**The Peer Review Process[[1]](#footnote-1)**

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***Introduction***

1. The peer review process in different jurisdictions tends to be influenced by a range of variables, e.g. the size and make up of the legal aid profession, the size and number of legal aid firms or practising units, whether legal aid is primarily delivered through a staff attorney programme, the resources available for the programme and the overall purposes of the programme. However, basic guidance can be given as to how to introduce a peer review process from the beginning.

***The First Steps***

1. Peer review works most effectively where it is a partnership between the Bar Association ( Law Society ), Legal Aid Authority and the Ministry of Justice (MoJ). The principal role of the MoJ is to fund the programme. The other two are needed to prevent the profession becoming fixated by the ethical challenges which can arise in some jurisdictions with peer review. Properly organized ( see below ) peer review raises no insurmountable problems with client confidentiality or lawyer independence. Accordingly, the starting point for any peer review programme or pilot is to establish a Quality Assurance Committee (QAC) with equal representation from the Bar Association and the Legal Aid Authority with representatives from other stakeholders or laypersons with an interest in the field.

1. The first task for the QAC is to draft a set of usable criteria with which to assess the performance of the legal aid providers in the jurisdiction. These criteria should be client –focused ( e.g. Did lawyer provide the client with accurate and appropriate advice at the outset of the case? ) and are normally drawn from standards of good practice from the profession or training manuals and should not exceed 30 or so criteria in all. The criteria should be shared with as many specialist groups within the legal profession as possible and with any peer reviewers that have been selected.
2. Next, agreement has to be reached as to the scoring system which will be used. The simpler the better, with a maximum of a fivefold scale ranging from 1 (non-performance) to 5 (Excellence).

***Provider and File Selection***

1. The QAC then needs to determine which section of the legal aid profession ( whether selected by geography or legal specialism ) it plans to include in the pilot or programme. In jurisdictions where peer review is well established, the legal aid providers are relatively settled[[2]](#footnote-2) and resources permit all providers to be assessed, the authorities will plan a cycle of inspections for the whole year, e.g. in Chile and South Africa. In Scotland the QAC works on a 5-6 year cycle to cover the whole profession,[[3]](#footnote-3) but in practice will plan inspections over a rolling 6 monthly basis.

1. Next comes the decision as to which providers or practising units to prioritise for inspection. Normally peer review programmes use a mixed approach, combining attention to risk with a random selection of providers to help set the benchmark and to avoid the confirmation bias that an entirely risk-based prioritization would be likely to produce (if reviewers expect only to find bad firms this would bias their reviews). In Scotland and Chile the legal aid authority will look at performance in earlier inspections to assist in the process. This means that high-risk provider units will be prioritised in these countries and low risk units will not be, although in Scotland peer reviewers’ firms (which are expected to be low risk) are assessed at the start of the cycle to ensure that they remain competent and to avoid the reputation risk if a reviewer or his/her firm were to fail their review. Larger law firms (who are generally considered to be low risk) will be deferred until later in the cycle. In England and Wales, firms that the legal aid authority considers to be riskier will be prioritised but these reviews will be complemented by a random selection of provider units. Reviewers will not know the purpose of each review.
2. Thereafter the QAC has to decide whether to restrict the peer review programme or pilot to a review of the providers’ files rather than their performance in Court ( logistically problematic ) and whether to combine peer review with a client satisfaction survey. In relation to file review, typically, programmes will take a random sample of the provider’s files but usually the sample will be stratified to reflect the balance of cases (by type or complexity) handled by the provider or to take account of the vulnerabilities of certain client groups. The number of files selected again varies between jurisdictions. 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 determining the size of the sample input may be required from a statistician to decide how many files need to be reviewed in order to ensure a representative sample from all firms.
3. If the focus of the review is on the practice unit rather than the practitioner, then the choice of files will reflect the work done by the unit, as in England and Wales where 20 files are selected on a stratified,[[4]](#footnote-4) random basis, of which 15 will be used in the review in case any files are not capable of review (e.g. because most of the work has been carried out by a different provider or the file is stopped early on in the work). This approach may mean that not all the practitioners who work on legal aid files in the unit will necessarily be assessed depending on how the random sampling works out.
4. In Scotland the focus is on the practitioner, so the administrator of the criminal and civil programmes will choose 8 criminal files per practitioner and 5 civil files, each on a stratified, random basis. In addition, where the civil practitioner handles “designated” clients – those viewed by the legal aid authority as likely to be vulnerable, e.g. asylum, immigration, mental health, adults with incapacity, employment and judicial review cases – the administrator will select 10% of the practitioner’s files which deal with designated clients. In South Africa, where the focus is on both practitioners and practice units the administrator selects 10 stratified[[5]](#footnote-5) random files per practitioner from half of the practitioners in the practising unit, although as in England only some of the selected files (6 of the 10) will actually be assessed. It should be noted that in South Africa the assessment is carried out in-house looking primarily at the work of staff lawyers of the Legal Aid Board.
5. In the UK and in South Africa reviewers are generally expected to be able to review around 5 files in half a day,[[6]](#footnote-6) although extra time may be required for the summary report. Usually the files will be closed or completed files – as in China. This removes any suggestion that peer review constitutes a threat to the independence of the lawyer being reviewed.
6. In any peer review pilot or programme the decision will have to be taken as to the location of the file assessment. The files can be sent to the reviewer by secure courier, as in England and Wales, Scotland (normally) and South Africa, or the reviewer can travel to the provider’s office or region ( as in the case of China, Chile and Scotland – in follow up reviews or where the provider requests it ).
7. Each file is assessed against the standard criteria and ratings scale (see paras 3 and 4 above). The criteria provide a framework against which the peer reviewer evaluates the quality of the information gained from the client and other sources, the advice given based on that information and the steps taken following that advice.
8. Where, during the course of a peer review, a peer reviewer identifies any adverse issue relating to the professional conduct of a provider, it should be reported through the appropriate channels. The QAC will take seriously any attempt to fraudulently change the content of files in order to affect the outcome of a review.

