Peer Review in Scotland

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Introit[1]

One of the most striking developments in the international arena of legal services in the past decade relates to the quality of work done by legal aid lawyers and how this has become a topic of central concern. It is a curious phenomenon, not simply because the concern for quality has been such a latecomer to the legal services arena, nor again because its global manifestation has varied so widely between jurisdictions with similarly developed legal aid programmes, but also because for much of the time the enthusiasm for the quality pursuit has come from without the profession. This paper summarises the debates as to the meaning of quality, the measures which have emerged as proxies for quality and how these measures have been operationalised in the UK in the last decade, before focusing on the principal measure of today, namely, Peer Review.

I. Quality: the background

Until comparatively recently in the legal services sector, 'quality' as a concept was understood in its traditional meaning of superiority or excellence (Sherr et al., 1994). However, in the last ten years or so this meaning has been challenged by a range of competing meanings emphasising the relativism of the concept. On any of these approaches, quality must be viewed within the specific context of the legal services being evaluated. Thus, if we were to think in terms of a continuum of performance by a lawyer between the atrocious and the excellent (Figure 1) a quality service could fall almost anywhere between threshold competence and excellence.[2]

[1]The first part of this paper is a synopsis of Paterson: " Quality Legal Services" in Regan et al, *The Transformation of Legal Aid* (Oxford, Oxford University Press: 1999) at p.233 onwards.

[2]See Sherr, Moorhead and Paterson, *Lawyers, The Quality Agenda* (London, HMSO: 1994) at p.19.

EXCELLENCE

COMPETENCE PLUS

THRESHOLD COMPETENCE

INADEQUATE PROFESSIONAL SERVICES

NON PERFORMANCE

Figure 1: The Performance Continuum

As Garth[3] noted twenty years ago, the challenge of resourcing poverty legal services confronts us with the impracticality of a uniform standard of competence or quality of performance throughout every sector of professional activity. Whatever the state's original intent in funding poverty legal services in the 1950s, it is clear that the state no longer expects that in funding poverty legal services in the guise of legal aid they are entitled normally to receive, a quality of performance from legal aid lawyers at the excellence end of the continuum – though corporate clients will expect just that from elite law firms. Indeed, increasing resource pressures entailed a substantial risk that either the funders or the suppliers of poverty legal services would be tempted by economic incentives only to fund or deliver services at or below threshold competence – what are known in the United Kingdom as 'inadequate professional services' (Sherr et al., 1994:19).

If reaching a consensus as to the meaning of 'quality' seems a chimera, it might be anticipated that measuring it would prove no easier, and so it has transpired. 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.* A well rounded quality evaluation will draw on several of these together[4] *Input* measures have the attraction of being relatively easy to collect. Inevitably, being indirect measures of quality at best, they also generally have the least to offer. Typical examples have included educational attainment, professional qualifications, membership of accredited specialist panels, continuing professional development seminars attended, work experience and status in the legal community. *Structural* measures concentrate on the environment in which performance takes place. They range from resourcing levels to record-keeping procedures, and from staff development policies to complaints procedures. However, structural measures, while assisting efficient practice management, only facilitate quality of performance in other aspects of professional practice – they do not ensure it.

Process measures focus more directly on the behaviour of professionals, examining the efficiency with which the work is done and its compliance with check-lists or standards of performance. They have had the greatest provenance in the medical world, however both the English Legal Services Commission and the Scottish Legal Aid Board have used them in the guise of peer review against agreed performance criteria.

Outcome measures has also had a greater provenance in educational and

[3]Garth, "Re-thinking the Legal Profession's Approach to Collective Self Improvement" 1983 *Wisconsin Law Review* 639

[4]See Sherr et al. 1994. In the same work the authors argue that the principal methods of assessing quality are self-assessment; external assessment; standardized clients and peer review.

