



**UNODC**

United Nations Office on Drugs and Crime

HANDBOOK ON

# Ensuring Quality of Legal Aid Services in Criminal Justice Processes

PRACTICAL GUIDANCE  
AND PROMISING PRACTICES

CRIMINAL JUSTICE HANDBOOK SERIES



UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

**Handbook on Ensuring Quality  
of Legal Aid Services  
in Criminal Justice Processes**  
Practical Guidance and Promising Practices



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## Preface

Promoting the rule of law and ensuring access to justice for all is essential in criminal justice system reform to allow all groups in society to equally enjoy their rights, ranging from fundamental human rights, such as the right to life and the right to a fair trial, to rights deriving from national legal procedures. The important role that access to justice plays in building societies and allowing them to grow affects countries at all levels of development, which was acknowledged in Sustainable Development Goal 16 of the 2030 Agenda for Sustainable Development,<sup>1</sup> and its target 3: “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.” Ensuring equal access to a fair justice system includes the provision of support to those who do not have the means to actively enforce and protect their rights.

Legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. It is a foundation for the enjoyment of other rights, including the right to a fair trial, a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process. This was recognized in the **United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems** (henceforth “UN Principles and Guidelines”), adopted by the General Assembly in December 2012 in resolution 67/187.<sup>2</sup> The UN Principles and Guidelines made it an obligation for Member States to put in place an accessible, effective, sustainable and credible legal aid system, and **to ensure the quality of legal aid services**, in particular those provided at no cost.

In resolution 67/187, adopting the UN Principles and Guidelines, the United Nations Office on Drugs and Crime (UNODC) was requested to provide advisory services and technical assistance to Member States, upon request, in the area of criminal justice reform, including the development of integrated plans for provision of legal aid, as well as making the UN Principles and Guidelines available through the development of relevant tools.

After the adoption of the UN Principles and Guidelines, to have a clear understating of States’ needs and priorities, UNODC and the United Nations Development Programme (UNDP) conducted the Global Study on Legal Aid (henceforth “UNODC/UNDP Global Study”).<sup>3</sup> Aiming at establishing a baseline understanding of how the right to legal aid has been defined and addressed around the world, it was the international community’s “first attempt to collect data on and present a comprehensive overview of the state of legal aid globally.”<sup>4</sup> The number one priority identified by responding Member States, as well as individual experts, was **improving the quality of legal aid services**. The Study recommended that the State authority responsible for delivery of legal aid should consider “enhancing the quality of legal aid services, including by developing performance and qualification standards for all legal aid providers”, and encouraged global sharing of experiences, lessons learned and good practices.

<sup>1</sup>General Assembly resolution 70/1, entitled “Transforming our world: the 2030 Agenda for Sustainable Development”.

<sup>2</sup>General Assembly resolution 67/187, entitled “United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems”, annex.

<sup>3</sup>UNODC/UNDP *Global Study on Legal Aid, Global Report* (2016), available online at: [http://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid\\_Report01.pdf](http://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid_Report01.pdf); Country Profiles are available at: [http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access\\_to\\_justiceandruleoflaw/global-study-on-legal-aid.html](http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/global-study-on-legal-aid.html).

<sup>4</sup>UNODC/UNDP *Global Study*, pp. 2, 13.

**In line with this recommendation**, this *Handbook* is intended as a practical guide for policymakers and practitioners for planning and implementing measures to ensure, monitor and constantly improve the quality of legal aid services, and for building the capacity of United Nations staff in the field to assist national partners in addressing quality of legal aid services when delivering technical advice and assistance. It covers legal aid only in the context of criminal justice processes and does not pertain to legal aid delivered in civil or administrative cases.

The *Handbook* is designed to address some of the key issues that policymakers and practitioners face in ensuring quality of legal aid services in criminal justice processes, including by:

- Explaining the relevant provisions of the United Nations Principles and Guidelines and other international or regional standards;
- Outlining different approaches to quality assurance and describing relevant considerations for designing programmes;
- Providing policymakers, civil servants and practitioners (lawyers, judges, prosecutors, police officers, detention officers, civil society actors and others) with tools for quality assurance and monitoring/evaluating;
- Sharing practical and innovative examples from different jurisdictions. As many countries are still developing their national legal aid systems, it is crucial that they include quality assurance considerations and measures from the outset. Therefore, examples are provided from countries across all regions that have made progress in establishing such measures and have shared their experiences.

**Chapter 1**, on the right to legal aid, provides an overview of the relevant international and regional standards on the right to legal aid and lists some of the key provisions on quality of legal aid services within a fair, humane and efficient criminal justice system. It presents the specific standards developed in the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems that pertain to quality and provide guidance on good practices in achieving quality legal aid services.

**Chapter 2**, on legal aid delivery in criminal justice systems, describes the environment in which legal aid is delivered in the context of the criminal justice system. More specifically, it describes the normative and institutional environments in which legal aid is delivered, and the different factors that impact the quality of services. It also discusses the role of other criminal justice actors in ensuring access to legal aid and the factors that influence the effectiveness of legal aid. These factors should be addressed in any programmes and projects on legal aid delivery, as further discussed in chapter 5.

**Chapter 3**, on the legal aid system, provides practical guidance on measures to establish quality legal aid services within the national legal aid system, in line with Principle 2 of the UN Principles and Guidelines. Starting from defining what quality should entail, moving on to appointing a national body to monitor legal aid quality (and/or establishing such a body where none exists yet), and then adopting more concrete measures such as working conditions and procedures to facilitate the work of legal aid providers, introducing measures to cater for the needs of special groups of beneficiaries, measures to ensure quality legal aid services at all stages of the criminal justice process as well as child-friendly and gender-sensitive measures. Finally, it discusses the importance of data collection to ensure monitoring and on-going improvement of quality of services in the system.

**Chapter 4**, on the individual legal aid provider, briefly describes measures to ensure the quality of legal aid services provided by the individual provider. It then focuses on the evaluation and monitoring of quality. It provides an overview of a wide range of tools to measure the quality of legal services and their relative strengths and weaknesses. Finally, it describes the possible outcomes of evaluation – for the individual legal aid provider, for beneficiaries, and for the legal aid system or the criminal justice system as a whole, on the basis of the findings of evaluations. The role of legal aid beneficiaries in the evaluation of quality is briefly discussed. While chapter 3 generally describes how to establish quality in the legal aid system, the main focus of chapter 4 is on how to measure/evaluate quality of the actual services provided, and how to use the findings of such evaluations.

**Chapter 5**, on quality in action, provides practical guidance to Member States on how to develop national strategies and action plans to ensure quality in different legal aid systems, on the basis of information provided in the previous chapters. It outlines the steps for developing such strategies, providing questions for legal aid assessments and highlighting programming considerations and options.

While the *Handbook* addresses cross-cutting issues such as child-friendly legal aid, gender-sensitive legal aid and legal aid for victims, the discussion in the *Handbook* is not exhaustive, and reference is made to other relevant publications.



# 1. The right to legal aid

## A. International human rights standards

As recognized in the UN Principles and Guidelines, legal aid is an element of the right to fair trial in criminal justice processes, established by several human rights instruments that by now have gained almost universal ratification status.<sup>5</sup> Therefore, the first step to understanding quality in the context of criminal legal aid is to outline the elements of this right and the concrete obligations of Member States in fulfilling it.<sup>6</sup>

### 1. International instruments

#### i) *The International Covenant on Civil and Political Rights (ICCPR)*<sup>7</sup>

The right to legal assistance free of charge to persons charged with a criminal offence was first established in the International Covenant on Civil and Political Rights,<sup>8</sup> article 14(3)(d):

*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.*

According to the Human Rights Committee, this right is non-derogable. Actually, whilst article 14 of the ICCPR is not one of those explicitly mentioned as non-derogable, in article 4 of the

<sup>5</sup>Some 172 Member States have ratified the International Covenant on Civil and Political Rights of 1966. See [https://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx](https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx).

<sup>6</sup>This *Handbook* focuses on criminal trials. In the context of civil legal aid, for example, the Hague Convention of 1980 on International Access to Justice provides for reciprocity in access to legal aid services for nationals of countries parties to the convention.

<sup>7</sup>The ICCPR is not the sole international instrument referring to legal aid. See also ICRMW art. 18(3)(d) and art. 37(d) of the CRC referring to “prompt access to legal and other appropriate assistance”. While it does not make explicit a right to free legal aid, there is soft law support for access to free legal aid (see rule 18(a) of the United Nations rules for the protection of juveniles deprived of their liberty, rule 18(2)).

<sup>8</sup>Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 4.

ICCPR, the Human Rights Committee has explained that the list in article 4 is non-exhaustive. Instead, the Committee has concluded that “fundamental principles” of fair trial rights are non-derogable.<sup>9</sup>

The right was further elaborated in General Comment No. 32 of the Human Rights Committee:<sup>10</sup>

*Counsel provided by the competent authorities on the basis of this provision **must be effective** in the representation of the accused. Unlike in the case of privately retained lawyers, blatant misbehaviour or incompetence, for example the withdrawal of an appeal without consultation in a death penalty case, or absence during the hearing of a witness in such cases may entail the responsibility of the State concerned for a violation of article 14, paragraph 3 (d), provided that it was manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice.*

*There is also a violation of this provision if the court or other relevant authorities **hinder appointed lawyers** from fulfilling their task effectively.*

*Counsel should be able to **meet their clients in private** and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized **professional ethics** without restrictions, influence, pressure or undue interference from any quarter.*

*What counts as **adequate time** depends on the circumstances of each case. If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial. A State party is not to be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice.*

***Adequate facilities** must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory.*

## 2. European standards

A similar guarantee of the right to legal aid was recognized in article 6 of the European Convention on Human Rights, and further developed by the European Court of Human Rights:

*6. 3. Everyone charged with a criminal offence has the following minimum rights: c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.*

<sup>9</sup>This conclusion is based on a variety of arguments including the fact that compliance is required with other international obligations (such as international humanitarian law applicable during armed conflict), and that derogation is not permitted where it would undermine a non-derogable right or the right to an effective remedy for a non-derogable right. See Human Rights Committee, General Comment No. 29, paras. 6–9; Human Rights Committee, General Comment No. 32, para. 6.

<sup>10</sup>Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, paras 32–34, 38. The General Comment refers to an extensive body of relevant Human Rights Committee jurisprudence.

The Court held that to fulfil this obligation, **the legal aid lawyer should perform at least at basic quality, and the administering institution should ensure sufficient time and facilities for an officially appointed lawyer to prepare for a case, and should rectify the situation if the appointed lawyer is manifestly failing to perform:**

- The right to free legal assistance is not satisfied by the formal appointment of a lawyer: this right must be practical and **effective**.<sup>11</sup>
- The court needs to take measures of a positive nature to permit the officially appointed lawyer to fulfil his obligations “in the best possible conditions,” such as the adjournment of a hearing or the suspension of a sitting to allow for studying of the case file.<sup>12</sup>
- “[C]ompetent national authorities are required [...] to intervene only if a failure by legal aid counsel to provide **effective representation** is manifest or sufficiently brought to their attention in some other way.”<sup>13</sup>
- Denying legal assistance to a suspect while he or she was held and interrogated in police custody is a violation of the right to a fair trial.<sup>14</sup>

As well as the Council of Europe, the European Union has, in recent years, sought to create clear minimum standards for Member States of the European Union in the area of legal aid. In 2013, the European Commission adopted the “Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings”.<sup>15</sup> 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, 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.

Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings,<sup>16</sup> establishes in article 7, “Quality of legal aid services and training”:

1. *Member States shall take necessary measures, including with regard to funding, to ensure that: (a) there is an effective legal aid system that is of an **adequate quality**; and (b) legal aid services are of a quality **adequate** to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession.*
2. *Member States shall ensure that adequate training is provided to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings.*

<sup>11</sup> *Artico v. Italy* (1980). Appl. No. 6694/74, para. 32.

<sup>12</sup> *Goddi v. Italy* (1984). Appl. No. 8966/80, para. 31.

<sup>13</sup> *Kamasinski v. Austria* (1989). Appl. No. 9783/82, para. 65. *Imbrioscia v. Switzerland* (1993). Appl. No. 13972/88.

<sup>14</sup> *Salduz v. Turkey* (2008). Appl. No. 36391/02.

<sup>15</sup> Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings.

<sup>16</sup> Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016. Available online in 24 languages at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L1919>.

3. *With due respect for the independence of the legal profession and for the role of those responsible for the training of lawyers, Member States shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services.*

4. *Member States shall take the necessary measures to ensure that suspects, accused persons and requested persons have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify.*

Although Directive 2016/1919 clarifies that the “quality” and “adequacy” of legal aid services must be determined by reference to whether those services “safeguard the fairness of proceedings”, it does not seek to identify what this requires. Other European Union Directives on the right to a fair trial have, however, started to enunciate key aspects of the right to a fair trial that quality legal aid services are crucial to securing.

### 3. American standards

In the Americas, article 8(2)e of the American Convention on Human Rights<sup>17</sup> recognizes the right to be assisted by counsel provided by the state:

*The inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.*

While the Convention leaves the question of funding to national laws and recognizes a duty of the State to provide counsel within a defined period of time.

The decisions of the Inter-American Commission on Human Rights and the case law of the Inter-American Court of Human Rights indicate that if counsel is appointed, but no effective assistance was provided, article 8 is violated. This included, for example, providing effective defence in death penalty cases by proactively participating in the case, presence during discussion on admissibility of evidence, access to case file and witnesses, and mounting a defence.<sup>18</sup>

In a recent decision, the Court identified certain situations that are indicative of **ineffective** criminal defence: not to display any activity regarding the evidence of the case; argumentative inactivity in favour of the interest of the accused; lack of legal technical knowledge of the criminal process; not presenting motions to the detriment of the rights of the accused; lack of foundation of the motions/appeals presented; abandonment of defence.<sup>19</sup>

<sup>17</sup>American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

<sup>18</sup>Report 41/00, *Desmond McKenzie and Others v. Jamaica*, April 13th, 2000, paras. 295–306; Report 41/04, *Whitley Myrie v. Jamaica*, October 12th 2004, paras. 61–65; Report 49/00, *Adolfo Gerbert Ascencios Lindo and Others v. Perú*.

<sup>19</sup>In the case of *Ruano Torres v. El Salvador* (Judgment of October 5th, 2015, paras. 147–175), the Court ruled that the legal representation provided to Ruano Torres through State public defenders during his criminal prosecution had been ineffective and El Salvador was for that reason responsible for the violation of articles 8.1, 8.2.d and 8.2.e of the American Convention. The Court considered that the legal representation had been ineffective since “the defenders representing Mr. Ruano Torres did not present a motion to dismiss the recognition procedure in a row of persons based on irregularities indicated by the accused and other persons, as well as on the basis that the victim of the crime had seen the detainees in the news,” and that evidence had been one of the main reasons for the conviction. The Court also noted that the defenders had not appealed the conviction to 15 years of prison to a higher court (paras. 167–168). See [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_303\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_303_esp.pdf).

The Inter-American Juridical Committee of the Organization of American States (OAS) approved in 2016 the Principles and Guidelines on Public Defence in the Americas. Principle 4 recognized that “cost-free state-provided legal counsel services are fundamental to promoting and protecting the right of access to justice for all persons, particularly those who find themselves in a situation of vulnerability.”<sup>20</sup>

#### 4. African standards

The African Charter on Human and Peoples’ Rights recognized in article 7 the right to defence. This right was elaborated upon by the African Commission on Human and Peoples’ Rights in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa of 2003.<sup>21</sup>

The African Principles and Guidelines establish that the lawyer appointed shall:

*Be qualified to represent and defend the accused or a party to a civil case; have the necessary training and experience corresponding to the nature and seriousness of the matter; be free to exercise his or her professional judgement in a professional manner free of influence of the State or the judicial body; advocate in favour of the accused or party to a civil case; and be sufficiently compensated to provide an incentive to accord the accused or party to a civil case **adequate and effective representation.***

These standards provide a comprehensive framework for deducing the elements of quality in the delivery of legal aid services as directly linked to the provision of effective defence that fulfils the right to fair trial, and for listing measures to ensure such quality of services, both at the level of the organization administering legal aid and the individual providing legal aid, reflecting obligations of the State. The concept of effective defence includes both positive and negative elements, for example, what the lawyer should or should not do. This provides a useful (and binding)<sup>22</sup> starting point for the discussion on quality, and for the necessary measures to establish it which are summarized below.<sup>23</sup>

In addition, article 8 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa,<sup>24</sup> entitled “Access to Justice and Equal Protection before the Law”, states that women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure effective access by women to judicial and legal services, including legal aid.

<sup>20</sup> CJI/doc.509/16 rev.2, *Annual Report of the Inter-American Juridical Committee to the General Assembly* (2016) <http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2016.ENG.pdf>.

<sup>21</sup> African Commission on Human and Peoples’ Rights (2003).

<sup>22</sup> Since it is linked to binding international instruments to which most Member States are party.

<sup>23</sup> In a 2014 research project, researchers took the number of violations of the right to access to justice protected by article 6 of the European Convention on Human Rights as an indicator of quality of access to justice in a country. They found a pattern similar to other indicators, with the exception of Finland. Hill, *Innovating Justice, Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?* (2014), 64.

<sup>24</sup> Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003, available at: <http://www.achpr.org/instruments/women-protocol/>.

## 5. Arab standards

The Arab Charter on Human Rights provides for the general principle of the right to a fair trial. Article 13 states that “everyone has the right to a fair trial that affords guarantees before a competent, independent and impartial court that has been established by law to hear any criminal charge against him or to decide on his rights or obligations.” Article 16 stipulates that:

*Everyone charged with a criminal offense shall be presumed innocent until proved guilty by a final judgment rendered according to the law, and in the course of the investigation and trial, he shall enjoy the following minimum guarantees: 1. The right to be informed promptly, in detail and in a language which he understands, of the charges against him; 2. The right to have adequate time and facilities for the preparation of his defence and to be allowed to communicate with his family; 3. The right to be tried in his presence before an ordinary court and to defend himself in person or through a lawyer of his own choosing with whom he can communicate freely and confidentially; 4. The right to the free assistance of a lawyer who will defend him if he cannot defend himself or if the interests of justice so requires, and the right to the free assistance of an interpreter if he cannot understand or does not speak the language used in court; 5. The right to examine or have his lawyer examine the prosecution witnesses and to on defence according to the conditions applied to the prosecution witnesses; 6. The right not to be compelled to testify against himself or to confess guilt; 7. The right, if convicted of the crime, to file an appeal in accordance with the law before a higher tribunal; and 8. The right to respect of his security of person and his privacy in all circumstances.*

The right to a fair trial, the right to defence and the right to legal aid, including the right to free legal assistance, as mentioned before, are to be interpreted in accordance with the international legal standards embodied in international conventions. Article 43 of the Arab Charter explicitly provides for this referral by stating that “nothing in this Charter may be construed or interpreted as impairing the rights or freedoms [...] set forth in the international and regional human rights instruments which the States parties have adopted or ratified [...]”<sup>25</sup>

## 6. The role of human rights bodies

As demonstrated above, an extensive body of case law on the right to legal aid exists, including from the United Nations Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights. Decisions of these courts interpreted what would be considered effective defence, and brought about significant changes, for instance on access to legal aid in police stations in Europe. In addition, United Nations bodies regularly review reports from Member States and provide comments on the implementation of human rights treaties. The observations and recommendations made by experts during the meetings of those bodies are useful to inform and guide national institutions in legal aid reform processes.<sup>26</sup> For example, Kenya adopted a national legal aid law after receiving a comment from the Human

<sup>25</sup> See Mohamed Y. Mattar, Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards, 26, *Harvard Human Rights Journal* 91 (2013).

