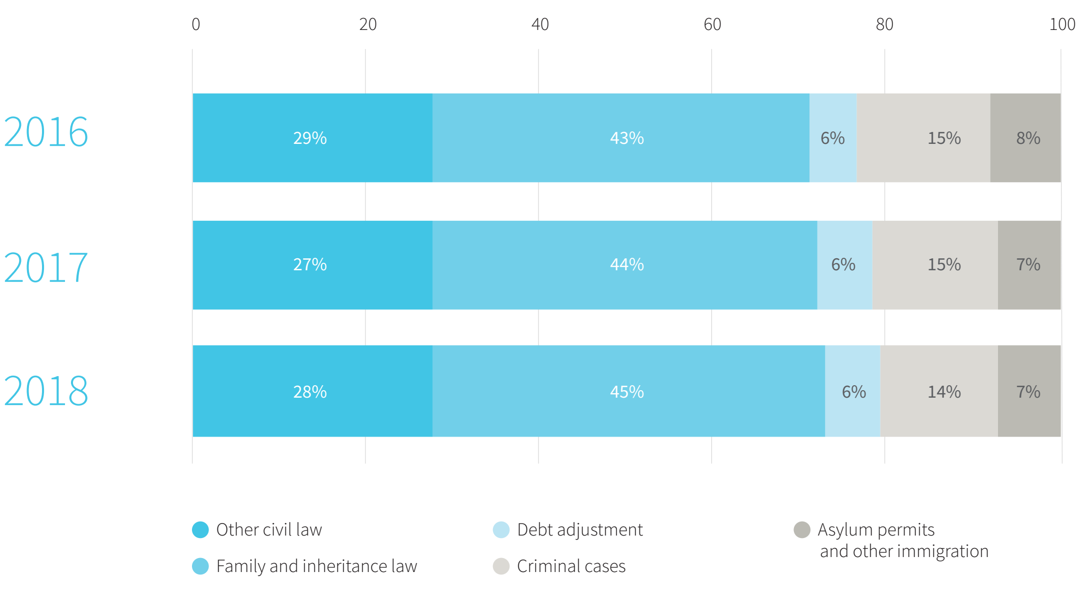
The Legal Services Commission (LSC) accepted 2001 report's recommendations on peer review and implemented a three-year rolling programme in 2003 (using reviewers trained and monitored by the research team) of a sample of contract holders in all areas of civil and criminal work in England and Wales. Peer Review in Criminal cases was then undertaken and tested as part of the Evaluation of the Public Defender Service in England and Wales in 2005-6. Peer Review was then rolled out to apply to all private law firms and law centres and CSO organisations that held a contract to provide legal aid and/or advice from the new body in charge of legal aid, the Legal Aid Agency (LAA) (located within the Ministry of Justice). In England and Wales quality assurance had come in as part of a deliberate attempt to reduce provider numbers. Nevertheless, the practitioners feared that this was just a start and that quality assurance might be the vehicle to drive further reductions in the supply base. In fact, the LSC and LAA have delegated much of the implementation of the scheme to Professor Sherr and the Institute of Advanced Legal Studies (London University) and relatively few firms appear to have lost their contracts as a result of peer review. The scheme covers 8 specialisations in civil legal aid and one in criminal legal aid. All contract holders are expected to be peer reviewed on a three-year rolling plan. Each year some contract holders are reviewed by rotation, some chosen randomly and some on a risk assessment basis. This allows the LAA to assess the standard of chosen legal aid providers as part of a risk-based approach to quality assurance. In both England and Wales and Scotland trained and experienced legal practitioners, recruited through an open procurement process, review, on an independent basis, a provider's random sample of case files. These files are then measured against an objective set of criteria.[58] In England and Wales reviewers are assessing the work of a whole law firm in a particular area of work. There is an expectation that work and files may be shared by more than one lawyer, that the work will be properly allocated, managed and supervised. Accordingly, the reviewers are asked to use their judgement not only about work on individual files, but also on the standard of management and training and supervision within the firm. In coming to an overall score, they will take all these issues into account as seen through a total of 15 files for the firm or contract holder. In England and Wales, the way legal aid supplier organisations are run is seen as a valuable proxy indicator of how likely it is their primary and secondary legal aid will be of a reasonable quality, hence provider-organisations, quite apart from maintaining high quality individual case-files, also need to comply with specific organisational standards.

2.7 Finland[59]

Legal aid is mixed legal aid system. The state legal aid offices employ around 210 public legal aid lawyers. Half of the public legal aid lawyers are members of the Finnish Bar Association. In Finland, there are around 2,100 attorneys (members of the Bar) and around 1,600 licensed lawyers who handle legal aid cases. This means that there are altogether around 3,800 lawyers providing legal aid services. Finland has 23 regional legal aid offices, which are located mainly in the vicinity of the district courts. There are 158 local legal aid offices, of which around half are service points where clients are met as required. There are around 420 employees in the legal aid offices, of whom half are public legal aid lawyers and the other half are legal aid secretaries who help legal aid customers and lawyers working in office. Public legal aid lawyers can handle all type of measures from legal advice to court proceedings. In matters that are not to be brought before a court (e.g., advice or drawing up of a document, such as an estate inventory or an agreed distribution of matrimonial

58. Details of the operation of English and Welsh peer review can be found on the website of the Legal Aid Agency (accessed 14th June 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620110/independent-peer-review-process-guidance.pdf

59. Information derived from ILAG national Report (2019) and directly from the MoJ.



property), legal aid is given only by public legal aid lawyers. In practice most criminal legal aid is dealt with by the private bar and the public legal aid attorneys do all the primary legal aid work as in Ukraine.

2.7.1 Work carried out by legal aid offices

As for quality assurance Finland did run a pilot peer review programme in 2009[60] but it is understood that its expansion was not popular with the Bar. Although staff lawyers contain a mixture of senior and junior lawyers and a junior lawyer may show his/her file to a senior colleague for guidance or feedback this happens irregularly on a voluntary basis reflecting the relationship between the lawyers. There is no formal supervision or mentoring programme. There is, however, a specific procedure in place to be applied in the supervision and direction of lawyers by the Courts who monitor the appropriateness of the procedure by way of active process management. To safeguard public funds, it is possible for the Court to reduce the lawyer's fee or remove it altogether if the quality of work has not met the set requirements. It is unclear how effective a quality assurance measure is, and whether it varies from judge to judge. In a bid to monitor the quality of public legal aid a client satisfaction survey was initiated in February 2017 with 26% response rate. The survey also included a self-evaluation questionnaire for lawyers. Again in 2018 a research project on accessibility and quality of the legal aid was initiated. The purpose of this research was to produce a reliable picture of the availability, quality and utility of the legal aid in Finland.[61] The research looked at public legal aid in general, asylum seekers' legal aid and financial and debt counselling services, and why and how legal aid should be further developed. According to the results, customer satisfaction on the services varied between those three sections. Asylum seekers had both positive and negative experiences. The customer experiences were largely positive in the responses of the clients of both public legal aid and financial debt counselling, although as stated earlier there are limitations in the ability of client satisfaction surveys to provide a rounded picture of the quality of service delivered by the legal aid lawyers.

60. The training was provided by Professor Paterson

61. Karoliina Majamaa, Kati Nieminen, Outi Lepola, Kati Rantala, Laura Jauhola,Risto Karinen, Tuomas Luukkonen, Jeremias Kortelainen, Towards High Quality Legal Aid Services (Prime Minister's Office, 2019)

2.8 Ireland[62]

Civil legal aid in Ireland is largely provided by staff attorneys based in legal aid centres run by the Irish Legal Aid Board, although in some cases civil legal aid is provided through solicitors in private practice who have agreed with the Board to provide services according to the prescribed terms and conditions and to be placed on a panel of solicitors maintained by the Board. In May 2020 the Board had 33 law centres employing 118 solicitors and 56 paralegals and 732 private lawyers on their 6 panels.[63] The staff attorneys generally have their files reviewed annually by their line managers (Managing Solicitors) who are required to submit their reports and these are logged centrally. The Regional Managers including the Director of Civil Legal Aid carry out reviews of files of managing solicitors and similar reports are completed and logged. The regional managers also carry out file reviews of private practitioners. The templates used are the same for solicitors whether they are in house or private practitioners. There is currently a plan being implemented to carry out the 2020 file reviews remotely due to the Covid-19 Pandemic. The Board does not operate an independent peer review system although all solicitor file reviews are currently undertaken by managers who themselves are solicitors (Managing Solicitors, Regional Managers, Director of Civil Legal Aid).[64] The Board's file review process is being updated and the Board is in the process of developing a number of other case specific file review templates. The review of files is a time-consuming activity especially if it requires site visits. In recent years, greater emphasis has been put on file reviews being carried out uniformly and ensuring that all law centre lawyers' files will be reviewed every year and private lawyers' files are reviewed at least every few years. The reviews have thrown up instances of underperformance which is followed up for in-house solicitors through the performance management system and for private practitioners' removal from the panel. COVID crisis may provide the impetus for remote file reviews as the way of the future. (For a detailed account of the File Review Process in Ireland see Annex A below).

In addition to file review within the Law Centre network, regional managers and their support unit utilise a nationwide case management system (EOS) to generate reports which give an indication of activity which is an aspect of quality. These include risk register (e.g., covering cases with statutory deadlines), inactivity report (where the case management is showing no substantial activity for a particular period), milestone late (showing the extent to which workflows are being updated) and age profile. These reports enable managers to identify cases which might need a closer look through the file review process and overall create a greater culture of transparency. These generated reports are not used for cases which are being handled by private practitioners who have a multiplicity of case management systems. The Board encourage client feedback and recent survey results have been highly positive. There is also a complaints process that will sometimes highlight quality issues that need investigation. The Board has an internal audit function which audits compliance with the Board's administrative procedures relating to the processing of legal aid applications. In recent years this audit process has been expanded. Typically, law centres can expect to be audited every two years.

61. Information derived from Irish National Report for the Global Access to Justice Project 2020 and direct from the Irish LAB.

63. 120 are members of more than one panel.

64. For further information on the file review system in Ireland see Annex A

2.9 The Netherlands[65]

The Netherlands is a country of mixed delivery of an unusual nature. Like Finland and Ukraine primary legal aid (advice) is not provided by the private Bar, but by salaried staff employed under the direction of the nationwide operating Legal Service Counters Organisation based in 30 lokets, located prominently in the high streets of towns distributed around the Netherlands such that almost all of the public is located within an hour of a loket.[66] Secondary legal aid (representation) however, cannot be provided by the lokets. It is provided by members of the Dutch Bar. Out of 17,830 advocates registered with the Bar in 2019, 6,883 (and a further 935 mediators) were authorised by the Dutch Legal Aid Board (LAB) to undertake secondary legal aid.[67] The LAB is external to, and independent of, the Ministry of Security and Justice and in 2018 issued 267,500 legal aid certificates for representation by private members of the Bar in civil and administrative matters. Legal aid in the Netherlands is usually provided by private lawyers/ law firms representing clients in cases dealing with the major fields of legal aid: criminal, family, labour/employment, housing, social security, consumer, administrative, asylum and immigration. To be entitled to accept legal aid cases, private lawyers need to be registered by the LAB and comply with a set of quality standards. These standards are set by the Bar and the LAB including maximum and minimum numbers of legal aid cases handled annually. For most fields of law – criminal, mental health, asylum and immigration law, youth, family law, victims of crime, labour, social security and housing – additional terms are applied. The lawyer must both have adequate expertise and sufficient experience in that particular field. Also, a continuing legal education system exists, in which lawyers have to earn a certain number of study/training-points every year in order to keep themselves competent.

In the Netherlands, the role of the deans of the local bar associations is to liaise with all institutions, which helps to improve the communication in the whole system and to reveal problems in an informal manner. The deans collect all complaints. Information about the possibility to complain is published online and is easily found via google. Lawyers conduct customer satisfaction surveys themselves and in addition the LAB conducts such surveys regularly. The most recent survey took place in 2017 and showed that clients were generally satisfied with their lawyer. To judge whether lawyers do a good job legally, the LAB has asked other legal professionals (judges, prosecutors) to judge the work of lawyers, although this was not based on file review. This research shows that other legal professionals judge the lawyers' work mostly positively, though differently.

In the Netherlands, peer review was first considered in 2008 following a presentation by Professor Paterson and with the help of the Viadicte Foundation pilot peer review projects were established in 2009 (mental health) and in 2012 (social security). Ironically, the presentation had a role in persuading Dutch notaries to introduce peer review on a compulsory basis in 2009. The criteria and marking scheme in the pilots were largely based on the Scots model of peer review. With the help of the Viadicte Foundation Paterson provided training or led seminars in peer review on two further occasions in the Netherlands. The Dutch LAB preferred not to implement it simply for legal aid lawyers, encouraging the Bar as the whole to embrace re-validation of competence. Following a legal challenge based on lawyers' privilege legislation was eventually passed to overcome this problem. Today peer review is primarily in use with legal aid lawyers (and administered by the LAB) in the area of immigration and asylum law. In this field of law, the lawyers came to an agreement that clients are highly vulnerable and have little possibilities to complain if they were dissatisfied with the quality of the legal aid service by the lawyer as they are typically sent back to their home country after their application for asylum is refused. All lawyers decided on the implementation of the peer review system in a democratic vote and they also elect the peers who conduct the peer review; in order to do that the peers review the files of the lawyers regularly, attend court

65. Information derived from the Dutch LAB, Dutch national reports to ILAG (2019) and to the Global Access to Justice Project (2019) and from Guido Schakenraad of the Viadicte Foundation.

66. China has adopted a similar model for its local legal aid offices which are both call centres and drop in counters for the public.

67. On average, each legal aid advocate handled 56 cases in 2019.

sessions and monitors new asylum lawyers. However, the pilot project in social security is still running with seven firms on a voluntary basis.

Following a sustained debate involving legal profession and government a regulation was passed by the Dutch Bar Association requiring its lawyers since March 1, 2020 to take part in either peer review, group intervision/inter-collegial consultation (the lawyer can choose between the two). The LAB is not currently planning to expand the use of peer review but in its regulations for legal aid lawyers it requires the lawyers to evidence sufficient Continuing Professional Development hours to demonstrate their continuing competence. Lawyers who have participated in the peer review can deduct up to 4 hours from the total of 10 or 12 hours/points that they require to attain for continuing to deliver legal aid in a specialized area. In this way the LAB seeks to stimulate peer review. The Dutch Bar is also adopting more of a “hands off” approach and leaving it to the specialist societies of advocates in the Netherlands. Currently there are over 20 of these and a few have opted for peer review. Rather more have opted for the quarterly afternoon conversations between specialists in the same field (intervision). In the Personal Injury field, the specialist society opted for peer review which consists of a visit from a practising advocate in the field who inspects files and discusses the running of the firm with the lawyer being assessed. However, there is a victim’s organisation Victims Support, the Netherlands,[68] with many branches dealing with domestic abuse or criminal injuries compensation which has begun to use its market muscle to require that any lawyer who wants to do any work for a victim (usually a compensation case) must obtain a quality or kite mark from the victim’s organisation. This again consists partly of a peer review of the lawyers’ files. The victims’ organisation’s kite mark is attracting more followers than the specialist bar kite mark. It is not clear that either kite mark uses a set of rigorous criteria and a marking scheme.