medical spheres than in the legal world, thus, avoidable deaths, morbidity rates, re-infection and re-admission rates, and survival-recurrence rates are everyday fare for today's hospital administrators. Legal equivalents have been slow to arrive and those that have emerged have provoked controversy in the profession. Part of the problem is that examination of outcomes in individual cases is a very different matter from collecting evidence of a law firm's outcomes over a substantial number of cases. The first, in the shape of peer review, is understood by lawyers, but has until recently been thought of as too expensive to justify implementation on a wide scale. The second requires a statistical approach which considers general patterns in aggregate case results. While the data is cheaper to collect than by peer review, it assumes that the factors which influence the outcome of an individual case are too complex to be captured by a handful of performance indicators. To this extent, the approach accepts the lawyers' argument that each case is unique. However, the statistical approach is predicated on the assumption that by controlling for all the other key factors which will influence the outcome of a series of cases, if a sufficient sample is taken, systematic variations in outcomes from a normal distribution of results must be due to differences in the quality of the lawyering. It follows that outcome measures require large sample sizes – which, except for a handful of firms with substantial case loads, renders their use in the case of many individual firms problematic.[5] The most commonly discussed outcome measures in the legal realm include: case cost, time taken, success rates and client satisfaction. *Average case cost* appears straightforward, but contains complexities. Is it the net cost to state funds that is the relevant figure, or the rate of return judged by amount gained for every pound or dollar invested? Furthermore, a low average figure is not necessarily a good sign.

Time taken at first sight also appears to be a useful performance measure. The measure is predicated on the assumption that, if other factors can be held constant, firms or providers of services which consistently take longer than others to handle similar case-loads at otherwise similar standards of quality are providing a poorer service. This should hold as true for the time taken to reach a trial or settlement date as for hospital waiting lists. Yet, some clients favour delay and delays in hearings are likely to vary between court districts due to the operation of 'local legal cultures'.[6] It is therefore necessary to distinguish between the time actually spent by lawyers in relation to a case and the elapsed time from the date when the process began.

Results or success rates are commonplace performance indicators in the medical world, e.g. mortality rates, re-admission rates, long-term survival or recurrence rates. Even here the indicators will frequently require interpretation. For the legal realm the problems of defining 'success' are considerably greater. Excluding medical negligence cases, the overwhelming majority of personal injury cases result in some sort of settlement. It would be unwise, however, to equate the mere fact of settlement with a quality service. In divorce cases, is the lawyer who extracts the maximum settlement for his or her client at the cost of bitterness and rancour between the parties which affect the children necessarily delivering a higher quality service than the lawyer who settles for less but smooths the way to an amicable parting? Alternatively, in a criminal case it is not intuitively obvious that a lawyer who gains a community service order for his or her client is doing a better job than one who obtains probation or even a modest fine.

[5]See Goriely, "Contracting" in *Legal Aid: How much justice can we afford?*, Proceedings of the ILAG conference, Edinburgh, 1997.

[6]Church, *Justice Delayed* (Virginia, National Centre for State Courts: 1978).

Finally, there is *client satisfaction.* Rooted in the consumerist approach to quality, this measure relies on clients' perceptions of the quality of service that they have received. However, it has long been recognised in the service quality field that what the client perceives may differ from the view of the specialist. Some key factors e.g. the proper price for the job, the length of time which it should take, and what should constitute an acceptable outcome, are matters on which clients – especially first time or 'one-shot' clients – are peculiarly dependent on the advice of professionals. It follows that client satisfaction surveys which tap into aspects of client care are valuable and have a role to play in quality assessment. Where the surveys go on to look at results achieved, the ability of professionals to influence client perceptions through 'image management' renders them less useful as an objective measure of quality. As Goriely has observed[7] client satisfaction scores tend to produce relatively undifferentiated responses.

2. Quality in England and Wales

The English Legal Aid Board only seriously engaged with the quality of legal aid work when they began to consider the merits of franchising legal aid work, itself a precursor to contracting, in 1989. It was not until 1994 that first full franchises were awarded. Under the contracts, firms agreed to adhere to a set of Practice Management Standards (covering a personnel plan, a business plan, accounting systems, staff supervision, file review procedures and a complaints procedure). Franchising also required compliance with process measures of quality – the Transaction Criteria. These were sets of steps which would be expected to be completed in different types of cases. The criteria were compiled by the researchers[8] based on concepts of good practice and audited against files by employees of the Board who were not legally qualified. These criteria attracted considerable criticism since they were thought to encourage standardised practice. However, the research team behind the transaction criteria were convinced that irrespective of the Board's intentions, eventually the Treasury would see contracting as the precursor for exclusive contracts awarded on the basis of competitive tendering on price. Such scenarios have a history of leading to a 'race to the bottom' in quality terms and in the eyes of the researchers, transaction criteria, properly applied and audited, constituted a robust yet affordable approach to establishing a quality floor. The need for such a quality floor was reinforced by the experience of jurisdictions such as Australia and the United States where contracting was introduced largely without adequate quality control measures, to the detriment of levels of service provision.