<sup>26</sup> An overview of recommendations on legal aid from the *Universal Periodic Review* up to the year 2015 can be found in the annexes of the UNODC/UNDP *Global Study*, pp. 236–240. For further research, it is suggested to consult the Universal Human Rights Index (UHRI) at: <https://uhri.ohchr.org/en>, which is designed to facilitate access to human rights recommendations issued by three key pillars of the United Nations human rights protection system: the Treaty Bodies established under the international human rights treaties, as well as the Special Procedures and the Universal Periodic Review (UPR) of the Human Rights Council.

Rights Committee.<sup>27</sup> In the case of the Maldives, the Committee expressed concern about the lack of access to legal aid in police stations and commented that the Legal Aid Act should allow for legal aid when the interests of justice so require, thus recognizing the importance of early access to legal aid.<sup>28</sup> The CEDAW (Convention on the Elimination of All Forms of Discrimination against Women) Committee expressed concern on the impact of legal aid reform in on women's access to justice in the United Kingdom.<sup>29</sup> In the case of Malawi, it welcomed the adoption of a legal aid law, but expressed concern about the adequacy of resources allocated to the national authority.<sup>30</sup>

## 7. The roles of States, legal aid systems and lawyers

While the standards outlined above create obligations for Member States, in practice there are different roles for States, legal aid systems and individual legal aid providers to implement them and ensure delivery of quality legal aid services. Below is a summary of these respective roles.

The role of the State is to put in place the laws and institutions that enable legal aid delivery. These elements are discussed below in chapter 2. To some extent, they are preconditions for delivery of quality legal aid. The actual measures taken by the legal aid system and the individual providers contribute directly to achieving quality of services. These measures are outlined in chapters 3 and 4 below.

In order to fulfil their obligation to ensure access to legal aid in criminal processes, States should:

- Ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible.

<sup>27</sup> Consideration of reports submitted by States parties under article 40 of the Covenant. Concluding observations adopted by the Human Rights Committee at its 105th session, 9–27 July 2012, Kenya, para. 19. “While welcoming the introduction of a pilot National Legal Aid (and Awareness) Programme and the establishment of a National Legal Aid (and Awareness) Steering Committee in 2007, the Committee regrets that access to legal aid and courts is unduly constrained by lack of funding for a legal aid scheme and physical accessibility factors. The Committee is also concerned that the Legal Aid bill has not been passed into law. The Committee is also concerned that the right of arrested persons to contact counsel is often not respected (arts. 2, 9 and 14). The State party should give full effect to the rights of accused persons to contact counsel before and during interrogation, and when they are brought before courts. Furthermore, the State party should take appropriate measures to ensure access to courts and to provide adequate funding to the legal aid scheme. The State should also, as a matter of urgency, enact a comprehensive legal aid law.” [www2.ohchr.org/english/bodies/hrc/docs/co/CCPR.C.KEN.CO.3\\_AV.doc](http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR.C.KEN.CO.3_AV.doc).

<sup>28</sup> Consideration of reports submitted by States parties under article 40 of the Covenant. Concluding observations adopted by the Human Rights Committee at its 105th session, 9–27 July 2012, Maldives, para. 18. “The Committee is concerned that suspects may be detained by the Police or National Defence Forces for a period exceeding 48 hours without appearing before a judge and without charge. The Committee is also concerned at reports that suspects do not always benefit from legal assistance (art. 9). The State party should provide legal guarantees to suspects detained by the Police, or National Defence Forces, whereby that they are brought before a judge who should decide on the lawfulness of their detention and/or its extension, within 48 hours. In adopting its Legal Aid Act, the State party should also ensure that free legal assistance is provided in any cases where the interest of justice so requires.”

<sup>29</sup> Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its 55th session, 8–26 July 2013, para. 22.

<sup>30</sup> Concluding observations on the seventh periodic report of Malawi, adopted by the Committee at its 62nd session, 26 October to 20 November 2015, para. 12. “The Committee notes the adoption of the Legal Aid Act in 2010. The Committee is, however, concerned that women continue to face multiple barriers in obtaining access to justice, including the unavailability of courts, legal fees and women's lack of legal literacy, especially in rural areas. It is particularly concerned that customary judicial mechanisms, to which women have to resort, are not gender-sensitive and continue to apply discriminatory provisions. The Committee notes with concern that insufficient human, technical and financial resources have been allocated to the Legal Aid Bureau and that its services are not yet available in all areas of the State party.”

- Allocate the necessary human and financial resources to the legal aid system.
- Consider establishing a national legal aid body or authority to provide, administer, coordinate and monitor legal aid services, including quality.
- Ensure access of lawyers to their clients in detentions centres, prisons and courts, and allow them to fulfil their obligations.
- Not interfere with the organization of the defence of the beneficiary of legal aid or with the independence of his or her legal aid provider.

Legal aid systems should:

- Provide adequate time and facilities for the lawyer to prepare their clients' defence.
- Establish criteria for accreditation of the legal aid providers.
- Establish quality standards for legal aid providers.
- Provide adequate training, necessary supports and supervision of legal aid providers.
- Establish monitoring and evaluation mechanisms to assess and continuously enhance the quality of the services provided by legal aid providers.
- Intervene when lawyers' conduct is incompatible with the interests of justice or when they are manifestly failing to perform.

Lawyers<sup>31</sup> should:

- Acquire the necessary skills to represent their clients, taking into account the specific crimes with which the client is charged, and any special needs of the client.
- Advise their clients and assist them in every appropriate way in navigating the criminal justice system, including preventing them from making statements against their interests and taking legal action to protect their interests.
- Mount an effective defence and protect the interests of their clients.
- Uphold and defend human rights and fundamental freedoms recognized by national and international law.
- Comply with professional standards.
- Comply with ethical standards of their profession.

## **B. Specific standards on legal aid: the United Nations Principles and Guidelines on access to legal aid in criminal justice systems**

The UN Principles and Guidelines, adopted in 2012, were developed on the basis of article 14 of the ICCPR, and while they further develop the content of the right to legal assistance, they also recognize the corresponding obligation of Member States to establish national legal aid systems that are accessible, effective, sustainable and credible. The UN Principles and Guidelines provide, for the first time, a detailed international normative framework for implementing

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<sup>31</sup>This also applies to non-lawyers, such as paralegals or university law students working for a legal aid clinic who provide legal aid services, with the necessary adjustments regarding their role, duties and responsibilities. For a detailed discussion see chapter 4.

measures to guarantee the right to legal aid, setting benchmarks for Member States. The document contains 14 Principles and 18 Guidelines altogether. Ideally, if all these benchmarks are achieved, the quality of legal aid services could also be guaranteed.

The UN Principles and Guidelines provide that legal aid should be available to persons without sufficient means whenever the offence they are charged with is punishable by a term of imprisonment or the death penalty, **or** in other situations when the interests of justice so require – for example, when there is an urgent need for legal advice in police stations, and the person under investigation is unable to obtain a private lawyer.<sup>32</sup> Thus, they expand the eligibility to legal aid and reflect the development of the concept of “interests of justice”.<sup>33</sup> The UN Principles and Guidelines form part of the United Nations standards and norms in crime prevention and criminal justice, instruments adopted by the international community in more than sixty years, covering a wide variety of issues.<sup>34</sup>

Highlighted below are some of the key provisions.<sup>35</sup>

**Principle 1** recognizes that access to legal aid is a fundamental component in ensuring the right to a fair trial and that legal aid is a safeguard to ensure public trust in the criminal justice process.

According to **Principle 2**, “**States should consider the provision of legal aid their duty and responsibility.** To that end, they should consider, where appropriate, enacting specific legislation and regulations and ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible. **States should allocate the necessary human and financial resources to the legal aid system.**”

<sup>32</sup>UN Principles and Guidelines, see definition of legal aid and Principle 3.

<sup>33</sup>In defining the “interest of justice”, the Human Rights Committee has stressed that the gravity of the offence is an important consideration in deciding whether counsel should be assigned in the interests of justice (see HR Committee, general comment No. 32, para. 38. See also UN Principles and Guidelines, paras. 20 and 21, which state that free legal assistance should be provided, regardless of income of the person, if the interest of justice so requires, for example in the case of urgency, complexity of the severity of the potential penalty as well as in death penalty cases). Thus, States must provide legal aid in cases where the death penalty may be imposed (see HR Committee, general comment No. 32, para. 38). At the regional level, the European Court of Human Rights has concluded that the factors to be taken into account to determine whether the “interests of justice” require the provision of legal assistance, include the seriousness of the offence, the severity of the potential sentence and the complexity of the case (European Court of Human Rights, Appl. No. 12744/87, *Quaranta v. Switzerland*, Judgment of 24 May 1991, paras. 32–34). The complexity was related to the fact that the accused person was on probation at the time of commission of the offence which necessitated the court ruling on whether to activate the suspended sentence or decide on a new sentence. See also UN Principles and Guidelines on access to legal aid in criminal justice systems, para. 21, which states that free legal assistance should be provided, regardless of income of the person, if the interest of justice so requires, for example in the case of urgency, complexity of the severity of the potential penalty). It has also held that in principle legal representation is necessary in cases where the deprivation of liberty is at stake (see, for example, European Court of Human Rights, Appl. No. 19380/92, *Benham v. United Kingdom*, Judgment of 10 June 1996, para. 61, endorsing the approach in Appl. No. 12744/87, *Quaranta v. Switzerland*, Judgment of 24 May 1991, para. 33). In appeals cases, the objective chance of success may be considered in determining whether legal aid should be given (see Human Rights Committee, general comment No. 32, para. 38; Communication No. 341/1988, *Z.P. v. Canada*, views adopted by the Human Rights Committee on 11 April 1991, para. 5.4 in conjunction with para. 4.4).

<sup>34</sup>One hundred experts from more than 40 countries attended the expert group meeting that developed the UN Principles and Guidelines. Overall, the United Nations standards and norms have made a significant contribution to promoting more effective and fair criminal justice structures in three dimensions. They can be utilized at the national level by fostering in-depth assessments leading to the adoption of necessary criminal justice reforms, they can help countries to develop sub-regional and regional strategies, and globally and internationally, they represent “best practices” that can be adapted by States to meet national needs. Although not binding, their content is based on recommendations and decisions of court and human rights bodies, and best practices presented by experts from many jurisdictions.

<sup>35</sup>The full text of the instrument is available online at: [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf).

**Principle 3** holds that **legal aid shall be made available at all stages of criminal justice when the offence is punishable by a term of imprisonment or the death penalty, when the interests of justice so require (regardless of the means), and that children should have the same or more lenient conditions in access to legal aid.**

It is the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid.

**Principle 7** establishes that **legal aid should be effective**, meaning unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence. It should also be **prompt and available at all stages of the criminal justice process.**

**Principle 9** holds that States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied.

The UN Principles and Guidelines do not define quality of legal aid services, yet state that governments should strive to continuously improve the quality of legal aid services. **Principle 13** requires States to put in place mechanisms to ensure that all legal aid providers possess the education, training, skills and experience that are commensurate with the nature of their work, including the gravity of the offences dealt with and the rights and needs of women, children and groups with specific needs.<sup>36</sup> Also other provisions are of relevance to enhance quality, and provide detailed guidance on measures to be taken by States. The following concrete measures are listed:

- Criteria for accreditation of the legal aid providers (Guideline 15);
- Quality standards for legal aid providers and paralegals (Guidelines 16 and 14);
- Adequate training, and supervision by qualified lawyers (Guideline 14);<sup>37</sup>
- Monitoring and evaluation mechanisms to assess and continuously enhance the quality of the services provided by lawyers and paralegals (Guidelines 16 and 14);
- Mechanisms to track, monitor and evaluate legal aid to continually strive to improve the provision of legal aid (Guideline 17);
- National legal aid body or authority to provide, administer, coordinate and monitor legal aid services, including quality (Guideline 11).

Additional Principles and Guidelines are referenced throughout this *Handbook* where applicable. It is important to mention **Guideline 3**, “Other rights of persons detained, arrested, suspected or accused of, or charged with a criminal offence and mention again in criminal justice system.” The Guideline lists rights that should be respected in order to allow for meaningful fulfilment of the right to legal aid and guarantee a fair trial. States should introduce measures:

<sup>36</sup>Expanding the provisions of the United Nations Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. “6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.”

<sup>37</sup>Guideline 14 mentions supervision only in the context of paralegals only, although this would probably be appropriate for lawyers as well and is, in fact, used in many countries as a measure of quality.

- (a) *To promptly inform every person detained, arrested, suspected or accused of, or charged with a criminal offence of his or her right to remain silent; his or her right to consult with counsel or, if eligible, with a legal aid provider at any stage of the proceedings, especially before being interviewed by the authorities; and his or her right to be assisted by an independent counsel or legal aid provider while being interviewed and during other procedural actions;*
- (b) *To prohibit, in the absence of any compelling circumstances, any interviewing of a person by the police in the absence of a lawyer, unless the person gives his or her informed and voluntary consent to waive the lawyer's presence, and to establish mechanisms for verifying the voluntary nature of the person's consent. An interview should not start until the legal aid provider arrives;*
- (c) *To inform all foreign detainees and prisoners in a language they understand of their right to request contact with their consular authorities without delay;*
- (d) *To ensure that persons meet with a lawyer or a legal aid provider promptly after their arrest in full confidentiality; and that the confidentiality of further communications is guaranteed;*
- (e) *To enable every person who has been detained for any reason to promptly notify a member of his or her family, or any other appropriate person of his or her choosing, of his or her detention and location and of any imminent change of location; the competent authority may, however, delay a notification if absolutely necessary, if provided for by law and if the transmission of the information would hinder a criminal investigation;*
- (f) *To provide the services of an independent interpreter, whenever necessary, and the translation of documents where appropriate;*
- (g) *To assign a guardian, whenever necessary;*
- (h) *To make available in police stations and places of detention the means to contact legal aid providers;*
- (i) *To ensure that persons detained, arrested, suspected or accused of, or charged with a criminal offence are advised of their rights and the implications of waiving them in a clear and plain manner; and should endeavour to ensure that the person understands both;*
- (j) *To ensure that persons are informed of any mechanism available for filing complaints of torture or ill treatment;*
- (k) *To ensure that the exercise of these rights by a person is not prejudicial to his or her case.*

Finally, **Guideline 17** recommends that States adopt measures to monitor the efficient and effective delivery of legal aid **in accordance with international human rights standards**.



## 2. Legal aid delivery in criminal justice systems

As described in chapter 1, access to legal aid is a fundamental component in ensuring the right to a fair trial, including the right to legal defence and the fundamental human rights of life and liberty. For a criminal justice system to be fair, humane, effective and based on the rule of law, the rights to legal advice and assistance of suspects, accused and imprisoned persons, as well as witnesses and victims of crime, must be upheld and protected.

While the right to legal aid is recognized in most national constitutions and laws, its implementation is still lagging behind in many countries. The challenges in providing access to legal aid were described in detail in the findings of the UNODC survey report on Access to Legal Aid in Criminal Justice Systems in Africa of 2011.<sup>38</sup> It found that the laws governing legal aid recognized a lawyer-centered model, yet the numbers of practicing lawyers in African countries were low in proportion to the overall population. Furthermore, the large majority of these lawyers resided in urban areas, whereas the majority of the population lived in rural or peri-urban areas. While laws respected a right to legal aid, in many countries State budget allocations to legal aid were minimal. Access to legal aid was not available at all stages of the criminal justice process and was particularly rare in police stations and only sometimes available in prisons and in the lower courts. Law students as a human resource to provide legal advice and assistance, such as in university law clinics or as assistants to lawyers, were under-used and community legal services were not available in every district and are not accessible for every person in need of such services. At the time, most governments did not have an overarching legal aid strategy to maximize the use of the resources available.<sup>39</sup> Several of these issues were addressed in the 2012 UN Principles and Guidelines and, while actions were taken by some governments, challenges still remain globally.

The UNODC/UNDP Global Study on Legal Aid lists the most significant obstacles that poor and vulnerable groups are facing in accessing legal aid: lack of organized legal aid system; limited number of lawyers to cover legal aid needs; legal aid is geographically inaccessible; lawyers are paid very little for legal aid work; people do not know where to find legal assistance; people may not understand how legal aid services can help them; people may not be aware that legal aid services are available at little or no cost; covering the cost of police, prosecutors and judges is prioritized over spending public funds on lawyers; little support among the population for spending funds to defend accused criminals; and lack of public confidence in the quality of legal

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<sup>38</sup> UNODC *Access to Legal Aid in Criminal Justice Systems in Africa Survey Report* (2011), pp. vii–viii.

<sup>39</sup> *Ibid.*

aid services.<sup>40</sup> A recent study conducted in Haiti<sup>41</sup> confirmed that among the key challenges of legal aid provision were the lack of capacity and political will, limited availability of national funding and the highly insecure environment.

It is important to understand from the outset that these factors determine the environment in which legal aid is delivered and influence the capacity of legal aid systems to provide quality services.<sup>42</sup>

In order to understand how quality can be achieved in national jurisdictions, it is important to look at the specifics of the legal system in which legal aid is delivered. Issues such as the number of lawyers and their physical location in the country, the quality of legal education, the availability of sufficient budgets for legal aid, the infrastructure of the legal system and more, all influence the ability of the legal aid system to provide legal aid. In order to ensure quality and timely legal advice, these issues need to be taken into account and direct reform measures.

The following provides an overview of the normative and institutional environment in which legal aid is delivered, starting from key principles that should guide Member States in ensuring access to legal aid in their criminal justice systems and what this implies for quality of services.

## A. Legal aid delivery: the legal system

### 1. Adversarial vs. inquisitorial legal systems

In assessing the effectiveness of legal aid delivery, and establishing specific criteria for quality, it is important to identify the legal context in which it operates. Criminal justice systems are usually characterized as either adversarial or inquisitorial, in relation to the procedural tradition they follow, although there is a great variation and many systems are reforming and adopting features from both traditions.