***The Report***

1. Following consideration of the files against the standard criteria, the peer reviewer produces a peer review report, which sets out the findings of the assessment. The report is detailed and contains appropriate examples from the files to support and substantiate the rating given.

1. Once the report is complete, 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 (as occurs in Scotland). The latter approach, adopted in South Africa, is to send the report unchecked to the provider for comment and representations if (s)he / they so wish. Especially where it is a pilot or in the early days of establishing a peer review programme there is merit in building in a checking facility such as a QAC, primarily to ensure consistency between reviewers and their reports.
2. Whichever route the report takes, all programmes give the provider, and indeed *need*[[7]](#footnote-7) to give the provider, the chance to comment on, or object to, the findings and recommendations in the report . In Chile the checked report goes to the provider who can object to its findings. If the provider does so the Head of the Legal Aid Authority’s Department for Control, Evaluation and Complaints (DECR) will consider the representations before making the final decision either confirming or modifying the report.
3. In Scotland the report goes first to the QAC who will often engage with the practitioner as to the findings of the reviewer in relation to specific files and aspects of these files. This gives the provider a chance to comment on the findings before a final decision has been taken by the QAC. However, only once a final grade has been made by the QAC will the full report be sent to the provider. There is no appeal against the QAC’s decision unless the review is a “Final” review in which case appeal will lie to the courts.
4. In South Africa the provider is given two chances to respond. First, when the unchecked report is sent to the provider – comments made at this stage will be considered by the reviewer alone – and the reviewer may adjust their report and /or grade in the light of the response. If the provider still objects to the final report of the reviewer the provider can appeal the assessment to the manager of the Quality Audit unit of the legal aid authority who will conduct the review with another independent reviewer.
5. In England and Wales, providers have the right to make representations after an initial peer review, which will have been monitored by a consultant or Professor Sherr before going out, where the peer review rating is Below Competence or Failure in Performance. In these circumstances the peer review result will only be finalised following the completion of the representations phase. If a provider does not pursue the representations phase, the result will be finalised as it is, within a stipulated timescale.
6. The terms of the English peer review programme provide that upon receipt of a peer review assessment of Below Competence or Failure in Performance (the bottom two grades) the provider may make representations on the following grounds:

-The provider disputes the overall peer review rating;

-The peer review file sample does not appear to the provider to be sufficiently representative of their usual files; or

-Any other reasonable grounds.

The Legal Aid organisation will arrange for the representations to be considered by the peer reviewer who conducted the original review and a senior panel member. The senior panel member’s participation in the representations process is intended to ensure that all the representations are fully considered and taken into account in making the assessment. The senior panel member should have an opportunity to see any files mentioned in the representations and to discuss the grading with the initial peer reviewer.