Whatever the merits of transaction criteria, the researchers were aware that it was likely that 'Goodhart's Law' would entail that even reliable proxies for quality would cease to be so once they are articulated and measured. Since 1994, therefore, the hunt has been on for new quality proxies. Thus when block contracting was being researched[9] both peer review and model clients were utilised as new methods for assessing the work . Peer Review has also formed a significant part of the current evaluation of the Public Defender Service.

3. Quality in Scotland

The Scots' interest in quality has come very late in the proceedings. Its legal aid programmes have been very similar to those in England and Wales although this is now changing. Not surprisingly, therefore, like the authorities in the Netherlands and Australia, the Scottish Legal Aid Board watched the English franchising experiment with keen attention. Although attracted by the notion of enhanced quality assurance

[7] *Op.cit.*
[8] See Sherr et al 1994. op cit.
[9] Moorhead et al, *Quality and Cost*, (Norwich, England, Stationary Office: 2001)

there was much suspicion of the bureaucracy and expense involved in monitoring transaction criteria. Moreover, the concentration of the top one hundred legal aid suppliers in the central belt of Scotland meant that a system which hinged on the availability of specialist legal aid firms spread geographically across the country was viewed with some scepticism. The breakthrough came with pay negotiations with the profession between the Law Society of Scotland, the Scottish Legal Aid Board (SLAB) and the Scottish Executive from 2002 onwards. The profession had not had an increase in civil legal aid fees for more than decade, and the Executive took the view that if they were to get one, the Executive must get quality assurance in return. The success of peer review as deployed by the Legal Services Commission in England and Wales convinced SLAB and the Executive that peer review was the route to pursue.

4. Peer Review in General[10]

Peer review as used in this piece is "the evaluation of specified aspects of service provided a person or organisation against specified criteria and levels of performance by an independent person (or persons) with significant current or recent practical experience in the area(s) being reviewed." Professional peer review can look at a range of factors but in the light of the continuing problems of measuring the success of outcomes achieved by lawyers[11] it is perhaps understandable that post peer review studies of lawyers should focus on a mixture of process and outcome. Although peer review studies of legal services now use a wide range of methods, ranging from observation[12] (logistically challenging) to model clients[13] (ethically challenging), the majority rely principally on case file review against agreed criteria. Having specified the aspects of the service which will be reviewed, and the subject of the review itself, there is then the need to assimilate these factors and generate specific criteria for evaluating quality of performance.[14] Criteria can be aimed at management systems, strategy and resource allocation, professional threshold requirements (eg conduct rules), as well as accuracy and approach and the impact of failures (or successes) on the clients in question. Hardly surprising then that the developing criteria can lead to long, exacting lists. However, there is inevitably a trade-off between the length of such lists and the consistency of reviewer's marking as well as the number of files a peer-reviewer can look at. There is also a trade-off in the opposite direction between consistency and validity: a reviewer needs to look at a certain number of files to be satisfied a valid judgement can be arrived at. The law of diminishing returns ensures that reducing the number of criteria that can be answered increases the number of files than can be looked at, but if taken too far may also reduce the consistency of the judgement arrived at, in turn reducing the validity being striven for. What is needed is a balance and trial and error suggests that the optimum number of criteria for reviewers to work with is around twenty. This argues for a focused approach on limited aspects of service by the peer reviewers. A search through the literature throws up a number of different aspects of performance which are capable of analysis by peer review. These include: accuracy, appropriateness and timeliness of advice; client care (taking adequate

[10]This part of the paper draws heavily on the work of Richard Moorhead during the Contracting for Advice and Assistance pilot for the English Legal Aid Board. It is reproduced with the kind permission of the author.