Generally speaking, an adversarial system determines the facts in the adjudication process. The prosecution and defence compete against each other, and the judge serves as a “referee” to ensure fairness to the accused and that the legal rules of criminal procedure are followed. The adversarial system assumes that the best way to get to the truth of a matter is through a competitive process to determine the facts and application of the law accurately.<sup>43</sup> Judges have no investigative role and make their decision on the basis of evidence produced by the prosecution. The accused may, but does not have to, provide evidence until the sentencing stage which is a separate stage from the trial stage, because the trial is focused on protecting the accused’s interests.<sup>44</sup>

<sup>40</sup> UNODC/UNDP *Global Study*, p. 62.

<sup>41</sup> DPKO/USAID *Assessment of Legal Aid in Haiti: Lessons Learned* (2017). This study was led by the Justice and Corrections Service of the Office of Rule of Law and Security Institutions, DPKO. Available online at: <https://issat.dcaf.ch/download/125808/2568524>.

<sup>42</sup> In that sense, numerical standards of quality (such as number of cases per lawyer, or years of experience) are not applicable in countries that are still struggling to establish legal aid systems but can be used as a source of inspiration and benchmarks for the future.

<sup>43</sup> UNODC, Education for Justice (E4J) initiative *University Module Series: Organized Crime Module 9: Prosecution Strategies* at: <https://www.unodc.org/e4j/en/organized-crime/module-9/key-issues/adversarial-vs-inquisitorial-legal-systems.html>.

<sup>44</sup> Cape, Ed (2018), ‘Defence Rights, Duties, Norms and Practices in Common Law and Civil Law Jurisdictions,’ in Brown, D., Turner, J. and Weißer, B., *Oxford Handbook of Criminal Process* (Oxford: Oxford University Press, forthcoming). Quoted in the Module on Access to Legal Aid in Criminal Proceedings, UNODC, E4J initiative *University Module Series* at: <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-3/index.html>.

The role of the defence in such a system can be described as curbing the power of the State and protecting the accused from potential abuse. A recent assessment on legal aid in Afghanistan found that the move towards an adversarial system allowed for a more active role of the defence bar.<sup>45</sup>

The inquisitorial system is characterized by extensive pretrial investigation and interrogations with the objective of avoiding bringing an innocent person to trial. The inquisitorial process can be described as an official inquiry to ascertain the truth, and grants more power to the judge who oversees the process, whereas the judge in the adversarial system serves more as an arbiter between claims of the prosecution and defence.<sup>46</sup> The inquisitorial system reflects a more trusting relationship between the State and its citizens, and the person suspected or accused is expected to cooperate with this inquiry. Courts make their decision on the basis of all relevant material collected during the investigation, and the main function of the trial is to ensure that this material was lawfully and properly obtained. There is no clear distinction between the trial and sentencing phases, and information relevant only to sentence is nevertheless available to the tribunal even before guilt has been established.<sup>47</sup>

Therefore, the function of the defence may be construed differently in adversarial and inquisitorial system. Adversarial defence has an active role in the investigation, selection and presentation of the evidence on which the court will base its determination of guilt or innocence. It aims to achieve equality of arms for the accused, balancing the advantage of the State. Inquisitorial defence has a different role in different stages of the process. Engagement with the case must be during the pretrial enquiry phase, since to present an alternative case at trial will in many instances be too late, as much reliance is placed upon the written evidence gathered during the pretrial stage and contained within the dossier.<sup>48</sup>

These differences should be taken into account in developing national practice guidelines for defence lawyers and legal aid lawyers. For example, the protocol for defence lawyers in police stations in the **Netherlands** lists as one their important tasks monitoring the correct content of the official report that is made of the questioning of the suspect. Since the official report can play an important role at a later stage in the proceedings, it is therefore of great importance that the suspect's statement is reported correctly: "This applies to incriminating parts of the statement, but, of course, also to parts of the statement that are/can be exculpatory for the suspect. Bearing this in mind, the defence lawyer must run through the draft official

<sup>45</sup>The Asia Foundation, *Legal Aid Assessment and Roadmap: Afghanistan (2017)*, pp. 136–137: "Appointments by the Attorney General's Office of former legal aid lawyers and human rights activists reflect an intent to balance adversarial system and leverage the strength of the defence bar. Throughout the provinces, several defence lawyers have been appointed as appellate prosecutors, including in Balkh, Badghis, Ghor, and Kunduz, in addition to the anti-corruption court. These actions, which specifically promote understanding and communication among the organs of the justice system, create efficiencies as well as opportunities to promote the importance of the defence function and legal aid through interlocutors with first-hand experience in legal aid and defence counsel work. Constantly challenging law enforcement and justice actors to follow the law and improve their practices, defence counsel and legal aid providers can shape and elevate the level of practice of all justice system personnel in individual courts as a systemic intervention. Thus, the adversarial process that has been adopted by the Afghan justice system gives defence lawyers an incredible opportunity for daily engagement and active participation in forming the justice system." In recent years, several other countries have moved from inquisitorial to adversarial models, for example, Chile, where similar effects may be observed.

<sup>46</sup>UNODC, *E4J University Module Series: Organized Crime Module 9: Prosecution Strategies* at: <https://www.unodc.org/e4j/en/organized-crime/module-9/key-issues/adversarial-vs-inquisitorial-legal-systems.html>, referring to Dammer and Albanese, 2014; Reichel, 2017.

<sup>47</sup>Cape, Ed (2018) "Defence Rights, Duties, Norms and Practices in Common Law and Civil Law Jurisdictions", in Brown, D., Turner, J. and Weißer, B., *Oxford Handbook of Criminal Process* (Oxford: Oxford University Press, forthcoming). Extract from UNODC *E4J University Module Series: Module on Access to Legal Aid in Criminal Proceedings*.

<sup>48</sup>Hodgson, J. (2009), "The Role of the Criminal Defence Lawyer in Adversarial and Inquisitorial Procedure". Electronic copy available at: <http://ssrn.com/abstract=1504000>.

report with his client, and he must ensure that any necessary improvements, additions and/or changes are made to the text.”<sup>49</sup>

The American Bar Association in the **United States** has developed a detailed set of “Criminal Justice Standards for the Defense Function”.<sup>50</sup> Standard 4-1.9 on Diligence, Promptness and Punctuality provides under (a): “Defense counsel should act with diligence and promptness in representing a client and should avoid unnecessary delay in the disposition of cases. But defense counsel should not act with such haste that quality representation is compromised. Defense counsel and publicly-funded defense entities should be organized and supported with adequate staff and facilities to enable them to represent clients effectively and efficiently.”

In **South Africa**, the Code of Conduct for legal aid professionals in section 6. – Duty to the Court – establishes that “an employee shall never deceive or recklessly or knowingly mislead the court.” This is the general position in common law countries (e.g., **Australia, New Zealand, the United Kingdom, Canada** and the **United States**). However, in **Argentina** the lawyer has no duty to prevent a client from giving perjury.<sup>51</sup> In the **Netherlands**, the protocol for lawyers in police stations mentions that “because arriving at the truth is paramount during the (police) questioning, the defence lawyer will, in principle, act with some reserve, but not passively.”<sup>52</sup> This is the general position in civil law/inquisitorial systems (e.g., **Chile**).

Another example is in relation to the concept of plea bargains, which are more common in adversarial systems. The **New Zealand** practice code establishes that lawyers “should advise the client at the first reasonable opportunity and throughout the case about the sentencing discounts for pleas of guilty in terms of *R v. Hessel*. The lawyer will remind the client of the discounts prior to any status hearing or call-over, and before any trial or hearing.”<sup>53</sup>

Due to these differences in legal systems, practice standards for particular stages of the process and specific content of practice manuals will be different. At the same time, these differences in legal systems cannot be used as a pretext to derogate from universal fair trial guarantees, and any guidelines developed would still need to comply with these standards.

## 2. Legal aid laws and regulations

As mentioned above, States should consider the provision of legal aid their responsibility. To that end, the UN Principles and Guidelines invite Member States “consistent with their national legislation, to adopt and strengthen measures to ensure that effective legal aid is provided”, to “consider, where appropriate, enacting specific legislation and regulations”. In the absence of such legislation, legal aid service providers, as well as individual providers, would need to operate with very little guidance to rely on, except for the criminal and procedural codes. **In addition, laws and regulations define the framework for what quality services entail, what are the roles and duties of legal aid providers, and what are the remedies for lack of effective defence.**

<sup>49</sup>Jan Boksem, Defence counsel at police questioning: protocol. Unofficial translation from Dutch.

<sup>50</sup>Available at: [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/).

<sup>51</sup>In article 296, Criminal Code of Procedure (law 23.984), it is established that the accused will never be asked to give a statement under oath. In practice, this means that there is no consequence for the accused to lie on the stand. The Organic Law on Public Defenders in articles 5.b. and 17, first paragraph, establishes that public defenders should always act in the best interest of the client and to do what is needed to obtain the best possible result for him/her.

<sup>52</sup>Jan Boksem, Defence counsel at police questioning: protocol. Unofficial translation from Dutch.

<sup>53</sup>New Zealand, Practice Standards for Legal Aid Providers, February 2017.

Particularly in contexts emerging from conflict, the institutionalization of legal aid measures often encounters significant challenges in terms of resources and capacity available while requiring strong political commitment from the State. This is why strategic engagement from the United Nations field presence may be critical in advancing legislative reform efforts. For example, United Nations peace operations have supported domestic institutions in drafting legal aid legislation in countries such as the **Central African Republic, Haiti and Sudan**.

Many countries have adopted a dedicated law on legal aid, as reported by 71 per cent of Member States responding to the Global Study.<sup>54</sup> Such laws are important as they provide the basis for legal aid delivery in the country and define duties and rights of legal aid providers and beneficiaries, as well as quality assurance mechanisms.

The adoption of legislation on legal assistance can also ensure the sustainability of legal assistance programmes, including through the allocation of a proportion of the national budget to support such initiatives. The fulfilment of these commitments can be facilitated by formally incorporating the adoption of the law and the allocation of a budget into a framework of mutual commitments agreed between the host government and its international partners. The UNODC Model Law on Legal Aid in Criminal Justice Systems with Commentaries<sup>55</sup> was developed as a technical tool to assist States in drafting of legal aid legislation. It proposes a model for establishing a comprehensive legal aid system without aiming to replace the national legislative drafting process, but rather to assist in it. The Model Law is based on the UN Principles and Guidelines and covers issues such as procedures to apply for legal aid, the role of providers, financial arrangements, rights and remedies, guiding principles and more.

A recent assessment on legal aid in **Haiti** recommended the adoption of a regulatory framework to improve the quality of legal aid services: “The framework should clarify whether service providers can take on private cases and the conditions attached to doing so, how conflicts of interest should be handled, the monitoring and sanction mechanisms, including the measures aimed at preventing and punishing corruption, and verification and complaints procedures.”<sup>a</sup>

<sup>a</sup>DPKO/USAID *Assessment of Legal Aid in Haiti: Lessons Learned* (2017). This study was led by the Justice and Corrections Service of the Office of Rule of Law and Security Institutions, DPKO. Available online at: <https://issat.dcaf.ch/download/125808/2568524>. See p. 30.

## B. Legal aid delivery: the institutions

### 1. Delivery model

While the UN Principles and Guidelines do not endorse any specific delivery model, when selecting one, States should take into account the implications of each model for ensuring quality and the fulfilment of the right to legal aid and other fair trial guarantees.

The approach to quality assurance in any given legal system will depend on how legal aid is organized and delivered. In particular, it will depend on: (a) whether there is a legal aid body responsible for administering legal aid; (b) whether there is a contracting relationship between

<sup>54</sup> UNODC/UNDP *Global Study*, p. 67.

<sup>55</sup> UNODC *Model Law on Legal Aid in Criminal Justice Systems with Commentaries* (2016), available online at: [https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model\\_Law\\_on\\_Legal\\_Aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Model_Law_on_Legal_Aid.pdf).

the legal aid body and the legal aid service providers; and (c) whether legal aid is provided through a public defender service.<sup>56</sup>

In countries where legal aid services are provided under contract, quality standards can be built into the contracts and contractual mechanisms can be used to ensure that legal aid services are delivered in accordance with those standards. A similar approach can be taken where legal aid services are provided by a public defender service, or where practitioners are required to register with the legal aid authority in order to provide legal aid, for example, in **Scotland** and **Ukraine**. In the absence of such arrangements, quality assurance may be left to bar associations and individual legal aid service providers.<sup>57</sup>

The relevance of any particular quality standard will depend upon the mode of delivering legal aid. For example, response times will be relevant to call-in schemes but not to visiting schemes, whereas ethical standards will apply to both types of schemes.<sup>58</sup>

**The following is a short description of the main delivery systems:**<sup>59</sup>

- *Public defender schemes* – Legal advice, assistance and representation is provided by lawyers (sometimes supported by paralegals or law students, and sometimes with work farmed out to specified private practice lawyers) as salaried employees or receiving a monthly fixed remuneration/fee, who work in specialist offices, directly or indirectly funded by national or federal governments, in rare cases also by civil society organizations or NGOs. They work exclusively as advocates of the rights of qualifying legal aid recipients. Examples may be found in most countries in the **Americas**, including **Argentina** and **Brazil**, some African countries, including **Liberia**, and in **Israel**. The public defender institution is an institution dedicated exclusively to meeting the legal needs of qualified recipients of legal aid through the services of salaried public defenders, or others appointed and monitored by them. Public defender institutions may be organized at the national, regional or city level, and may provide legal aid in a variety of jurisdictions. This should not be confused with the public defender of rights, which is an ombudsman institution in some countries.<sup>60</sup>
- *Private lawyer schemes* – Legal aid services are provided by licensed practicing lawyers working in private law firms who participate in the provision of State-funded legal aid on a case-by-case basis. It is sometimes referred to as “judicare”, but there are different approaches to the way in which this is organized:
  - *Contract schemes* – lawyers or law firms are contracted to provide legal aid services for a particular period of time and/or location, and are normally under contract to a legal aid authority or to a public defender service (**England and Wales; China**);
  - *Ex officio or panel schemes* – Lawyers are appointed to act in individual cases, normally by a prosecutor or judge who is dealing with a specific suspect or accused person (**Poland**);

<sup>56</sup> UNODC/UNDP *Handbook: Early Access to Legal Aid in Criminal Justice Processes: A Handbook for Policymakers and Practitioners* (2014), p. 84. Henceforth ‘UNODC/UNDP *Handbook on Early Access to Legal Aid*.’

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> UNODC *Model Law on Legal Aid in Criminal Justice Systems with Commentaries* (2016), pp. 81–86.

<sup>60</sup> For example, in Armenia, the Ombudsman is named Human Rights Defender, <http://www.ombuds.am/en/legislation/the-law-on-the-ombudsman.html>; in Georgia, the Ombudsman is named Public Defender, <https://matsne.gov.ge/en/document/download/33034/14/en/pdf>; in the Czech Republic, Public Defender of Rights, <https://www.ochrance.cz/en/law-on-the-public-defender-of-rights/>.

- *Registered lawyer schemes* – Private lawyers contract with, or are registered with, the legal aid authority (e.g., **Scotland**) or are appointed by the public defender service to carry out work under their supervision or monitoring (**Georgia, Ukraine, Israel**);
- *Pro bono schemes* – Lawyers provide legal aid services on a voluntary basis without pay from either the state or the person requiring assistance. In some countries, lawyers are under a professional obligation to undertake a number of unpaid cases per year, and in others trainee lawyers are required to undertake a number of such cases during their training (e.g., the **Philippines**). In countries where the monitoring mechanisms for compulsory *pro bono* work are weak, there could be requirement of proof of completing the requisite number of *pro bono* hours in applications for renewal of licenses to practice (where this is required) or promotion to Senior Counsel.<sup>61</sup>
- *Paralegal schemes* – Legal aid services are provided by paralegals, who may or may not have a legal qualification. Paralegals perform some of the functions of lawyers, although not the full range of services, at different stages of the criminal justice process and either work with or for lawyers or refer cases to lawyers in respect of work that is only permitted to be carried out by a lawyer. The exact nature of the work that paralegals can undertake differs from jurisdiction to jurisdiction. Examples of the former are found in **Malawi** and **Sierra Leone**, and of the latter in **England and Wales**.<sup>62</sup>

In **England and Wales**, paralegals must adhere to certain restrictions and cannot advocate at the magistrates' court. The 2017 Standard Crime Contract requires paralegals to be supervised by a lawyer in criminal legal aid cases; and no legal aid provider can consist wholly of paralegals. This includes paralegals who are police station representatives and have been accredited. When they are at the police station, it is a requirement under the law that they have a legally qualified supervisor available to contact.

- *University law clinics* – Legal aid services are provided by law students working in university law clinics, appropriately trained and supervised by law professors and/or lawyers. Examples may be found in many countries, including the **United States**, the **United Kingdom** and a number of countries in Africa and the Americas. A varied model can be found in **India**, wherein law students provide indirect legal aid services by acting as facilitators between persons in custody, prisons and legal services institutions.<sup>63</sup> In **Canada**, these types of programmes serve as a training ground for future legal aid lawyers. Clinics in some jurisdictions can also provide specialized services, such as representation of prisoners in disciplinary hearings. Students of the Queen's Prison Law Clinic have a high success rate in getting the Federal Court of Canada to quash decisions made by corrections authorities.<sup>64</sup>
- *Specialized legal aid service providers* – Legal aid services are provided for people from certain socio-demographic groups, such as children, women, ethnic minorities, prisoners, etc. For example, Legal Aid **South Africa** works with NGOs to provide legal aid services to women, children and farming communities, and to undertake public interest law cases, such as the Legal Resources Centre. In **Jordan**, the Justice Center for Legal Aid provides legal aid to poor and vulnerable persons through a number of legal aid

<sup>61</sup>NGOs might also assist the legal profession to coordinate *pro bono* services, such as ProBono.org in South Africa.

<sup>62</sup>For an examination of community-based paralegal schemes, see *Community-Based Paralegals: A Practitioner's Guide*, Open Society Institute (2010).

<sup>63</sup>Commonwealth Human Rights Initiative, *Leaving No One Behind: Role of University Legal Aid Clinics in Ensuring Access to Justice* (2019, forthcoming).

<sup>64</sup>For more information, see <https://queenslawclinics.ca/prison-law>.

clinics. In **India**, panel lawyers are categorized according to type of case, type of court and years of experience. Additionally, separate appointments are made for defence of children. In **Canada**,<sup>65</sup> in many jurisdictions, clinics exist that focus on the needs of Indigenous people; particularly in the North, where Indigenous people make up the majority of the population, legal aid services are tailored to those cultures and communities' needs.

