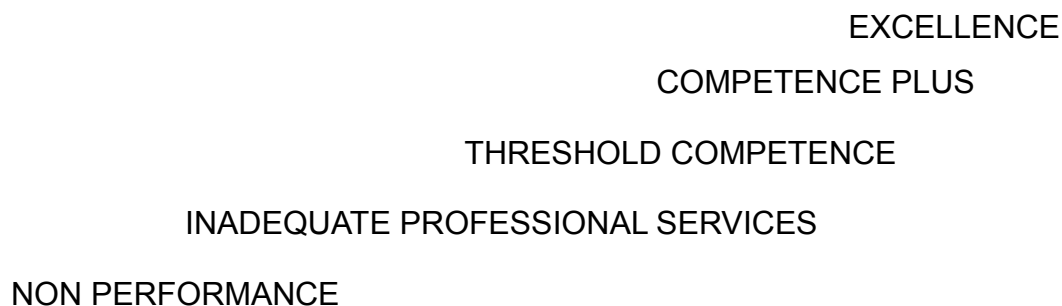


## Peer Review and Cultural Change: Quality Assurance, Legal Aid and the Legal Profession.<sup>1</sup>

Professor Alan Paterson<sup>2</sup> and Professor Avrom Sherr<sup>3</sup>

When the study of the quality of professional services was in its infancy, quality was used as a synonym for excellence and the writers on self-regulation and professionalism – usually connected with the professions – would imply that all professionals, except an aberrant few, delivered a highly competent or excellent service. However, consumerism had an effect on manufacturing industry at an earlier stage than in the professional services field and quality as excellence gave way to notions of “fitness for purpose” or “value for money” when considerations of cost were balanced against convenience and excellence. Applied to professional services, this led to the recognition that clients could choose to purchase services in the market at different levels of quality. Whilst the State in some jurisdictions<sup>4</sup> would set a minimum standard of provision which all clients must receive – “an adequate professional service” which equated with minimum acceptable competence, this was recognized to be different from excellence or even “good practice” – for which clients might have to pay more, as shown in figure 1.



*Figure 1 The Quality Continuum*<sup>5</sup>

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<sup>1</sup> This piece, which is work in progress, draws on our earlier work on peer review and also the Peer Review Handbook produced for the China – EU Access to Justice programme in 2016-17.

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<sup>3</sup> Professor Emeritus, Institute of Advanced Legal Studies, University of London

<sup>4</sup> E.g. the USA, Australia, England and Wales and Scotland. The USA expanded civil liability to solve the services problem, whilst Australia introduced a “disputes” jurisdiction. The UK relies on the notion of *Inadequate Professional Services*. See generally the discussion in para 1.31 in chapter 1, A Paterson & B Ritchie, *Law Practice and Conduct for Solicitors* (2nd edn) (W Green, Edinburgh 2014).

<sup>5</sup> © Paterson & Sherr

The recognition that the quality of professional services fell on a continuum still left funders of legal aid programmes with two problems:

-Where on the continuum (at, or above, the threshold competence level) would they require legal aid lawyers to perform? and

-How to establish where on this continuum a particular service provision could be said to fall?

The first question is a policy decision for legal aid authorities which will depend on the nature and culture of the jurisdiction concerned, the maturity of the quality assessment process as well as the available funding. In relation to the second question, quality evaluation work in the medical and legal worlds of professional practice have tended to focus on four main measures or proxies for quality: *Inputs, Structures, Process and Outcomes*.<sup>6</sup>

### **Quality measures**

*Input* measures refer to those things that the professional brings to practice before the work begins. They include e.g. educational attainment, professional qualifications, skills training undertaken, membership of accredited specialist panels, continuing professional development seminars attended, work experience, legal knowledge, contacts in the legal community, office accommodation, opening hours, library facilities and IT. These measures have the attraction of being 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 lead to a good and effective work product for clients. The management systems range from allocation systems for work and resourcing levels to record-keeping procedures, from training to supervision and from staff development policies to complaints procedures. However, structural measures, while assisting efficient practice

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<sup>6</sup> See Sherr et al. *Quality and Cost*. ( London, HMSO, 2001 ) In the same work the authors argue that the principal methods of assessing quality are self-assessment; external assessment; standardized clients and peer review.

management, only facilitate quality of performance in other aspects of professional practice – they do not ensure it.