In the Netherlands peer review in the version approved by the Bar is a form of structured feedback that relates to the legal assessment of a lawyer’s files by a reviewer. Given that the reviewer has access to the lawyer’s files, it is important that the reviewer is designated as an expert within the meaning of Article 26 of the Lawyers Act, (and registered with the DBA) so that the obligation of confidentiality regulated in Article 26 of the Lawyers Act was applied. It is important that both the lawyer and the reviewer reviewed, work in the same area of law, so that the legal content can be an adequate part of the assessment. In the conversation that follows the review there can be discussion as to which alternatives are possible or were possible in the handling of the case and what the lawyer can learn from this. In this way the quality of the handling of cases is promoted. Under the new provisions,

- any peer review takes place for at least eight hours a year, with a minimum of two hours and a maximum of four hours connected per day;
- the lawyer and the reviewer cannot mutually review each other;
- the lawyer and the reviewer discuss the issue of confidentiality prior to the review of what is discussed or viewed during the review;
- prior to the peer review, the lawyer performs a self-evaluation in preparation for the review;
- the review comprises at least five files selected by the reviewer in consultation with the lawyer;
- the review is concluded by a conversation between the reviewer and the lawyer; and the reviewer confirms in a report that peer review has taken place with a short, non-substantive, description of what has been discussed.

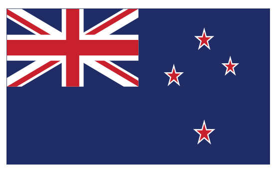
Requirements for reviewer:

- the reviewer has been working as a lawyer for more than seven years;
- the reviewer has demonstrable specific expertise in the area of law in which he does the review;
- the reviewer has followed a course of training in the field of peer review consisting of at least two half-days and a follow up meeting; and
- the reviewer has registered as such with the DBA.

Peer review in Asylum cases has been suspended because of COVID.

68. https://www.slachtofferhulp.nl/english/

2.10 New Zealand[69]



Following the Bazley review,[70] the New Zealand Ministry of Justice implemented a comprehensive audit process involving peer review of legal aid files. Section 68 (1) of the Legal Services Act 2011 says that the Secretary for Justice should establish, maintain and purchase high-quality legal services in accordance with the Act. A national quality assurance framework for legal aid was established to ensure that the service provided to clients is consistent across the whole country, so that everyone can have confidence in the quality of services provided by legal aid lawyers. It is based on file audits rather than observation, which assess the legal advice and representation provided to the beneficiary; management of cases, including the adequacy of documentation; compliance with the conditions of granting the legal aid and any amendments thereto; and the provider's service delivery systems. Although the country's community law centres are not part of the state legal aid programme, they also conduct file audits for the QA purposes. In 2019 there were approximately 1,600 'active' legal aid providers in New Zealand across all of their legal aid programmes but the MoJ can only carry out about 110 peer review audits per year. Those selected for review are chosen on the basis of a risk profile of each provider drawing on a combination of financial risk and risk to clients.[71] New Zealand has an 'approved' panel of auditors/lawyers (some of them in house) and they do the 'peer review' and measure performance against the UK style criteria and rating scales. The audit process in New Zealand[72] (based on the practice in England and Wales) requires the auditor to forward a draft report to the provider, and then allows the provider to make comments thereon. The auditor then reviews the comments prior to writing the final report. Once the final report is published, the provider may be required to formally respond to any issues raised. Through this two-step process, a provider can respond to any issues that result due to miscommunication or other error at an early stage, and avoid having these findings permanently recorded. This provides some measure of procedural fairness and protection for firms' reputations.

The principal challenge the audit system faces is the removal of non-performing providers, since current process is somewhat cumbersome. The MoJ would like to increase the number of audits including 'on site' audits where they send the auditor to the provider's office. In the last year 20% of audits have been 'on site' which have produced positive feedback from the provider being audited as they feel it is more of a discussion and educative rather than just receiving an 'end rating'. Anecdotally, there are fewer formal responses from the provider where there has been an 'on-site' audit.

Lastly the MoJ plans to look at the existing complaints process. There is anecdotal feedback on this but in general third parties e.g., the judiciary, court staff and other providers are reluctant to make formal complaints which then are difficult to pursue.[73]

69. Information obtained from the MoJ and the UNODC Handbook

70. Dame Margaret Bazley, 'Transforming the Legal Aid System: Final Report and Recommendations' (November 2009) Legal Aid Review https://www.beehive.govt.nz/sites/default/files/Legal%20AidReview.pdf ('Bazley Report').

71. Factors looked at include: total amount paid to the provider in the last year; number of files assigned in the last year; cost per file; number of extensions sought; number of case approvals rejected/refused; percentage increase in fees or files over last two years; number of substantiated complaints; adverse judicial comment; and progression to a new provider level or area of law. New Zealand Ministry of Justice, Terms of Reference: Quality and Value Audits (May 2018), 6 https://www.justice.govt.nz/assets/Documents/Publications/Quality-and-Value-Audit-Terms-of-Reference.pdf .

72. New Zealand Ministry of Justice, Audit and Monitoring: Operational Policy (May 2018) 5 https://www.justice.govt.nz/assets/Documents/Publications/Audit-and-monitoring-policy2.pdf .

73. Information derived from the MoJ and from the UNODC Handbook 2020 edn.

2.11 Moldova[74]

In the Republic of Moldova, improving the quality of legal aid services was chosen to be one of the strategic development objectives by the National Legal Aid Council (NLAC). The quality assurance mechanism set by the NLAC in 2015 was based on several elements: recruitment of legal aid lawyers through a public contest process; providing compulsory annual training for all legal aid lawyers; development and application of professional standards and guidance for legal aid lawyers; specialization of legal aid lawyers; internal and external independent monitoring of delivered services using peer review of files based on the Scottish style criteria and marking; and connected actions such as support of the Bar Association in observance of professional standards by all certified lawyers.[75] External monitoring of the quality of legal aid is performed by a special Commission of 7 members created by the NLAC: one representative from the NLAC, 3 lawyers from the legal aid system and 3 private lawyers selected through public contest.[76] In such a way "peers" are not only legal aid lawyers but also general private defence lawyers who are not part of the legal aid system. Such an approach contributes to the perceived independence and credibility of the monitoring commission as well. There is an annual plan of external monitoring – 10 per cent of the total number of lawyers in the legal aid system selected randomly are included into the annual plan of external monitoring of the quality of legal aid services. Each chosen lawyer needs to be reviewed based on 10 cases selected randomly by the Commission and 10 cases chosen by the lawyer, from the past 12 months.

The files are assessed with a document to be filled in by the monitoring group (at least two peer reviewers – one legal aid lawyer and one private lawyers, members of the External Monitoring Commission). This "monitoring act" includes several sections and each section is composed of criteria and indicators. For each criterion there are maximum approved points/marks, which vary from 2 to 6. The peer reviewers need to mark each criterion and then a total mark/points per case, and then for the lawyer. One of three overall outcomes is achieved: very good, good and insufficient. Between 2015-2017 external monitoring/peer review was tested on cases involving juveniles and only in 2018 it was fully applied (to criminal cases and cases with juveniles. NLAC has still to develop criteria and standards for civil and administrative cases. Due to some administrative barriers (the monitoring commission needs to be set up on a yearly basis based on public acquisition rules, which does not allow contracting the best lawyers and does not ensure continuity), external monitoring was not conducted in 2019 and has been disrupted in 2020 by COVID.

2.12 Scotland[77]

Scotland is very largely a judicare model of legal aid delivery. In terms of scope, eligibility and expenditure per capita, Scotland has one of the most generous legal aid programmes in Europe.[78] The great majority of primary and secondary legal assistance is delivered by solicitors and advocates (barristers) in the private sector on a case-by-case basis. There is no obligation on the profession to accept instructions from a client who seeks assistance. The legal aid authority, the Scottish Legal Aid Board (SLAB) employs around 25 salaried solicitors in the (Public Defence Solicitors' Office (PDSO) to deliver criminal legal aid, and a similar number of civil solicitor's in the Civil Legal Assistance Office (CLAO) in 7 offices across Scotland). SLAB employed solicitors also manage a 24-hour Solicitor Contact Line which provides advice and

74. Information primarily derived from the UNODC Handbook (2020) p.28.

75. NLAC Moldova, The Legal Aid Activity Strategy, 2015–2017.

76. This approximates to the model of the Quality Assurance Committee in Scotland

77. Information derived from LSS and SLAB websites, National reports to ILAG 2015, 2017, 2019.QAC records.

78. See Evans, Rethinking Legal Aid (2018) https://www.gov.scot/publications/rethinking-legal-aid-an-independent-strategic-review/

facilitates access to solicitors for people requiring advice in police custody. There are approximately 1,100 solicitors in Scotland in 600 private law firms who carry out criminal legal aid compared to 25 publicly employed solicitors in the Public Defence Solicitors' Office. There are around 560 firms that conduct civil and/or children's legal aid with around 1,000 solicitors involved. In 2018/19, there were 13,000 grants of civil legal aid for representation in Court and 63,000 grants of primary legal aid that also covered limited appearance before tribunals. Net expenditure in 2018/2019 on civil legal aid was £42 million and on children's legal aid it was £5 million. SLAB also manages a range of projects delivering legal and other support across the country which are funded through government grants costing in the region of £5 million.[79]

2.12.1 Quality assurance[80]

As discussed in the entry on England and Wales above the origins of peer review in Scotland stem from the work conducted by Paterson and Sherr, the Professors for legal aid authorities in England and Wales from 1993 onwards. In 2003, Paterson carried out research for SLAB to assess the quality for the work of the PDSO lawyers using peer review, trained independent reviewers to assess a random selection of files, a set of agreed criteria and a robust marking scheme. This pilot study demonstrated that file-based peer review was a viable quality measurement process for Scottish public defenders[81] and in 2004 the work was used to justify and underpin the introduction of peer review for all 1,200 civil legal aid practitioners and 600 law firms then registered to do civil legal aid work in Scotland. Since that time all solicitors in Scotland who provided primary or secondary civil legal aid have had a stratified[82] random cross section of their legal aid files assessed by independent peer reviewers on a 6-yearly cycle.[83] For most practitioners 5 files (which may be live or closed) are selected. However, since 2011, 10% of the practitioners' files reviewed where the cases falling in the areas where SLAB and the LSS considered the client to be vulnerable e.g., immigration, or mental welfare cases. All peer reviewers in Scotland are solicitors who have current or recent (i.e., within the last year) experience in providing civil legal assistance, and their engagement as a peer reviewer is always part-time in order that they could continue practicing when they are not conducting reviews. They are asked to peer review in areas of practice where they have suitable experience, although (unlike England and Wales) they need not be a specialist in these areas. The reviewers are not permitted to assess any firm they might be in competition or they have a connection with. Accordingly, they are usually allocated to firms which are geographically remote from them and are instructed to raise any potential conflicts of interest with the body in charge of the civil peer review, namely, the Quality Assurance Committee (QAC).

22 criteria used in civil primary and secondary cases were drawn up to reflect professional standards of good practice by experienced lawyers in the civil law field with input from the Law Society of Scotland (LSS) and various key stakeholders. The criteria are client-centred in their orientation. The first two are:

"1. How effective were the solicitor's initial fact and information gathering skills, including the identification of any additional information required and the way it was obtained?
2. Was the client given accurate and appropriate advice regarding

- a) the potential case, to include whether it was statable;
- b) the client's eligibility for advice and assistance, especially if the client is not admitted, and whether the advice and assistance Mandate (Declaration) was properly signed and dated by both the solicitor and client;
- c) legal aid more generally, including the application of the regulation 18, advice and assistance, including possible clawback and the impact of legal aid on expenses?"

The marking scale for each criterion is:
1 = Below requirements
2 = Meets requirements
3 = Exceeds requirements
C= Cannot Assess/Not Enough Information
N/A= Not Applicable

79. Peer review for voluntary organisations CSO https://www.slab.org.uk/advice-agencies/scottish-national-standards-for-information-and-advice-partners/ (accessed 14/6/2020)

80. See https://www.slab.org.uk/solicitors/quality-assurance-scheme/ (accessed 14/6/2020)

81. See Paterson, A., "Peer Review and Quality Assurance" 13 (2007) Clinical Law Review 757

82. To reflect the balance of the practitioners' work.

83. For fuller details of the Scots civil scheme see the detailed peer review manual which is located on the LSS website https://www.lawscot.org.uk/media/8823/peer-review-manual-2016.pdf

The marks for each file and for each practitioner are out of 5:

1 = Non-performance

2 = Below expectations

3 = Threshold competence

4 = Competence plus

5 = Excellence

Once a review is completed by the reviewer, he/she submits a report to the QAC which comprises 3 members from SLAB, 3 from the LSS and 3 members from the public selected in open competition. The report contains suggested marking for each file and practitioner, including comments on good practice and areas for improvement. The QAC then makes their decision based on the information provided from the peer reviewer(s).[84] The QAC may pass a firm with one of three grades: Good pass, Straightforward pass or Marginal pass. The last grade entails that the firm will be reviewed again within the next 12-18 months. Alternatively, the QAC may ask a firm for comments on a particular issue outlined in the report before passing a firm or coming to a decision of whether a further review should be instructed. Should the QAC conclude that a firm had failed its routine review, it may decide to schedule an immediate extended review for the firm that failed to a great extent or may decide that a period of approximately six to nine months is required for the firm to rectify issues before further review, being a deferred extended review. A special review can be instructed where the QAC have been alerted to a particular concern in the firm's civil legal assistance procedures. A final review is instructed where the QAC considers the outcome of a further review to be unsatisfactory.

The peer reviewers meet on an annual basis to discuss issues arising out of the peer review and receive feedback on the statistical outcomes of peer reviews from the QAC's professional peer review adviser (Paterson). This assists with consistency of marking by reviewers which is important for the fairness of the process to all firms. Consistency is further assisted by double marking approximately 25% of firms' files.

In 2011, based on the robustness of civil peer review as evidenced by research, SLAB and the LSS determined to introduce peer review for 550 criminal firms and 800 criminal legal aid practitioners over a six-year cycle. In 2017, peer review was then extended to children's legal aid on a similar cycle.

2.12.2 Results

The purpose of the quality assurance programme for legal aid providers is not to covertly reduce the supply base, but to demonstrate the quality floor that exists in the profession and to gradually raise overall standards. The programme has established that errors in legal advice, professional negligence or professional misconduct are relatively uncommon in Scotland. In particular, examples of misconduct, money laundering or abuse of the legal aid scheme have been very unusual, although privately charging a client who is covered by legal aid is not that uncommon. The most typical causes of fails have been:

- Delays in taking action or applying for legal aid;
- Poor communication with clients relating to the operation of the cost rules for legally aided persons;
- Poor file notes of phone calls or interviews;
- No terms of engagement letters on file;
- Not completing the electronic mandate from the client when lodging a legal aid application electronically.

The evidence suggests that the programme is raising standards. In the first cycle, 10% of files failed the initial review compared with 9% in the second cycle. However, in the second cycle a tougher standard was imposed to pass and in the third cycle the threshold has been raised again. The proportion of special reviews (triggered by serious concerns) reduced from 2% of firms in the first cycle to 0.5% of firms in the second and the number of firms taken to final review decreased from 3% to 2%. Further evidence of quality improvement stems from the fact that practitioners and files received a higher proportion of distinction grades in the second cycle. Even the profession has come to accept the value of the programme. Although they were suspicious of the motives of the Government and SLAB in pushing for the introduction of peer review civil legal aid lawyers this has now largely dissipated. Thus, a survey of Scots lawyers in 2013 showed that 84% of respondents had a positive or neutral opinion on whether the QA

84. For a detailed account of the Scots scoring system used by reviewers and the QACs see Annex B below.

scheme was an effective way of ensuring quality. Indeed, many firms have found that the approach to files and cases which is embodied in peer review can, with advantage, be applied to their other, non-legal aid, cases.