[11]See Goriely on outcomes. Subjective v.Objective Medical peer review studies tend to focus on outcomes.

[12] See e.g. Harris 1991

[13]See e.g. Moorhead et al, *Quality and Cost*, (Norwich, England: Stationary Office: 2001) and Moorhead, Sherr and Paterson, "Contesting Professionalism" 37 (2003) *Law and Society Review* 765

[14]It is essential to involve the peer reviewers in the generation and agreement of these criteria, and the evidence necessary to satisfy them, once they have seen a range of files and identified the types of issue that can be assessed by looking at files and talking to legal advisers.

instructions and providing initial information concerning future actions, including client meetings); adequate, appropriate and timeous fact gathering; adherence to the requirements of professional responsibility; appropriate strategy formation and execution; adequate staff supervision and case management etc. Nevertheless, the desirability of reviewers commenting on the overall quality of the work done in a case "in the round", suggests that in addition to assessing files against individual criteria, reviewers should also be able to award an overall mark to the case. A further challenge for reviewers is the marking scheme to be adopted. While this could be a simple pass/fail standard, an issue would still remain as to where to set the passmark. Much depends on the purpose for implementing peer review and quality assurance. If the aim is to "weed-out" poorly achieving practitioners, a pass/fail standard at the level of minimum competence will suffice. If the however, quality assurance has wider goals, including the raising of professional standards over time, the review process should contain positive reinforcement where the practitioner demonstrates good practice and the pass/fail standard may be adjusted over time. Peer review programmes for legal aid lawyers in the UK have utilised the quality continuum set out in Fig 1 (above)[15] with files marked on a five point scale (where 1=non-performance, 2=inadequate professional services, 3=threshold competence, 4=competence plus and 5=excellence). By placing the passmark at around threshold competence at the outset the schemes allow service providers to get used to a quality assurance regime whilst leaving room for quality enhancement over time. In addition there is a risk that if the passmark was placed higher up the scale, competent providers would be lost to the service and access problems or "advice deserts" created.

Finally, in order to maximise the fairness and validity of peer review it is necessary to select reviewers who are independent persons with significant current or recent practical experience in the area(s) being reviewed, (where possible) to involve them in the development of the criteria and the assessment protocol and to train them in both on actual files. To ensure ongoing consistency amongst the reviewers it has become accepted practice to implement double-marking of up to 25% of the files to be reviewed.

5. Peer Review in Scotland: Criminal work

SLAB's first foray with peer review was related to the work of the Public Defence Solicitors' Office (PDSO). This was the newly fledged public defender service for Scotland which built on an earlier pilot project from XXX to YYY.[16] Although the service consists of little more than a handful of salaried lawyers employed by SLAB (there are around ZZZ lawyers in private practice who are registered to do criminal legal aid work) it provides a useful benchmark for SLAB when assessing the work (and cost) of the private profession. In part to address issues of quality which were unresolved after the review of the pilot project,[17] in early 2003 SLAB established a working party to draft a set of peer review criteria for assessing the work of the public defence lawyers undertaking summary criminal work.[18] The draft criteria were revised by leading practitioners and then tested with a further group of established practitioners at a workshop at the end of March. Following discussion of the criteria, they were tested against a range of case files with the practitioners working in pairs. After training, a high degree of consensus was attained by the pairs. The markers agreed that in light of the peer review research in

[15] Developed by Paterson and Sherr in Sherr, Moorhead and Paterson, *Lawyers, The Quality Agenda* (London, HMSO: 1994).

[16] See Goriely et al, *The Public Defence Solicitors' Office in Edinburgh* (Edinburgh, The Scottish Executive, 2001).

[17] Goriely et al, *op.cit.*

[18] "Summary" here refers to the procedure adopted for less serious offences in Scots Criminal law.