In practice, in any particular country, a number of different models may be used to deliver legal aid in parallel or in co-ordination. The delivery model influences many of the factors that determine quality of legal aid services such as independence of providers, supervision and monitoring, adequate training of all individual providers, accreditation process, and so on, as well as their relative costs, for example, costs of auditing by external auditors versus internal auditors. These measures are described in detail in chapter 3, and in any assessment on their relevance to a legal system, one should also look at their applicability in the current or planned delivery model (on assessments, see chapter 5).

## 2. Allocating sufficient budget for legal aid

**Guideline 12** on funding the nationwide legal aid system provides:

60. *Recognizing that the benefits of legal aid services include financial benefits and cost savings throughout the criminal justice process, States should, where appropriate, make adequate and specific budget provisions for legal aid services that are commensurate with their needs, including by providing dedicated and sustainable funding mechanisms for the national legal aid system.*

61. *To this end, States could take measures:*

(a) *To establish a legal aid fund to finance legal aid schemes, including public defender schemes, to support legal aid provision by legal or bar associations; to support university law clinics; and to sponsor non-governmental organizations and other organizations, including paralegal organizations, in providing legal aid services throughout the country, especially in rural and economically and socially disadvantaged areas;*

(b) *To identify fiscal mechanisms for channelling funds to legal aid, such as:*

(i) *Allocating a percentage of the State's criminal justice budget to legal aid services that are commensurate with the needs of effective legal aid provision;*

(ii) *Using funds recovered from criminal activities through seizures or fines to cover legal aid for victims;*

(c) *To identify and put in place incentives for lawyers to work in rural areas and economically and socially disadvantaged areas (e.g., tax exemptions or reductions, student loan payment reductions);*

(d) *To ensure fair and proportional distribution of funds between prosecution and legal aid agencies.*

62. *The budget for legal aid should cover the full range of services to be provided to persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, and*

<sup>65</sup>For example, legal aid services to Alberta's Siksika Nation (<http://www.legalaid.ab.ca/help/Pages/Siksika-Nation.aspx>), and Legal Aid Ontario's Aboriginal Legal Services (<http://www.aboriginallegal.ca/>).

*to victims. Adequate special funding should be dedicated to defence expenses such as expenses for copying relevant files and documents and collection of evidence, expenses related to expert witnesses, forensic experts and social workers, and travel expenses. Payments should be timely.*

A good practice for implementing **Guideline 12** is the promotion of dedicated budget lines for legal aid. Budgets should cover the full range of services that detained, arrested or imprisoned persons are entitled to when suspected, accused of, or charged with a criminal offence, including in circumstances where there have been prior experiences of violence and abuse. Tax incentives can also be provided to lawyers who work in disadvantaged and hard to reach communities. Another good practice is matching the budget for legal aid/criminal defence with the budget for prosecution, or the status of public defenders with that of prosecutors. This is discussed further in the section on independence but could be considered as one approach to implementing **Guideline 12**. In **Fiji**, for example, the budget for the Fiji Legal Aid Commission is almost the same as the budget for the Attorney General's Office – excluding the cost of police prosecutors. The budget for the legal aid scheme is partially funded from the interest earned on solicitors' trust accounts.<sup>66</sup>

The availability of funding is crucial for achieving equal access to quality legal aid. Findings of the Global Study show that barriers to access to legal aid were more pronounced in less developed countries. For example, Least Developed Countries were less likely (14 per cent) than High-Income Countries (61 per cent) to have a separate allotment for legal aid in the national budget. Moreover, while nearly all of 107 responding Member States had indicated that defendants had a right to legal aid under their national law upon being charged with a criminal offence, upon arrest or detention on criminal charges or when sentenced to imprisonment, there was a significant gap between legal entitlements as provided by law and the availability of legal aid in practice.<sup>67</sup>

In crisis settings, given the significant challenges that such situations present, it is essential to determine strategic priorities for legal aid services and focus the limited financial and human resources on the most important needs of the population. The prioritized categories of beneficiaries often include children, women, specifically victims of violence, persons with disabilities, sick prisoners, persons who have been in prolonged pretrial detention for over two years, and victims of serious crimes.<sup>68</sup>

### 3. Meeting the demand for lawyers

**Guideline 13** on human resources states:

*63. States should, where appropriate, make adequate and specific provisions for staffing the nationwide legal aid system that are commensurate with their needs.*

*64. States should ensure that professionals working for the national legal aid system possess qualifications and training appropriate for the services they provide.*

*65. Where there is a shortage of qualified lawyers, the provision of legal aid services may also include non-lawyers or paralegals. At the same time, States should promote the growth of the legal profession and remove financial barriers to legal education.*

<sup>66</sup> Fiji Trust Accounts Act (1996).

<sup>67</sup> UNODC/UNDP *Global Study*, pp. 92–94.

<sup>68</sup> See discussion on national legal aid strategies and policies in chapter 5.

66. *States should also encourage wide access to the legal profession, including affirmative action measures to ensure access for women, minorities and economically disadvantaged groups.*

Having a sufficient number of legal aid providers to meet the demand for legal aid is a necessary condition to providing quality services. Therefore, one of the first factors to include in any assessment of the legal system is the number of lawyers per population, as this affects accessibility and quality of legal aid, as well as remuneration of lawyers.<sup>69</sup>

In that regard, countries face different challenges. For example, **India** has a sufficient number of lawyers and faces the challenge of establishing meaningful supervision over quality,<sup>70</sup> whereas a country like **Sierra Leone**, due to the lack of lawyers vis-à-vis the size of its population, has to rely on paralegals to provide criminal legal aid, and measures such as workload quotas for lawyers are completely irrelevant.

This implies that in legal aid assessments targeting quality, all these questions need to be asked and a balanced plan should be developed taking into account all relevant factors (see more in chapter 5). The demand for lawyers will be influenced by other factors, such as levels of crime and the size of the prison population, and countries with higher crime rates will require more resources for criminal legal aid services.

Legal education is also an important factor in quality, and **Guideline 13** encourages States to promote the growth of the legal profession and remove financial barriers to legal education. Investing in legal education and clinical education not only increases the number of professionals but potentially also contribute to the quality of legal aid services provided by these professionals. While it may lie beyond the mandate of legal aid bodies to ensure quality legal education, it is still the obligation of States, and can be a venue for expanding the scope of legal aid through legal clinics and law students' participation in outreach and legal awareness.

### C. The role of other criminal justice actors

To provide further context for the discussion on quality of legal aid services in the criminal justice system, the duties and responsibilities of other actors and processes in the criminal justice system need to be discussed, especially when trying to evaluate quality from the perspective of the outcome of the criminal justice process.

The effectiveness of legal aid services will be influenced by the attitudes and actions of police, prosecutors and judges and by levels and mechanisms of coordination and cooperation among them. General challenges such as congestion in prisons, delays in court and outdated infrastructure will affect the access of lawyers to their clients and their ability to come up with effective defence. High corruption levels limit the effectiveness of legal representation and influence the behaviour of legal aid providers. In addition, the status of legal aid providers as perceived in comparison to private lawyers or prosecutors will affect the ability of the legal aid system to attract qualified lawyers. For example, in countries where public defenders enjoy the same status and remuneration as prosecutors, the quality of services is usually considered to be higher.

<sup>69</sup> UNODC *Access to Legal Aid in Criminal Justice Systems in Africa Survey Report* (2011).

<sup>70</sup> Commonwealth Human Rights Initiative, *Hope behind Bars? Status Report on Legal Aid for Persons in Custody* (2018).

Another example is the role of the police and other investigative agencies, and actors such as detention officers, prosecutors and judges in ensuring that the right to early access to legal aid<sup>71</sup> is respected in practice, which is recognized by **Principles 7, 8 and 9** of the UN Principles and Guidelines, together with the associated Guidelines.

#### THE ROLE OF POLICE IN ALLOWING EARLY ACCESS TO LEGAL AID<sup>a</sup>

Police authorities and other investigative and detention agencies should provide clear instructions to officers on how to give effect to the right to early access to legal aid and devise processes, procedures and recording mechanisms that are designed to give effect to the right. In addition, they should devise appropriate training so that officers know the relevant law regarding, and understand the importance of, early access to legal aid. The role of police officers and other relevant officials in respect of early access to legal aid is to ensure that this right is respected in practice. In carrying out this role, officers have a number of responsibilities, including:

- Identifying whether a suspect or accused person is a child or otherwise vulnerable;
- Informing suspects and accused persons of their right to legal aid as soon as practicable after arrest or detention, preferably in accordance with a standard form of notice, and ensuring that it can be understood;
- Enabling a suspect or accused person to make a voluntary and informed decision about whether to exercise his or her right to early access to legal aid;
- Contacting a legal aid provider;
- When a suspect or accused person has exercised his or her right to legal aid, refraining from interviewing that person, except as allowed for by law;
- Providing meaningful information to the legal aid provider;
- Facilitating access by the legal aid provider;
- Imposing no pressure on the legal aid provider;
- Recording (and, in the case of senior officers, monitoring) actions taken and decisions made in respect of early access to legal aid.

For instance, in **Fiji**, there is an ongoing project between the Fiji Legal Aid Commission (FLAC) and the Fiji Police Force providing for a “first hour procedure”, whereby the police must contact the FLAC within the first hour of arresting a person. FLAC has a staff member on 24/7 duty who will then arrange for the duty legal aid lawyer to consult with the arrested person.

In **Canada**, the courts require that an individual be advised of the right to available legal advice prior to giving a statement to police. In the absence of available advice, statements made by the accused to the police may not be admissible in court. As a result, statistics show that the police are diligent in ensuring early access to legal aid.

Increasingly, in some jurisdictions, instead of arresting and detaining suspects for the purpose of an interview, the police are conducting so-called voluntary interviews. In some countries, suspects in voluntary interviews have the same right to free and independent legal advice and so it is important that the responsibilities of the police in allowing early access to legal aid, as set out above, are also relevant to these interviews.<sup>b</sup>

<sup>a</sup> UNODC/UNDP *Handbook on Early Access to Legal Aid*, pp. 112–113.

<sup>b</sup> Kemp, V., “Digital Legal Rights: Suspects’ understanding of the right to legal advice and potential barriers to accessing advice”, in *Criminology and Criminal Justice* (2019, forthcoming).

<sup>71</sup> For instance, to consult with a lawyer at the police station. For extensive discussion of this right, see UNODC/UNDP *Handbook on Early Access to Legal Aid*.

The duties of police officers, prosecutors, judicial officers and officials are mentioned throughout the UN Principles and Guidelines,<sup>72</sup> in particular in **Guideline 3**, which lists other rights that should be respected in order for access to legal aid to be timely and effective.<sup>73</sup> While the *Handbook* does not cover these duties, they should be taken into account in any reform process of the legal aid system, and are key to effective quality legal aid services.

In this regard, the experience emerging from contexts such as **Haiti** suggests that legal aid projects are more effective when they form part of a set of other initiatives aimed at improving the functioning of judicial services, such as committees to coordinate the criminal justice process, or support for procedures. Effectively coordinated activities framed as part of an integrated approach can be mutually reinforcing.<sup>74</sup>

At the same time, quality legal aid services can have a beneficial impact on the criminal justice system as a whole by helping to identify weak and ill-considered cases which can be diverted out of the criminal process at the earliest opportunity.<sup>75</sup> There can also be a beneficial impact on reducing rates of pretrial detention and prison overcrowding, by encouraging the application of alternatives to imprisonment and rehabilitation, by ensuring that due process and fair trial guarantees as well as other human rights are protected and respected, by identifying errors in the system that require public attention, and by increasing client satisfaction and trust in the fairness of the justice system. This is especially relevant in the context of criminal justice reform in post-conflict situations.<sup>76</sup>

As the example from the Philippines below demonstrates, other actors in the justice system such as penitentiary institutions can not only play a role in facilitating access to legal aid by communicating with providers but can go beyond that and establish their own services that work closely with other relevant actors in the system to provide quality services to those in need.

#### PHILIPPINES: BUREAU OF JAIL MANAGEMENT AND PENOLOGY (BJMP) PARALEGAL SERVICES PROGRAMME

In the Philippines, the main authority for pretrial detainees, the Bureau of Jail Management and Penology (BJMP), created a paralegal services programme and designated detention officers (particularly those with legal education) as jail unit paralegal officers.<sup>a</sup> The programme follows a national plan of action that contains indicators designed to measure the impact of the paralegal services.<sup>b</sup> The paralegals provide legal assistance to detainees in various ways, including providing legal information on basic criminal justice processes, securing legal assistance, requesting that courts enact medical emergency releases, and facilitate access to early modes of release. They receive face-to-face training from lawyers within the BJMP and from non-governmental organizations engaged in provision of legal training, and also complete offline electronic paralegal learning modules<sup>c</sup> that contain a resource centre on laws and standards, and intervention forms and templates.

<sup>72</sup> See, for example, Principle 3, Guidelines 2–4, 7, 11.

<sup>73</sup> See above under A. The UN Principles and Guidelines.

<sup>74</sup> DPKO/USAID *Lessons Learned Study Report on Legal Aid in Haiti*, completed in 2017. This study was led by the Justice and Corrections Service of the Office of Rule of Law and Security Institutions, DPKO. Available online at: <https://issat.dcaf.ch/download/125808/2568524>. For extended discussion of programming in legal aid, see chapter 5.

<sup>75</sup> Kemp, V., *Effective Police Station Legal Rights: Country Report 2 – England and Wales* (2018b). Available at: <http://eprints.nottingham.ac.uk/51145/1/Countrys%20Report%20England%20and%20Wales%20Final%20.pdf>.

<sup>76</sup> DPKO/USAID *Lessons Learned Study Report on Legal Aid in Haiti* (2017). Available online at: <https://issat.dcaf.ch/download/125808/2568524>. The study highlighted the critical role played by legal aid in post-conflict stabilization and peace sustainment efforts by enhancing access to justice, addressing prolonged pretrial detention, and prison overcrowding and reducing community violence.

The programme has been recognized by the Supreme Court of the Philippines,<sup>d</sup> and has concluded a memorandum of agreement with the main state provider of free legal aid, the Public Attorney's Office, to work together to decongest overcrowded prisons through provision of effective legal aid.

<sup>a</sup> BJMP *Manual* (2015), pp. 74 et. sq., <https://www.bjmp.gov.ph/files/BJMP-OpnsManual2015.pdf>.

<sup>b</sup> The BJMP has a national paralegal service programme office under the Inmates Welfare Directorate and appoints lawyers to function as regional paralegal officers to supervise the jail paralegals. Together with the ICRC, it developed a National Paralegal Plan of Action (2018) and distributed access to legal services posters to 487 BJMP prisons nationwide.

<sup>c</sup> Developed together with the International Committee of the Red Cross (ICRC Philippines); available online at: <https://www.bjmp.gov.ph/EPLM/index.html>.

<sup>d</sup> <http://oca.judiciary.gov.ph/wp-content/uploads/2014/05/OCA-Circular-No.-112-2014.pdf>.



## 3. The legal aid system

To fulfil their obligations emanating from the right to effective legal assistance of persons facing criminal charges, Member States need to establish a legal aid system that is able to provide *quality* services. This entails the adoption of dedicated and adequate legislation and providing the necessary budget and human resources. Within the national legal aid system, there are certain measures that should be taken to ensure the quality of services provided.

This chapter describes these measures as a step-by-step process, starting from defining the national approach to quality, establishing an accountable body and adopting concrete measures to ensure quality.

### A. The concept of quality in the national system

Considering the different legal, political and cultural environments in which legal aid is delivered, diverse national approaches to quality have developed. While quality is directly linked to the concept of effective legal defence in line with human rights standards, it is also perceived as linked to other issues such as meeting the goals of the service and the needs of clients.

The current *Handbook* does not aim to define quality, but rather to provide an overview of how quality is understood and which measures are adopted by legal aid systems to achieve quality. While keeping in mind the international standards described in chapter 1 that apply to all, the *Handbook* recognizes the diversity of measures and attempts to highlight promising practices.

Defining the vision of quality is the first step in setting up measures for quality control. Most countries require that lawyers demonstrate sufficient competence, but some require that they meet standards of high quality. Others link the quality to fair outcomes or the protection of human rights. Some specify that quality should be consistent throughout the country, and others define quality as meeting the needs of beneficiaries. Below are some examples. Of course, these are only standards that have been put in place as a first step, and it is important to establish measures to monitor that services provided comply with these standards.

## NATIONAL APPROACHES TO QUALITY

In **Argentina**, the law governing the Federal Public Defender's Office makes a direct link between legal aid and human rights. Article 1 considers the Office "an institution for the protection and defence of human rights". It implies a wider effectiveness with high-quality services not only restricted to technical assistance/representation in court, but also related to access to justice for vulnerable groups. Article 5 provides a long list of duties of public defenders, for example, to take into account gender considerations and to promote alternative dispute resolutions. Article 16 establishes that the members of the Office must manage their cases permanently and continuously in an **efficient manner**, providing technical and **adequate defence**. In practice, this is examined not only on the basis of general parameters of quality and adequacy (such as comparing the actions of a lawyer with a checklist), but also on the circumstances of the specific case and the rights and needs of vulnerable clients. The activity of the provider is evaluated considering the special characteristics of the defendant. For example, if the accused is a woman or a child, their particular rights and vulnerability should be considered when defining and executing the defence strategy and the quality evaluation process should not disregard them.

In **Canada**, the Bar Association and Canada's Association of Legal Aid Plans established the six benchmarks for public legal assistance services. On quality of services, the fifth states that "Public legal assistance services in all provinces and territories are fully **accessible, timely, high quality, culturally appropriate and cost-effective**. Such services will lead to evaluated meaningful participation and fair and equitable outcomes, and contribute to the empowerment and resilience of individuals, families and communities."<sup>a</sup> The other five benchmarks cover a National Public Legal Assistance System, the scope and spectrum of services, service priorities, and a supported, collaborative, integrated service sector.

In **China**, a key objective of the legal aid system reform is to guarantee the quality of services with gradual improvement. It includes, inter alia, the following approaches: to set national quality standards; to support the development of standardized training programmes for legal aid lawyers; to offer "legal support for legal aid lawyers" through the National Online Support Platform; to ensure the availability of monitoring and evaluation mechanisms. For example, in 2017, the first provincial "Rules for Legal Aid Services of Zhejiang Province" were promulgated by the Quality and Technical Supervision Bureau of Zhejiang Province, and in 2018, the Ministry of Justice promulgated National Rules for Criminal Legal Aid Services.

In **Israel**, the basic values of the Public Defender's Office include a section on "Ensuring the Quality of Representation", which provides that public defenders "shall strive to represent his clients with devotion, determination and creativity, and in accordance with **high standards** of knowledge and professional skill". The Office of the Public Defender acts to ensure the quality of representation by selecting the most capable attorneys to represent on its behalf and matching the attorneys to the specific characteristics of each case; by facilitating institutional professional advice; by supervising and monitoring the public defenders who work for the office; by creating a pool of experts and specialists who assist the public defenders and supplement their work; and by providing continuing legal education and dissemination of professional knowledge.<sup>b</sup>

In **Kenya**, in the context of legal aid, quality means the provision of legal aid services that are **responsive to identified legal aid needs** and are in conformity with universally accepted principles on the right to legal aid. It entails putting in place systems, processes and functions that ensure the quality requirement of legal aid services is met.