2.12.3 Civil Society Organisations

In Scotland considerable amounts of free primary legal advice is given by the CSO or Not For Profit bodies like the Citizens' Advice Bureau, Shelter or community law centres. Although some of these agencies have contracts with SLAB to provide assistance to the public in a particular geographic and legal area, in the majority these services are not funded by SLAB but from central or local government resources. The Government has produced a set of standards[85] for these organisations which are voluntary, but those who attain them are awarded a Kite Mark. Increasingly funders and referral agencies for these CSO/advice agencies are demanding that they have the Kite Mark (rather as is occurring with victim organisations in the Netherlands). To obtain the Kite Mark agencies must undergo a form of peer review and organisational audit. This is handled by SLAB because of its expertise in running peer review programmes. Details as to the operation of the peer review programme for CSO agencies in Scotland can be found in Annex C to this report.

2.13 South Africa [86]

South Africa has a broad criminal legal aid defence system but a rather limited civil legal aid programme (comprising around 15% of the work). The primary legal aid body is Legal Aid South Africa (LASA) which provides legal services to indigent people mainly in criminal matters plus in certain categories of civil matters subject to availability of resources. LASA has a mixed delivery system – primarily it uses salaried staff lawyers attached to Justice Centres and Satellite Offices augmented by a limited judicare model. Salaried legal staff are also stationed at a number of District and Regional Magistrates Court. Private lawyers offer a judicare service by arrangement with LASA in particular circumstances e.g., where there is a conflict of interest between the client and LASA or when specialist knowledge needed is not available at the Justice Centre or where there is insufficient in-house capacity. LASA also enters into co-operation agreements with other institutions, like public interest law firms and certain university law clinics, to enhance the delivery of free legal services, especially in civil matters. LASA also undertakes or funds Impact Litigation Services to cover group litigation.[87]

Staff lawyers must have a law degree coupled with two years vocational training and admission exams. Salaried staff posts at LASA attract a high level of interest since the salaries are competitive. Relatively small proportion of work done by private lawyers is remunerated on a case-by-case hours worked basis.

Civil legal aid is of limited scope but it does cover offering free legal advice. Recently, a telephone legal advice line facility has been introduced, including a "Please call me" free SMS/text service for call-backs so as not to limit the service to those who are able to afford the call.

2.13.1 Quality Assurance[88]

LASA has implemented various quality control mechanisms and review procedures to improve the delivery of quality legal representation, both proactively and after the event, which include supervision of legal practitioners, legal training and development, mentorship and case discussion forums, performance management systems and establishing a legal quality assurance unit. These quality control measures are applied at all the offices of LASA. The overall aim of the quality management programme is to ensure that there is one uniform quality

85. Scottish National Standards for Information and Advice Providers

86. Information derived from ILAG national report 2017, Legal Aid South Africa conference papers (Fiji,2019) P. Hundermark, "Delivery of Quality Legal Aid Services and Best Practices in South Africa" and LASA ILAG paper (2013), South African National Report Global Access to Justice Project,2020.

87. Legal Aid South Africa. 2018. Legal Aid Manuel. Available at: https://legal-aid.co.za/wp-content/uploads/2018/11/Legal-Aid-Manual.pdf. [Accessed 8 January 2020].

88. This text involves substantial elements taken with permission from P. Hundermark (2019)

standard in the entire organisation. Every staff member who delivers services to clients must achieve this quality standard and every aspect of the services LASA deliver to clients is subject to review. This includes court work, legal advice given to clients as well as telephonic legal advice given to clients by the LASA advice line. All staff members who render services to clients are subjected to a quality assessment or quality audit at pre-determined regular intervals. This includes paralegals, candidate legal practitioners, qualified legal practitioners as well as their managers and supervisors, to the extent that they interact directly with clients. The quality target to be achieved is determined taking into account the type of work, as well as the level of practitioner performing the work.

Some reviews are conducted proactively by managers whilst files are pending and errors can be rectified before the case is completed. Other, after the event, reviews take place when the case is completed using different levels of assessors. A number of assessment instruments have been developed over the years and are subject to continuous refinement. The quality reviews involve an examination of the case file of a legal practitioner, as well as observation of how the practitioner conducts the case in court.

To ensure that there is transparency and consistency in the quality review process, quality assessments are conducted at different levels, namely:

- Self-reviews on line of all files by the practitioner who performed the work covering the quality of all aspects of the lawyer work. These self-assessments are designed to encourage self-reflection and are monitored by the LASA Local Office supervisory staff who also have to conduct a quality assessment on the file before it is closed.
- Peer reviews by a colleague chosen by the practitioner, and one chosen by the practitioner's supervisor which include file management and court observation feedback. These reviews are intended for practitioner development purposes.
- Manager reviews by a manager or supervisor based in the practitioner's office excluding the direct manager of the practitioner.
    - All Legal Aid SA Local Offices are required to conduct formal quality reviews of all their practitioners.
    - All Heads of Local Offices would review a sample of files closed during the quarter to conduct this review.
    - All practitioners have set quality targets that they have to meet. If practitioners fall below these targets, then individual intervention plans are agreed between the practitioner and their supervisor.
    - These scores are monitored on a quarterly basis by both provincial and national management of Legal Aid SA and have an influence on the performance monitoring of each Legal Aid SA Local Office.
- Provincial reviews by provincial legal teams who are tasked with devising support systems for the local offices, based on the findings of their assessments.

All Legal Aid SA Local Offices are under the direct control of a Provincial Office, of which there are six in South Africa. Each Provincial Office is staffed with a small legal component whose primary function is to monitor the quality of legal services in the province and provide support to the Legal Aid SA Local Offices when necessary. This includes the conducting of the Legal Aid SA Local Office quality audits. The quality scores awarded during these reviews are analysed for consistency and any marked variations in the scoring are investigated.

In 2009, LASA concluded on reviewing their quality management processes in terms of the numerous flaws therein. It was felt that managers who were accountable for the quality of service of their justice centre were not likely to be fully independent in their assessment of their staff. It was also noted that although there was a standardised instrument of assessment the managers used this instrument differently in different parts of the country and thirdly it was felt that the standard instrument focused too much on outputs and too little on outcomes. LASA considered UK style peer review but did not consult with the authors of the UK system, instead concluding that it might be too expensive and too prone to regional variation. LASA's answer was to create an entirely independent Legal Quality Assurance Unit (LQAU) located in the internal audit department. The reviewers there would be highly experienced legal practitioners under the leadership of a very senior legal manger. This was so that the staff lawyers would regard the reviewers as experienced, independent

expert peers and accept their assessments more readily. Unfortunately, as occurred in Chile the risk with appointing such reviewers on a full-time basis is that after a few years of not practising these "experts" cease to be seen as genuine peers by those, whom they assess. Moreover, if they are better remunerated, they can come to be seen as an elite that is no longer quite in touch with applicable standards of practice. The legal quality auditors based in the LQAU use the same methodology and the same instruments in conducting their quality assessments as those used in all quality assessments performed within the organisation.

Over a two-year cycle LQAU seeks to cover 64 or so Justice Centres, and 128 local offices and all the 2,000 staff attorneys as well as 400 judicare lawyers. The target is to assess 9 files a day (a file per 1 hour), although for each practitioner the reviewer selects six files to review (from a random sample of 10). As for judicare lawyers, LQAU reviews the top 200 practitioners in terms of instructions received in the last year, who were not reviewed in the last three years. There is a system in place for legal practitioners to liaise with LQAU auditors on any adverse findings they make on their files, and to provide further proof of compliance with the quality standards. All findings made by the LQAU are reported to the LASA Board, and are analysed to identify any areas of concern.

2.13.2 Methodology

- General advice given to the client is assessed by reviewing the quality of the notes recorded by the paralegal or lawyer giving the advice, as well as the subsequent advice given.
- Advice given by telephone to callers to the Call Centre, the LASA Advice Line, is reviewed by listening to the record of a conversation to determine the issue presented by the client, the paralegal or practitioner's handling of the client, as well as the advice given.
- In litigation matters, the first review involves a review of the physical case file, and assessing the level of quality based on the notes made by the legal practitioner in the file as well as other supporting documents, e.g., case law referred to during the trial.
- A court observation review involves the assessor sitting in court while the practitioner conducts a client's case, and allocating scores according to the pre-determined criteria of what is expected of the practitioner in conducting the client's case.

Each assessment is scored on a 1-5 marking scheme (1 is poor and 5 is excellent).[89]
High scored practitioners are not reviewed again as quickly as lower scoring practitioners. As in some other jurisdictions[90] a risk-based approach has been introduced to govern the selection of judicare practitioners to be reviewed.

2.13.3 Assessment instruments

Specific assessment instruments have been developed for each area of legal work with the same criteria and scoring framework to reduce the element of subjectivity. As in the UK a range of files is selected at random, and the assessment of the practitioner's performance is done against criteria or 'areas of risk' with suggestions for improvement. As in the UK the system combines output and outcome measures of the lawyer's performance. In civil cases the criteria/risk areas are: not properly consulting with the client (10%); not drafting pleadings properly (15%); failing to communicate effectively with the client and others; (10%) not preparing for the hearing properly (10%); not obtaining instructions for settlement (10%); not dealing properly with file administration or professional ethics (10%) and failing to enforce court orders (10%). The remaining 25% is allocated to outcomes. The instruments were shared with the Law Society and Bar Council but no feedback other than an acknowledgement was received. These instruments are not dissimilar to those utilised by peer reviewers in the UK despite the suggestion that South Africa had consciously eschewed peer review. However, the marking scheme appears to offer less scope for professional judgment on the part of the reviewer and thus may produce more rough and ready outcomes than review schemes such as those in the UK that allow the reviewer to exercise judgement provided that it is explained and justified in their report. LQAU and managers use the same instruments and there is a good correlation between their scores for the same lawyers.

89. The Scots peer review system uses the same scoring system for files and practitioners (though a narrower range for individual criteria).
90. E.g., Scotland and Chile.

2.13.4 Sanctions for poor performance

Around 5% of practitioners fail to achieve the quality targets set for them (these reflect the degree of deemed complexity in the work typically done by the practitioner being assessed). Those who fail are given support, mentoring and supervision to achieve the required target within 6 months. If they fail, the performance management processes that can eventually lead to dismissal is initiated.

2.13.5 Observations on file review

The file review experience of LASA has been interesting and instructive replicating in many ways the experience in other programmes such as in Chile and the UK. The need to use peer reviewers who command the respect of those being reviewed is paramount as is their need to be independent. Measures have to be taken to prevent files from being "window dressed" before being submitted for review. Measures also need to be taken to ensure marker consistency over time and as between different markers.

2.13.6 Additional Quality Measurements

Third party assessments:

- Feedback is sought by the lawyer's supervisor or the Heads of Office from the presiding officer, prosecutors or magistrates about the performance of the lawyers in the Justice Centre.
- Client satisfaction surveys are conducted by telephone with the client by call centre staff
- Complaints from clients are directed to the call centre hot line and passed to the head office for investigation and learning opportunities.
- There is also an Ethics hot line managed by an independent auditing company. Service delivery complaints are passed to the local office for investigation.

Quality Program evaluation

As in Chile data from various quality assessments are analysed to identify gaps in the programme as well as areas for improvement. Remedial action can be directed to the practitioner or the unit. In all local offices there is now a legal supervisor and at regular intervals all supervisors are assessed on a number of criteria and the ratio of legal staff to supervisors is also monitored continuously Finally the quality management programme itself is subject to annual review.

Support mechanisms

- Every LASA local office is expected to have a mentorship program in place in terms of which each practitioner is paired with a mentor.
- All legal practitioners including trainees must participate in daily or weekly case discussion forums facilitated by a supervisor.
- Civil Cluster Support System. Given the complex nature of civil cases, the potential for negligence and the limited capacity to handle these cases, a decision was taken to arrange LASA Local Office's civil departments into clusters for purposes of providing support to each other. Each cluster has a civil unit at its head led by the principal legal practitioner whose responsibility is to provide support to the smaller civil sections in the cluster. Training interventions are arranged at cluster level.

3. Thematic aspects of peer review[91]

3.1 Standards and Criteria to be used in peer review

ПThe first step is to determine the areas of practice and the types of cases to be assessed. This can be triage or initial advice by a call centre as in the Netherlands, Ukraine or China. Alternatively, it might be representation in criminal, civil, children's or administrative cases. Thirdly it might be to assess the advice and representation work of employees of civil society organisations. In each case the decision has to be taken as to how specific the criteria should be. In Scotland there are only three sets of criteria: For Criminal cases, for Civil cases and for Children's cases. In South Africa and China, the criteria are restricted to civil and criminal cases. Therefore, in these three countries the standards and criteria used are fairly generic since they have to cover a wide range of cases. In the Netherlands peer review is currently restricted to Immigration and Asylum cases – and the criteria reflect this. In England and Wales there are separate sets of criteria for Crime, Community Care, Debt, Employment, Family, Housing, Immigration, Mental Health and Welfare Benefits. The focus on more specific criteria has had the effect of the peer reviewers being specialists and inevitably the pass mark required for the files is not the standard of the reasonably competent generalist practitioner but the reasonably competent specialist in Debt or Employment etc.

As stated above, the criteria may be generic or specialist – tailored for particular fields of law, for example, relevant to children. The more generic the criteria, the greater the range of cases they can encompass. Indeed, the generic nature of the Scottish civil criteria entailed that they could be applied with relevant adjustments in the Netherlands and China, which have very different legal systems. The criteria used in peer review may be chronological – starting at the first client interview and ending with the termination of the case – or thematic, for example, fact and information gathering, advice giving and preparation, interaction with third parties, or ethical considerations.

The criteria should consider whether the action taken was timely, correct, appropriate (and appropriately communicated), and helpful to the client in the circumstances. The criteria can be aimed at all aspects of the process and outcome (see Introduction above); communication issues; client care; legal competence; appropriateness of advice (including ethical issues); completeness of advice; clarity, correctness and timeliness of advice (taking adequate instructions and providing initial information concerning future actions, including client meetings); effective negotiation; appropriate preparation for advocacy and appearance in court; management systems, strategy and resource allocation, professional discipline threshold requirements, appropriate strategy formation and execution; and adequate staff supervision and case management. As a result, as the drafters of the American Bar Association Model Standards found, the criteria can result in long and unwieldy lists. Despite the drafters, best endeavours, what begins as a set of guidelines reflecting acceptable standards of minimum competence subsequently becomes a statement of good or even best practice. The longer the list becomes (as it did in the case of some pilot projects in China) the harder it is for the reviewers to mark consistently, and the longer it takes to assess one file. The opposite is also true. The fewer the criteria used in the assessment instrument, the more files that can be assessed by reviewers in any given time period. However, if this process is taken too far it is likely to reduce the consistency of the judgement, in turn reducing its validity. To achieve a happy medium takes trial and error but international experience suggests that the optimum number of criteria for reviewers to work with (if they are to mark consistently) is no more than 30 and possibly rather fewer.