*Process* measures focus on the manner in which the actual work is carried out by the service providers from the first point of entry into the system of the office through the handling of the case and onwards to maintenance of files and documents thereafter. As such they encompass the appropriateness of the legal work done, 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. It is probably essential to have good inputs and a good structure in order to produce a good process. However, the inputs and structure by themselves may not assure the quality of the process of the work carried out.

*Process* measures will usually include the quality of advice and information given to the client both in person and in following correspondence, the quality of letters and other documents to the opposing party, to the court and to others (such as expert witnesses) involved in the process, the quality of decisions taken and the negotiations and advocacy, written and oral, carried out on behalf of clients. Such *process* measures can, for example, look at elements expected in given transactions, information essential to make proper, appropriate decisions, sufficient information and advice imparted to the client in full and in an appropriate manner in order to make the necessary decisions. So, *process* measures would take into account the whole range of lawyering, from fact gathering and legal analysis to client handling, advice and assistance and practice management.

Inevitably such matters are more difficult to measure and to measure consistently than input and structure measures, because they operate in the territory of professional judgement and are open to subjective reasoning and differing opinions among professionals and others. It is also the most characteristically "professional" element of all the measures, based on all learning and experience about law and its practice and therefore an essential, if contested, element in all quality assessment. Sometimes *process* measures will be evaluated through compliance with check-lists

or with standards of performance; frequently they are assessed through peer review applying agreed performance criteria.<sup>7</sup>

*Outcome* measures, like process measures, have had a wider provenance in educational and medical spheres than in the legal world. Thus, avoidable deaths, morbidity rates, re-infection and re-admission rates, and survival-recurrence rates are everyday measures for today's hospital administrators, and form a part of the Revalidation programme that all UK doctors must take part in every five years.<sup>8</sup> Legal equivalents have been slow to arrive and those that have emerged continue to provoke debate in the profession.<sup>9</sup> Part of the problem is that the qualitative examination of outcomes in a few individual cases of a particular type is a quite different exercise from collecting statistically valid evidence of the quality of the outcomes achieved by a large group of law firms, in the way this might be achieved with a large hospital and many repeat work items. The qualitative examination of outcomes, through peer review, is understood by lawyers, but has until recently not been properly conceived and organized on a wide scale.<sup>10</sup> Considering outcomes in general requires a statistical approach which assesses general patterns in aggregate case results. While the latter are cheaper to collect than using peer review, the factors that 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, or that the number of similar cases is not easily comparable across different law firms or areas. The statistical approach also assumes that if a large enough sample is taken that allows the other key factors to be controlled for, systematic variations in outcomes from a normal distribution of results will be due to differences in the quality of the lawyering. However, the number of cases required to effectively control for other factors is so great that it means that only a handful of firms even in a country as large as the

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<sup>7</sup> See Richard Moorhead, Avrom Sherr, Lisa Webley, Sarah Rogers, Lorraine Sherr, Alan Paterson and Simon Domberger, *Quality and Cost*, (London, The Stationery Office, 2001)

<sup>8</sup> Revalidation is the process by which all licensed doctors are required to demonstrate on a regular basis that they are up to date and fit to practise in their chosen field and able to provide a good level of care. This means that holding a licence to practise is becoming an indicator that the doctor continues to meet the professional standards set by the GMC.

<sup>9</sup> See e.g. Report on the OUTCOMES, PERFORMANCE MEASURES AND QUALITY ASSESSMENT SUMMIT held at Harvard Law School on June 21<sup>st</sup> 2003 and published by the LSC.

<sup>10</sup> See Avrom Sherr et al., *Lawyers, The Quality Agenda* (London, Her Majesty's Stationery Office, 1994)

United Kingdom have big enough caseloads of a similar sort to permit a statistical approach to quality assurance to be operationalised.<sup>11</sup>

The most commonly discussed outcome measures in the legal realm include: case cost, time taken, success rates and client satisfaction.<sup>12</sup> *Average case cost* appears straightforward, but contains complexities. *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 particularly in criminal cases, and delays in hearings are likely to vary between court districts due to the operation of 'local legal cultures' and the administrative and judicial resources available.<sup>13</sup> 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, for example, 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'<sup>14</sup> are considerably greater. Excluding medical negligence cases, the overwhelming majority of personal injury cases in the common law world result in a settlement. It would be unwise, however, to equate the mere fact of settlement with a quality service.<sup>15</sup> Again, in a criminal case it is not intuitively obvious, for example, that a lawyer whose efforts result in his

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<sup>11</sup> 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 ILAG conference, Edinburgh, 1997.

<sup>12</sup> See the discussion in Richard Moorhead et al. *Judging on results?* (1994)

<sup>13</sup> Thomas Church, JUSTICE DELAYED ( 1978 ).