England and Wales, each criterion should be marked against a threefold of "below requirements" (1), "meets requirements" (2) and "exceeds requirements" (3), but that in addition there should be provision for two other possible answers, namely: "can't assess" and "not applicable". It was agreed that in addition, as in England and Wales, an overall mark should be assigned to the file and that this should be on a five fold scale, approximating to the 5 levels set out in Fig 1 (above), with a "1" score being so poor as to be almost non-performance and a "5" score as Excellent. This overall mark would not be the product of a mathematical averaging but rather of the reviewer's professional judgement bearing in mind a common set of marking protocols. A comments section was added to the end of each criterion and at the end of the overall file report inviting a few lines from the reviewer to explain either the overall mark given to the file or any fail scores on individual criteria. It was agreed that, as in England and Wales, 25% of files should be double marked to enable marker consistency to assessed and maintained.

By the end of the development phase the practitioners and SLAB came to the conclusion that:

1) Despite the early skepticism in a number of quarters that Scottish criminal lawyers would not keep detailed enough records on their files to enable a peer reviewer to assess what had been happening in summary cases, it was felt that the workshop had demonstrated that the criteria could be applied without significant difficulties to the PDSO files;
2) The criteria could be applied consistently by different markers and that such areas of significant disagreement in the scoring as emerged could largely be attributed to differences in knowledge and local legal culture[19] as between the reviewer and the original file handler;
3) These differences in local legal culture could affect the scoring on the criteria but that the effect of these could be counteracted by the training of the reviewers, the use of the comments section at the end of the form and providing an opportunity for the lawyers' whose work was being reviewed, to respond to fail scores on particular criteria;
4) If the pilot phase threw up any significant problems there might be some merit in exploring some limited use of customer satisfaction surveys[20] and observation[21] as supplementary measures.

[19] Refer to local legal culture work

[20] However, it was noted that the research on the pilot public defender project had encountered considerable difficulties in trying to implement a customer satisfaction survey, due to an inability to track sufficient numbers of accused persons or to persuade them to assist with the research. (Reference). Up until the workshop it had been thought that it might be necessary to amplify the information on the file through observation in order to answer some of the criteria and secondly that there would be severe practical problems in carrying out such observation. The option of following an individual PDSO lawyer around the courts on a particular day was not considered to be a practical one but it was felt that if the PDSO had several cases coming before the same sheriff on a particular day there might be merit in an observer watching a whole morning thus enabling them to take account of factors such as the mood of the sheriff and the cooperativeness of the fiscal.

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5) Overall, the day had indicated that peer review based on using files, even in the criminal legal aid field was a valid and acceptably reliable method for assessing the quality of case handling in criminal legal aid cases provided that peers of appropriate experience are selected, that reviewers are given appropriate training and that provision is made for feedback from the staff being reviewed.

Subsequently, SLAB implemented a pilot programme of reviewing files from the PDSO with the help of two of the trained peer reviewers. The results of this pilot programme over nine months were considered at a further seminar for the reviewers and the Head of the PDSO at the end of August 2004. It was clear that one of the markers had failed considerably more files than the other. An examination of the double marking of the same files by the two reviewers was conducted, from which it emerged that the two reviewers had taken significantly different approaches to two key matters. The first was in relation to omissions from the files.[22] It was agreed that a broad brush approach was preferable in criminal cases where there was a tendency for less to be written down than in civil cases.[23] The second difference between the reviewers stemmed from a difference in the pass/ fail standard which they were applying. One had applied the equivalent to a minimum adequate performance (see Fig 1) while the other had applied a higher pass mark. It was agreed that the pass/fail standard for a file should be set at the former level, i.e. that of the competence of the solicitor of ordinary skills (equivalent to the test for professional negligence).[24] With these matters resolved, a series of additional files were marked and a high degree of uniformity achieved. The seminar attendees concluded that the robustness of peer review in relation to summary criminal files had now been demonstrated. In the months since then negotiations have been continuing between SLAB, the Scottish Executive and the Law Society of Scotland. In consequence it has been agreed that peer review of criminal files will be extended to the legal aid files of the private profession in both summary and solemn[25] cases. A version of the peer review criteria for solemn cases has been agreed and will shortly be piloted on anonymised files.