In the **Republic of Moldova**, improving the quality of legal aid services was chosen to be one of the strategic development objectives.<sup>c</sup> The quality assurance mechanism set by the Moldova National Legal Aid Council in 2015 is based on several elements: recruitment of legal aid lawyers through a public contest process; providing compulsory annual training for all legal aid lawyers; development and application of professional standards and guidance for legal aid lawyers; specialization of legal aid lawyers; internal and external independent monitoring of the delivered services; and connected actions such as support of the Bar Association in observance of the professional standards by all certified lawyers.<sup>d</sup>

In **New Zealand**, Section 68 (1) of the Legal Services Act 2011 provides that the Secretary for Justice should establish, maintain and purchase **high-quality legal services** in accordance with the Act. A national quality assurance framework for legal aid was established to ensure that the service provided to clients is consistent across the whole country, so that everyone can have confidence in the quality of services provided by legal aid lawyers. It is based mostly on audits, which assess the legal advice and representation provided to the beneficiary; management of cases, including the adequacy of documentation; compliance with the conditions of the grant of legal aid and any amendments to it; and the justification of expenditure of legal aid funds; and provider's service delivery systems.<sup>e</sup>

<sup>a</sup> Canadian Bar Association, Access to Justice Committee, December 2016, p. 9.

<sup>b</sup> Israel, Values of the Office of the Public Defender.

<sup>c</sup> Justice Sector Reform Strategy and its Action Plan, 2011–2016, Available online at: [http://justice.gov.md/public/files/file/reforma\\_sectorul\\_justitiei/srsj\\_pa\\_srsj/PA\\_SRSJ\\_adoptaten.pdf](http://justice.gov.md/public/files/file/reforma_sectorul_justitiei/srsj_pa_srsj/PA_SRSJ_adoptaten.pdf).

<sup>d</sup> NLAC Moldova, The Legal Aid Activity Strategy, 2015–2017.

<sup>e</sup> Legal Services Act (2011). Available online at: <http://www.legislation.govt.nz/act/public/2011/0004/latest/whole.html>.

Professors Paterson and Sherr developed an approach to quality which includes all the elements mentioned above, under four principal sets of measures for assessing the quality of the work of legal services providers, *Input*, *Structure*, *Process* and *Outcome* measures:<sup>77</sup>

*Input measures* refer to the resources and experience which the legal services provider brings to the performance of legal work, for example, education, skills training, professional qualification, specialist accreditation, office facilities (library, IT) and staff. Possession of these is relatively straightforward to measure, but they are indirect proxies for quality. They may enhance the quality of the service providers' performance, but on their own they do not assure it.

*Structural measures* build on input measures by referring to the management of *inputs* (e.g., case management systems, record keeping, staff training, supervision, mentoring and complaints procedures) to form an environment in which the legal services providers will be assisted to provide a quality product for the client. Again, they are relatively easy to measure, but are less direct proxies for quality. While it is probably essential to have good inputs and structures to produce a good level of performance, inputs and structure by themselves may do not assure the quality of the work carried out.

*Process measures* focus on the performance of work by legal aid providers "from the first point of entry into the system through the handling of the case and onwards to maintenance of files and documents". As such, they encompass the appropriateness of the legal work done (what should and should not be done), its effectiveness, and its responsiveness to the client's wishes (so far as these may be respected in all the circumstances). Therefore, they indicate the lawyer's competence, from fact gathering and legal analysis to client handling, advice and assistance and practice management.<sup>78</sup> As mentioned above, a simplified

<sup>77</sup> Paterson A. and Sherr A., "Quality Legal Services: The Dog that did not bark", chapter 10 in F. Regan, A. Paterson, T. Goriely and D. Fleming (eds), *The Transformation of Legal Aid* (Oxford: Oxford University Press, 1999); Paterson, A., "Peer Review and Quality Assurance" 13 (2007), *Clinical Law Review* 757; Sherr, A. and Paterson, A., "Professional Competence, Peer Review and Quality Assurance in England and Wales and in Scotland" 45 (2008), *Alberta Law Review* 151; Paterson, A. and Sherr, A., "Peer Review and Cultural Change: Quality Assurance, Legal Aid and the Legal Profession".

<sup>78</sup> Professor Alan Paterson and Professor Avrom Sherr, "Peer Review and Cultural Change: Quality Assurance, Legal Aid and the Legal Profession" (ILAG, 2017).

way to establish such measures is through performance criteria for providers. Such criteria could be very detailed and address what is expected from a competent legal aid provider generally, at different stages of the criminal justice process, when working on specific types of crimes, and with specific groups of clients. These are the specific actions that the lawyers must perform in order to deliver a quality service to their clients. The assessment of lawyers' actions can be based on negative criteria, or positive criteria, where lawyers are graded in accordance with excellence criteria. Process variables are generally harder to measure than input and structural ones, but where this has been done, they are regarded as better proxies for quality of performance. Research suggests that the most effective ways of measuring process variables include observation, file review by peers and the use of "model" or standardized, simulated clients. When looking at process measures, one of the issues would be **whether delivery of legal aid is done in accordance with international human rights standards.**<sup>79</sup>

*Outcome measures* look at the outcome of the legal process. This implies either a peer review to assess the quality of the outcome, or a statistical approach to compare results in similar cases. The latter is difficult to implement, especially considering that the factors that influence the outcome are many, and some are outside the influence of the individual provider. Outcome variables are amongst the hardest to measure satisfactorily. There are several reasons for this – the need to control for case bias in the distribution of cases between practitioners; the difficulty in establishing a consensus as to what constitutes a "good" outcome in a particular case; and the need to show that the "successful" outcome was actually achieved as a result of the efforts of the lawyer, and not as a result of other factors such as luck, a poor opponent, a weak judge, etc. Additional outcome measures include case cost, time taken, success rates and client satisfaction. Outcome measures may also refer to the ultimate goals of the quality programme and can be informed by idealistic factors such as the organization's vision, or even the aspirations of the justice system or country.

Another approach to quality which adds to these elements the perspective of clients' expectations, relative costs and evaluation, was suggested by the Viadicte Foundation of private providers in the Netherlands:<sup>80</sup>

"Complying with justified expectations of the client in an adequate price–quality ratio by an incorruptible and independent lawyer; who meets the criteria of sufficient professional competence; to be tested by the colleagues (Peers); to be attuned to the partners in the chain and who works in an office which has been provided with instruments for measuring output and outcome and which applies auditing in accordance with unambiguous and well worked-out standards."

Professor Roger Smith proposed for the purposes of assessment of quality in a national legal aid system, to break down the concept of quality to three headings: (a) technical; (b) ethical; and (c) professional/practical. **Technical** includes, for example, keeping files properly, attending punctually, being efficiently organized. **Ethical** includes, for example, "avoiding outright corruption but also respect for the paramount interest of the client, successfully identifying conflicts of interest and appropriately resolving them." **Professional/practical** includes, for example, "making judgements as to the appropriate law, identifying the strategy to be

<sup>79</sup> UN Principles and Guidelines, Guideline 17.

<sup>80</sup> Viadicte Foundation ("Stichting Viadicte"), available online at: <http://www.viadicte.nl/en/quality/towards-a-definition-of-quality/qualitydefinition.html>.

taken, communication with client, gathering the facts, ensuring client’s instructions are followed.” Different national institutions would be responsible for upholding and monitoring these aspects.<sup>81</sup>

The International Legal Foundation (ILF) suggested a definition that combines process and outcome:<sup>82</sup>

“Quality is a characteristic of legal aid services that describes the extent to which legal aid providers perform the intended legal aid services and increase the likelihood of achieving the intended results. There are two ways of measuring quality: in terms of process – providing the right legal aid services – and in terms of outcomes – obtaining the right results. Legal aid quality is not binary but instead exists on a spectrum, where higher-quality representation more frequently involves performing the intended activities and/or producing the intended outcomes.”

## B. Appointing a national legal aid body

After conceptualizing what quality should mean in their own legal system, States should decide who would be responsible for legal aid delivery, and more specifically, to establish and monitor legal aid quality.

**Guideline 11** of the UN Principles and Guidelines provides:

*To ensure the effective implementation of nationwide legal aid schemes, States should consider establishing a legal aid body or authority to provide, administer, coordinate and monitor legal aid services. Such a body should:*

- (a) Be free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure;*
- (b) Have the necessary powers to provide legal aid, including but not limited to the appointment of personnel; the designation of legal aid services to individuals; the setting of criteria and accreditation of legal aid providers, including training requirements; the oversight of legal aid providers and the establishment of independent bodies to handle complaints against them; the assessment of legal aid needs nationwide; and the power to develop its own budget;*
- (c) Develop, in consultation with key justice sector stakeholders and civil society organizations, a long-term strategy guiding the evolution and sustainability of legal aid;*
- (d) Report periodically to the responsible authority.*

<sup>81</sup> *Quality of Legal Aid Services: A capacity needs assessment for the National Council for State Guaranteed Legal Aid from the Republic of Moldova*, supported by UNDP [Bratislava Regional Center and UNDP Moldova] Roger Smith (United Kingdom), international expert, and Olga Rabei (Moldova), national consultant, January 2013, pp. 8–9.

<sup>82</sup> ILF *Measuring Justice, Defining and Evaluating Quality for Criminal Legal Aid Providers* (2016).

## 1. Establishing a legal aid body

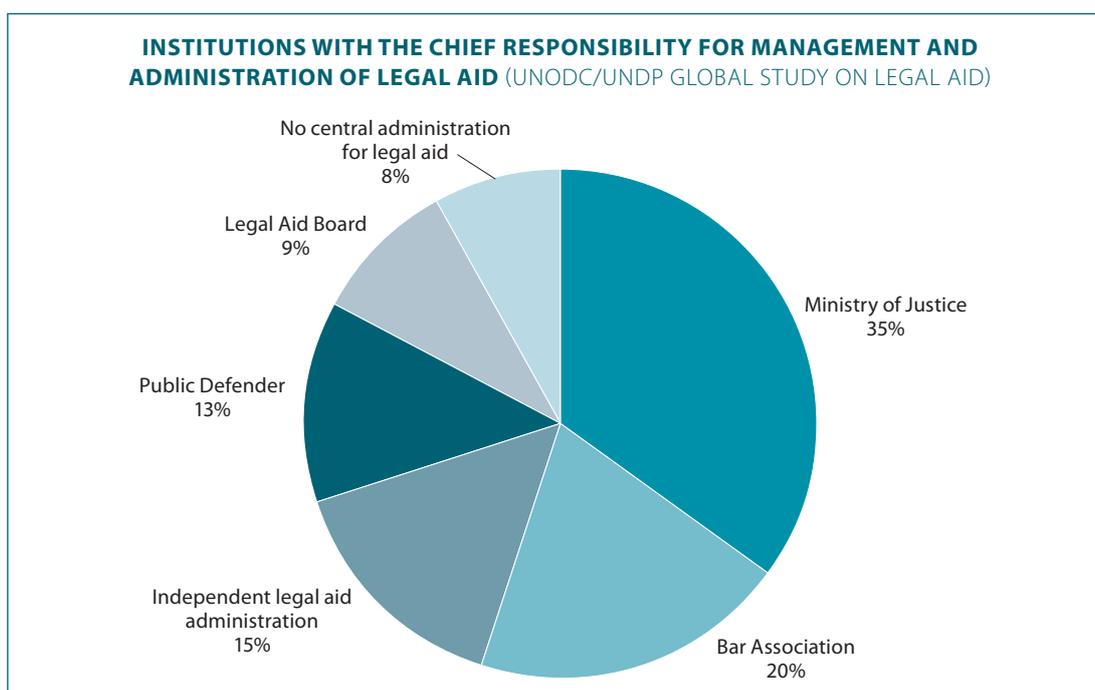
### i) Administering legal aid

Globally,<sup>a</sup> nearly all (90 per cent) of Member States responding to the Global Study have established **specialized structures to oversee the provision of legal aid** (see figure below). When asked which institution had the chief responsibility for the administration of legal aid in their country, 43 per cent of Member State respondents cited the Ministry of Justice (or the executive agency in charge of justice), a quarter referred to the Bar Association (25 per cent), one in five (19 per cent) reported having established an independent legal aid administration, and nearly the same proportion (16 per cent) said the Public Defender was in charge. One in ten Member State respondents (11 per cent) reported having established a legal aid board, while more or less the same proportion (10 per cent) indicated that there was no central administration.

<sup>a</sup> UNODC/UNDP *Global Study*, pp. 84–85.

In most countries, legal aid is administered by a specialized body. The body may be responsible both for quality assurance and monitoring, but the monitoring functions may be fulfilled by another body. The monitoring body does not need to be a national body; some countries are federal and so the administration of justice would be decentralized. The key point is that **there should be a structure in place** to fulfil the functions listed in **Guideline 11** related to quality, for instance:

- Appointment of dedicated personnel;
- Setting of criteria for accreditation and putting in place a system for accreditation of legal aid providers, including training requirements;
- Oversight of legal aid providers and the establishment of independent bodies to handle complaints against them; and
- Reporting periodically to the responsible authority (for instance, to the Ministry of Justice).



In the absence of a national legal aid body, quality assurance is a difficult task to tackle and left mostly to bar associations imposing codes of conduct which typically include rules for ethical behaviour more than standards for quality performance of lawyers providing effective defence. In fact, this was the situation in many Member States that responded to the UNODC/UNDP Global Study on Legal Aid.<sup>83</sup>

**Bar associations** are organizations of lawyers responsible for the regulation of the legal profession in their jurisdiction (by promoting professional competence, enforcing standards of ethical conduct), or professional organizations dedicated to serving their members, or both. Traditionally, they were the main providers of legal aid through pro-bono schemes. The UN Principles and Guidelines recognize the role of bar associations and recommend developing partnerships with them in order to ensure nation-wide coverage of legal aid (Guidelines 11 and 16), to request bar associations to establish rosters of lawyers and paralegal for police, court and prison legal aid schemes (Guidelines 4, 5 and 6) and to consult with them on the accreditation of paralegals (Guideline 14). A strong bar is important for ensuring the independence of lawyers,<sup>84</sup> which is a key requirement for ensuring quality legal aid services, as discussed below (chapter 3, section A. 3).

In **Haiti**, bar associations have been the main implementing partners of legal assistance projects, either by directly taking responsibility for the comprehensive management of legal aid offices or by selecting service providers and, sometimes implicitly, evaluating the quality of their services. The assessment concludes that “the choice of a legal assistance model in which bar associations play a major role makes sense in contexts, such as Haiti, where the bar association is a permanent institutional actor that also has legal responsibilities for providing assistance to the most indigent people [...]. The choice of a mixed system that allows for the involvement of other service providers, as envisaged in the current draft law in Haiti, may be more appropriate.”<sup>a</sup>

<sup>a</sup>DPKO/USAID *Assessment of Legal Aid in Haiti: Lessons Learned*, 2017. This study was led by the Justice and Corrections Service of the Office of Rule of Law and Security Institutions, DPKO. Available online at: <https://issat.dcaf.ch/download/125808/2568524>. See pp. 35–36.

As the UN Principle and Guidelines imply, bar associations cannot be the sole providers of legal aid, as they are not able to meet all legal assistance needs and have other important functions and interests to protect. In addition, when it comes to evaluating quality of services, the main tool applied by bar associations is complaint mechanisms, which suffers from many deficiencies (see discussion in chapter 4, section C. 3). Experience suggests that a national body dedicated to providing and monitoring legal aid can more effectively perform these functions, while working in cooperation with bar associations when it comes to accreditation of providers, establishing codes of conduct and providing training.

<sup>83</sup> UNODC/UNDP *Global Study*, pp. 86, 131–132, 150–152.

<sup>84</sup> See, for example, “Bar Associations for Independent, Qualified and Ethical Exercise of the Profession of Lawyer”, International Conference Report, 20–21 June 2016. Available at: <https://rm.coe.int/1680695560>.

ii) *Monitoring quality of legal aid***SUPERVISING BODY OR INSTITUTION**

According to the responses to the UNODC/UNDP *Global Study*,<sup>a</sup> in most countries, the bar is responsible for supervising the quality of legal services, through applying codes of conduct and complaints mechanisms. Responding Member States most frequently cited the bar association as the monitoring institution (35 per cent). A fifth of Member State respondents said that the legal aid board or the Ministry of Justice performed monitoring functions (20 per cent). In the majority of responding Member States, establishing performance standards and monitoring the delivery of legal aid was a formal responsibility of legal aid authorities.<sup>b</sup>

<sup>a</sup> UNODC/UNDP *Global Study*, pp. 86, 131–132, 150–152.

<sup>b</sup> *Ibid.*, pp. 130–131.

**Guideline 16** of the UN Principles and Guidelines, entitled “Partnerships with non State legal aid service providers and universities” provides that “States should, where appropriate, engage in partnerships with non State legal aid service providers, including non governmental organizations and other service providers.” They should also “take measures, in consultation with civil society and justice agencies and professional associations to set quality standards for legal aid services”. It could therefore be argued that quality assurance in legal aid is best pursued as a partnership between the legal aid authority, and other key stakeholders such as the bar association.

For example, in **France, Germany, Belgium and Poland**, the bar associations are in charge of the general quality of legal services and are responsible for handling complaints for breaches of professional conduct. In **England and Wales, Ireland** and the **Netherlands**, the authorities responsible for legal aid grants set additional quality criteria. In **England and Wales**, this includes setting standard for both firms and individuals – including enhanced standards required for supervisors. However, in the **Netherlands** disciplinary measures against the lawyers are taken by the bar association, as the legal aid board can only remove the lawyer from the list of legal aid lawyers in case of grave misconduct and in case of not being compliant with the registration conditions. **Scotland** has both: a separate mechanism of assessing the performance of the legal aid board staff in processing the requests for legal aid, as well as a general complaint mechanism for the performance of solicitors and barristers in legal aid cases and a peer review system for legal aid lawyers.<sup>85</sup>

In the **United Kingdom**, quality of services delivered by legal aid providers is the responsibility of the regulatory bodies and the profession. However, in **England and Wales** the Legal Aid Agency (LAA) works closely with the regulators such as the Legal Services Board, the Bar Standards Board, and the Solicitors Regulation Authority to ensure that appropriate quality standards are in place to protect the public and sets additional quality criteria in the legal aid contract. These organizations are responsible for setting education and training requirements, determining continuing training requirements to ensure key skills are maintained, establishing standards of conduct and principles, monitoring the service provided by practitioners to assure quality and handling complaints against practitioners and taking disciplinary or other action where appropriate. The LAA contracts with all providers, setting additional requirements related to legal aid work. Providers are subject to being per reviewed by an independent system

<sup>85</sup> Hill, *Innovating Justice, Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?* (2014), 46–47.

funded by the Legal Aid Agency.<sup>86</sup> In **Scotland**, the Scottish Legal Aid Board works in partnership with the Law Society to establish quality standards and to peer review all solicitors who provide legal aid services.<sup>87</sup> The Law Society and the Faculty of Advocates along with the Scottish Legal Complaints Commission ensure that there are education and training standards in place and that complaints against legal aid practitioners are investigated and compensation and disciplinary action taken where appropriate.