<sup>14</sup> For a discussion of research in the USA and the United Kingdom which uses outcome data in assessing the quality of poverty legal services, see Alan Paterson, PROFESSIONAL COMPETENCE IN LEGAL SERVICES (1990).

<sup>15</sup> On the complexities of assessing outcomes in personal injury cases, see Richard Moorhead, Avrom Sherr and Alan Paterson "Judging on Results" 1 (1994) *International Journal of the Legal Profession* 191, 200.

client receiving an order to perform work in the community has done a better job than one whose client receives a modest fine.<sup>16</sup>

### ***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”<sup>17</sup> or what constitutes “adequate supervision”. Unfortunately, they are generally weak predictors of quality of performance. Process and outcome measures are better measures of quality but harder to assess.

A possible starting point is to ask the legal aid lawyer whose performance is under scrutiny to conduct a *self-assessment*. This has been tried in China and Chile, however it has not proved to be a particularly helpful weapon in the quality assurance armoury<sup>18</sup>. Either the lawyers claim to be uniformly excellent, or the more modest or honest lawyers found themselves at risk of being penalized for their candour.

Another possible starting point is to ask the lawyer’s clients. In situations where the client is a “repeat-player”<sup>19</sup> or regular user of the legal system and courts, e.g. an insurance company that acts for professionals accused of professional negligence, this may well produce valuable information. However, where the client is an occasional user of legal services and is unfamiliar with the legal system and the courts there are drawbacks to the use of *client satisfaction* questionnaires or surveys,<sup>20</sup> to measure process or outcome variables. This is because such surveys rely on clients’ perceptions of the quality of service that they have received.

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<sup>16</sup> For a study focusing on the assessment of outcomes in criminal cases in Canada and Scotland see Tamara Goriely et al., *THE PUBLIC DEFENCE SOLICITORS’ OFFICE IN EDINBURGH: AN INDEPENDENT EVALUATION* (Edinburgh, Scottish Executive Central Research Unit, 2001)

<sup>17</sup> See Sherr, “The value of experience” *Modern Law Review* 1985. Showing how experience is not always a predictor of good legal interviewing technique.

<sup>18</sup> In Sherr’s work on actual cases lawyers were asked if they thought they had done a good job of client interviewing. Their answers related often to their level of experience but not to the level of their actual performance.

<sup>19</sup> Mark Galanter, “Why the Haves come out Ahead” , 9 (1974) *Law and Society Review* 95.

<sup>20</sup> 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* (London, NCC, 1990 ). See also Richard Moorhead, Avrom Sherr and Alan Paterson *What clients know: client perspectives and legal competence* 10 (2003) *International Journal of the Legal Profession* 5-35 (2003)

However, the necessary gulf in expertise between the lawyer and the client (particularly the first time client) creates a power imbalance or information asymmetry between them. Lay clients can tell if their lawyers have been attentive, sympathetic, empathetic and contactable - all important matters to the client – but they often cannot judge how good the outcome the lawyer achieved for them was, or whether it took too long to achieve it, or cost too much.<sup>21</sup> This is because legal services are generally non-transparent, that is, difficult for a non-expert / specialist to evaluate. With one clear exception (criminal accused who are repeat players<sup>22</sup> ) legal aid clients will rarely know the relevant law or its application in the real world or have any familiarity with state organized dispute resolution mechanisms such as courts or tribunals. Additionally the clients' perceptions are entirely mediated through the comments and advice of the same lawyer; who may paint a picture of what has happened which tends to enhance the client's view of the lawyer.<sup>23</sup>

It follows that in the service quality field what the client perceives may differ from the conclusion which an objective specialist in the field would draw. Some key factors such as the proper price for the job, the length of time it should take, and what should constitute an acceptable outcome, are matters on which clients – especially first time or 'one-shot' clients<sup>24</sup> – are peculiarly dependent on the advice of professionals. 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 perceptions through 'image management' renders them less useful as an

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<sup>21</sup> The Legal Services Consumer Panel research report on *Quality in Legal Services* ( Legal Services Board, 2010 para 3.1 ) found exactly this. The clients surveyed considered that it was too difficult for them to assess the quality of advice provided by their lawyer, so preferred to focus on what they could measure – the perceived quality of the service that they were offered.

<sup>22</sup> Mark Galanter, "Why the Haves Come out Ahead", 9 (1974) *Law and Society Review* 95

<sup>23</sup> A. S. Blumberg, "The Practice of Law as a Confidence Game", 1(1967) *Law and Society Review* 15.