6. Peer Review in Scotland: Civil work

The background

While the criminal pilot was still ongoing, following negotiations between the Scottish Executive, SLAB and the Law Society, it was agreed that peer review would be introduced for all civil legal aid and advice and assistance practitioners in Scotland. A total of 752 firms are registered to provide civil legal aid or advice and assistance and a rolling review of all these firms commenced on 1st July 2004, which is scheduled to be completed in three years. The process is administered by the Quality Assurance Committee of the Law Society (QAC).[26]

observer watching a whole morning thus enabling them to take account of factors such as the mood of the sheriff and the cooperativeness of the fiscal.

[22] One had always marked these as "Cs" ("can't say") whereas the other had taken the view that if there was nothing on the file, but nothing to suggest that the point had not been covered AND nothing appeared to hinge in that case on its presence or absence then she would award a "2" rather than a "C".

[23] In relation to assessment protocols it was agreed that in the light of the broad brush approach the appropriate rule of thumb to be applied to the scoring of files would be that 3 or more "1"s or "C"s would prima facie lead a file to fail, unless in the reviewer's professional judgement the failures or omissions did not justify the file failing.

[24] Known in Scotland as the *Hunter v. Hanley* test.

[25] The procedure adopted for more serious crimes in Scotland, which involves a jury.

[26] Its membership includes members from Law Society, SLAB and the public (with

It recruited a team[27]of peer reviewers from the solicitors' branch of the profession, arranged for them to be trained, and set in place the current review programme. As on the criminal side, a set of twenty or so criteria were developed with input from senior practitioners. These were refined and tested on a series of anonymised files by the peer reviewers working together in pairs for training purposes. No significant problems were encountered.[28] At the end of the exercise it was concluded that (1) the criteria could be applied without significant difficulties to the files; (2) the criteria could be applied with reasonable consistency by different markers, and; (3) no differences due to local legal culture were detected.[29] These findings were reinforced in subsequent training sessions.

Operationalising peer review

Early on it was determined that up to five files per legal aid practitioner in a firm would be reviewed in the initial or "routine" review.[30] The files selected for review by SLAB are sent to the reviewers who mark them against the agreed criteria and then return the files and marks sheets to the QAC. The Quality Assurance Committee examines the reports from the reviewers[31] and determines whether the firm should "pass" the first or routine review of its files. Most firms do, and they simply receive a report informing them that they have passed, but identifying points from the reviewer's reports that need attention for the future. For the small minority that do not pass a continuation may be given to clarify further points or an "extended" review will be instigated. Such reviews take place on site and are conducted by two different reviewers from those who conducted the routine review. They may call for any legal aid file they choose which the firm is conducting and do not restrict themselves to merely five files. The purpose of an extended review is to see whether the potential flaws detected in the routine review are widely spread through the firm's files, or merely am aberration. Where a firm fails an extended review (fortunately a relatively rare event, to date) they have a period of one year in which time to rectify the problems revealed by the routine and extended reviews before a "final" review is held. In the interim a "special" review may be conducted. Although this process sounds somewhat threatening, and indeed may ultimately lead to a firm being refused permission to carry out legal aid work in the future, the primary aim of peer review in Scotland is to boost the overall quality of the work being done by legal aid practitioners, rather than to weed out weaker firms. It follows that considerable emphasis is given in the process to passing constructive feedback to the firms, with points of good practice being highlighted as well as points requiring attention for the future. In this respect, legal aid firms are merely following in the footsteps of large corporate firms or those that are members of a club or network of similar

some knowledge of quality assurance in other walks of life).

[27] There are seventeen civil peer reviewers, with a range of specialisms and spread across Scotland, all of them full time practitioners doing the review work in their spare time (on a remunerated basis).

[28] As with the criminal files a problem was found to arise as between scoring omissions from the file as "1"s, "C"s or "2"s. The general conclusion was that in civil files the normal way to score omissions should be with a "C" but that too many "C"s would lead to a possible fail of the file.

[29] In consequence of the third finding the QAC have been happy to accept that reviewers should not normally review firms operating in their own geographic locality, to obviate questions of conflict of interest.

[30] However, it is the firm, rather than individual practitioners which is approved by the peer review process. This leaves open the potential anomaly that a firm may pass its peer review overall, but one or two practitioners fail theirs.

[31] Quite apart from files that are being double marked, it is common for a firm's files to be assessed by two or more reviewers with different specialisms.

firms in the UK or European firms who have adopted independent file review quality assurance processes.