In **Canada**, supervising legal services generally falls to the lawyer's licensing body. In legal aid cases, both the licensing body and the legal aid plan are likely to be involved in addressing quality of service. All Canadian plans have formal processes in place to receive, investigate and respond to complaints from clients or third parties. This can result in parallel investigations occurring in the professional body and the legal aid plan. On occasion, legal aid plans will report lawyers to the professional body. There may be circumstances where there is a duty on the lawyer to report a complaint received by the legal aid plan to the professional body.

In **South Africa**, an independent unit called the Legal Quality Assurance Unit (LQAU) was established to ensure the integrity of the entire quality assessment programme. This unit is located within the Internal Audit Department of Legal Aid South Africa and reports directly to the CEO and Board. It therefore does not report to the operations side of the business. It is staffed by senior lawyers who have vast experience in their field. The legal quality auditors based in the LQAU use the same methodology and the same instruments in conducting their quality assessments as is used in all quality assessments performed within the organization. There is a system in place for practitioners to engage LQAU auditors on any adverse findings they make regarding their files, and to provide further proof of compliance with internal quality standards. All findings made by the LQAU are reported to the Board and are analysed to identify any areas of concern in the delivery programme.

In **Israel**, supervising the quality of representation is at the core of the work of the Public Defender's Office and is among the justifications central to its establishment. It works in a mixed model: legal representation is provided both through internal staff attorneys and lawyers from private firms. Administrative responsibility and professional supervision remain with the Office. In order to ensure the proper representation by the defence attorneys, the Public Defender's Law empowers the national defence attorney to supervise the professional level of all the lawyers acting on its behalf, and the district attorneys to supervise professional work of the public defenders representing the district where they are responsible. In all districts, special departments are currently operating to control the quality of the representation that are involved in the work of the supervisory authority. The Department for Monitoring the Quality of Representation oversees and carries out supervisory work, which has significant advantages: accumulation of expertise and experience; concentration of professional knowledge; gathering information about the lawyers' work; developing uniform guidelines for lawyers; setting general policy and identifying key issues as goals for treatment; uniform auditing and control; balancing between uniformity, diversity and creativity; prevention of exhaustion; and the creation of professional pride.<sup>88</sup>

<sup>86</sup> See online at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/620110/independent-peer-review-process-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/620110/independent-peer-review-process-guidance.pdf). In practice, only a proportion of legal aid providers will be peer reviewed in a given cycle.

<sup>87</sup> Because of Scotland's smaller size, the Board is actually able to review *all* solicitors.

<sup>88</sup> *Annual Report 2017*, unofficial translation from Hebrew.

In **Argentina**, both quality assurance and monitoring are the responsibility of the Federal Public Defender General, as the governing authority of the legal aid institution.<sup>89</sup> The Federal Public Defender has the power to impose sanctions on staff of the Office, including disciplinary sanctions, that can be appealed and may be challenged. Public defenders can also be removed from office on the grounds of poor performance, grave negligence or the commission of any type of felony.<sup>90</sup>

In the Office of the Federal Public Defender of **Brazil**, a special Council whose members are elected for a period of two years is responsible for setting quality standards for the public defenders. Several working groups on specific issues exist, such as on gender in the criminal justice system, to address each topic holistically and develop guidelines for the practitioners. All files of cases that have come to an end are checked by the supervisors of the provider before the case is archived.

#### PROJECT ENHANCING THE QUALITY OF LEGAL AID: GENERAL STANDARDS FOR DIFFERENT COUNTRIES (QUAL-AID)

A research project on quality on legal aid in Europe<sup>a</sup> focusing on three countries – the Netherlands, Lithuania and Germany – has had similar findings:

In the **Netherlands**, the main institutions supervising the advocates involved in the provision of legal aid are the Netherlands Bar Association (*Nederlandse Orde van Advocaten, NOvA*) and, to a lesser extent, the Legal Aid Board (LAB). They exchange information with the aim of improving the supervision of advocates within the State-funded legal aid system. The Dutch Bar Association has laid down rules of conduct and regulations that advocates should follow, which are limited as related to quality. The Netherlands Bar Association has introduced best practices and quality assessments which are meant to encourage advocates to gain insight into, and receive feedback on, their conduct and improve this where necessary. The LAB's supervision of advocates providing legal aid is limited. It mainly focuses on verifying if the registration conditions set by the LAB are fulfilled and terminates the registration if not. The requirements for registration are quite strict and not easy to meet. However, disciplinary measures against lawyers are taken by the NOvA, and in case of grave misconduct, the LAB can also remove the lawyer from the list of legal aid lawyers. Once every two or three years, advocates and clients are asked about their experiences with the legal aid system. This includes a client satisfaction survey on the services provided.

In **Lithuania**, supervision of advocates providing legal aid is carried out by the Lithuanian Bar Association and the State-Guaranteed Legal Aid Service (SGLAS). The SGLAS resolves beneficiaries' complaints regarding the actions of legal aid providers. The Bar Association has a general duty of supervising the advocates. Having received a complaint on legal aid provided, the SGLAS, in accordance with an agreement on provision of legal aid concluded with an advocate, can take the following measures of control: (i) request to explain the situation and issue a decision to replace the lawyer; (ii) if SGLAS determines that the issue in the complaint is related to the quality of the lawyer's activity, it transfers the complaint to be considered by the Lithuanian Bar; (iii) terminate the agreement concluded with the lawyer. Thus, the SGLAS is not empowered to supervise the quality of the service itself and, similar to the Netherlands, disciplinary measures against the lawyers are taken by the Bar Association. The duty to verify the quality of activities of the lawyers providing secondary legal aid in Lithuania is assigned to the Bar. It is responsible for examination of disciplinary cases of lawyers (through the Court of Honour of the Bar). The Bar also organizes the assessment of the quality of lawyers' activities when providing secondary legal aid. The Law of the Bar provides that quality assessment rules must be approved by the Bar, but no rules exist as of yet. The Bar considers the complaints of the persons to whom legal aid is provided according to the same procedure as the complaints on private lawyers.

<sup>89</sup>Organic Law of the Office of the Federal Public Defender 27.149, Title XVIII. Systems of control of management. Article 54 – *Rules of functioning and control of management*. The Federal Public Defender General establishes general criteria and protocols of action and ensures an efficient and adequate defence. He or she implements a specific system of management for the control and weighted assignment and shifts of the cases and seeks to continually improve the working processes. The Federal Public Defender General must assess the quality of the services provided by the Federal Public Defender's Office, especially with regard to the observance of the Law, the compliance of deadlines and of the general recommendations.

<sup>90</sup>Organic Law of the Office of the Federal Public Defender 27.149, articles 35, 55, 57.

In **Germany**, there are no formal quality control mechanisms for court-appointed lawyers. This is partly due to the fact that the appointment of a lawyer is carried out by the courts and that the German Constitution guarantees the independence of judges. Furthermore, the requirements for becoming a lawyer in Germany are quite strict. A person who is not satisfied with the quality of the work of the legal aid lawyer may submit a complaint to the Bar. However, neither the Bar, nor the courts, run any independent monitoring or quality assurance mechanism.

In **Ukraine**, the quality of legal assistance is the responsibility of the Coordination Center for Legal Aid Provision (CCLAP), an independent unit of the Ministry of Justice. The obligation to provide quality legal aid is assigned to a defence lawyer in the Law on Free Legal Aid.<sup>91</sup> CCLAP, together with partners such as NGOs, in particular the Ukrainian Legal Aid Foundation, and the Ukrainian National Bar Association, have developed Legal Aid Quality Standards in criminal cases,<sup>92</sup> adopted by the Ministry of Justice and the Ukrainian Bar as mandatory. In each region of Ukraine, CCLAP authorized a defence lawyer to be a quality manager to whom legal aid lawyer can apply for quality support, for example, when they are in need of mentorship. In 2018, CCLAP, the Ukrainian Bar, as well as three leading NGOs signed a Memorandum of Understanding and created the Commission for legal analysis of the quality of legal aid. The Commission started developing internal documents for the selection of assessors and a pilot for conducting peer review.

A 2014 study on legal aid covering European countries<sup>93</sup> found that legal aid systems had various mechanisms aimed at ensuring the quality of the legal aid services.

In the **United States**, the American Bar Association developed ten principles of public defence which apply to the organizations delivering legal aid:<sup>94</sup>

1. The public defence function, including the selection, funding and payment of defence counsel, is independent.
2. Where the caseload is sufficiently high, the public defence delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defence counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention or request for counsel.
4. Defence counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defence counsel's workload is controlled to permit the rendering of quality representation.
6. Defence counsel's ability, training and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.

<sup>91</sup> See <https://zakon.rada.gov.ua/laws/show/3460-17>.

<sup>92</sup> See [http://ulaf.org.ua/wp-content/uploads/2015/09/BPD\\_standarts.pdf](http://ulaf.org.ua/wp-content/uploads/2015/09/BPD_standarts.pdf).

<sup>93</sup> Hill, *Innovating Justice, Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?* (2014), 46–47.

<sup>94</sup> ABA Ten Principles of a Public Defence Delivery System. Approved by American Bar Association House of Delegates, February 2002. The American Bar Association recommends that jurisdictions use these Principles to assess promptly the needs of public defence delivery systems and clearly communicate those needs to policymakers.

8. There is parity between defence counsel and the prosecution with respect to resources and defence counsel is included as an equal partner in the justice system.
9. Defence counsel is provided with and required to attend continuing legal education.
10. Defence counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

On the basis of these principles, a survey was developed to allow the assessment of adherence to the principles, and a national survey of public defence providers was conducted to obtain their perspectives on the degree to which they were able to adhere to the Ten Principles.<sup>95</sup>

## 2. Independence of the legal aid body

According to **Guideline 11**, the legal aid body should be:

*free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure and have the power to develop its own budget.*

The independence of the legal aid body is crucial for ensuring quality of services. This is not only a matter of institutional preference but touches upon basic human rights. The Special Rapporteur on the independence of judges and lawyers declared that he would also pay particular attention to “any attempt to suppress or restrict the independent operation of bar associations”.<sup>96</sup>

In the case of *Ruano Torres v. El Salvador*, the Inter-American Court of Human Rights ruled that the legal representation provided to Ruano Torres through State public defenders during his criminal prosecution had been ineffective and El Salvador was, for that reason, responsible for the violation of articles 8.1, 8.2.d and 8.2.e of the American Convention. Among other reasons, the Court noted that when the legal representation is provided by a State institution (such as public defenders’ offices), it was necessary that the institution has sufficient autonomy and also that there is a strict selection process of the public defenders, appropriate controls on their activity and permanent trainings.<sup>97</sup>

<sup>97</sup> *Ruano Torres v. El Salvador*, the Inter-American Court (Judgment of October 5th, 2015, paras. 147–175) (para. 163). See [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_303\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_303_esp.pdf) – unofficial translation from Spanish.

<sup>95</sup> Caroline S. Cooper, The ABA “Ten Principles of a Public Defence Delivery System”: How Close Are We To Being Able To Put Them Into Practice? *Albany Law Review* [Vol. 78.3 2015] 1193–1213. Their key findings were “lack of adequate understanding on the part of many public defence providers themselves as to what is entailed in adhering to each of the Ten Principles (as noted earlier, over half of the respondents were not familiar with them prior to receiving the survey); lack of understanding on the part of other justice system officials – judges and prosecutors in particular – as to what is truly required to achieve the Ten Principles; and, most important, lack of an adequate organizational structure (and infrastructure) to promote effective public defence services – a situation that will require attention from policymakers at all levels, not simply public defence providers”.

<sup>96</sup> Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/35/31, 9 June 2017, paras. 49–50. More specifically, the Special Rapporteur noted that “it is important that the legal profession be organized by a self-regulating, independent professional association. Such an organization would provide an umbrella of protection for its members against undue interference in their legal work. States should support such professional organizations of lawyers, which very often take the form of bar associations, without exercising any influence. Bar associations should also play an essential role with regard to the regulation of the process of admitting candidates to the legal profession. It follows that the institutional independence of such professional associations is of great importance as well. Not only would they act as a safeguard for their members against undue pressures, threats or influence, but they would also monitor and report on their members’ conduct.” A/67/305, para. 48.

There is a clear link between the independence of legal aid providers and legal aid bodies, such as public defenders, and the quality of services they are able to provide.<sup>97</sup>

In **Canada**, of 13 legal aid plans, all but one are non-governmental. While all are fiscally dependent on government, governance structures vary considerably. In some plans, the board, the board chair and the chief executive officer (CEO) are all appointed by government. In others, only part of the board is appointed by government, and the board elects its chair and hires its CEO. All plans function without government interference in the provision of legal aid.

While countries choose different models for administration and delivery of legal aid services, the structure should always maintain independence in order for lawyers to be able to act zealously on the behalf of their clients. For example, in **Liberia**, the Public Defenders' Office is placed under the Supreme Court and public defenders have in the past reported that they usually do not challenge the judges. At the same time, it is also important that legal aid providers be seen as independent by the beneficiaries. The development of the Office of the Federal Public Defender in **Argentina** provides a good example for this principle.

#### INDEPENDENCE OF THE FEDERAL PUBLIC DEFENDER'S OFFICE IN ARGENTINA

In 1994, the Office was recognized by the National Constitution as an independent institution, free of undue interferences from other branches or powers of the government. However, as Argentina is a federal country, in some provinces public defender offices were still part of the local Supreme Courts' structures, or the provinces' General Prosecutor's Offices. Over the past decade, many cases in which the Supreme Court found **ineffective criminal defences** were handled by these local offices, which do not enjoy full independence. It was found that in those cases the public defenders had, for example, refused to argue in favour of the client because of "the respect that the Court deserves" or since they "completely agreed with the Court's interpretation of the law or determination of the facts", and for those reasons they did not file an appeal or sustain an appeal as requested by the defendants. Being embedded in court or prosecution structures also includes being subject to administrative decisions, such as allocation of resources, and career decisions, such as allocation of cases, workload and promotions. It is therefore important to guarantee the independence of providers to establish a balanced criminal justice system.

### 3. Independence of individual legal aid providers

The independence of the individual legal aid provider is also crucial for the quality of services. This principle was first elaborated upon in the Basic Principles on the Role of Lawyers.<sup>98</sup> Lawyers' first duty is to their clients; therefore, they should be free from interference in order to provide quality legal aid assistance. Principle 16 of the Basic Principles provides that governments shall ensure that lawyers:

<sup>97</sup> Report on the Guarantees for the Independence of Justice Operators (2013), para. 45. Produced by the Special Rapporteur on Human Rights Defenders of the Inter-American Commission, available at: <http://www.oas.org/en/iachr/defenders/reports/thematic.asp>.

<sup>98</sup> Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990.

*(a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.*

**Principle 12** of the UN Principles and Guidelines expands this principle to all legal aid providers, whether lawyers, or non-lawyers:

*States should ensure that legal aid providers are able to carry out their work effectively, freely and independently. In particular, States should ensure that legal aid providers are able to perform all of their professional functions **without intimidation, hindrance, harassment or improper interference**; are able to travel, to consult and meet **with their clients freely and in full confidentiality** both within their own country and abroad, and to **freely access prosecution and other relevant files**; and do not suffer, and are not threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.*

The Human Rights Committee held in its General Comment No. 32 that “lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter.”<sup>99</sup>

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa<sup>100</sup> also provide that lawyers shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

To oversee the implementation of these many principles, a Special Rapporteur on the independence of judges and lawyers was appointed by the United Nations Human Rights Council. The Special Rapporteur expressed concern about the “increased number of complaints concerning Governments’ **identification of lawyers with their clients or their clients’ causes, especially lawyers representing the accused in politically sensitive cases.**”<sup>101</sup>

<sup>99</sup> CEDAW General Comment 32, para. 34.

<sup>100</sup> African Commission on Human and Peoples’ Rights (2003). See detailed list of measures under “independence of lawyers”.

<sup>101</sup> Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/35/31, 9 June 2017, paras. 49–50.

### FINDINGS OF THE SPECIAL RAPPORTEUR

The Special Rapporteur found that “often lawyers are subjected to pressure, intimidation and constraints, leading up in many cases to arrest, assault and disappearance, for example. In many countries their work is hampered by complex regulatory regimes that govern the issuance and renewal of licences to practise law, and in extreme cases it may, for example, be the public prosecutor who takes the decision or advises the executive branch on the matter.”<sup>a</sup> Those situations consisted mainly of harassment, intimidation, vilification and threats, but may include enforced disappearances, assassinations or summary executions of judges, prosecutors or lawyers simply because they are doing their jobs. Cases recorded in 2006 showed how regularly such circumstances arose: about 55 per cent of communications, relating to some 148 cases in 54 countries, dealt with violations of the human rights of judges, lawyers, prosecutors and court officials. **Threats, intimidation and acts of aggression directed against lawyers accounted for 17 per cent of communications issued by the Special Rapporteur; the corresponding figure for judges and prosecutors was 4 per cent.**<sup>b</sup> There were recurrent instances of non-existent, inadequate or disregarded safeguards on the freedom to practise their profession, as well as difficulties obtaining access to clients or documentation and inequality of arms throughout the case.<sup>c</sup> Lawyers were regularly hunted down and arrested because they are identified with their clients, and continue to be harassed by the authorities following their release. This in turn meant that individuals accused of sensitive crimes may have difficulty finding a lawyer who will take their case.<sup>d</sup>

<sup>a</sup> A/HRC/8/4, para. 40.

<sup>b</sup> A/62/207 para. 24.

<sup>c</sup> Ibid., para. 29.

<sup>d</sup> A/HRC/4/25 para. 15.