<sup>24</sup> Mark Galanter, "*Why the Haves Come out Ahead*", 9 (1974) *Law and Society Review* 95

objective measure of quality.<sup>25</sup> In any event, such surveys tend to lead to relatively little variation in client responses – satisfaction rates tend to be uniformly high.<sup>26</sup>

Closely linked to the use of client satisfaction surveys to assess quality is to rely on reported *complaints*. Indeed, in a recent global study of legal aid practice<sup>27</sup> a range of countries claimed to operate a quality assurance scheme of their providers. Further scrutiny revealed that the majority of these respondents were using levels of complaint against legal aid providers as their proxy for quality.<sup>28</sup> Yet where the complaint is made by a client it suffers from the same deficiency as client satisfaction surveys – the problem of information asymmetry. Where the complaints are made by knowledgeable third parties e.g. judges or other lawyers these are a more effective way of assessing aspects of a lawyer's quality. However, experience has shown that for a variety of reasons neither judges nor other lawyers<sup>29</sup> are generally interested in making formal complaints against lawyers. This is the second problem with relying on numbers of complaints as a proxy for quality. It turns out that levels of complaints are not a good indicator of satisfaction with the service provided. A recent study of complaints about lawyers in the UK conducted by the Office of Fair Trading (OFT) found that 15% of those who use legal services were dissatisfied. However, only a small minority (13%) of those who were dissatisfied went on to make a formal complaint.<sup>30</sup> This is a considerably lower proportion than in relation to wider consumer problems – previous OFT research found that, of those who had

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<sup>25</sup> Research has shown that some lawyers use “image management” to impress their clients thus skewing their perception of the quality of work being done by their own and other lawyers. See for example, Abraham Blumberg, “The Practice of Law as a Confidence Game” 1(1967) *LAW AND SOCIETY REVIEW* 15, 24-31, Carl Hosticka, “Lawyer-Client Negotiations of Reality” 26 (1979) *SOCIAL PROBLEMS* 559 (1979), Douglas Rosenthal, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974) 109-112, Stewart Macaulay, “Lawyers and Legal Consciousness” 14 (1979) *LAW AND SOCIETY REVIEW* 115, 120-28

<sup>26</sup> Tamara Goriely, *Quality of Legal Services: The Need For Consumer Research* 1993 *CONSUMER POLICY REVIEW* 112.

<sup>27</sup> UNODC, *Global Study on Legal Aid* (2016)

<sup>28</sup> *Ibid.* Fig.66 indicates that 57% of Member states responded that their primary method of monitoring the quality of legal aid services was to review complaints by legal aid recipients.

<sup>29</sup> Unless there is a dispute over access to clients

<sup>30</sup> Office of Fair Trading (2013) *Economic Research into Regulatory Restrictions in the Legal Profession*, London: Office of Fair Trading;  
[http://www.offt.gov.uk/shared\\_offt/reports/professional\\_bodies/OFT1460.pdf](http://www.offt.gov.uk/shared_offt/reports/professional_bodies/OFT1460.pdf)



experienced a consumer problem and felt they had genuine cause for complaint, almost two-thirds complained or did something about the problem.<sup>31</sup>

A further possible standpoint from which to assess the quality of performance of legal aid lawyers would be to use a participatory third party evaluation of the process and/or outcomes that the legal aid lawyers achieve. Such participants might include (1) “standardized or model clients”, (2) members of juries in criminal cases, (3) judges in civil or criminal cases or (4) non-lawyer officials involved in the justice system or employed by the legal aid authorities. Taking each of these in turn:

- (1) To assist with the consistent assessment of the quality of lawyers, one route is to control the variation of inputs to lawyers by providing them with “standardized problems or model clients” who are trained actors who present to each lawyer being assessed a commonly worded problem and record the responses of the lawyers. However, unless the model clients are experienced lawyers, this approach has to be coupled with evaluation of these responses by legal experts<sup>32</sup>.
- (2) Non-lawyer jury members would be even more problematic as evaluators of lawyers, since they are by definition untrained. Moreover, even if the problems of consistency and objectivity in evaluation by non-lawyer jury members could be overcome, in many jurisdictions there are legal restrictions on interviewing members of juries which would exclude their use as quality evaluators.
- (3) Judges, on the other hand have the legal knowledge with which to assess the quality of lawyers who appear before them and are expected to be objective so might be considered a useful source for quality evaluation of lawyers.<sup>33</sup> However, judges, especially in smaller communities, are dependent for the smooth operation of the court proceedings on their daily interactions with the local lawyers. Expecting judges to formally assess the quality of the lawyers who appear before them has the potential to disrupt the understandings and relationships with the lawyers who appear before