To keep the number and length of the criteria in check whilst ensuring their acceptability to the legal community to be assessed requires a focused approach on limited

91. This section has been informed by earlier work of the consultant, in particular Paterson and Sherr Peer Review of Legal Aid Files: A Toolkit for the National Legal Aid Centre in China (British Council and NLAC 2016) and the UN Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes (UNODC, Vienna,2019) https://www.unodc.org/documents/justice-and-prison-reform/HB_Ensuring_Quality_Legal_Aid_Services.pdf

aspects of service by peer reviewers. This will involve a two-stage process. First the study of the best practice manuals, skills training textbooks, practical lawyering materials and consultations with specialist practitioner groups. This is because peer review criteria are derived from professional standards of good practice. It is important therefore that peer reviewers and professional bodies (as well as those who are to be assessed) are consulted about the criteria. The UK peer review programmes which had an impact on a majority of programmes followed in other jurisdictions, developed sets of criteria which were compiled with the assistance of academic consultants[92] and experienced practitioners in the relevant fields of law and the bodies responsible for legal aid. Principal opponents to such programmes have usually been the professional associations of lawyers, who have traditionally been responsible for policing the minimum competence of their members. However, well-publicised weaknesses of self-regulation in the legal profession have tended to include a failure to discipline lawyers for weaknesses in competence. Where third parties are paying the lawyer's fees on a regular basis e.g., insurance companies or the state/legal aid authorities there has been an increasing desire in modern times for evidence that the funders are getting the competence they are paying for. Peer review offers that assurance, but can create friction with the professional associations who see it as moving onto their territory. The best way to increase the likely acceptability of a pilot project, therefore, is to involve the professional association at every stage, if it is willing to be engaged. Accordingly, it is strongly advisable that the drafting of the criteria has an input from the bar association or professional body for the lawyers in the relevant legal field. This can be through a formal partnership (as in Scotland) or through discussion (as in England, Chile, China and South Africa). These consultations should also take place if the criteria are to be changed or updated. Thus, the Scottish Legal Aid Board (SLAB) agreed new peer review criteria and guidance for reviewers in 2018, with detailed guidance on the criminal quality assurance scheme available online as information for all interested parties. Similarly, the EU guidelines for developing quality measures suggest that the local Law Society or Bar Association should be closely involved in the development of performance criteria.[93] In a mixed jurisdiction this suggests that it would be sensible to bring together staff salaried lawyers and private lawyers who provide legal aid (and to private clients) to discuss standards. The standards cover the matters of technical law, legal practice, client care (including the need to use plain English and where English is not the client's mother tongue, the possibility of translation) and utility. The latter in England and Wales includes the extent to which a lawyer's actions help to 'achieve the client's reasonable objectives.'[94] Utility also covers compliance with the standards expected by the legal aid authority from providers in relation to the knowledge and expertise in applying for legal aid, running and completing a legal aid case.

The second stage in the criteria drafting process is for the editing team in consultation with key stakeholders to reduce the number of criteria to between twenty and thirty which cover the essential aspects of advice and/or representation in the field of law being assessed.

As for the phrasing of the criteria, these should be framed in a way that allows the answer to be scaled e.g., from 1-3 where "1" indicates that the performance does not meet the required standard, "2" indicates that the standard has been met and "3" indicates that the practitioner/provider has exceeded what was required of him/her under the scheme. Typical criteria include:

"How effective were the lawyer's initial fact and information gathering skills, including the identification of any key evidence required and the way it was obtained?"

"Was the client given accurate and appropriate advice in non-technical language regarding the legal issues raised in the case and the possibility that the case might be unsuccessful and what cost there might be to the client if the case was lost?"

These criteria focus on the client and it would be fair to say that "client-centred lawyering" lies behind the model of peer review that has been implemented in most jurisdictions. Indeed, the Chinese adoption of peer review in civil cases in the last decade was in part due to their desire to foster client-centred lawyering in legal aid

92. Professor Avrom Sherr and Professor Alan Paterson

93. S. Nikaratas and A. Limante, "Tools and Criteria for Measuring |Legal Aid Quality: Guidelines for EU Member States" QUAL-AID Report (Law Institute of Lithuania, 2018)16 https://www.jura.uni-frankfurt.de/75941968/QUAL_AID_Evaluation_of_Legal_Aid_Quality.pdf?

94. Legal Aid Agency, Independent Peer Review Process Guidance (June 2017) 42 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620110/independent-peer-review-process-guidance.pdf

practice there.[95] The focus on the client is also reflected in jurisdictions such as South Africa, Chile and Scotland which augment peer review with regular client satisfaction questionnaires.

Finally, peer review is not like an unseen examination. It is not designed to catch out the lawyers who are being assessed, but to encourage them to practice in an effective and appropriate manner. Accordingly, it is important that the profession is familiar with the criteria and the marking scheme that will be used to assess them. Some of them will have had the opportunity to contribute to the framing of the criteria when the programme was set up, as stated above, but for the rest comprehension and acceptance is to be desired. For this reason, in South Africa, China, England and Scotland the legal aid authorities make the criteria widely known. Indeed, in England and Scotland there are on-line peer review practice manuals indicating in detail what the criteria are, and how they are applied by the peer reviewers.[95]

3.2 The Marking scheme

The marking of criteria and files or hearings by a peer reviewer is always an act of professional judgement. As such it is necessarily partly subjective. To keep as much objectivity and replicability as possible, it is advisable to keep the range of marks used by reviewers relatively short. As mentioned earlier, files and practitioners (or even firms) are commonly marked from 1 to 5, with 3 as the pass mark. This leaves two marks for failing and two for those performing above the pass mark. Whilst it would be possible to use a much broader range of marks, experience has shown that a group of reviewers marking independently will struggle to mark consistently, both as between themselves and in terms of their own marking over time, if a much broader range is used. Even with a fivefold range, in practice, the pass mark grade tends to attract the bulk of the marks, while marks of “1” and “5” are relatively unusual (less than 10 per cent in total). In Scotland and the countries that have followed its peer review system,[97] files and practitioners are marked out of 5 (1 is poor and 5 is excellent) but the individual criteria are marked out of three marks only, with two further marks for “not applicable” and “unable to assess from the file”.[98] At the outset of peer review in the UK it was unclear whether there might be large numbers of “can’t assess” marks in a review, caused by lawyers not recording matters on their files. As time has gone on it has become clearer that this is not a significant problem in practice, and lawyers have become better at client handling and file management. Nevertheless, one of the key attributes of the skilled peer reviewers is their ability to deduce (in situations where there is insufficient evidence that a particular criterion has been complied with) from indirect evidence e.g., a letter later in the file or from the judgment of the Court that the criterion was indeed complied with, although there is no file note or letter at the time to indicate that it has been. Thus, the frequency of “unable to assess” scores depends partly on the skill of the peer reviewers in inferring from other material on the file that a particular criterion has very probably been met, even though the more usual forms of direct evidence of compliance with the criterion may be absent. However, it is only possible to deduce that something has been done if there is something actually on the file that suggests this is so. In England and Wales each criterion is marked on the same 5-fold scale as files. As a protection against variability between reviewers, it is advisable to arrange for a proportion of files to be “blind double marked”, i.e., marked by another reviewer who is unaware of the marks given by the first reviewer. (In Scotland 25% of files are double marked in this way.) In Chile there is a fourfold marking scale for reviewers: “Compliant”, “minor observations”, “major observations” and “insufficient”.[99] It is therefore important to use a marking scheme that has a quite limited range in order

95. Paterson and Sherr “Peer Review and Cultural Change: Quality Assurance, Legal Aid and the Legal Profession” conference paper (ILAG, Johannesburg, 2017). http://www.internationallegalaidgroup.org/images/miscdocs/Conference_Papers/Peer_Review_and_Cultural_Change.3docx_28APAS29.pdff

96. Detailed guidance with all criteria is available online at:
https://www.slab.org.uk/export/sites/default/common/documents/profession/Criminal_quality_assurance/New_Crim_QA_Criteria_29_Oct_2018.pdf
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620110/independent-peer-review-process-guidance.pdf

More in-depth discussion of peer review criteria can be found in Paterson and Sherr “Peer Review of Legal Aid Files: A Toolkit for the National Legal Aid Centre in China” (British Council and NLAC, 2016)

97. E.g., China, the Netherlands and Moldova.

98. See: https://www.lawscot.org.uk/members/rules-and-guidance/rules-andguidance/section-c/rule-c3/guidance/c3-peer-review-criteria-guidance/.

99. A similar fourfold scale is to be found in Victoria, Australia.

that the inevitable variance between "hard" and "easy" markers cannot be extensive.[100]

The last question in relation to the assessment system is where to set the pass mark. This, of course is a mark of "3" for a file, variously described as "threshold competence" or "acceptable competence". This is the minimum level that the pass mark could be set at. However, as lawyers and attorneys become more familiar with quality assurance it is quite likely that the state or the legal aid body will look for a slightly higher pass mark in the future. This would be in keeping with a concept of continuous improvement.

3.3 Selection of the subjects of review

Traditionally legal aid authorities have selected practitioners or firms for review on several bases. It is commonplace for the selection to include a proportion that are selected purely on a random basis – to persuade the profession that the scheme is not simply a covert way of the legal aid authority picking on firms that it dislikes or wishes to discourage. However, all schemes also allow risk to play a part.[101] It is only sensible where there is a review cycle (e.g., in South Africa, Chile or Scotland) to focus some reviews on the higher risk firms. These may be firms that handle large volumes of legal aid cases, or large volumes of legal aid cases for vulnerable clients (immigration or mental health). Alternatively, performance in other audits or a high level of client complaints may be risk factors. Again, once a peer review programme has been going for a while then firms that perform well will not be reviewed as regularly as those who do less well (this risk-based approach has been adopted in Chile, Scotland, New Zealand and South Africa). That said focusing quality control on risk can create distortions to the system and may incentivise attempts to manipulate the review process through e.g., file tampering. Random selection counteracts this but is inefficient. In practice the solution seems to be a combination of random and risk.[102]

3.4 Selection of files for review

The aim of the selection process is to get a representative sample of the provider's work. This may require the random sample to be stratified according to the different types of work that the provider does. Clearly the more files that are examined the fewer providers can be covered in a set period, assuming that the capacity of the peer reviewers remains static. In England and Wales, the contract holder (the firm) is registered to provide legal aid and accordingly the review takes a stratified random sample of 20 files from the provider unit of which 15 files will be assessed. So, if a firm is a substantial size then a random sample may well mean that the work of some individual lawyers in the firm is not examined at all. Despite this the statisticians are confident that provided the selection of files from the unit is genuinely random then the results will be statistically valid. In South Africa where the focus is on both practitioners and practice units the administrator selects 10 stratified,[103] random files per practitioner from half of the practitioners in the Justice Centre, although as in England only some of the selected files (6 of the 10) will actually be assessed.[104] In New Zealand the initial review involves 5 files per lawyer.[105] In Chile it is 15 files per public defender. In Scotland practical trials established that peer reviewers could mark and produce a report for 8 children's files or 8 criminal files in half a day. Typically, civil files are larger so the reviewers are only expected to review and report on 5 files in half a day. The statisticians were satisfied that provided the stratified samples were drawn randomly these numbers would provide a fair assessment of the work of each lawyer. In 2011, it was decided that the need to protect civil clients whom SLAB

100.For further details on marking in peer reviews see Paterson and Sherr Peer Review Toolkit (British Council and NLAC 2016) and the Scots assessment protocol in Annex B below. The minimum threshold

101. Risk can be a financial one to the legal aid authority or to the client

102. For a further discussion of this see the QUAL-AID Report at p. 32 and Boersig and Davenport, "Distributing the legal aid dollar- effective, efficient and quality assured?" ILAG conference paper, Ottawa, 2019

103. Half the files will be from completed trials and half from guilty plea cases.

104. In Moldova the legal aid body selects 10 random files from each lawyer who is being assessed and the lawyer nominates 10 files of his choosing.

105. New Zealand Ministry of Justice New Zealand Ministry of Justice, Audit and Monitoring: Operational Policy (May 2018) 9
https://www.justice.govt.nz/assets/Documents/Publications/Audit-and-monitoring-policy2.pdf

deemed to be vulnerable (e.g., asylum, immigration, mental health, adults with incapacity, employment and judicial review cases) meant that in addition to the 5 cases per practitioner the reviewers would look at 10% of the practitioner's files in any of these areas. In some cases, this could be as many as 60 files. This decision to include an element of risk profile for the practitioner or firm has also been followed in New Zealand.[106] Increasingly, providers are conducting legal aid cases electronically. The lawyer therefore expects the files to be assessed electronically. In Scotland peer reviewers are already assessing the files on an interactive database, but the files are still mainly in hard copy. This means that the files have to be transferred safely to the reviewer(s). As in South Africa the risk is that once the random files have been identified the lawyer being reviewed will be tempted engage in "window dressing" to improve the files. The second risk is that files go astray in the transfer process. The alternative (which is used in the follow up review in Scotland if the routine review is failed), is for two reviewers to attend the lawyer's office to assess the files on site. This, however, is expensive and the intention is that the cost of the final review will be charged to the lawyer being assessed in Scotland as it currently is in England and Wales.[107]

3.5 Identification and selection of reviewers

The concept of peer review is predicated on the presumption that those best equipped to assess the professional work of providers are other professionals with experience and skill in the same legal fields as the provider. Since judges and prosecutors do not practice in the same way as defence lawyers, they are not perceived as "peers" by those who are being assessed. It follows that using either prosecutors or judges to assess defence lawyers would be problematic However, peers may be specialists or generalists. Which make the best reviewers? In England and Wales, the preference has been for peers who are specialists. This means they recruit them in open competition but insist on a high minimum number of hours of specialist experience, and being at least 50% active in case work (in a country with a large specialist legal profession this is perhaps not surprising). However, specialist peers have three potential drawbacks. First, they tend to want specialist rather than generic criteria. Secondly, they tend to mark more toughly than generalists. For those reasons it is thought that the standard which is applied to English contract holders is higher than the pass mark expected of generalist lawyers in Scotland. Thirdly, specialist peer reviewers may expect to be paid more than generalist ones. England also insists that their reviewers have experience as supervisors of other lawyers. Scotland being a smaller country with a more dispersed profession, has always preferred that peer reviewers be generalists, but nonetheless it selects them in open competition, and very largely attracts experienced practitioners who are respected in their field and who have frequently had experience in training younger lawyers. In both Scotland and England newly recruited peer reviewers will have their own files reviewed by one or two existing reviewers (blind, double marking the files) before being approved to undergo training. During the training (see below) the reviewer will be shadow marking existing reviewers prior to full qualification.

Whether they are specialists or generalist the experience of the reviewer must be current, by which is understood that it must be less than year since the reviewer has ceased to practice law in the relevant legal field, he/she is reviewing. This test, which applies in England and Scotland would be problematic if applied in Chile, Ireland or South Africa. This is because in these countries the reviewers are either full time reviewers attached to a special audit unit or full-time supervisors/managers. Either way after a few years the reviewers may cease to be seen as peers by the lawyers they are assessing. This is exacerbated if the reviewers are paid more than legal aid lawyers, because then they may be perceived as an elite and the turnover for such posts (which would allow some freshening of the team) is a difficulty. This has already become a problem in Chile and may yet become so in South Africa.

106. Ibid.
107. Legal Aid Agency (n 46) 31 [6.38].

Finally, the reviewer must be independent of the lawyer being assessed to prevent conflicts of interest or a situation of actual or perceived bias. Thus, in England and in Scotland the reviewer should come from different part of the country than the lawyer being reviewed, and have no connection (past or present) with the lawyer. As a further protection in Scotland the person being reviewed is informed as to the identity of the reviewer(s) and can object to their appointment. In countries with numerous staff attorneys this means that the reviewer should not be the manager or the supervisor of the lawyer being assessed. Indeed, in South Africa a special Quality Unit was created with peer reviewers who were not supervisors and managers to prevent a conflict of interest arising between the manager of a Justice Centre being expected to have a well performing Centre and also be responsible for the independent review of subordinate staff where failure will reflect badly on his management skills.

3.6 Training and monitoring of reviewers

Given the inherent subjectivity in peer reviewers exercising their professional judgement in the application of criteria and the marking scheme, it is not enough to rely on a limited number of criteria and a restricted range of marks for assessing them. Undoubtedly one of the strongest features of the UK peer review system is the robust introductory training programme which new recruits undergo. Normally it consists of three days training (usually delivered by international academic experts with experience of peer review) with the first two days run consecutively and six months later a third day of training. In between the reviewers will be shadow marking peer reviews in the normal way but always being blind double marked by a more experienced reviewer.