***The Outcome***

1. If, after any representations have been dealt with and the report finalised, the provider has passed (i.e. has gained an overall grade of 3 or better) then the provider will be written to by the administrator to explain that the review has been passed but bringing to the provider’s attention any recommendations for improvement which the provider is expected to attend to. This is true for all programmes, however in addition in Scotland a provider who attains only a marginal or “bare” pass will be re-scheduled to have a further initial or “routine” review in a year’s time – both as a risk prevention measure and to encourage continuous improvement.
2. On the other hand, if the provider has failed the initial review, the programmes will initiate follow up action. Typically these include a second review with or without support measures. In Chile the follow up can range from professional support to, or technical supervision of, the provider, to sanctions (including removing the practitioner from the lists eligible to do legal aid work). In South Africa the predominantly staff lawyer workforce will be supervised and supported within their Justice Centre (although the Regional Office will oversee the process to ensure that the support is properly delivered). After 6 months the provider will be re-assessed on work done since the first failure. If the provider fails again then performance management processes will be introduced which could lead to the practitioner being dismissed.
3. In England and Wales a second peer review will be scheduled if the provider receives one of the two failing grades. If the provider receives the bottom grade (Failure in Performance) the second review on a separate set of files will be scheduled immediately. Where the work of the provider received the second bottom rating (Below Competence) in an initial review the second review will normally be scheduled after six months, since the objective is to give the supplier time to remedy the problems found initially, and to carry out the suggested remedial work mentioned in the initial report, or otherwise remedy their performance. If a second peer review is required it will be conducted on a new random sample of work and conducted by a different peer reviewer who is “blind” to the reason for the review. The process followed is the same as that for an initial peer review.
4. In Scotland the sequence of events where the initial review has been failed is not dissimilar to that in England and Wales but has some additional features which are designed to support the programme’s overall aim to push the legal aid profession towards continuous improvement.
5. Once the QAC has determined that the routine or initial review has been failed, they will decide whether the fail is due to a range of disparate but not catastrophic flaws, or to repeated but minor systemic problems, which whilst entailing a failed review do not suggest a significant risk to the clients. In such cases the QAC will order that a further or “extended” review will take place but be deferred for 6 months to allow the provider the opportunity to address the weaknesses revealed in the first review. However, where the fail contains catastrophic elements or serious problems which pose a significant risk to clients the QAC will order an immediate “extended” review to verify the extent of the problems. In either form of “extended” review the administrator will send two different reviewers from the original reviewer(s) to the place of business of the provider to conduct an “on site” inspection and review. The reviewers will be provided with a list of files selected with the help of the legal aid authority which will be notified to the provider in advance, but the reviewers will have the right to ask to see any legal aid file which the provider has worked on. At such reviews the reviewers will work together to jointly mark the first four files, to calibrate their marking, and thereafter mark other files on their own. However, if one of the reviewers proposes to fail one of the later files he / she will always consult with the other reviewer.
6. Should the provider fail an “extended” review the provider will be given one last chance to improve, and offered professional support in order to do so, as well as the detailed report from the two reviewers involved in the “extended” review. The “final” review will be held no later than a year after the extended review and will involve two further reviewers acting in a similar manner to an “extended” review. In practice, most providers pass their deferred “extended” reviews, although the small minority who have immediate “extended” reviews do not. Of the few providers who get to the stage of a “final” review, most will opt to resign from doing legal aid work rather than go through the pain of a further review.

**Evaluation and Follow up**

1. Once the pilot project or the programme cycle is complete, a process of evaluation is needed. Has the marking scheme worked effectively and efficiently, or are there signs of reviewer confusion? Have ambiguities or infelicities in the wording of the criteria become apparent? Should the criteria be amended, removed, substituted or augmented? Does analysis of the results for the whole of the pilot or cycle programme indicate that there are systemic weaknesses amongst the providers which evidence training needs in particular aspects of practice or client handling and communication?

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1. This document is partly derived from a toolkit written by A.Paterson and A.Sherr for the National Legal Aid Centre in China entitled “Peer review of Legal Aid Files, China-EU Access to Justice Programme, British Council,2016. [↑](#footnote-ref-1)
2. E.g where there is a large staff lawyer element in the provider population – such as South Africa. [↑](#footnote-ref-2)
3. The first two cycles were completed in 3 years each. [↑](#footnote-ref-3)
4. In a way that ensures that some complex or serious cases are included in the sample. [↑](#footnote-ref-4)
5. Half the files will be from completed trials and half from guilty plea cases. [↑](#footnote-ref-5)
6. In Scotland it is 8 criminal files in half a day. [↑](#footnote-ref-6)
7. In order to retain the profession’s acceptance of the programme. [↑](#footnote-ref-7)