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<sup>31</sup> Office of Fair Trading (2008) Consumer Detriment : Assessing the frequency and impact of consumer problems with goods and services, London: Office of Fair Trading:  
[http://www.offt.gov.uk/shared\\_offt/reports/consumer\\_protection/OFT992.pdf](http://www.offt.gov.uk/shared_offt/reports/consumer_protection/OFT992.pdf)

<sup>32</sup> As was carried out in *Quality and Cost*. ( op.cit. )(2001)

<sup>33</sup> After all, there has long been an expectation that judges should report to the disciplinary authorities significant breaches of the professional codes of ethics by the lawyers appearing before them.

them, which enable smaller courts to operate with a minimum of tension. Not surprisingly the use of judges to formally assess the quality of those who appear before them has not proved to be popular with either judges or lawyers. Proposals to introduce such a system were considered and rejected by federal judges in the USA in the 1980s. More recently it has been proposed that the quality of criminal advocates in England and Wales should be assessed by the judges before whom they appear – a proposal entitled Quality Assurance Scheme for Advocates (QASA). The researchers into the pilot scheme found that many judges had misgivings about the proposals but their concerns were overcome by a senior judge who championed the scheme. There was an attempt by the criminal lawyers to challenge the introduction of the scheme in the courts, but this was unsuccessful, although there has been a delay in the introduction of the scheme.<sup>34</sup> The scheme still has some question marks against it. For example, will the judges be willing to undergo the training and monitoring required to ensure that there is consistency between markers?

- (4) In relation to non-lawyer officials - this might be a fruitful avenue for exploring aspects of lawyer quality e.g. court clerks or legal aid authority staff commenting on the efficiency and timeliness of lawyers in filing legal aid applications or court documents but these would only be able to provide an assessment of relatively narrow aspects of the lawyers' performance. In some programmes or studies non-lawyers<sup>35</sup> have used detailed checklists to confirm whether all the steps that would normally be taken in a particular kind of case, have been taken, or whether all the matters which one would expect to see on a client's file were indeed present. Such an approach can perform a useful audit function, however, its major weakness lies in the fact that the assessor is not qualified to conclude whether the advice given to the client or the tactical and strategic decisions taken in the case fall within the range which a fellow professional would consider to be acceptable.

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<sup>34</sup> *R v Legal Services Board* [2015]UKSC 41

<sup>35</sup> E.g. Transaction Criteria under Franchising in England and Wales or quality assessment of Public Defenders in Chile. Although they were not practising lawyers, in some studies the assessors did have law degrees.

The challenges and limitations of non-lawyer assessors of legal quality have led scholars and policymakers in the legal aid sphere to come increasingly to the conclusion that the most appropriate assessors of the quality of the work of lawyers and of legal aid lawyers in particular are fellow lawyers with current experience of the relevant areas of legal practice – that is, peers. In Ukraine, quality managers in regional legal aid centres – who are all experienced lawyers – assess the quality of legal aid lawyers through interviews with clients and by observing the defence lawyers’ performances in court. Similarly, the assessors of public defenders in Chile – all highly experienced criminal lawyers - listen to audiotapes of defence lawyers’ performances in court. However, although such approaches can often provide insights into the quality of outcome, on their own they cast relatively little light on the quality of the process adopted by legal aid lawyers throughout the case – especially in civil cases. Assessment of that requires the scrutiny of lawyers’ files by lawyer reviewers (*peer reviewers*) who have experience in the relevant field of law but who are independent of, and not competitors of, the lawyers who are being assessed. Indeed, Paterson and Sherr define *peer review* as “the evaluation of a 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”. The criteria are derived from good practice manuals and from experienced practitioners and generally focus on the interface with the client e.g. How well does the adviser appear to have understood the client’s problem? How effective was the adviser’s fact and information gathering? Was the client given accurate and appropriate advice?

