

# Purposes, Outcomes and Tools for Evaluating Quality: The Quality Assurance System in Scotland

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# Quality Assurance and the Public

- Pilots Regular Competence Checks
- Doctors and Nurses Regular Competence Checks
- Lawyers?
- What public expect of us – research findings show that UK public think lawyers have regular competence checks

# International Developments I

## EU Commission

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

**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 to ensure the quality of legal aid lawyers should be in place in all Member States.”

This includes *accreditation* of legal aid providers and *appropriate training*; appointment of lawyers while taking into account the wishes of the accused and allowing accused to choose a provider from a list; and replacement of lawyers who fail to provide adequate legal assistance. [ **Input & Structure** ]

**EU Directive 2016/1919** establishes in Article 7 ‘Quality of legal aid services and training’:

1. Member States shall take necessary measures... 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. [ **Input & Structure** ]

# International Developments II

## *UN Global Study findings*

**Improving quality of legal aid services** was identified as **the number one priority** for Member States in the Global Study on Legal Aid (UNODC,2016)

## *Monitoring/ Evaluation mechanism of Quality of legal aid?*

Legal Aid Board/ Ministry of Justice	40%
Bar Association	35%
None	11%

**However, 57% of responding states indicated that the mechanism used to assess quality was client complaints.**

Only 26% reported taking any proactive steps to assess quality – the most frequent measure being client satisfaction surveys.

Others approaches: Good Practice Guidelines; Case numbers; CPD; Examinations; Interviews

# Regulation and Quality

For Economists the justification for regulation of the legal services market is market failure caused by the asymmetry of information between the lawyer and the client.

That's why we cannot rely on client satisfaction surveys or Complaints programmes as good measures of Quality and competence.

- a) Underreport problems – 13% UK clients are unhappy but only 13% of them complain
- b) One shot personal service client can only assess parts of quality
- c) Complaints systems do not usually deal well with systemic problems

Potential solution?: Revalidation for lawyers –

Already do for :

- (a) All Scots Lawyers in relation to client money and money laundering
- (b) The files of all legal aid lawyers in Scotland

# Proxies for Quality

- \* Input
- \* Structure
- \* Process
- \* Outcome

# STRUCTURE

Supervision

Management

Allocation

Library

Education

Sentence

Qualification

Training

Systems

Financial

Action

Training

Licensure

Private

Inaction

# INPUTS

# OUTCOMES

Contacts

Experience

Property

Public

Advice

Social

Knowledge

Equipment

Fact Gathering

Correspondence

Damages

Skill sets

IT

# PROCESS

Client Handling

Strategy

Decisions

Advocacy

Performance

Legal Analysis

Practice Management

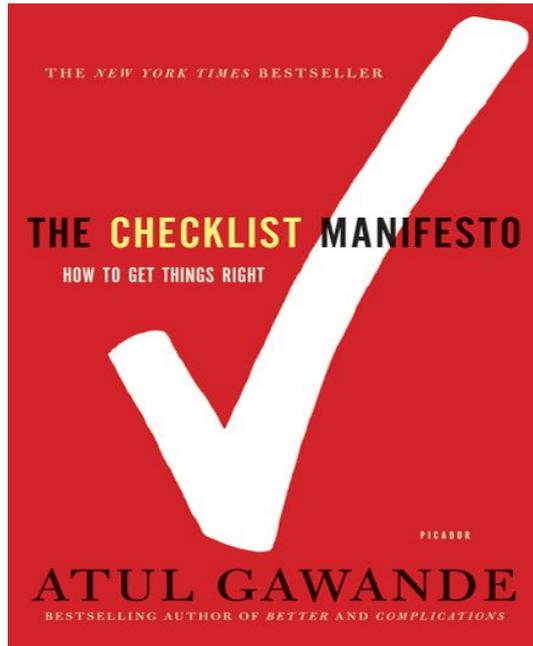
# *Methods of measurement*

1. Checklists
2. Interviews ; Focus groups;
3. Surveys; Client satisfaction ; Client complaints
4. Model clients;
5. Third party evaluation; Peer Review of files, tapes or observation
6. Key Performance Indicators; Cost ;Time; Results

See Sharon and Paterson: UNODC Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes (2019)