The purpose of the initial training is to introduce reviewers to the concept of quality and the range of methods used to assess thereof. Thereafter, they are introduced to peer review and to the criteria, taking each one in turn in some detail, and the marking scheme and discussions are encouraged as to how these should be interpreted and applied. Thirdly, the trainees are exposed to marking actual files, either in pairs or small groups (which rotate regularly), usually including existing reviewers, with the aim of (a) exposing them to differences of opinion and how these might be resolved and (b) fostering a collective consensus as to the interpretation of the criteria and as to the application of the marking scheme. The reviewers are also trained in the writing of summary reports on the files they have reviewed. In Scotland, new peer reviewers have all their marks in the first six months double-marked by more experienced reviewers. After six months, they are shown their marks (and those of their colleagues) and then exposed to difficult files to discuss in small groups and collectively. The purpose of the training is to enhance the certainty and consistency of the marking by reviewers both as individuals over time and as between the reviewer and his/her fellow reviewers. Thereafter, on an annual basis all reviewers will receive a day of refresher training, where their scores will be shown to themselves and to all the reviewers in their cohort. Merely demonstrating that a reviewer is out of line with his or her peers can usually either consciously or subliminally apply pressure on the marker to move towards the group average in failed files or distinctions.[108] In this way all reviewers are having their marking scrutinised in a way that seeks to reduce the gap between “tough” and “generous” markers.

3.7 Management and Administration of Peer Review

For peer review to operate in a jurisdiction there has to be a body that carries out the administrative and management tasks associated with the programme e.g., devising the criteria and the marking scheme, recruiting the reviewers, arranging for their training and monitoring, to assess the reports from reviewers and to liaise with the practitioners being assessed. The body will also have to plan the cycles within which to determine how many practitioners (and which ones, and how many files) are assessed in any given year. The body may also make policy decisions as to the programme or this responsibility may be located elsewhere e.g.in the MoJ.

108. Any file mark over a “3” constitutes a “distinction”.

3.7.1 The Administrative body

Not infrequently the body responsible for the management and administration of the peer review is the legal aid authority itself or a quality audit unit within the legal aid authority. Thus, in Chile the peer review programme is run by the Department of Control, Assessments and Complaints (DECR) within the Public Defender's Organisation (PDO) and in South Africa it is the Legal Quality Assurance Unit within Legal Aid South Africa. In Moldova the external monitoring of the quality of legal aid is performed by a special Commission of 7 members created by the legal aid authority (one representative from the legal aid authority, 3 lawyers from the legal aid system and 3 private lawyers selected through public contest. In such a way "peers" are not only legal aid lawyers but also general private defence lawyers who are not part of the legal aid system. Such an approach contributes to the perceived independence and credibility of the monitoring commission as well. There is an annual plan of external monitoring – 10 per cent of the total number of lawyers in the legal aid system are included in the annual plan of external monitoring of the quality of the legal aid services.

In England & Wales peer review administration is handled by the Legal Aid Authority, but overall policy lies in the hands of the MoJ. The appointment and training of reviewers, and monitoring and conduct of reviews and review decisions is carried out by an independent consultant (Sherr), together with a group of independent experts. The use of independent experts has served to reassure both the profession and the MoJ as to the integrity of the peer review programme.

In Scotland there are three programmes, one for civil legal aid cases, one for criminal legal aid and one for children's legal aid. Each programme has their own administrator but each is also headed by a Quality Assurance Committee. The civil QAC is a sub-committee of the lawyers' association (the Law Society of Scotland) but consists of 3 representatives of the lawyers' association, 3 from the legal aid authority (the Scottish Legal Aid Board - SLAB) and 3 lay members with an interest or expertise in quality assurance. The criminal QAC and the children's QAC are committees

A key person in any peer review programme is the administrator who is appointed by the administrative body to run the programme on a day-to-day basis. This person:

- liaises with the reviewers on an ongoing basis.
- organises the reviewers' refresher training sessions in conjunction with the person or body charged with monitoring the work of the reviewers.
- drafts and implements a rolling plan for selecting which practitioners should be as-sessed at what times in the year or review cycle.
- liaises with the practitioners over the files selected for review, identifying which re-viewer will assess them, and where the files will be assessed.
- selects the reviewer(s) required to assess the practitioner (taking care to avoid conflicts of interest) and liaises with the reviewers concerning the practitioner and files allocated to them, monitors the progress being made by the reviewer with the review, and pro-vides feedback from the administrative body on reviewers' reports where appropriate.
- keeps track of the files allocated to the reviewers, ensuring that the correct files have been sent, that they are complete and, in a form, fit to be assessed.
- collates the reports from reviewers for placement before the management/administrative body (preferably in a way that maintains the confidentiality and personal data of the cli-ents' whose files have been reviewed).
- corresponds with the practitioners on the matters arising out of the review or on the outcomes of the reviews after the determination by the administrative body,
- maintains records on the reviewers' scoring to be passed to the person responsible for monitoring the consistency of performance of the reviewers.
- Arranges any follow up reviews where the initial review has been failed.

of SLAB but are otherwise composed in the same way as the civil QAC. To maintain consistency between the three QACs the professional adviser to the programme (Paterson) sits on all three. The make-up of the QACs is not accidental, since the composition of each QAC reflects the fact that in Scotland the peer review programmes are a partnership between the Government, the professional association and the legal aid authority. This maximises the acceptance of schemes within the profession and its ongoing funding by the Government whilst reminding the legal aid authority and the professional association of their shared interest in professional standards of the providers as well as in ensuring that quality of legal aid work paid for by the Government remains high.[109]

Having recruited the reviewers, the administrative body for the peer review programme should ensure that the reviewers have a contract of employment setting out how long they will serve in the first instance, what their duties will be (and the type of report they will be expected to produce), what their fees will be and how the contract may be terminated or suspended (e.g., if a professional conduct charge averring harm to a client is established). It should also stress the importance of the reviewer respecting the confidentiality of the lawyer's files they are reviewing, of protecting the data of the individuals named in the files, and what to do if the file reveals that a crime or professional misconduct has been committed by the practitioner.

3.7.2 Policy

Any peer review programme needs both a body to formulate the policies underpinning the scheme as well as a body with the operational capacity to implement the programme and the policies behind it. Sometimes two functions are done by the same body, especially where it is the legal aid authority (as e.g., in China, Chile, England and Wales, New Zealand, Moldova and South Africa). In Scotland the key bodies are the Quality Assurance Committees (QACs) which are essentially partnerships between the legal aid authority (SLAB) and the lawyers' professional association (the Law Society of Scotland). Although the QACs are, in practice responsible for the policies behind the programme and the operation of the scheme – both the Law Society and the SLAB have to formally approve the programme.

Amongst the key decisions for the policy making body to make are:

- To set the overall objective of the scheme e.g., to reassure the public; to safeguard the public purse;
- To set the pass mark for the assessment process – often it will be "threshold competence" but it need not be so;
- Whether the programme is designed to re-validate every practitioner or provider unit or simply to give a representative picture of the overall quality of provider body. The former allows for continuous enhancement of standards, the latter rather less so.
- Whether the review of files is to be supplemented by other quality measures e.g., client satisfaction interviews, management audits or court observations – as happens in Chile, England and Wales, Ireland, Scotland and South Africa

Other important issues include:
Numbers and types of files to be examined; How long the review cycle should last and whether there should be an annual or a rolling plan and which providers should be prioritized; what quality control through checking and monitoring procedures there should be of the assessments and reports and of reviewer consistency; where files should be reviewed; and the role of technology in the process.

3.7.3 Confidentiality and Data protection

The administrative and management body has a further regulatory role. This is to ensure that the procedures of the scheme adequately protect any personal data on the files as well as the confidentiality of the clients and others mentioned in the providers' files. Today, it is generally the norm for the e legislation setting up the scheme to provide that peer reviewers may look at practitioners' files without this being a breach of confidentiality or data protection. Often the legal aid authority will also require clients who wish to receive legal aid to agree (in writing) that their files may be looked at by reviewers working for the legal aid authority for quality assurance purposes as part of the initial agreement between legal aid lawyer and client.

109. See QUAL-AID report op.cit. 16

3.7.4 The role of the QAC or administrative body in the assessments

Whilst reviewers are responsible for the initial assessment and report in relation to the practitioner, most programmes build in a checking function with respect to the report. Further, all programmes offer the provider an opportunity to make representations, either before or after the report has reached the administrative body. Nevertheless, generally it is the administrative body which makes the final decision in relation to the report and any representations or appeal that has been made by the provider. In Scotland it is considered to be a strength of the scheme that although reviewers make recommendations as to the outcome of the review, the final decision lies with the QACs. Each QAC

- Is responsible for liaising with practitioners about their review – especially from the perspective of continuous improvement, and dealing with any representations and comments from the providers.
- Acts as a consistency check since it sees all the reports and can moderate the marks of any reviewers who are felt to be outliers from the bulk of the reviewer cohort, thus reducing the impact of marker variation in generosity or toughness.[110]
- Uses 25% blind "double-marking" as a further safeguard against marker inconsistency.[111]
- Decides on the outcome of the review: Good Pass, Average Pass, Marginal Pass; Fail; Bad Fail.
- Takes responsibility for the publication of reports to the providers – including any mistakes or defamatory remarks about the provider. Should providers wish to litigate a decision to exclude them from doing legal aid – the QAC would be the defender, not the reviewers who made the assessments of the provider.

3.7.5 Outcomes

If the peer review programme is designed to reduce the supply base of providers/practitioners or simply to assure the state that legal aid providers are of an adequate quality then a simple pass/fail outcome would be enough. On the other hand, if the objective of the programme is continuous improvement, it is more likely that the body administering the scheme will wish to see a range of possible outcomes. Scotland has such a scheme, in consequence the QACs have a number of options available to them:

- Good pass – the practitioner has been awarded a mark or 4 or 5.
- Pass – the practitioner has received a mark of 3 or 3 + (this will be accompanied by detailed feedback to the provider as to how to improve before the next review)
- Marginal pass – the practitioner has only just passed and will be subject to a further review within a year or so.
- Fail – the practitioner's files have failed, although sometimes only marginally. The practitioner may have achieved good outcomes for the clients or given accurate and appropriate advice to the clients, but the file documentation may be very poor, few notes from meetings or phone calls with clients, no evidence of proper preparation and the client communication may be minimal. This will almost always lead to an "deferred extended" review in 6-8 months in which the practitioner's files which have been worked on since the original failed review will be examined by two different reviewers, (probably on site) for signs of improvement and a clear indication that the provider has learned from the detailed feedback from the QAC / reviewer(s).
- Bad Fail – the provider has been awarded a mark of 1 or 2 (the bottom two fail grades). The QAC will usually order an "extended" review to take place within two weeks (where the fail is so bad that the practitioner is felt to be a threat to the public) or sometimes a "deferred extended" review after 6 months. Extended reviews are always by two different reviewers and are usually on site. The reviewers will generally have indicated which files they wish to inspect (chosen at random) but they may inspect any legal aid file the practitioner has. Should a practitioner fail the "extended" review they will be provided with detailed feedback, offered the services of a mentor and sent to a "final" review between 6 and 12 months from the date of the fail. Once again this will involve two different reviewers and will be done

110. It is quite unusual for the QAC to change the grade recommended by the reviewer to the extent that the QAC fails a practitioner that the reviewer has recommended should pass or passes a practitioner whom the reviewer has recommended should fail. Where this occurs, the provider will be shown the reviewer's recommendations as well as the QAC's decision. Decisions by the QAC to vary the passing grade (either up or down) recommended by the reviewer are less unusual but still occur in less than 10% of cases.

111. As an additional safeguard against marker inconsistency, the QAC works with an academic consultant as professional adviser whose role it is to monitor the marking of the reviewers and to debrief the reviewers on an annual basis showing them their scores and training them in order to increase consistency.

on site. As before the QAC will be looking for signs of improvement since the date of the fail.

- To instruct a “special” review immediately to check whether the practitioner has been guilty of systemic breaches of professional ethics, of the law or the legal aid regulations.
- To report a possible crime to the prosecution authorities, or evidence of money laundering to the appropriate agency or professional misconduct to the independent legal complaints’ regulator.

Similar decisions are available in relation to the results of review reports in England although the details differ slightly.

In Chile there is a fourfold outcome scale: Compliant; Compliant with minor deficiencies; Compliant with major deficiencies and Insufficient. The last three receive substantial feedback but only the last grade constitutes a fail. In Victoria, Australia the peer review programme outcomes are somewhat similar: Good Practice; Good Practice with Education; Education and Quality Improvement Plan. As in Chile the last three grades receive detailed feedback of areas for improvement and the last grade is a fail. In Moldova there are only three outcomes: “Very Good”, “Good” and “Insufficient”.

3.7.6 Appeals or representations.

Peer review and supervision systems vary with their approach to communicating with the practitioner who is being assessed. In Chile the reviewers will interview the practitioner as part of the assessment exercise. In Scotland even where there is an on-site review the practice is not to discuss the outcome of the review with the practitioner on the day. In part this is to protect reviewers from being harassed by the practitioner whose main source of income may be at stake. In part it is also a recognition that it is the QAC which decides the outcome of the review, not the reviewer(s). In England and Wales, the Netherlands, New Zealand and in South Africa once the draft report has been written, if it is a fail, then the practitioner will be given a chance to respond to the report before it becomes formal. In Scotland the QAC will engage with the practitioner about any significant defect that it detects in the work of the practitioner before a decision is made as to whether the practitioner passes or not. In England and Wales,[112] a final finding of ‘incompetence’ can be appealed through the ‘representations’ process (see below). This is appropriate where the issues were not resolved at the draft report stage and result in a fail grade. Victorian Legal Aid and New Zealand also provide firms with rights of reconsideration and review with respect to certain sanctions.[113] Where lawyers disagree with the outcome of their quality assessments, it may be possible to request that their review be reassessed. In Chile, the peer reviewer’s report is checked by another peer reviewer from a different region (to promote geographic consistency) and then approved by a senior inspector. The practitioner who has been assessed can challenge the findings of the peer review by writing to the Head of the Evaluation Unit (DECR) in the Public Defender’s Office. In South Africa, the lawyer can ask the legal auditor to review their assessment and the auditor can vary his or her assessment if persuaded by the arguments of the lawyer. If the auditor still marks the practitioner at below the recommended performance target, the practitioner can appeal the assessment to the manager of the Legal Quality Assurance Unit. In England and Wales, a lawyer who fails his or her assessment can make representations to the legal aid authority. These will be considered in writing by the original reviewer and another senior reviewer who will ensure that all the points raised by the lawyer are dealt with. The decision will be monitored by a further independent senior reviewer to check that the panel has followed the correct procedure and the final mark is in accordance with the written report. A further review on a different file sample is then carried out by different reviewers either immediately (in cases of extreme concern for clients) or after a period of six months. Where the second review is also a fail and the firm has its contract to do legal aid withdrawn, they may appeal to the Legal Aid Agency and subsequently challenge a decision in the courts through judicial review. In Scotland, a practitioner who has failed his or her review can make representations to the QAC who will consider them, taking account of any second marker’s views (if it was double-marked), and may overturn the review outcome or ask for

112. Legal Aid Agency op. cit. 29.

113. Victorian Legal Aid, Section 29A Panels Conditions: Quality Audit Terms and Conditions (Schedule 3)

https://www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels/panels-conditions note that not all sanctions can be appealed – Schedule 6 of the Panels Conditions contains a full list of sanctions that can be appealed. New Zealand Ministry of Justice, Audit and Monitoring: Operational Policy (May 2018) 5
https://www.justice.govt.nz/assets/Documents/Publications/Audit-and-monitoring-policy2.pdf

a further review. However, even where the fail is confirmed, the lawyer will usually have a further review in six to eight months' time by two different reviewers. If that review is a fail, the practitioner has one final review in nine to twelve months with two further reviewers. A lawyer cannot be removed from the Scots legal aid programme without being failed by at least five separate reviewers. Even thereafter, such a lawyer could challenge the decisions in the courts through judicial review. These additional appeal mechanisms promote fairness and transparency by ensuring that the response to the review is proportional to any negative finding.