Experience has shown that to conduct such assessments fairly and effectively entails that the reviewers have a role in endorsing the criteria (i.e. that they are agreed both by the reviewers and the relevant stakeholders in the legal field in question), that there be a robust marking scheme, and rigorous training to enhance marker consistency.<sup>36</sup> Nevertheless, in the end the system rests solidly on the professional judgment of the reviewers. If they cannot see direct evidence on a file that a criterion has been complied with they are nonetheless allowed to draw inferences from the file, exercising their professional judgment. Despite the strength

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<sup>36</sup> A. Paterson, “Peer Review and Quality Assurance” 13(2007) *Clinical Law Review* 757; A. Sherr and A. Paterson, “Professional Competence, Peer Review and Quality Assurance in England and Wales and in Scotland” 45(2008) *Alberta Law Review* 151

that this gives the system as a quality assurance scheme that carries weight with the profession, it also contains potential weaknesses. In times of economic stress how sympathetic might reviewers be to their fellow professionals who have been tempted to cut corners on quality? Might they decline to fail practitioners however weak their files if they consider that the criteria are unfair for some reason.<sup>37</sup> Alternatively, might reviewers from private firms give poor marks to salaried public defenders employed by the legal aid authority, since they are seen as unfair competition for the private profession? One solution to such dangers is to employ full time peer reviewers recruited from the ranks of experienced practitioners, as e.g. in Chile. However, within a few years such reviewers are perceived as out of touch with current practice and they cease to be viewed as “peers”, and may be regarded with suspicion by the practitioners whom they are reviewing.

It might be argued that for a well rounded quality evaluation of lawyers, peer review of files and/or observation of court performance should be supplemented by a range of other measures and procedures.<sup>38</sup> Indeed, 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 through the examination of lawyers’ files, reinforced with model clients 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 peer review. Accordingly, when peer review of lawyers’ files was implemented in England and Wales and in Scotland it was operationalised 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). In South Africa peer review of files is augmented by telephone client satisfaction surveys. In Chile peer review (which is confined to public defenders) is supplemented by external audits conducted by non-lawyers, using a detailed checklist to assess what was and was not done on the file as compared with the detailed case information held on the Public Defender Organization’s computers. The public defenders also complete a self-assessment which is inspected by the peer reviewer along with any complaints

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<sup>37</sup> For examples of this see the description of the introduction of peer review in China and Georgia below.

<sup>38</sup> *Ibid.*

against the public defender. However, these additional measures come with additional costs. There is no research yet to show whether such additional measures are cost effective.

### **The History of Measuring Quality in Legal Services**

The pursuit of adequate measures of quality is not new in the legal services industry. The Legal Services Corporation of the USA in 1970s was one of the early movers in this field. They were interested in measuring outcomes and in the use of peer audit visits to legal services programmes. The former proved hard to realise for the reasons set out above, the latter proved expensive and time consuming to implement. In the UK value for money for taxpayers in public expenditure has been a key goal for the UK Treasury for over 20 years. Schools, Hospitals and Universities all became subject to regular quality inspections. Publicly funded legal services were late to come into the frame. Concerned by evidence that most legal aid firms in England and Wales (70%) did only a small proportion of the work (30%) and were, therefore, by definition 'dabblers' who were likely to be doing the work inefficiently, the English Legal Aid Board decided in 1993 to introduce optional contracting (franchising) for providers. In 2000, compulsory contracts were imposed, and in recent years attempts have been made (none of them successfully) to introduce competitive tendering for contracts based on price. These initiatives (justified on value for money grounds) have all required a robust quality assessment mechanism as an essential component in the reforms. Similarly, in 2003 the Scottish Legal Aid Board (SLAB) introduced quality assurance measures of its public defenders as part of the justification for the expansion of their services.

What were these quality assessment mechanisms in the UK? In the initial project the English Legal Aid Board commissioned Professor Avrom Sherr and Professor Alan Paterson (assisted by Richard Moorhead) to provide a report,<sup>39</sup> developing quality assessment for legal aid lawyers with a franchise. At that time there was no reliable, verifiable model for such an assessment. Drawing on Paterson's earlier work for the theoretical framework, the team demonstrated (1) the potential for file auditing methods for assessing quality, (2) that performance was a continuum (at a time

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<sup>39</sup>Sherr, A., Moorhead R. and Paterson A., (1994) *Lawyers- The Quality Agenda* (London: HMSO/ The Legal Aid Board)

when quality in a professional context was seen as binary phenomenon), and (3) the difficulties in identifying reliable proxies for quality in legal services.

In 1998 the original research team were again commissioned by the Legal Services Commission (LSC) to evaluate the quality of work done by lawyers and the 'not for profit' sector, who held the new legal contracts for civil work that had been allocated by the LSC. The research,<sup>40</sup> 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) and showed (again for the first time) that it was the best available means for assessing the quality of legal work. Following this peer review of legal aid lawyers' files was introduced in England and Wales on a wide scale. Thereafter, further research by Paterson in 2003 and 2005 on peer review in Scotland funded by the Scottish Legal Aid Board (SLAB) led to the introduction of peer review for civil legal aid practitioners in Scotland and subsequently for criminal and children's legal aid lawyers.