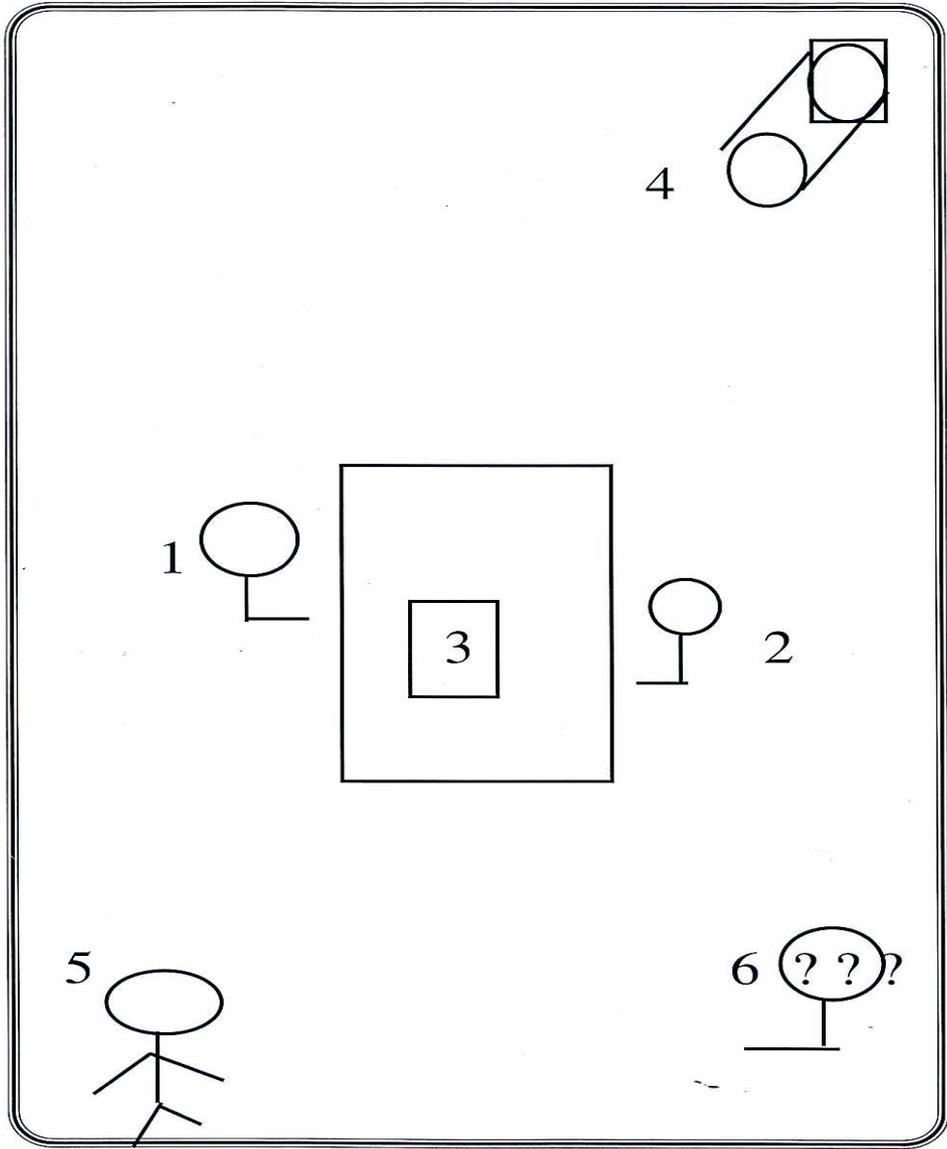
# *Methods of measurement II*

Checklists – See Gawande, *The Checklist Manifesto* (2010)



Transaction criteria – See Sherr, Paterson & Moorhead, *The Quality Agenda* (1992)





# Peer Review

“The evaluation of the *service* provided against *specified criteria* and *levels of performance* by an independent person with significant current or *recent practical experience* in the areas being reviewed”

## Peer Reviewers

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- Appointed after an open recruitment process.
- Peer reviewers are experienced practising lawyers.
- Peer reviewers must be independent.
- Peer reviewers must receive substantial training on reviewing and marking files or performances in court according to the criteria.

## *Further issues about Peer reviewers*

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- Must be Peers
- Generalist or specialist? Elite ?
- Remuneration - Lessons from Chile
- Part-time or Full-time – Lessons from Ukraine and from Chile
- The successful reviewer
- Ownership of the scheme and criteria
- Training vital for enhancing consistency of interpretation of criteria and marking by reviewers and between reviewers
- Implications for judges, prosecutors or non-practising lawyers as reviewers

# The Spectrum of Quality

EXCELLENCE

COMPETENCE PLUS

THRESHOLD COMPETENCE

INADEQUATE PROFESSIONAL SERVICES

NON PERFORMANCE

*Figure 1: The Performance Continuum*

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# Setting the Pass Mark

- Best practice
- Good practice
- To pass a peer review assessment
- Fitness to practice – threshold competence. The discipline standard. Does this change with time?
- The negligence standard for specialists
- The negligence standard
- Minimum requirement of Art 6 Jurisprudence ECHR
- To permit an “ineffective assistance of counsel” appeal