3.7.7 Dealing with the Challenged Provider

Where a legal aid provider is reviewed by a supervisor, a legal auditor or peer reviewer, and attains a score which is below the expected pass mark, there will almost always be a consequence. If the lawyer who has failed the assessment is a staff lawyer, a range of measures may start, including retraining or support measures or even removal or closer supervision for a defined period of time. If there is still no improvement, the lawyer may be dismissed. In Moldova, obtaining "insufficient" at internal or external monitoring could lead to exclusion from the Legal Aid System; then, if not excluded from the legal aid system, an internal monitoring will be performed in a three-month period. A second "insufficient" leads to automatic exclusion from the legal aid system. In Chile, the practitioner who has been found to have a deficient performance may be subject to technical supervision, sanctions or even termination of employment. In South Africa, the 5 per cent of practitioners who do not meet their performance target are provided with feedback from the legal auditors, and supervision and mentoring at their Justice Centre before being reassessed in six months. If they have not improved, they will be subject to performance management processes which could result in these practitioners being dismissed if no significant improvements are noted. In Scotland, (see above) the practitioner who fails their first or "routine" review has two further opportunities to prove that they have learned from past mistakes It is only if they fail the third (and Final) review that they are excluded from delivering legal aid services thereafter. In cases of serious or egregious non-performance by the lawyer the client may suffer serious detriment. Jurisdictions should ensure that remedies are in place if no legal aid provider arrives or if a legal aid provider is unprepared or unqualified. Although there may be overlaps between professional misconduct offences and performing badly in quality assessments, breaches of ethical codes should be kept separate from the quality process and sent to the ethics department of the relevant professional association to be dealt with.

3.8 Supplementary issues

3.8.1 Additional assessment measures.

As discussed in the country summaries a range of countries complement their peer review programmes with additional QA measures. Administrative audits of private firms are often done by legal aid authorities by non-legally qualified staff to check the office systems of the legal aid providers. These could be combined with peer reviews but this would be likely to increase the cost since to do so would always involve an on-site visit and one or more lawyer reviewers. Secondly, there are client interviews (unusual) although it happens in Chile and Ukraine. More common are client satisfaction questionnaires. These can be targeted to the clients whose cases have been peer reviewed but this is logistically difficult and more expensive. General surveys of client satisfaction are conducted by many legal aid authorities. Another mechanism is complaints against legal aid lawyers but, as stated earlier, neither client satisfaction questionnaires, nor complaints systems are effective methods of assessing quality.

3.8.2 The threat to independence

Some professions have claimed that peer review interferes with the professional independence of the lawyer. This might be a legitimate concern if supervisors or peer reviewers were to comment adversely on the lawyer's strategy in a case, other aspect of their professional judgement, or even their professional conduct. In practice, problems of independence can be overcome by: a) only reviewing closed or completed files, as is the case in England, Chile and Scotland (crime only) b) through clear terms in the staff lawyers' contract of employment, if he or she is providing services under such contract and c) by ensuring that outcomes of peer

review are proportionate. In any case, it should be clear from the outset that peer review has to be independent of government interference.

3.8.3 Threat to the Lawyers' privilege

A third challenge is the issue of lawyer privilege and client confidentiality. The latter doctrine exists in every jurisdiction, although its ambit may vary, with the purpose being to encourage clients to have confidence and trust in their adviser by limiting when and to whom communications can be disclosed. Due to the practicalities of everyday work in the legal environment, a general acceptance has formed that the lawyer's staff and partners or supervisors in the firm are also permitted to have access to confidential information of the client and the file, and the client is considered to have either impliedly or expressly consented to this. In jurisdictions where a client lodges a formal complaint against a lawyer or sues for negligence, the client will be deemed to have waived the doctrine of client confidentiality to the extent necessary for the lawyer's defence. This enables the bar association or the court to access confidential aspects of a case. In most jurisdictions (and all Common Law ones), it is accepted that clients can consent to the details of their case being seen by an independent lawyer for quality assurance purposes. In some civil law countries, a doctrine of "professional secrecy" exists, and the bar associations have sometimes sought to argue that, while clients could consent to others in their lawyer's firm seeing the details of the case, and to other lawyers seeing details where there is a client complaint or negligence suit, the client could not unilaterally consent to an independent lawyer seeing the details of the case. In their view the permission of the lawyer who is to be assessed is also required. This approach may have been justified in days gone by however such arguments could appear self-serving today. Ultimately, some jurisdictions e.g., England and Wales and the Netherlands have passed legislation to deal with this issue. In practical terms, the most sensible way to deal with the confidentiality is to always seek client consent, and to make sure that the peer review programme is a partnership between the Bar Association and the Legal Aid Authority and funded by the State[114].

3.8.4 Expenses

Finally, it is sometimes argued that peer review is too expensive since it involves using experienced legal aid lawyers on a paid basis. Recent research in Scotland reveals that the cost of the peer review programmes there amounts to around 4 per cent of the annual budget for administering the entire legal aid scheme. Each file review costs less than 200 Euros, whereas the cost of each complaint file – which is assessed by the independent regulator – amounts to about 2,500 Euros per case. In such a context, not only would peer review be a much better way of objectively assessing quality than client complaints, but it would also be considerably more cost-efficient. In many jurisdictions legal aid is delivered by paralegals. There is no reason why paralegals could not operate under a peer review scheme and where not for profit or CSO agencies in England and Wales have contracts to supply legal aid there are indeed peer reviewed as a result.

114. See QUAL-AID report op cit p.15.

4. Conclusions

Paterson and Sherr asserted in 2017 that "Peer review has established itself as a success story in a range of jurisdictions across the globe. It is expensive because it relies on highly experienced practitioners, but it has demonstrated its value as the gold standard in relation to the quality assessment and assurance."[115] Similarly Boersig and Davenport concluded in 2019 that "International trends…indicate that peer review is the 'gold standard' of quality control."[116] As this short report has indicated, in addition to the full blown examples of peer review there are a number of jurisdictions (indeed rather more than is generally understood) around the world including, Canada, Australia and Ireland, where staff attorneys are having their files monitored by their managers or supervisors. Depending on the rigour with which this is done, this can mirror a number of the features of a peer review programme. Although EU funded research[117] has revealed that there are a range of vehicles that are used to assess the quality of a lawyer's work, most either assess input or structural variables or are flawed methods for assessing outcomes e.g., client satisfaction surveys or a complaints system. Peer review alone offers a way of harnessing subjective professional judgement with an objective set of criteria and scoring system to produce a proactive, systemic, risk-based form of assessment of the quality of lawyers' performance and of the outcomes they achieve. Additionally, peer review when harnessed to individual criteria in a spreadsheet can produce a unique set of data showing the areas of practice in which the profession (or the part that does legal aid) excels and where it does not. The latter can then be targeted by training and continuous professional development. Finally, peer review has the further advantage over a complaints system that it can be more easily used to drive up standards over time, and even, as in China and Georgia, be used to nudge practitioners towards a change in culture namely, client-centred lawyering.

115. Alan Paterson and Avrom Sherr "Peer Review and Cultural Change: Quality Assurance, Legal Aid and the Legal Profession" ILAG conference paper, Johannesburg, 2017). http://www.internationallegalaidgroup.org/images/miscdocs/Conference_Papers/Peer_Review_and_Cultural_Change.3docx_28APAS29.pdf

116. John Boersig and Romola Davenport, "Distributing the legal aid dollar- effective, efficient and quality assured?" ILAG conference paper, Ottawa, 2019. http://www.internationallegalaidgroup.org/index.php/conferenecs/ottawa-2019/conference-papers

117. S. Nikaratas and A. Limante, "Tools and Criteria for Measuring |Legal Aid Quality: Guidelines for EU Member States" QUAL-AID Report (Law Institute of Lithuania, 2018)16 https://www.jura.uni-frankfurt.de/75941968/QUAL_AID_Evaluation_of_Legal_Aid_Quality.pdf?

Annex A

Irish Legal Aid Board

1. Performance/file review process

Background

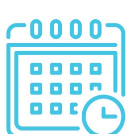
Having regard to the need to ensure effective risk management the Board has put in place the following formal structured systems of case file reviews. The systems are designed to contribute to the effective management of performance and of the appropriate management of risk.

Own file review process

A regular review of all cases in law centres is essential for the purpose of assuring the quality of legal services provided and to ensure that there is a proper structure in place to limit the scope for potential professional negligence actions against the Board.

The process requires that solicitors review their files and ensure that the workflow/case status on EOS is up to date (in practice, the workflow should be kept up to date as the case is in progress by marking checklist items/milestones as Done or Not Needed and progressing to the next appropriate workflow when required). Each solicitor is required to review their files three times a year to ensure the workflow/status is up to date.

The review dates are as follows:



Before the end of May
All files which were open on the 30th April

Before the end of September
All files which were open on the 31st August

Before the end of January
All files which were open on the 31st December

Each solicitor is also required to submit a Declaration, in the format below, that they have reviewed their files and that there are no issues that might give rise to a claim in respect of breach of professional duty against the solicitor or the Board. The Declaration should be suitably qualified if a solicitor has concerns about a particular case.

Declarations should be scanned and emailed to your Regional Manager or the Director of Civil Legal Aid, as appropriate.

Solicitors are required to declare that they are broadly familiar with the contents of the Administrative Procedures Handbook. Managing solicitors must sign a different version of the declaration also stating that they regularly discuss the contents of the Handbook with staff, and that the risk register is up to date and they monitor it regularly.

Declaration by solicitor following review of files

I declare that I have reviewed all of my files for the four-month period ending ___________ and that the case status on EOS is up to date.

I further declare that, at the date of this declaration and following a review of all case files, I am not aware of any circumstances that may give rise to a claim in respect of breach of professional duty against myself or against the Legal Aid Board.

I further declare that I am familiar with the contents of the Board's Administrative Procedures Handbook.

NAME (BLOCK CAPITALS):

LAW CENTRE:

SIGNED: DATE:

Declaration by managing solicitor following review of files

I declare that I have reviewed all of my files for the four-month period ending ___________ and that the case status on EOS is up to date.

I further declare that, at the date of this declaration and following a review of all case files, I am not aware of any circumstances that may give rise to a claim in respect of breach of professional duty against myself or against the Legal Aid Board.

I further declare that I am familiar with the contents of the Board's Administrative Procedures Handbook and that I regularly discuss the contents of the Handbook with staff.

I further declare that the risk register which I have attached is up to date and that I monitor it regularly.

NAME (BLOCK CAPITALS):

LAW CENTRE:

SIGNED: DATE:

File review process

- primary responsibility for the provision of a professional and timely service lies with the individual solicitor the case is assigned to;
- primary responsibility for managing the risk of providing an inadequate and unprofessional service lies with the solicitor the case is assigned to, though, for example, regular case file reviews, and providing the required case status returns and declarations in accordance with the Circular on the matter;
- the primary responsibility for appraising the performance of solicitors in a law centre lies with the managing solicitor of that law centre;
- the primary responsibility for appraising the performance of managing solicitors in law centres lies with the Director of Civil Legal Aid/Regional Manager;
- to assure performance to the satisfaction of the Board, reviews of the documented aspects of the legal service provided will be carried out in an appropriate manner, as set out in this document and having regard to the requirements of effective oversight and confidentiality;
- for the purpose of this structured system of file reviews, 'file review' means that a reviewer, as set out below, shall be entitled to have full access to the case file and sight of all such necessary documents as to enable that reviewer carry out the review process;
- expert or welfare reports directed to be procured by the court in family law cases, such as section 47 reports, will not be reviewed or examined as part of this process (in the light of the obiter dicta of Ms. Justice Laffoy) and any such report should be identified by the solicitor with conduct of the file beforehand and placed in an envelope on the file;
- a review should take place with each solicitor on an annual basis;
- reviews will be carried out in the law centre on the basis of the relevant checklist available on the bulletin board and at Annex C. The checklists, which should be completed, are benchmarked against the Board's best practice guidelines, and take full account of the need for effective risk management. In the event that no checklist is available for the case type, a short note should be done on a separate page setting out the pertinent facts and time-lines on the case;
- all personal injury and other files involving statutory deadlines will be reviewed;
- initially five files that commenced four or more years prior to the review will be reviewed;
- if the reviewer considers that there is an element of systematic delay that is not warranted by the circumstances of the case a further seven files that commenced four or more years prior to the review will be reviewed;
- a minimum of five other files, selected at random, will be reviewed;
- a written report will be prepared on the reviews in the format set out on the bulletin board under 'Procedures' and a copy furnished to the relevant solicitor;
- copies of the checklists, together with a copy of the review report, should be furnished to the Director of Civil Legal Aid/Regional Manager;
- in the event that the reviewer considers that a file review identifies areas of concern, the reviewer will identify those concerns to the solicitor and every effort should be made by the solicitor to address those concerns within an agreed timeframe. (Such concerns could include, among other things, a failure to proactively manage files giving rise to undue delay, a failure to communicate with clients, and a failure to record and manage information on the file appropriately). The reviewer should monitor on a regular basis whether the concerns are being addressed by the solicitor. If the concerns are not being addressed, the solicitor should be so informed in writing and the concerns must be brought to the attention of the Director of Civil Legal Aid/Regional Manager. It will be a matter for the Director of Civil Legal Aid/Regional Manager, in consultation with the reviewer, to determine whether a more comprehensive review of case files should take place;
- in the event that the file reviews identify areas of major concern, the reviewer should identify those concerns to the solicitor in writing and the concerns must be

brought to the attention of the Director of Civil Legal Aid/Regional Manager immediately. The Director of Civil Legal Aid/Regional Manager, in consultation with the reviewer, will determine whether a more comprehensive review of case files should take place. The solicitor, the subject of the review, will be notified in writing in advance of the review and of the major concerns giving rise to it;

- it is imperative that any file that constitutes a professional negligence risk be brought to the attention of the Director of Civil Legal Aid immediately.
- the Director of Civil Legal Aid/Regional Manager will review a proportion of the case files that have been reviewed and the Report of File Reviews completed by managing solicitors. In the event that the Director of Civil Legal Aid/Regional Manager is not satisfied that the review has taken place or has taken place in accordance with the agreed procedures, or if it becomes apparent that this review identifies major concerns that should have been brought to the attention of the Director of Civil Legal Aid/Regional Manager by the managing solicitor on foot of the original review, the Director of Civil Legal Aid/Regional Manager will determine whether a standard review in accordance with the process herein, or a more comprehensive review, of the solicitor's case files be undertaken by the Director of Civil Legal Aid/Regional Manager. A more comprehensive review will have no restriction on the number of files reviewed. The solicitor the subject of the review will be notified in writing in advance of the review and, if relevant, of the major concerns giving rise to it.
- fair procedures will apply at all stages of the process, as will any relevant provisions of the Industrial Relations Recognition and Procedures Agreement between the Legal Aid Board and Unite and SIPTU.

A solicitor who considers that a particular file in respect of which access is being sought contains material of an unusually sensitive nature may advise the Director of Civil Legal Aid/Regional Manager of this fact. If, following consultation between the solicitor and the Director of Civil Legal Aid/Regional Manager, the latter considers that a review of the file is still essential to enable the Board to discharge its functions and duties under the Act, the review of the file, will be facilitated.