The success of the UK work on peer review reached a broader audience through presentations at several ILAG conferences and pilot projects and sometimes programmes began to emerge in a range of jurisdictions – Chile, South Africa, the Netherlands ( Notaries and Advocates ), Ontario, Finland, Moldova, China and Georgia.<sup>41</sup>

### **The Purpose of Peer Review projects**

For most projects the primary driving force has been the state's concern that legal aid programmes should represent value for money. However, there have also been other motives. In the case of Professors Paterson and Sherr their interest in quality was sparked by an awareness that the attractions of contracting as a delivery mechanism were likely to lead eventually to a government introducing competitive

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<sup>40</sup> A. Sherr A. et al., *Quality and Cost* (London: The Stationery Office, 2001)

<sup>41</sup> The ILAG website contains a range of papers presented in ILAG conferences illustrating work done in peer review e.g. in the United Kingdom, South Africa, Chile and China.

tendering on price as the vehicle for allocating legal aid contracts in the future.<sup>42</sup> There then began a race to see if they could develop a robust quality assessment mechanism before competitive tendering was introduced. The legal aid profession in the UK had their own concerns, which included a fear that the state's real purpose for introducing peer review was to come up with a mechanism for weeding out weaker practitioners. 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 Legal Services Board delegated much of the implementation of the scheme to Professor Sherr and the Institute of Advanced Legal Studies<sup>43</sup> and relatively few firms appear to have lost their contracts as a result of peer review.<sup>44</sup> In Scotland the peer review programme was introduced as a partnership between the Legal Aid Board, the Law Society of Scotland and the Government.<sup>45</sup> This might have led to a reduction in supply, but it did not. The Scottish Government saw no reason to concentrate the supply base of legal aid lawyers there ( partly because of the more rural nature of the country ) and in twelve years of operation the programme has seen less than 20 practitioners out of a 1,600 or so excluded from doing legal aid, as a result of the quality assurance programme. What then has been the aim of peer review in Scotland? To establish that legal aid lawyers are providing a service paid for from public funds which is at least adequate and hopefully more than this. Secondly, to establish a culture of continuous improvement. This means that over time lawyer performances which might have passed at the start of the first peer review cycle, will no longer be considered to be adequate. To reinforce this aim, variations have been introduced into the programme which are designed to encourage improved performance by the lawyers.

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<sup>42</sup> Competitive tendering in other walks of life have led to a "race to the bottom" in term of quality, as successful bidders seek to compensate for an overly low price offered to obtain the contract, by cutting corners in terms of the quality of work done,

<sup>43</sup> Part of the University of London.

<sup>44</sup>It is not clear exactly how many firms have lost contracts in England and Wales only as a result of peer review. This is because firms have withdrawn from the particular area of legal aid work when they have "failed" a peer Review, so as not to be forced out. Alternatively they have joined with other better performing firms, or there have been additional reasons why the Legal Aid Board/ The Legal Services Commission or the Legal Aid Agency have enforced a contract breach against them.

<sup>45</sup>The professional body for Scottish solicitors -much the most numerous branch of the legal profession there.

The aims of peer review in Chile and South Africa have been to assure the quality of providers and the original peer review pilots in China had a similar objective by way of producing a detailed objective overview of the work on a file. However, following the inception of the China – EU Access to Justice Programme the focus of the pilot projects expanded. The early pilots had revealed that Chinese Legal aid lawyers and their files tended to concentrate on the judges and the courts and less on the needs and expectations of the clients. The leaders of the Chinese National Legal Aid Centre (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 the new culture somewhat more quickly. By developing the peer review criteria in China along UK lines the lawyers’ files would be assessed against criteria that focused on interaction with client, taking the clients instructions and the advice given to the client. The decision was taken to introduce 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 from 16-18<sup>th</sup> March 2015 led by Professors Alan Paterson and Avrom Sherr, the two architects of the operation of UK style peer review. The 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 a 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. However, there was evidence of a reluctance on the part of the reviewers to fail files which did not accord with the criteria, in part because they considered it unfair that lawyers should be “failed” for not conducting their files in accordance with criteria which exemplified a completely different culture and which they had no knowledge of , in the first place. Professors Paterson and Sherr returned to Beijing in June 2015 to conduct further training. This workshop reinforced the conclusion from the March 2015 Zengzhou workshop that 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 NLAC was the testing of modified UK style criteria and marking in ten provinces. In addition the Professors were commissioned to produce a toolkit to assist NLAC in rolling out peer review in the provinces in the future. The toolkit should include issues ranging from the interpretation of the criteria and the marking scheme to guidance on training and the administration of peer review. It was agreed that the lawyers in Henan and Shanxi would be given several months exposure to “client-centred” lawyering materials and to the Beijing criteria, before their files were subject to a further audit. This, it was hoped, would meet the reviewers’ objection that it was unfair to mark lawyers against criteria with which they had no familiarity. Providing the lawyers with an opportunity to alter their form of lawyering might obviate any tendency of the reviewers to distort their application of the criteria out of considerations of fairness to the practitioners being assessed.