Taking stock

By the end of April 2005, the civil reviewers had reviewed a total of 189 firms although only fifteen of them had been double marked. By the end of February 2005 251 practitioners had been marked and a total of 1045 files reviewed. On average the reviewers had done 15 practitioners each although one had done only 6 while another had done 24. Since it is the exception rather than the rule for a practitioner to fail a routine review, the average number of practitioners failed by reviewers by this date was less than 1 per reviewer since July 2004. Indeed practitioners were twice as likely to receive an overall score that exceeded threshold competence (a "3") as they were to fail. On average each reviewer had looked at 61 files although again the range went from 30 to 105. They had failed on average 5 of these files each, (with a the range being from 0 to 12) . In terms of overall marks for files there was a greater variation with two reviewers never having awarded more than a 3 for a file and one having awarded more than 3 on 29 occasions. (the average was 7.5). In the light of the curve of normal distribution we should expect to see natural variations between markers, with some more predisposed to award fail or distinction marks than others. While the raw figures to date appear in conform to such an expectation, it is premature to draw any conclusions as to where the reviewers are going to fall on the distribution curve. In the main, the reviewers are marking different practitioners and files and they have not marked sufficient files for potential biases in the distribution of practitioners and files to be eliminated. For example, one poor or excellent practitioner can still dramatically alter the overall statistics of a reviewer in terms of fail or distinction marks. Certainly, the results so far should not cause concern to the administrators of the peer review programme to have concerns over the extent of the variations observed to date.

An extended discussion took place between the reviewers early in the 2005, having seen each others scores, with several expressing the view that provided that over time the allocation of files to reviewers became more truly random, we should expect to see reviewers marks moving towards the group average. Indeed, the very fact that reviewers could see how they compared with other markers and the group average is like to reduce the deviation from the average. Where it was possible to look at the consistency of the reviewers' marking e.g. by double-marking, initial impressions indicate that in two thirds of cases markers agreed on the overall score given to a file and in over 85% there was agreement as to whether the file should pass or not. However, there are slight indications that if a reviewer has a low or high overall number of distinction scores that will be reflected in the double marking and similarly reviewers who have higher or lower numbers of failing files will tend to have this reflected in the double marking.

7. Peer Review in Scotland: Advocates

Quality assurance of Scottish lawyers is not confined to corporate firms (driven by their insurers to take risk management and external peer review seriously) and legal aid solicitors. Requests by advocates for a new "pay" deal from the Scottish Executive, with respect to criminal cases, have provided the key to negotiations between SLAB and with the Bar to introduce peer review. However, after preliminary discussions it emerged that there was insufficient written records of the work done by advocates to afford a robust basis for peer review of advocates. It has therefore been agreed that peer review of advocates and solicitor advocates will primarily be based on observation of their court work by trained peer reviewers. Even given the much smaller number of advocates regularly handling criminal cases (as opposed to solicitors, the logistics of such an operation are proving difficult to crack). The draft criteria are being worked on

with an eye to a pilot programme later in the year. It has been agreed that where an advocate fails his or her routine review, in place of an extended review (as occurs with solicitors) they will be tested by taking part in a mock trial with a real judge.

7. Conclusions

As can be seen, quality assurance in the shape of peer review, is well on the way to be being applied to all legal aid lawyers within the next two years. What is unclear, is what the impact of this development will be. Peer review is expensive to implement, and since it will certainly increase pressure on lawyers to keep better files, its cost may rise further if the profession succeed it passing the cost of this to SLAB. On the other hand greater efficiency by the profession will reduce costs overall and deliver a better service to the public. However, there are implications of peer review that are less obvious. First, the culture of file review may spread beyond the legal aid lawyers and the corporate lawyers who currently have to endure it. Pressure from the indemnity insurers for effective risk management may push peer review into the rest of the profession. Next, if peer review reveals moneylaundering, or professional misconduct or even negligence or inadequate professional service the pressure will grow for reports to be made to clients and the authorities. Peer review will thus become part of the profession's regulation and redress mechanisms. It may even provide objective evidence which could be used to improve the process of appointing lawyers who apply to become judges or chairs of tribunals.