In relation to private practitioners the above procedure may be followed with relevant adaptations. In particular, the Director of Civil Legal Aid/Assistant Director or other relevant staff member nominated by the Director of Civil Legal Aid will be substituted for the Director of Civil Legal Aid/Regional Manager.

File review forms

Report of File Review

1. Solicitor:

2. Reviewer:

3. Date of Review:

4. Personal injury/statutory deadlines reviewed, the year(s) those files were opened in, and the case reference numbers:

Reviewer's observations on conduct of these files having regard to the existing circulars/best practice guidelines and including details of any areas of concern:

5. Files reviewed that commenced four or more years prior to the review, the year(s) those files were opened in, the case reference numbers and the subject matters:

Reviewer's observations on conduct of these files having regard to the existing circulars/best practice guidelines and including details of any areas of concern:

6. Random files reviewed including the year(s) the files were opened in, the case reference numbers and the subject matters:

Reviewer's observations on conduct of these files having regard to the existing circulars/best practice guidelines and including details of any areas of concern:

7. Action identified as being required to address any issues of concern:

8. Identify any area of disagreement between the jobholder and the reviewer in relation to either areas of concern expressed by the reviewer or action identified by the reviewer as being required.

File Review
Checklist – separation, divorce, Dissolution of civil partnership and Cohabitation Relief cases

1. Date of first consultation:

2. Is there a clear note of the basic information (KS1)?

3. Чи є примітка або лист про те, що обговорювалися варіанти вирішення суперечок та дотримувалися Розділи 5, 6 або 7 (KS1)?

4. Is there a clear record of the advice given, including advice in relation to the range of settlement options (KS3)?

5. Was the appropriate preparatory work done (KS4)?

6. Were attempts made to enter into a settlement process or is there a note to the effect that a conscious decision has been taken to press ahead with proceedings (KS5)?

7. Were the settlement negotiations successful and if so on what date was agreement reached (KS5)?

8. On what date was a Separation Agreement executed or Consent Orders obtained (KS 6 and 7)?

9. In the event that the case was contested on what date was a legal aid certificate applied for (KS8)?

10. Was the letter sent on foot of Section 40 (KS8)?

11. On what date were proceedings issued/a defence filed (KS8)?

12. Was the client furnished with copies of the proceedings filed on his/her behalf (KS8 and 10)?

13. Is there a note of any discussion with the client about whether discovery was necessary (KS10)?

14. Were any preliminary applications to court filed (and authorised if such authorisation was required) (KS2, 9 and 11)?

15. Prior to the Notice of Trial being served were the relevant proofs identified (and subsequently available for the hearing) (KS12)?

16. On what date was a Notice of Trial served (KS13)?

17. If counsel was briefed, did the client meet with counsel before the day of the hearing (KS14)?

18. On what date was the case heard (KS14)?

19. Was the client written to immediately after the hearing with an explanation of the outcome and advice in relation to a possible appeal if the case was contested (KS15)?

20. Was there a pension involved and if so, was it fully addressed? If not, was the client informed of what further steps would need to be taken to address it (KS15)?

21. If the client was the applicant, was a draft Order furnished to the County Registrar/the opposing solicitor for approval (KS15)?

22. Was the client furnished with the original certified copy if the Order (KS18)?

23. Any other comments?

File Review
Checklist - asylum cases

1. On what date did the client first register?

2. On what date was the client first seen by a solicitor/paralegal (KS1)?

3. Is there a clear record that the client was appropriately advised pre Questionnaire/pre-interview (KS1)?

4. If the provisions of the Dublin II Regulation are applicable was the client advised of the option of making a submission to ORAC (KS2)?

5. If the client expressed concerns about the ORAC interview were these concerns followed up with ORAC (KS4)?

6. If the client received a positive recommendation from the RAC was s/he written to (KS6)?

7. If the client received a negative recommendation from the RAC is there a clear record of the client giving instructions to appeal (KS6)?

8. If the Notice of Appeal was prepared by a law centre solicitor or by a barrister, is there a written authority from the client to sign the Notice of Appeal (KS6)?

9. Was the Notice of Appeal submitted within the statutory period (KS6)?

10. Was the client furnished with a copy of the Notice of Appeal (KS6)?

11. Was country of origin information submitted before the hearing or is there a note to the effect that it was deemed not to be necessary (KS6)?

12. If no oral hearing was available or requested, did the Notice of Appeal respond to the grounds of refusal identified in the Section 13 Report?

- identify a Convention reason?
- address issues of credibility identified in the Section 13 Report in a fact / case specific way?
- make a case specific argument as to why the applicant should be recognised as a refugee?
- adhere to the UNHCR checklist? (KS7)?

13. Was a decision made to seek a medical report or not (KS8)?

14. Was the client written to, confirming the date of the oral hearing (KS11)?

15. Was the barrister informed of the hearing date on receipt of the notification from the RAT (KS11)?

16. Is there an attendance note on the file in relation to the hearing (KS11)?

17. If the RAT decision was negative, was the decision furnished to the barrister within seven days (KS12)?

18. Was the client written to within ten days with advices in relation to judicial review (KS12)?

19. If the RAT decision was positive was the client written to (KS12)?

20. Was the client written to, or other contact made, after the Section 3 letter was received (KS13)?

21. Is there a clear record of advices given and instructions received at Section 3 stage (KS13)?

22. Was a leave to remain application made within the statutory period (KS13)?

23. If a Deportation Order was served, was the client written to (KS14)?

24. Were any potential JR issues followed up promptly?

25. Has the file been appropriately maintained (File management)?

26. Any other comments/observations?

File Review
Check list – custody and access

1. Date of first consultation (KS1)?

2. Is there a clear note of the basic information (KS1)?

3. Is there a note or a letter to the effect that dispute resolution options were discussed and the solicitor's obligations on foot of Section 20 of the Guardianship of Infants Act 1964 (as amended) were complied with (KS1)?

4. Is there a clear record of the advice given, including advice in relation to the appropriateness of the remedy sought and the possibility of reaching an agreement without the necessity of contested court proceedings (KS1)?

5. Were attempts made to enter into a settlement process or to reach an agreement (KS1)?

6. Was the appropriate preparatory work done (KS2 and 3)?

7. Date of hearing

8. Was the client advised in writing of the outcome of the case, the possibility of there being an appeal in the event that the case was contested, and the steps available to enforce the Order in the event of there being a breach (KS4)?

File Review
Check list – domestic violence

1. Date of first consultation (KS1)?

2. Is there a clear note of the basic information including details of the alleged behaviour giving rise to the relief sought (KS1)?

3. Is there a clear record of the advice given, including advice in relation to the likely availability of a Barring/Safety Order and the possibility of reaching an agreement without the necessity of contested court proceedings if it is considered that this is appropriate (KS1)?

4. Was the appropriate preparatory work done, including having witnesses or proofs available for the court (KS2)?

5. Date of hearing.

6. Was the client advised in writing of the outcome of the case, the possibility of there being an appeal in the event that the case was contested, and the steps available to enforce the Order in the event of there being a breach (KS3)?

File Review
Check list – guardianship

1. Date of first consultation (KS1)?

2. Is there a clear note of the basic information (KS1)?

3. Is there a note or a letter to the effect that dispute resolution options were discussed (KS1)?

4. Is there a clear record of the advice given, including advice in relation to the nature and implications of appointing a father a guardian and the possibility of reaching an agreement without the necessity of contested court proceedings (KS1)?

5. Were attempts made to enter into a settlement process or to reach an agreement (KS1)?

6. Was the appropriate preparatory work done including having a copy of the child/children's birth certificates available (KS2)?

7. Date of hearing.

8. Was the client advised in writing of the outcome of the case, the possibility of there being an appeal in the event that the case was contested, and the possibility of further applications being made to the court at a later stage (KS3)?

File Review Checklist – maintenance

1. Date of first consultation:

2. Is there a clear note of the basic information (KS1)?

3. Is there a clear record of the advice given, including advice in relation to the range of settlement options, and of the client's expectations being appropriately managed (KS1)?

4. Was the appropriate preparatory work done including the exchanging of Statements of Means and vouching documentation (KS1 and 2)?

5. Were attempts made to enter into a settlement process (KS2)?

6. Date of hearing.

7. Was the client advised in writing immediately after the hearing, of the outcome of the case, the possibility of there being an appeal in the event that the case was contested, and the steps available to enforce the Order in the event of there being a breach (KS4)?

File Review
Checklist - personal injury/other statutory deadline cases

1. Date of accident / cause of action / letter of PIAB authorisation:

2. Was it established that this is a PIAB case?

3. Was a letter of claim sent?

4. If the case is a post PIAB case, was it established how much time was left to run on the statute in accordance with Section 50 of the PIAB Act 2003?

5. Date proceedings issued: (if proceedings have issued, proceed to Q7)

6. Date of application for legal aid:

7. Date of first appointment with solicitor:

8. Date of application for a legal aid certificate:

9. Date certificate granted:

10. Date proceedings served:

11. Were the requirements for pleadings set out in the Civil Liability and Courts Act 2004 complied with?

12. Date Statement of Claim served (if required):

13. Date Defence filed:

14. Date Notice of Trial served:

15. Date of hearing:

16. Date of decision / settlement:

17. Was advice given in relation to the possibility of an appeal?

18. Date settlement monies received:

19. Comments:

Annex B

Alan A. Paterson

Civil Legal Aid Peer Review Assessment Protocol for Scotland 2020

Assessment procedures

1. All files are marked against a set of criteria and guidelines approved by the Law Society (LSS) and SLAB on a marking scale from 1 to 3 where 1 indicates "below acceptable standard", 2 "acceptable" and 3 indicates "exceeding acceptable standard". Over the years the persistent finding is that a "2" is a broad category and that a "1" or a "3" are narrower categories/marks (that means that a "2" will be much the most common mark of the 1-3 possibilities. There are two further scores: "C" meaning "insufficient information on file to score against the criteria" and "N/A" meaning "That criterion is Not applicable to this particular case".

2. There is a final Overall Mark criterion for the file as a whole which is marked on a 1-5 scale with 1 and 2 being below acceptability and 4 and 5 above the minimum acceptable standard. This mark is arrived at from the reviewer's professional judgement as to the overall acceptability of the work done by the solicitor/ firm in the case. The mark is NOT attained additively from the scores on the other criteria. However, there should be some relationship between the scores on the individual criteria and the overall mark for the file. A file that receives nothing by "2" for each criterion should not be classified as more than a "3" for the overall file unless the reviewer can claim that all the "2" marks for individual criteria are "High 2s". A clear "4" seems to need at least two marks of "3" on the individual criteria, however this works both ways. If a file receives several "3"s on individual criteria and no "c"s or "1"s then it should normally get a 4.

3. For every criterion (except the final "overall" one) on which a score of 1 is returned the reviewer will write or type notes at the end of the Scoring Sheet under the "Comments" heading, indicating why a score of "below acceptable standard" has been recorded for that criterion. (In the case of the Final Overall Criterion, notes should be provided if a score of 1 or 2 is recorded).

4. Where a score of 3 is recorded (or 4 or 5 in the case of the Final Overall Criterion) the reviewer will have the option of indicating in the Comments section why the performance is considered to be particularly meritorious.

5. There will be occasions where it is unclear whether the appropriate score for a criterion is a 1 or a "C". The consensus to emerge from the training days is that in these cases a "C" should be recorded but in practice the presence of 3 or more "C" scores should be commented on adversely in the Comments section at the end of the Scoring Sheet and should generally lead to the file failing unless the two of the "C" scores are really in relation to the same flaw.

6. Similarly, there will be occasions where it is unclear whether to award a score of 2 or a "C" for a criterion. It is suggested that if there is nothing on the file, but equally nothing to suggest that the criterion has not be complied with, AND nothing hinges on it, then a "2" would be appropriate rather than a "C".

7. What is the overall pass mark for a practitioner? If there are only 5 files then normally one file can be failed, but if two are failed, then the practitioner should fail, unless the reviewer provides a justification why the practitioner should nonetheless pass e.g., the three passing files are substantial ones whilst the failing ones were short A and A files. This suggests that the pass mark is around 70%.

8. A series of incidental points have arisen and they have been resolved as follows:

   Question 1:
   What guidance should we give to reviewers as to when a case reveals too many "C" scores?

   It is suggested that reviewers should comment adversely at the end of each case marks sheet at the number of "C" scores where: (a) it is not possible to tell what is happening in the case for significant periods of time because nothing is recorded on the file (b) the "C" scores are sufficient in number and area to indicate systematic problems in file management or (c) normally where there are 3 or more "C" scores in a case. As a rule of thumb, if there are 3 or more "C" scores and the reviewer does not recommend that the file should fail, the reviewer should explain in some detail why he/she has exercised his/her professional judgment in that way.

Question 2:
What guidance should we give to reviewers as to when a case should fail overall?

It is suggested that reviewers should give an overall fail mark to a case in respect of fails against individual criteria where: (a) the criterion is a crucial one in this case (a) "showstopper") (b) the "1" scores are sufficient in number and area to indicate systematic problems in case handling or (c) normally where there are 3 or more "1" scores in a case or "C" normally where there are 3 or more "1" or "C" scores in total.

In considering whether advice is appropriate, the reviewer should have regard to the circumstances of the case and the level of information available to the solicitor and take into account ethical, practical, tactical and legal considerations.

In considering whether advice is accurate, the reviewer should consider whether it is factually and legally acceptable.

Annex C

Scottish National Standards
for Information and Advice Providers

Peer Review scheme

The Role of the Moderation Committee member

1. SLAB
2. The SNSIAP
3. The accreditation process
4. The Peer Review process
5. The Moderation Committee

1. SLAB

The Scottish Legal Aid Board (SLAB) manages the legal aid system in Scotland and funds most of the criminal defence work carried out by Scottish solicitors and advocates and significant amounts of civil work, such as family law. Most of the legal advice paid for by SLAB is available from solicitors in private practice but SLAB also directly employs criminal defence solicitors in the Public Defence Solicitors' Office and civil solicitors in the Civil Legal Assistance Offices.

SLAB also funds advice sector agencies to run projects providing advice to members of the public about their rights. The advice sector is the term used to describe the many organisations and parts of organisations that provide free advice to the public about issues such as housing, benefits and debt. Many of the providers are highly visible such as the Citizens Advice Bureaux (CABx) but others may not be as well-known and, in the case of local authority advice providers, they may be part of a much larger team such as social work or housing.

Funding for these agencies comes from a variety of sources. Many local authorities will use their funding to fund the local CAB to provide independent advice while others will have their own in-house teams. Scottish Government, SLAB and the Lottery also fund projects that will provide advice, often to a specific group (such as ex-army personnel or hospital patients).

SLAB's involvement in the Quality Assurance of the advice being provided by these agencies has grown out of this funding role.

SLAB runs the Quality Assurance process for checking the advice that is provided by criminal defence solicitors and solicitors who act in cases involving children. SLAB recruits the peer reviewers from the solicitor profession and also manages the Quality Assurance Committee that oversees the peer review process. The SNSIAP peer review and Moderation Committee process has been modelled on these processes and we have been greatly helped by our QA colleagues in SLAB over the past year to set up the SNSIAP process. The Moderation Committee will be chaired by Kingsley Thomas who, as head of Criminal Legal Assistance at SLAB, manages and facilitates the criminal peer review process.

2. The SNSIAP

The Scottish National Standards for Information and Advice Providers (SNSIAP) were developed to help advice agencies to measure how well they were doing in providing advice to the public. In 2005, accreditation was introduced to provide formal recognition of organisations' achievements in meeting the Standards. Accreditation was also designed to provide assurance to the public, funders and policy makers that organisations were well managed and providing high quality advice.