In mid-August 2015 NLAC indicated that that the civil legal aid quality criteria had been presented to the All China Lawyers' Association (ACLA), who were 'very happy and impressed with them.' They have 'been passed by the ACLA and will be published soon'. 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 client. There are only 10 plus criteria, but all focus on what the lawyer does for the client'. The new criteria were published in October 2015 and, although a number of small changes had been introduced, the 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:

The 13 criteria basically addressed two major aspects: the attitude of the lawyer and the skill of the lawyer. Being “client-focussed” is an ethical issue,

he said. Attitude was demonstrated in the file, the notes made, the getting of evidence. Advocacy before the court and court performance could be assessed from the degree and quality of preparation for trial and whether process and procedure was properly followed. Skill covered everything that was done, not only highlighting the more obvious areas of work. Assessing files meant correlating everything that was done, looking for due diligence in carrying out good work. Their targets should be high. Some lawyers do not demonstrate a good attitude but they are sharp, he commented. Some lawyers have done well in process and formality, the content looks good but they do not always get to the key issues. They can write pages but do not get to the point. So he looks at the files for these issues: key points understood and achieved; all necessary work done; and a full understanding of the merits of the case. And clients must be told what material to bring. In considering outcome, some files are very thin but have good results, and others are detailed with poor results. Sometimes the whole case is entirely up to the judge and not much can be done by the lawyer to achieve success. So it is necessary to consider whether a client has been satisfied by what has been explained to them and a lawyer can have done well even if there is a poor outcome.

Another reviewer raised an issue that has arisen from time to time in the UK, namely “local legal culture”.<sup>46</sup> He observed that:

Each City or Region had a different approach to their legal work, sometimes as a result of the approach of the judiciary. Reviewers needed to infer the attitude of the lawyers, and the results of the cases tended then to be given more weight in the assessment than the actual attitude and performance of the lawyers. It might be sensible to involve at least one reviewer from that area in the reviewing team each time, until a body of understanding developed on the different approaches taken.

The Professors considered that these issues raised at the refresher training showed a correct approach to the business of peer review. Matters of judgement needed to develop, if possible together with the views of the lawyers being assessed.

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<sup>46</sup> See note 10 above.

Improvement would be gradual and attitudes of lawyers and clients would progress over time.

Later in the same year the Professors visited Tblisi, Georgia to train reviewers in November 2016. As in China and the UK they stressed the advantage to be gained from operating a peer review programme as partnership between the legal aid authority, the Bar Association and other stakeholders. It was also clear that as in China the culture of the legal aid lawyers was not to note much of the interaction with their clients on the file. Indeed their practice was typically to interact almost entirely orally with their clients and to show a greater focus on the Court than the client. As in China, one of the attractions of peer review for the legal aid authority was the potential it offers to introduce client centred lawyering through the criteria used. The experts indicated that in that case training in the new client-centred approach and in the recording of the communications with clients and the prosecution and others third parties, would need to be considered and carried out. They stressed that that it was wrong to judge the lawyers on something that they had not been taught and were not aware of. Both training and review should march forward together. The culture and approach of the system was important. They stressed that it was essential that peer review should be seen as a method for ensuring the quality of work, for encouraging good work, for advising how to perform good work, and not as a method of control or punishment.

## **Conclusions**

Peer review has established itself as a success story in a range of jurisdictions across the globe. It is expensive since it relies on highly experienced practitioners, but it has demonstrated its value as the gold standard in relation to quality assessment and assurance. Although part of its purpose has always been to change the culture of practising lawyers to one of demonstrating continuing competence it has unexpectedly begun to be used to introduce other cultural changes e.g to nudge practitioners towards a culture of continuing improvement, and to introduce a culture of client centred lawyering.