Therefore, safeguards that are essential for lawyers to freely and effectively discharge their professional functions should be in place. In addition to the ones listed above, these safeguards could include:

- While lawyers are not expected to be impartial in the same way as judges, they must be as free from external pressures and interference, as are judges.<sup>102</sup>
- Lawyers should be subject to a unified code of ethics; complaints of breaches should be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court and its decisions should be subject to independent judicial review.<sup>103</sup>

### PRINCIPLES OF INDEPENDENCE IN INTERNATIONAL AND REGIONAL ASSOCIATION OF LAWYERS

#### International Bar Association (IBA)

The IBA adopted its Standards for the Independence of the Legal Profession in 1990.<sup>a</sup> The Commentary provides that “[i]t is indispensable for the administration of justice and the operation of the Rule of Law that a lawyer acts for the client in a professional capacity free from direction, control or interference.” The IBA Commentary notes that it will be difficult for a lawyer to protect clients if he or she is subject to interference from others, “especially those in power”. The IBA Commentary further explains that individual practicing lawyers, governments and civil society should “give priority to independence of the legal profession over personal aspirations”.

<sup>102</sup> A/67/305, para. 48.

<sup>103</sup> A/64/181, paras. 54–58.

## PRINCIPLES OF INDEPENDENCE IN INTERNATIONAL AND REGIONAL ASSOCIATION OF LAWYERS (*continued*)

### The Council of Bars and Law Societies of Europe (CCBE)

The CCBE adopted a “Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers” in 2008.<sup>b</sup> Principle (a) is “[i]ndependence of the lawyer, and the freedom of the lawyer to pursue the client’s case”. The CCBE Commentary provides that: “[a] lawyer needs to be free – politically, economically and intellectually – in [...] representing the client.” This means that the lawyer must be independent of the state and other powerful interests and must not allow his or her independence to be compromised by improper pressure from business associates. The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts. Indeed, without this independence from the client there can be no guarantee of the quality of the lawyer’s work. The CCBE Code of Conduct adds more detail to this principle: “[a] lawyer must [...] avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the court or third parties.” Independence is necessary regardless of whether it is a non-contentious matter or litigation. If a lawyer gives advice “only to ingratiate him- or herself, to serve his or her personal interests or in response to outside pressure”, such an advice has no value.

### Resolutions on independence adopted by the Organization of American States (OAS)

The OAS adopted several resolutions on the autonomy of the Public Defender’s Offices (PDO) and independence of public defenders and legal aid providers. In 2013, it adopted the resolution entitled “Toward Autonomy for Official Public Defenders/Criminal and Civil Legal Aid Providers as a guarantee of Access to Justice”, to “underscore, without prejudice to the diversity of legal systems of each country, the importance of the independence and functional, financial, and/or budgetary autonomy of official public defender, criminal and civil legal aid provider services, as part of member states’ efforts to guarantee a public service that is efficient and free from any interference and improper control by other branches of government that might affect its functional autonomy, its mandate being to serve the interests of the person it is defending”. In 2014, it adopted the resolution “Toward Autonomy for and Strengthening of Official Public Defenders/as a guarantee of Access to Justice”, to “underscore, without prejudice to the diversity of the legal systems of each country, the importance of the independence and the functional and financial and/or budgetary autonomy of official public defender services, as part of member states’ efforts to guarantee an efficient public service that is free from any interference and improper control by other branches of government that might impair its functional autonomy, and whose mandate is to protect the interests of the person it is defending”.<sup>c</sup>

<sup>a</sup>Available online at: <https://www.ibanet.org>.

<sup>b</sup>Available online at: [https://www.ccbe.eu/NTCdocument/EN\\_CCBE\\_CoCpdf1\\_1382973057.pdf](https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf).

<sup>c</sup> See also “Report on the Guarantees for the Independence of Justice Operators” (2013), paras. 45 onwards, which talks about independence of PD Offices and links it to quality of the service provided. (Produced by the Special Rapporteur on Human Rights Defenders of the IA Commission), <http://www.oas.org/en/iachr/defenders/reports/thematic.asp>.

## 4. Examples of bodies responsible for quality

By way of example of some European countries, the table below informs about which body is responsible for legal aid quality, and the criteria it applies.<sup>104</sup>

<sup>104</sup>Based on Hill, *Innovating Justice, Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?* (2014), 46–47. The table was updated by experts contributing to the *Handbook*.

Country	Body	Entry requirements for legal aid lawyers	Procedures for the quality control in the legal aid cases
<b>France</b>	Bar association	<ul style="list-style-type: none"> <li>Registered lawyers</li> <li>Specialized training for specific fields of law</li> </ul>	<ul style="list-style-type: none"> <li>Not available</li> </ul>
<b>Germany</b>	Bar association	<ul style="list-style-type: none"> <li>Any lawyer can take on a legal aid case</li> </ul>	<ul style="list-style-type: none"> <li>No specialized mechanism to ensure the quality of the services in legal aid cases</li> <li>Bar association ensures the general quality of the services provided by its members</li> </ul>
<b>Belgium</b>	Bar associations	<ul style="list-style-type: none"> <li>Not available</li> </ul>	<ul style="list-style-type: none"> <li>Disciplinary system of bar associations</li> </ul>
<b>England and Wales</b>	Legal Aid Agency	<ul style="list-style-type: none"> <li>Work for a firm that holds a legal aid contract</li> <li>Firm must hold a quality standard covering office procedures and processes</li> <li>Supervisors must achieve enhanced standard including, in certain categories of law, membership of specialist professional accreditation</li> </ul>	<ul style="list-style-type: none"> <li>Complaints procedure at LAA</li> <li>Peer review</li> <li>Solicitors Regulation Authority/ Bar Standards Board</li> <li>Legal Ombudsman</li> </ul>
<b>Scotland</b>	SLAB Scottish Legal Complaints Commission	<ul style="list-style-type: none"> <li>Both solicitor and firm have to be registered [New firms/ lawyers require to be quality-assured within 6 months]</li> </ul>	<ul style="list-style-type: none"> <li>Peer review</li> <li>Complaint mechanism at the SLCC and SLAB</li> </ul>
<b>Ireland</b>	LAB	<ul style="list-style-type: none"> <li>Solicitors employed by the LAB</li> <li>Solicitors and barristers registered as members of private panels maintained by the LAB</li> </ul>	<ul style="list-style-type: none"> <li>Specialized quality control procedures of the LAB including the use of best practice guidelines, file reviews with reference to the guidelines and a complaint mechanism</li> </ul>
<b>Poland</b>	Bar association	<ul style="list-style-type: none"> <li>Members of the relevant bar association</li> </ul>	<ul style="list-style-type: none"> <li>No specialized mechanism to ensure the quality of the services in legal aid cases</li> <li>Bar association ensures the general quality of the services provided by its members</li> <li>In criminal cases, the court may inform the Bar about the manifest breach of professional duties by the lawyer, demanding measures to be taken within a specified time</li> </ul>
<b>Netherlands</b>	Bar Association LAB	<ul style="list-style-type: none"> <li>Lawyers have to be registered at and meet the requirements of the LAB</li> </ul>	<ul style="list-style-type: none"> <li>Complaint mechanism at and requirements by the LAB</li> <li>Complaint procedure at local Bar, disciplinary courts</li> <li>The Bar is responsible for the general quality of the services provided by lawyers who are members of the Bar. LAB requires additional quality criteria for legal aid services</li> </ul>
<b>Finland</b>	Legal aid offices Bar association	<ul style="list-style-type: none"> <li>Lawyers employed at the legal aid offices</li> <li>Advocates members of the bar association</li> <li>Attorneys upon receiving a license from the Licensed Attorneys Board</li> </ul>	<ul style="list-style-type: none"> <li>Courts can reduce the number of hours declared as needed or actually spent by the lawyers for the preparation and conduct of the case, this is binding for calculating the compensation</li> <li>Bar association ensures the general quality of the services provided by advocates and licensed attorneys</li> </ul>

## C. Adopting measures to establish quality

In order to facilitate the delivery of quality legal aid services by individual providers, institutional measures and standards need to be in place to guide their work, as well as have a basis for all providers to operate from. Some of these measures are explicitly outlined in relevant international standards, such as to have sufficient time for preparing defence (see above in chapter 2), and others are based on best practices and good management schemes. The structure of the national legal aid system may also influence the quality of services provided, in particular when it facilitates easier supervision and monitoring of individual providers.

It is important to establish service delivery standards as a basis for service delivery, such as compliance with ethical standards and prohibited behaviour. Furthermore, organizational standards are crucial for the providers to be able to perform well, which can include a variety of aspects:

- *Employment of appropriately qualified staff:* The legal aid service provider must employ appropriately qualified staff and assign cases to them that are commensurate with their qualifications, knowledge and experience.
- *Conditions of service (salary, pension, benefits, etc.):* The legal aid service provider should endeavour to provide conditions of service that are, at a minimum, comparable to those available in the prosecution service and commensurate with the services they provide in order to ensure that it is able to attract and retain high-calibre staff.
- *Personal supervision and support:* Staff must be routinely supervised by a person with the necessary qualifications, knowledge and experience to provide such supervision, and other appropriate mechanisms for supporting staff must be provided. Supervision should include a review of a selection of cases worked on by the relevant staff member.
- *Training:* A mechanism must be in place to determine the training needs of staff, and appropriate training should be provided on a regular basis, having particular regard to the need to develop the knowledge and skills necessary to providing legal aid at the early stages of the criminal justice process, including for children and other persons with special needs.
- *Case files:* A procedure must be in place to store case files for a specified period of time and to enable file retrieval (for example, to cater for “repeat” clients and to enable conflicts of interest to be identified).
- *Caseload:* Mechanisms should be in place to ensure that staff do not have responsibility for an excessive number of “live” cases, taking into account their qualifications and experience and the complexity and seriousness of the cases.
- *Quality of case work:* Mechanisms should be in place to assure and monitor the quality of work performed in individual cases. For example, some legal aid bodies impose a requirement that legal aid service providers submit a number of cases, or case files, for peer review.<sup>105</sup>

### 1. Appointment of providers

To ensure that legal aid providers possess the necessary education, training, skills and experience, States should put in place accreditation requirements for legal aid providers. This is covered in chapter 4 on the individual legal aid provider.

<sup>105</sup>UNODC/UNDP *Handbook on Early Access to Legal Aid*, pp. 85–86.

## 2. Establishing quality standards

**Guidelines 16 and 14** of the UN Principles and Guidelines provide that “States should take measures [...] to set quality standards for legal aid services”, and this is true for both lawyers and paralegals.

Such quality standards allow legal aid providers to align their work with recommended standards and have practical guidance that is clear and detailed on how to approach the case and their clients at each step of the criminal justice process (e.g., see below for specific standards on early access to legal aid). This applies in addition to any professional rules or ethical rules that apply to lawyers as members of the bar. For a detailed discussion, see below in chapter 4.

## 3. Providing training and skill development

After admission to a legal aid providers’ list or body, on-going training and skills development is required to maintain the quality of services provided. According to the findings of the UNODC/UNDP Global Study on Legal Aid, one of the key factors for ensuring high-quality legal aid services is to guarantee that legal aid providers undergo periodic training on advocacy skills and legal updates.<sup>106</sup>

The UN Principles and Guidelines ask Member States to develop standardized training programmes for lawyers and paralegals providing legal aid, and to ensure that they have adequate training.<sup>107</sup> Such training courses may be optional or mandatory, and may be provided by the bar, or by the national legal aid body. In some cases, training may be delivered to legal aid providers jointly with other criminal justice stakeholder, such as police, prosecutors, prison staff or judges, to improve coordination and communications and facilitate smooth operation of the criminal justice system. In countries where legal aid bodies oversee and provide legal aid services, training may also be provided to administrative staff of the legal aid body.

Globally, only half (49 per cent) of Member States responding to the Global Study had made it mandatory for legal aid providers to engage in periodic skills training. This proportion was only marginally higher (53 per cent) in countries that had reformed their legal aid system during the past decade. According to national experts, only 37 per cent of countries that made periodic skills training compulsory allocated public funding towards such training.<sup>108</sup>

In **Argentina**, all employees of the Federal Public Defender’s Office must complete a certain number of training hours every year, organized by a Training Unit and covering four types of competences: **technical competences** (the knowledge of the criminal and procedural law, human rights, litigation techniques, oral and written argumentation); **relational competences** (development of the ability to manage conflicts, team work and leading groups); **functional competences** (the ability of organizing work, decision-making and management of information); and **professional competences** (professional ethic and permanent learning). In addition, teleconferencing has been implemented to make it possible for all offices across the country to have access to training delivered in the city of Buenos Aires.

<sup>106</sup> UNODC/UNDP *Global Study*, p. 68.

<sup>107</sup> UN Principles and Guidelines, Guidelines 14–16.

<sup>108</sup> UNODC/UNDP *Global Study*, p. 100.

In **China**, to support the development of standardized training programmes for legal aid lawyers, video training courses were developed on a variety of issues, such as services in death penalty cases. The Legal Aid Center of the Ministry of Justice held special training for providers with the participation of university professors, and representatives of the prosecution, relevant ministries such as the Ministry of Public Security, judges from the Supreme People’s Court, as well as experienced private lawyers. In addition, consultation services for legal aid lawyers are offered by a National Online Support Platform, which aims to provide: convenient and efficient services for obtaining laws, regulations and relevant judgements; timely online legal consultation services by other specialized or senior lawyers; and access to expert advisory services focusing on major and difficult legal problems encountered by legal aid lawyers across the country.

Legal Aid **South Africa** provides regular training for its public defenders to keep them up to date on the latest developments in the law. It also conducts specialist training and an induction programme for its apprenticed candidate attorney public defenders who staff the district courts. The latter are trained in trial advocacy skills and accompany experienced public defenders to court before they begin defending legal aid clients themselves – initially under supervision.

In **Ukraine**, the Coordination Center for Legal Aid Provision, together with partner NGOs, has developed a series of training courses for defence lawyers. They are conducted by defence lawyers who have been trained as trainers and cover both knowledge of national laws and international instruments, and other skills such as best practices of preparing a lawyer for a case or speaking in court. The Ukrainian Bar requires that a number of courses are accredited by the Bar are completed annually. Therefore, all lawyers, even those who do not provide free legal aid, undergo regular relevant training.

#### 4. Establishing measures to ensure access to legal aid at all stages of criminal proceedings

##### *i) Early access to legal aid*

**Guidelines 4, 5 and 6** of the UN Principles and Guidelines outline measures to ensure access to legal aid at all stages of the criminal justice process. For such access to be meaningful, there should be a system in place to ensure effective defences – for example, through efficient case management and continuity of representation, or appropriate recording of the case to ensure access to all documents.

Allowing for early access to legal aid is an important tool in ensuring quality of legal aid services. When the lawyer is involved from the beginning of the case, he or she is able to provide relevant advice and influence the outcomes of the case. It also allows for requesting early release of the client.<sup>109</sup> One way to achieve this is through duty lawyers’ schemes in police

<sup>109</sup>UNODC/UNDP *Handbook on Early Access to Legal Aid*, pp. 1–2: The early stages of the criminal justice process are also crucial for the efficiency and effectiveness of the criminal justice system as a whole. During this period, the extent and quality of evidence collected, and thus the prospects for a fair trial and appropriate decisions about guilt or innocence are determined. Decisions are made about pretrial detention that have far-reaching consequences not only for the individuals concerned and their ability to support their families and dependents, but also with regard to the resources needed to maintain the facilities in which they are incarcerated. Prompt access to legal advice and assistance is the key to guaranteeing a fair trial and the rule of law. Early intervention by legal aid providers helps to ensure that rights are respected, improves the efficiency and fairness of the criminal justice system and represents an important safeguard against torture and other forms of ill-treatment. It also has the potential to reduce costs, both for the system overall and for the individual and families concerned, for example, in terms of the costs involved in paying bribes or the loss of income resulting from detention.

stations and other detention centres.<sup>110</sup> Specific standards can be developed for provision of legal advice at this stage.

Increasingly, in some jurisdictions, instead of arresting and detaining suspects for the purpose of an interview, the police are conducting voluntary interviews. In some countries, suspects in voluntary interviews have the same right to free and independent legal advice and so it is important that the responsibilities of the police in allowing early access to legal aid, as set out above, are also relevant to these interviews.

#### RULING ON EARLY ACCESS TO DEFENCE

In the case of *Barreto Leiva v. Venezuela*, the Inter-American Court of Human Rights ruled that “the right to defence must necessarily be able to be exercised from the moment in which a person is identified as a possible perpetrator or participant in a crime and only ends when the process is closed including, where appropriate, the execution phase of the sentence. Otherwise, the conventional guarantees that protect the right to defence, as article 8.2.b, would be subject to the fact that the suspect is in certain procedural stage, leaving open the possibility that his/her rights are violated on early stages of the process through activities from the authorities which are unknown by him/her or that he/her can’t control or effectively oppose to, all of which is clearly contrary to the Convention. In fact, preventing a person from exercising his/her right of defence from the moment in which an investigation against him/her begins and the authority decides or executes acts that affect rights means to enhance the State’s investigative powers to the detriment of the suspect’s fundamental rights.”<sup>a</sup>

<sup>a</sup> *Barreto Leiva v. Venezuela*, Judgement of 17 November 2009, para. 29.

The European Court of Human Rights deals with this issue in a landmark case – the *Salduz* case.<sup>111</sup> In *Salduz v. Turkey*, the Court held that people detained at police stations have the right to access a lawyer before being questioned; otherwise, there could be a violation of the fundamental right to a fair trial. This decision prompted reform in European countries, some of which developed specific standards as a result. For example, the **Netherlands** developed a protocol for lawyers in police stations, which also includes a checklist for police interrogation that include the key topics to be discussed with clients.<sup>112</sup>

Research has shown that there can be problems with the role of the police in allowing early access to legal aid. In **England and Wales** there is a legal requirement for the police to inform persons who waive their right to legal advice about the possibility of speaking to a lawyer over the telephone to help them make a decision. In some police stations, however, this requirement is simply ignored.<sup>113</sup> Seeking to address this problem, Dr Vicky Kemp from the University of Nottingham has developed an application to advise detainees of their legal rights independently of the police. A prototype app has been tested with 100 detainees in two large custody suites.<sup>114</sup> While this has the potential to help persons make informed decisions particularly over the waiver of legal advice, it was noted that detainees’ legal rights as set out in legislation are not always available on the ground. The legislation required legal advice to be available “as soon as

<sup>110</sup> *Salduz v. Turkey* (2008), Appl. No. 36391/02.

<sup>111</sup> *Ibid.*

<sup>112</sup> Jan Boksem, Defence counsel at police questioning: protocol. Unofficial translation from Dutch.

<sup>113</sup> Kemp, V., “Digital Legal Rights: Suspects’ understanding of the right to legal advice and potential barriers to accessing advice”, in *Criminology and Criminal Justice* (2019, forthcoming).

<sup>114</sup> Kemp, V., “Digital Legal Rights for Suspects: Users’ Perspectives and PACE Safeguard” (2018). Available at: <http://eprints.nottingham.ac.uk/52777/1/Final%20Report%20for%20Publication%204.7.18.docx.pdf>.

practicable” following a request, but in many cases, lawyers did not contact their clients until the police interview, which could be many hours later. The app also informed people that they could speak to a lawyer over the telephone, as required by legislation, but detainees were sometimes denied this right in practice.<sup>115</sup> While the use of new technology is a useful tool, it still remains most important for States to fulfil the obligation of protecting their citizens’ rights in the criminal justice system to ensure that legal rights are respected and measures are available in practice.