The Standards are owned by the Scottish Government and are published on their website at: http://www.gov.scot/Topics/Justice/policies/widening-access/standardsforadvisers They cover three areas of advice: housing, welfare benefits and debt/money advice and are divided into:

1. Organisational Standards – these cover the way the advice agency is run and include issues such as general management of the service, accessibility and customer care and planning.
2. Generic competences - these cover the general skills expected of an advice agency, such as interviewing skills or legal research skills.
3. Technical competences - these cover the technical legal knowledge expected of an advice provider in welfare benefits, housing and debt/money advice. They are sub-divided into topics. For example, there are 15 Housing standards covering topics such as Rent Arrears, Mortgages and Disrepair.

The SNSIAP accreditation process ran until 2012 when it was put on hold due to concerns about the costs involved in auditing agencies. At that time, auditors were paid to visit an agency and go through their processes and do some reviews of their case files. SLAB was then asked by Scottish Government to revive the Quality Assurance process but to put it on a more sustainable financial footing. After discussions with Scottish Government and the advice sector, we have separated the peer review process (which looks at the quality of the advice being provided to the public) from the audit process (which looks at the way the agency is managed). We have also set up a remote peer review process that will have the peer reviewers accessing case files digitally through a variety of different ways.

Types of advice

For the purposes of the SNSIAP, advice is divided into three Types. The purpose of dividing advice in this way is to make it easier for agencies to identify the limits and boundaries of their knowledge. It therefore means that the public can be reassured that if an agency is accredited as a 'Type I' agency it should not be providing advice beyond the limits of Type I agency.

Type I advise

If someone rings up an agency to ask about a housing issue, a welfare benefits issue or a debt/money issue, a Type I agency will provide them with information about their problem. This is more than just giving them a leaflet – that is known as 'signposting.' Much of the advice provided in Citizens Advice Bureaux by their volunteer advisers comes under the definition of Type I advise. So, someone may ring up and ask about disability benefits or what they have to do to apply for a local authority flat. The adviser will be able to provide them with information about how disability benefits work and what they need to do to apply for them and similarly, what they need to do to make an application to get on the council housing list.

Type II advice

If the person then says that they had a problem with their housing, welfare benefits or debt/money issue, they will need to go to another agency that is able to deal with their problem. By 'dealing with the problem' we mean asking the person for more details about the problem, asking them for information about their circumstances and then working with the person or on their behalf to sort the problem out. This could involve contacting the DWP or a landlord or a creditor by writing letters, making phone calls or sending emails. This is called 'casework' and agencies that do casework are described as Type II agencies. In the examples given above, the person with the disability benefits enquiry might be ringing because they have been ill and can no longer work and don't know if they can apply for disability benefits. Or they may have been threatened with eviction from their council house and they don't know what to do.

Type III advice

If the person's problem required a court or a tribunal to sort it out, the person might require someone to represent them at the tribunal. The agency that represented the person at the tribunal hearing would be a Type III agency. So, the person with the disability benefits problem may have to take their case to a tribunal after being turned down for the benefit by the Department for Work and Pensions. The person who is threatened with eviction may be taken to court by the council for an eviction order and the Type III agency would act for them in the case.

Some agencies will do Types I, II and III work but some will only do Type I work or Type I and II. Many agencies in Scotland will provide advice on all three of the SNSIAP areas (housing, debt and welfare benefits) but others will only give advice on one area or two of the areas.

3. Accreditation process

There are two routes to accreditation depending on the Type of agency.

Type I agencies accreditation process

An agency wishing to be accredited under SNSIAP as a Type I agency must apply to SLAB to be audited. The audit will, like most audits, look at the way the agency is managed using the Standards as a guide. If an agency passes the Type I audit it can be accredited. Because Type I agencies don't do casework, they do not have to go through peer review.

Type II/III agencies

Agencies wanting to be accredited under SNSIAP at Type II and/or III level in housing, money/debt or welfare benefits must first be successfully peer reviewed before they can apply for accreditation and audit. Only after the successful peer review, can a Type II/III agency apply for accreditation. They will then be audited and if successful, they will be awarded accreditation under Type II and/or III in housing, money/debt or welfare benefits.

Audit

The audit process will require the agency to fill-out a self-assessment form checking that they are confident that they have all the processes in place required by the SNSIAP to show that they are managing their agency to the standard required. If they are confident that this is the case, they apply for an audit. The SNSIAP auditor will come out and visit their office and carry out the audit then produce a report setting out whether they have passed or not and highlighting areas of improvement. Type I agencies will go through the audit process straightaway. Type II/III agencies will have to successfully complete the peer review process first and then apply for audit and accreditation.

CABx

The exception to the above process is the CAB service. Because CABx are already audited by Citizens Advice Scotland, a CAB wishing to be accredited as a Type II/III agency does not have to go through a full audit. They will go through a desktop audit. If this is successful, they will then be accredited in the same way as other agencies.

4. Peer review – the process

All advice agencies should have internal systems for checking the accuracy of the advice being provided by their advice workers. Some agencies will do internal peer review with colleagues checking the work of colleagues. In other agencies, the manager will check the work while some agencies pay someone from another advice agency to come in and check their case files on a regular basis. Whatever the method is used, they should be doing this on a regular basis so that they are confident that the advice they are giving to the public is good enough.

The SNSIAP peer review process provides an external check on whether these internal checking systems are working. It does this by checking the technical accuracy of the advice recorded on a small selection of client case files.

The primary aim of peer review is to support agencies to improve their service and the peer review reports should include recommendations to the agencies as to how they can do this. It will not:

a. Provide an assessment of the quality of advice provided by individual advisers

b. Provide an assessment under every one of the competences in each subject, e.g., 15 Housing competences or 19 benefits competences

c. Act as a substitute for regular, internal case checking and supervision of advice workers

In this way it differs from the old system. The new peer review process is primarily a check on the managers who are running the advice agencies because we are checking whether they are properly managing their advice teams by supervising their work and ensuring that they receive proper training and support.

The peer review process

- The agency will provide a list of all the open and closed cases from the last year in the housing and/or welfare benefits and/or debt/money advice;
- The agency must only send cases that are accompanied by the appropriate client consent;
- SLAB will randomly select 30 case files in each topic;
- The agency will send those case files to SLAB;
- SLAB will randomly select 15 from each topic and send these to the peer reviewer for assessment;
- The peer reviewer will write a report and send it to SLAB who will send it to the Moderation Committee for consideration;
- If the agency doesn't meet the required standard (75%) then a second peer reviewer will be assigned the same cases and will write a report;
- Both reports will be sent to the Moderation Committee for consideration;
- Every quarter a random selection of case files will be taken from the case files sent in by agencies and these will be double-marked to check for consistency;
- The Moderation Committee will decide whether they agree with the peer review report (if the agency is deemed to have met the required standard);
- If they are presented with two reports that both state that the agency did not reach the required standard, then the Moderation Committee will decide if it agrees with the peer reviewers;
- If they are presented with two reports with different conclusions (one says yes, required standard met and one says no, it is not), the Moderation Committee must decide whether the agency has met the required standard or not.

Digital transfer

The agency seeking to be peer reviewed must allow the peer reviewer to see the contents of their client case files so that the peer reviewer can carry out a peer review. The process of accessing case files will be a digital one. The case files will be accessed in one of two ways:

- By scanning and uploading the case files onto a secure internet file sharing server called e-PIMS which is owned and managed by the Cabinet Office;
- Through direct access to the agency's case files – this will be possible for agencies using a case management system called Advice Pro.

We will have our own file-sharing system in place within the next year, which will allow agencies to upload their case files directly onto the SLAB system. But for now, case files will be uploaded onto encrypted hard disks and sent to SLAB by post. They will then be uploaded onto the SLAB secure servers and put onto e-PIMS so that the peer reviewers can read them. The peer reviewers will look at the cases, check them for accuracy and produce a report setting out their

assessment of the accuracy of the advice recorded in that report.

All the peer reviewers have been given encrypted laptops to use for peer reviewing. These are owned and will be managed and checked by SLAB.

Peer review scoring

The process for scoring case files has been devised to make it possible to show where improvements to an agency's advice processes could be made. Peer reviewers will be given a case file and asked to go through it to check whether the advice that has been given to the client is accurate or wrong.

A Green, Amber, Red scoring process will be used to mark the case files.

- A Green score will mean that the peer reviewer has no concerns about the advice that has been given and there are no missed issues.
- An Amber score will be given if the advice provided to the client is accurate but there is room for improvement or issues have been missed.
- A Green or Amber score indicates that, in the peer reviewer's opinion, the advice provided is good enough to enable the agency to apply for accreditation and audit.
- A Red score will mean that, in the peer reviewer's opinion, the advice provided to the client was wrong or it is impossible to work out what advice was given to the client, because, for example, the case recording was so poor. If enough Red scores are awarded by the peer reviewer, this will indicate that the agency is not yet ready to apply for accreditation and audit.

Scoring and the Standards

After SLAB has selected 30 case files, the agency will send those files to SLAB along with a completed case selection grid. The case selection grid for Housing is provided below. The numbers along the top refer to the sub-topics of advice and the agency will put a tick under the sub-topics that it thinks are covered by each case. These sub-topics are listed under the table.

Case Identifier	Housing Area of Law														
	2.1	2.2	2.3	2.4	2.5	2.6	2.7	2.8	2.9	2.10	2.11	2.12	2.13	2.14	2.15
Case 1															
Case 2															
Case 3															
Case 4															
Case 5															
Case 6															
Case 7															
Case 8															
Case 9															
Case 10															
Case 11															
Case 12															
Case 13															
Case 14															
Case 15															

Housing Competences

2.1 Rent Arrears
2.2 Mortgages and Secured Loans
2.3 Housing Benefit and Council Tax Benefit
2.4 Disrepair in Rented Housing
2.5 Housing Options
2.6 Discrimination in Housing
2.7 Eviction
2.8 Anti-Social Behaviour
2.9 Harassment and Illegal Eviction (including Race Discrimination)
2.10 Homelessness
2.11 Relationship Breakdown
2.12 Rent: Private Sector
2.13 Security of Tenure
2.14 Statutory Tenancy Rights
2.15 Housing Repair Improvement and Adaptations

When peer reviewers look at a case they will be looking to see if the advice given on each of those topics is accurate. As well as this, they will be checking that any relevant generic competences have also been evidenced (or not). The generic competences are:
1.1 Effective Interviewing
1.2 Recording and Managing Casework
1.3 Time Management
1.4 Legal Research and Feedback
1.5 Form Completion
1.6 Effective and Appropriate Referrals
1.7 Negotiation
1.8 Representation and Litigation
1.9 Information Technology (in addition to where covered above)
1.10 General Benefits Checking, Income Maximisation & Information Gathering (in housing debt and housing affordability cases)

To help peer reviewers work their way through the files, they have been asked to break the cases down into stages and to mark each stage as they go along. The stages are:

- Diagnosis
- Advice and Information
- Support and Action

The peer reviewer will go through each case, checking that the advice is correct at each stage, noting anything that is wrong and also paying attention to relevant generic competences, such as case recording. They will then mark the case using a case recording grid.

These marks will then be fed into a case collation grid (see next page) and the peer reviewer will write their report.

The peer review report and the Collation sheets.

The Moderation Committee will see the peer review report and the Collation sheets for each agency that has gone through peer review in the past quarter. The peer review report will contain the peer reviewer's marks for each of the 15 cases that they have looked at. It will also contain their comments and reasoning behind those marks. The Collation sheet will show how the agency was marked against each of the relevant competences in each case.

Peer Review Collation Sheet – Housing

Ідентифікаційний номер справи	Діагностика	Інформація і консультація	Підтримка та дії	Загальна відповідність якості консультації (Т/Н)	2.1	2.2	2.3	2.4	2.5	2.6	2.7	2.8	2.9	2.10	2.11	2.12	2.13	2.14	2.15
Справа 1	G	G	A	Y	√		√	√	√		√								
Справа 2	A	R	R	N	√		√		X		X			X					
Справа 3																			
Справа 4																			
Справа 5																			
Справа 6																			
Справа 7																			
Справа 8																			
Справа 9																			
Справа 10																			
Справа 11																			
Справа 12																			
Справа 13																			
Справа 14																			
Справа 15																			

Бал за відповідність якості консультації

5. The Role of the Moderation Committee

The Moderation Committee is made up of experienced advisers from the three areas of work covered by the Standards (housing, welfare benefits and debt/money advice) and a Quality Assurance member who does not come from an advice background but has experience of Quality Assurances processes in other walks of life.

The Committee will be chaired by a SLAB manager and secretariat support will be provided by members of the SNSIAP team. The manager of the SLAB Policy team will provide expert support and guidance to the Committee on the Standards themselves.

The Moderation Committee has three primary roles:

Reviewing peer review reports

The Moderation Committee's will assist SLAB in developing and implementing the delivery of the SNSIAP model by overseeing the peer review process for Type II/III advice agencies.

The Moderation Committee will be sent copies of all peer review reports and will meet to discuss the findings in these reports and agree whether the report(s) provide

sufficient evidence to decide whether an agency has achieved the required standard to apply for accreditation and audit.

Monitoring for consistency

In the course of reviewing the peer review reports the Moderation Committee will be asked to note whether peer reviewers are taking a consistent approach to peer reviewing, both in their expectations regarding the technical accuracy of the advice provided by an agency and in the way they write their reports. If the Moderation Committee identifies issues of inconsistency or the need for training for the peer reviewers, they will report this to SLAB.

Improving the peer review process

The Moderation Committee will make recommendations to SLAB about ways in which the peer review process could be improved based on their knowledge of the peer review reports presented to them.

The Moderation Committee meeting

At the Moderation Committee meeting the Committee members will be asked to discuss the contents and conclusions of the peer review reports submitted to SLAB in the previous quarter.

Peer reviewers will be expected to provide explanations for their scores. In the case of Green scores, this may be limited to examples of good practice in the Conclusions section. Amber scores should be accompanied by clear and detailed explanations as to how the advice could be improved. Red scores must be accompanied by clear and detailed explanations showing why (in the peer reviewer's opinion) the advice that was given was wrong. It is important that the peer reviewers link their comments to the competences in the Standards so that the agency understands which areas of advice-giving (either technical or generic) need improvement.

Moderation Committee members – subject specialists and Quality Assurance members

The Moderation Committee's primary role will be to ensure that the peer reviewers have followed the Guidance and focussed on the technical accuracy of the advice given to the clients. It will do this by reading and reviewing the peer review reports and checking:

a. That the peer reviewers have followed the Guidance and have focussed on the technical accuracy of the advice and the generic competences (where relevant)
b. That the peer reviewers are marking consistently in two ways:
   - Individual peer reviewers are consistently picking up issues and scoring agencies in the same way across the 15 cases
   - Different peer reviewers are marking the same issues in a consistent fashion across the whole subject area

Advice agencies who apply for peer review should be confident that their case files will be marked in the same way as other agency's case files and that they will receive an objective, detailed report that has been marked in accordance with the Guidance provided to the peer reviewers. The peer reviewers should focus on the correct issues (was the advice accurate, have the generic competences, where relevant, been achieved) and not strayed into trying to second-guess what the client might have said to the agency or what they personally would have done if this had been one of their cases.

Focussing on the correct process will be the quality assurance member's primary role. Where relevant, the subject specialists will provide an oversight on any technical questions, such as, does the evidence provided in the peer review report – comments and technical competence references - support a Red mark?

https://www.slab.org.uk/advice-agencies/scottish-national-standards-for-information-and-advice-partners/