# File and Lawyer Scoring

5	EXCELLENCE
4	COMPETENCE PLUS
3	THRESHOLD COMPETENCE
2	POOR
1	NON-PERFORMANCE

# Peer Review Cases and Criteria - CIVIL

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- 5 random files (OR 10% of a lawyer's files where the client is likely to be vulnerable, adult incapacity; mental welfare or immigration cases ) for each lawyer in the firm are assessed against 14 published peer review criteria. These include:
  - Effectiveness of lawyer's initial fact and information gathering skills.
  - Effectiveness of communications.
  - Whether the lawyer identified the need for appropriate experts or counsel.
  - Evidence of adequate preparation for each stage of the case.
  - Evidence of the lawyer taking steps agreed with the client with a reasonable time.
  - Whether the case was concluded effectively.

**Criteria are Client Centred**

# Peer Review in Criminal Cases

## **Client contact at initial interview stage whether in custody or in an office**

1. How effective were the lawyers's initial fact and information gathering skills, including identifying any additional information required and taking steps necessary to obtain it?

**1 2 3 C N/A**

*This should also include consideration of any advice given to the client during a police interview at a police station, where appropriate.*

2. Did the solicitor give the client correct and appropriate advice about the defence case including whether it is stateable and whether an early plea should be considered? Has a discount for an early plea been canvassed with the client?

**1 2 3 C N/A**

## Scots Peer Review Mechanisms to overcome Reviewer Inconsistency

- **25% Double marking of files and practitioners**
- **Monitoring of Reviewer Summary reports by the Quality Assurance Committee**
- **Monitoring of Reviewer scores and regular feedback to reviewers at debrief sessions**

Case Report Analysis																						
Total No per criteria	1	2(a)	2(b)	2(c)	3(a)	3(b)	3(c)	3(d)	4	5	6	7(a)	7(b)	8	9(a)	9(b)	10	11	12	13(a)	13(b)	14
	1	43	58	290	237	638	25	10	21	196	53	32	6	66	25	199	98	227	167	13	83	14
2	5920	6004	5646	4547	4680	6385	5647	4215	5359	5174	3431	1649	3697	2326	4490	5068	5514	5301	2153	4092	1433	3702
3	548	298	14	33	122	53	68	156	415	515	73	63	22	196	45	369	275	415	96	8	22	10
C	170	308	494	759	1107	133	85	72	105	57	139	44	221	41	226	188	94	201	79	445	85	583
N/A	19	31	256	1125	147	99	890	2237	626	901	3023	4939	2695	4113	1741	973	591	616	4360	2070	5146	2266

# Results from peer reviews

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- Typical causes of fails:
  - Delays in taking action or applying for legal aid
  - Poor communication with clients relating to the operation of the costs rules for legally aided persons
  - Poor file notes of phone call or interviews
  - No terms of engagements letters on files.
- Occasional examples of abuse:
  - Private charges to legally aided clients or padding of accounts.

# Conclusion - Costs and Benefits

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- Scots cost of QA in 2013/14 was 220,000 Euros (2.3% of Scots expenditure on administration) (123 Euros per file)
- (Complaints 2016/17 2,582 Euros per case) .
- Evidence that peer review is driving up standards.
  - Fail rate has reduced on criminal.
  - Numbers of Final Reviews and Special Reviews has fallen on civil.
  - Numbers of solicitors achieving the highest marking has increased.
  - Survey of solicitors in 2013 showed that 84% of respondents had a positive or neutral opinion on whether the QA scheme was an effective way of ensuring quality.
- A few solicitors who were doing very small amounts of legal aid, or had failed reviews, withdrew from our register of suppliers.

# Other jurisdictions with some Peer Review of Lawyers

England & Wales

South Africa;

New Zealand;

Moldova;

The Netherlands;

Chile;

China



**Assignment phase**

1. The lawyer has appropriately dedicated himself to list the set of facts in the assignment phase as fully and clearly as possible from the client's point of view and the client's supply of information

Notes:


1 2 3 K n/a

2. The lawyer has taken appropriate and immediate steps in agreement with the client

Notes:


1 2 3 K n/a

3. The client has been appropriately informed about the opposing party's points of view and line of approach and about the implications for the client

Notes:


1 2 3 K n/a

# Chilean Peer Review System

## General flow chart