## 5. Establishing structure and organizational measures to facilitate delivery of quality services

Another important element of quality to be guaranteed by the legal aid system is structure and organization. Structural measures refer to the management and operating system, including procedures for record-keeping, supervision and staff development policies. These facilitate quality performance of the individual legal aid provider. Structural variables are only moderate predictors of likely quality of performance and outcome. However, scoring highly on structural aspects tends to indicate that a legal aid provider will be more likely to perform competently and to achieve acceptable outcomes.<sup>116</sup>

Therefore, structural measures are considered here as measures for *establishment* of quality, or preconditions for quality, and not for *measuring* quality. **It is also important to note that some of the measures listed below are mentioned in international instruments and therefore can be seen as part of the obligation of Member States to provide effective legal assistance to persons facing criminal charges.** Others are useful practices mentioned by Member States in their responses to the UNODC/UNDP Global Study. They may include:

- Establishing caseload limits to prevent overloading providers with work volume that precludes individualized attention to each client and his or her legal needs;
- Activating practicable systems of practice management, including training senior practitioners to be effective, proactive supervisors who can actively mentor legal aid providers on a day-to-day, case-by-case basis;
- Negotiating for cooperation from State justice actors on scheduling and logistics to enable providers to use time efficiently by consolidating provider’s procedural appearances thereby cutting down on travel time from office to court and other agency locations and back;
- Developing case management and statistical reporting programming to save time and enable legal aid operations to track needs and cases, and to produce reports documenting trends in legal aid practice, expenditures, outcomes and data substantiating budget processes;
- Procuring sufficient State funds for facilities and services to support the defence of clients’ rights, from office space and technical supplies such as printers, computers and connectivity, to clerical assistance, social work services and access to independent investigators and forensic experts;

<sup>115</sup> Kemp, V., “Digital Legal Rights: Suspects’ understanding of the right to legal advice and potential barriers to accessing advice”, in *Criminology and Criminal Justice* (2019, forthcoming).

<sup>116</sup> Professor Alan Paterson and Professor Sherr, *Peer Review and Cultural Change: Quality Assurance, Legal Aid and the Legal Profession* (ILAG, 2017).

- Advocating for participation by legal aid providers in legislative and administrative processes that affect the practice of defending the rights of the poor and vulnerable.

Highlighted below are some of the main measures that can be taken in legal aid systems. Additional measures could be developed, in particular a more extensive use of new technology and the internet for managing cases, delivering training, following checklists and assessing performance.

*i) Adequate time and facilities to prepare the defence*

As mentioned above, having adequate time and proper facilities to prepare the defence is an important guarantee which is seen as part of the right to a fair trial.<sup>117</sup> According to the findings of the UNODC/UNDP Global Study, one of the key factors for ensuring high-quality legal aid is establishing caseload limits to prevent overloading providers with a work volume that precludes individualized attention to each client and his or her legal needs.<sup>118</sup> This quality measure aims to safeguard against incompetent and/or overloaded legal aid providers – a large proportion of national experts report that those legal aid providers who have too many cases (45 per cent) or who feel that they lack the legal expertise or skills required for a specific case (44 per cent) can refuse to take a case. Legal aid providers who feel they lack the expertise in the law or skills required by a specific case can refuse to take a case.<sup>119</sup>

States should create structures within the system to ensure that lawyers have enough time to prepare a case. This may include incentives for lawyers to invest sufficient time in the preparation of a case, for example, by establishing a fee that corresponds to the amount of work required in such a case.<sup>120</sup>

#### CASE QUOTAS AND WORKING HOURS

In **Lithuania**, the order of the Minister of Justice sets the quota of lawyers providing legal aid on a regular basis, working exclusively on legal aid cases for a fixed monthly salary. Lawyers providing legal aid on an ad hoc basis are paid by the hour, and the rate is fixed by the State. They are required to dedicate 40 hours to the provision of secondary legal aid on week days (except in cases where working week is less due to national holidays or vacation), as well as on days off. For lawyers providing legal aid in criminal cases on an ad hoc basis in Lithuania, the provision of secondary legal aid is paid by the actual hours spent, but not more than the maximum number of hours foreseen for certain cases according to the seriousness and the type of the offence. Also, reimbursement for certain procedural steps is set. For example, in case of intentional very grave and intentional grave crimes, 48 hours are given for the legal aid lawyer. From then, a maximum of 11 hours is foreseen for pretrial investigation stage, proceedings before the court of first instance and preparation of appeal are paid for a maximum of 21 hours, and so forth.

In **Ukraine**, the Coordination Center for Legal Aid Provision recommends to its Regional Centers not to sign contracts with defence lawyers if they have already been assigned more than 30 cases. However, Regional Centers may deviate from this recommendation and sign a contract with such a lawyer if, for example, this attorney specializes in the areas covered by a particular case or when there are no other lawyers in the area/district who could take on such a case.

<sup>117</sup>HRC GC 32 on Article 14 (3) (d) of ICCPR.

<sup>118</sup>UNODC/UNDP *Global Study*, p. 68.

<sup>119</sup>*Ibid.*, p. 109.

<sup>120</sup>Discussed under the project “Enhancing the Quality of Legal Aid: General Standards for Different Countries”.

**CASE QUOTAS AND WORKING HOURS (continued)**

In the **Netherlands**, the number of cases a legal aid provider should handle per year is set between a minimum of 15 and a maximum of 250 criminal cases. A minimum quota is important to ensure that the provider is informed and experienced, a maximum quota prevents an overload of individual providers that may influence the quality of their work.

At the same time, in some countries, the overall availability of competent lawyers might affect this measure. The human and financial resources given to legal aid organizations influence their ability to provide high-quality services, vis-à-vis reaching a large number of beneficiaries. For example, in **Sierra Leone**, the Legal Aid Board has limited human resources to provide services to the large number of indigent persons in the country, so the Board's lawyers are required to handle as many cases as possible per day. This also applies to paralegals who provide advice and legal assistance to indigents in contact with the criminal justice system. In **Kenya**, there is no quota but the distribution of files is ensured to be equitable among the providers.

*ii) Continuity of representation*

In order to ensure the continuity of the defence approach, continuous representation by lawyers who have been involved in the case from an earlier stage of the proceedings is important, provided that the client has not complained about the lawyer, or there has not been misconduct that necessitates changing the lawyer assigned to the case. This can be implemented by the legal aid administration responsible for the appointment of lawyers to individual cases, whether it is the legal aid body or the courts.

According to the findings of the Global Study, among other quality safeguards, 70 per cent of experts reported that, once a legal aid provider was appointed, the same provider always or often remained in the case until it was resolved, unless the original legal aid provider became unavailable or otherwise unfit to provide services. This spares the legal aid beneficiaries from having to deal with successive appointments – a practice that has been found to weaken the mutual trust between legal aid providers and beneficiaries, thereby weakening the quality of services provided.<sup>121</sup>

In the context of the European Union, the preamble of the Directive (EU) 2016/1919 on legal aid<sup>122</sup> provides that, where legal aid has been granted to a suspect, an accused person or a requested person, one way of ensuring its effectiveness and quality is to facilitate continuity in his or her legal representation. In that respect, Member States should facilitate continuity of legal representation throughout the criminal proceedings, as well as – where relevant – in European arrest warrant proceedings.

A survey conducted in the context of the research project “Enhancing the Quality of Legal Aid: General Standards for Different Countries” asked experts about the importance of continuity. The results in general highlighted that continuity of representation strengthens the relationship and mutual trust between client and lawyers and saves time in preparing for a case. Respondents from **Latvia**, the **Netherlands**, **Lithuania** and **Austria** explained that their legal systems proceeded according to the principle of continuity. A policymaker from Lithuania stressed that this practice was good for the beneficiary, as it was more likely that he or she trusts in the advocate

<sup>121</sup> UNODC/UNDP *Global Study*, pp. 68, 109.

<sup>122</sup> See recital 25, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1919&rid=5>.

who knows his or her case. An academic from the Netherlands agreed that this benefited the quality of the defence as the lawyer knows the case and the client.

In **India**, it is not necessary that a legal aid counsel, once appointed, will continue to represent the person until the conclusion of trial. There are no provisions for this, so a lawyer who might be appointed at the remand stage, i.e., production prior to commencement of trial, may not be appointed to defend the accused at trial. However, there are some court orders which provide that if the defence lawyer is appointed by the court, then he will remain in charge of the brief until the conclusion of the case.

### *iii) Supervision and mentoring*

The importance of supervision of the work of legal aid providers is highlighted in **Guideline 14** of the UN Principles and Guidelines, in the context of the work of a paralegal, but this is also appropriate for lawyers, especially since in many countries the bulk of legal aid services is provided by young lawyers and recent graduates. Supervision allows for frequent, even daily feedback and on-the-job mentoring of legal aid providers by more experienced lawyers. To make supervision meaningful, identifying experienced lawyers with leadership skills is important, as well as providing training for the supervisors or mentors on how to fulfil their role. Supervision can be built into the structure of legal aid services, as is often the case with public defenders' offices (see below in chapter 3).

Supervision can also be implemented in a contract system, as part of the requirements under the contract. For example, in **England and Wales**, the 2017 Standard Crime Contract includes a requirement for supervision, so that any contracted organization identifies an individual who has a sufficiently high level of expertise to be considered a supervisor for the purpose of the contract. It is the supervisor's responsibility to look at their organization's casework, training and development needs, and to ensure that quality standards are maintained. Organizations must also maintain a specific ratio of supervisors for up to four caseworkers to ensure appropriate support to deliver a quality service.<sup>123</sup>

Mentoring programmes are increasingly common in **Canadian** legal aid plans, either provided directly or financially supported by the plans. They are typically available for junior lawyers, and mentoring is provided by both staff and private lawyers.

In **Haiti**, the Port-au-Prince Bar Association selects the most qualified trainee lawyers from the bar school. A practice that almost all of the legal aid offices have adopted is the supervision of trainee lawyers by more experienced lawyers.<sup>124</sup> There are no universal standards for ratio of supervisors to staff, but this could be a useful guidance in establishing services.

In **China**, support provided by the legal aid agency is regarded as an important tool for the individual provider, particularly in complicated or high-profile cases when a legal aid lawyer may need substantive or procedural legal advice or could be facing attempts of third parties to influence the outcome of the case. The agency can also provide information and recommend experts for specific legal or forensic issues.

<sup>123</sup> 2017 Standard Crime Contract in Annex A, p. 21: Supervisor Self declaration form. Available online at: <https://www.gov.uk/government/publications/standard-crime-contract-2017>.

<sup>124</sup> DPKO/USAID *Assessment of Legal Aid in Haiti: Lessons Learned 2017*, p. 30. This study was led by the Justice and Corrections Service of the Office of Rule of Law and Security Institutions, DPKO. Available online at: <https://issat.dcaf.ch/download/125808/2568524>.

### SUPERVISION DEPARTMENT WITHIN THE PUBLIC DEFENDER'S OFFICE IN ISRAEL

The PDO established a dedicated department for supervising quality of services. Different degrees of supervision are required according to the experience and skills of the providers and the complexity and seriousness of the case. Each external lawyer is paired with an internal staff lawyer to approach for advice, and personal supervision includes online consultation, approving plea bargains, approving use of experts such as social workers, periodical supervision meetings, and brainstorming on legal issues.

The supervision departments in the districts are also in charge of checking clients' complaints via telephone/writing/stopping by the office. The internal lawyer in charge of the external lawyer investigates the complaint. The department will try to solve the problem when there is a real issue. Replacing the lawyer will only take place in extreme situations.

In **South Africa**, supervision is provided by internal staff. Supervisors are legal practitioners with a minimum of 7 years of post-admission and 9 years post-qualification experience who carry a case load for 1–2 days a week, and supervisory duties for 3–4 days a week, and are responsible for their own case files, as well as implementation of legal programmes relating to quality. To assure the effectiveness of the supervision programme at local offices, a Supervisory Competency Assessment is conducted at regular intervals and all supervisors are assessed based on several criteria. The assessment covers 9 key areas – file supervision, court supervision, legal administration supervision, team leadership, team performance, legal programme implementation, stakeholder skills, values alignment and personal attributes.

### LEGAL AID SOUTH AFRICA: SPECIFIC OUTPUTS OF SUPERVISION

1. The supervisor ensures that files of members of his team are supervised as per the Supervisory Differentiation Model.
2. The supervisor ensures that all members of his/her team make comprehensive file/consultation notes in all their matters.
3. The supervisor provides all team members with regular feedback on the quality of their files, including areas for improvement.
4. Criminal – The supervisor monitors practitioner files so that there are no unnecessary postponements, unnecessary withdrawal by practitioners, and for early identification of conflict of interest.
5. The supervisor monitors files to ensure that they do not exceed target turnaround times and engages with practitioners to implement interventions to speed up matters.
6. The supervisor records the notes taken on all engagements, advice, follow-ups and interventions made on practitioners' case files.
7. The supervisor ensures that the court performance of members of his team is observed as per the Supervisory Differentiation Model.
8. The supervisor is able to identify practitioner performance gaps and is able to implement interventions to ensure improvement.

#### iv) *Conditions of service*

Adequate conditions of service and compensation levels enable legal aid service providers to attract experienced and specialized lawyers, and to create incentives for lawyers to perform better through the prospect of increased payments or other benefits. Countries apply different methods of payment. Research on legal aid in Europe recommended as a good practice using fixed fees for legal aid cases rather than paying lawyers per working hours.<sup>125</sup> In systems that use staff lawyers, other incentives could be considered, such as bonus pay, a (faster) promotion, or additional leave.

The incentive could also be negative, for example, by sanctioning lawyers who cause unnecessary delays to reimburse the costs of the delay from their own salaries. In **Germany**, such a regulation exists in Section 145 (4) of the Code of Criminal Procedure.

**Ukraine** established incentives for lawyers on the basis of outcomes, such as reduced sentences. In Ukraine, there is a Resolution<sup>126</sup> that regulates the procedure for paying legal aid lawyers, stating that if a defence lawyer provides legal aid, then an hour of work is paid in the amount of 5 per cent of the subsistence minimum, but taking into account the complexity of the case, or the number of hearings attended. One of the important factors that affect payment is a successful outcome in court. Thus, the government considers it necessary to encourage lawyers; in turn, it is clear that the result of the case in court and the quality of the work of a lawyer cannot be completely interrelated.

In **Argentina**, federal public defenders are magistrates matched with judges and prosecutors in hierarchy and payment.<sup>127</sup> This allows for appointing well-qualified lawyers who have a vocation for the defence and who can build their careers within the Public Defender's Office.<sup>128</sup>

In the **Republic of Korea**, staff lawyers who perform very well in the quality assurance programme may receive a financial bonus. In other countries, the lawyers who excel will be publicly congratulated within the institution for which they are working. For private lawyers, incentives can be that they can advertise their success to the public – like a quality kite mark. Furthermore, in a risk-based model, it is likely that private lawyers who have performed very well in the assessment will be spared a further assessment for several years, for example, in **Scotland**, practitioners who receive high marks are unlikely to be reviewed again for another six years.

The **Victoria Legal Aid Service in Australia** has recently conducted a consultation on how to improve funding and remuneration in order to ensure the quality of services.<sup>129</sup>

<sup>125</sup>Hill, *Innovating Justice, Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?* (2014), 108.

<sup>126</sup>Resolution No. 465 of the Cabinet of Ministers, <https://zakon.rada.gov.ua/laws/show/465-2014-%D0%BF>.

<sup>127</sup>Normative reference, Law 27.149, article 50: *Parity of remunerations*. Remuneration of the members of the Federal Public Defender's Office cannot be inferior to those of the members of the National Judicial Branch and of the Federal Prosecutor's Office and are equated in terms of treatment, scale and hierarchy. The above-mentioned assimilations extend to all patrimonial, social security and tax-related effects.

<sup>128</sup>Law 27.149, article 50: *Parity of remunerations*. Remuneration of the members of the Federal Public Defender's Office cannot be inferior to those of the members of the National Judicial Branch and of the Federal Prosecutor's Office and are equated in terms of treatment, scale and hierarchy. The above-mentioned assimilations extend to all patrimonial, social security and tax-related effects.

<sup>129</sup>Delivering High Quality Criminal Trials, Consultation and options paper, 2014. "The focus of this consultation was to ensure that Victoria Legal Aid funded representation in criminal trials was of the highest possible standard, and regulated by a system of fees that incentivize efforts by the right people, at the right intensity, at the right time – particularly before a trial starts."

v) *Case management and use of technology*

Case management is a standardized monitoring and management tool which is used widely by courts and prosecution services. Introducing computerized case management to compile all relevant data on the case (on the beneficiary, legal proceedings, actions taken by legal aid providers, etc.), is essential for organizing and systematizing the work, thus facilitating the work of individual legal aid providers and ensuring good record keeping.

In **England and Wales**, the Legal Aid Agency works almost entirely digitally; providers submit applications for legal aid and make claims for payment electronically. In **Ukraine**, the Coordination Centre for Legal Aid Provision uses the Comprehensive Information Analytical System, which serves to record the assigning of cases to lawyers, to account remuneration of defence lawyers, and records all possible interactions of lawyers with the Regional Centres. With the help of this system, a defence lawyer can easily and time-efficiently report to the centre on the work done in order to receive payment. The system also collects key data for all cases.

In **China**, the electronic legal aid quality management system operates as a routine administrative management method and daily data collection system, updated in real time. It is an integrated information platform which provides online services, collects data, supervises quality and evaluates performance. It aims at boosting work efficiency by monitoring progress and giving a warning when deadlines are approaching. Legal aid centres at provincial level have access to files and documents of the criminal case under their supervision and carry out research including on the category of the case, or the types of beneficiaries. The use of technology improved case-management and is cost-efficient. In the online system, each case can be accepted and approved within 15 minutes, and all the documents are delivered electronically. Costs saved by processing and evaluating cases through this system can be used to fund other essential services, such as hiring of experts to testify in proceedings, or logistical support such as transportation or rent of office space.

**Indonesia** uses smartphone applications and online services to expand the reach and quality of legal aid services, including through online applications that combine case management and data collection, monitoring and reimbursement, as well as applications that provide legal information or match a client with a lawyer through an online registration desk, based on factors such as the geographic location or substantive nature of the case.

#### **USE OF NEW TECHNOLOGY AND THE INTERNET FOR MANAGING CASES, DELIVERING TRAINING, FOLLOWING CHECKLISTS AND ASSESSING PERFORMANCE IN SIERRA LEONE**

Paralegals, lawyers and other staff of the national Legal Aid Board use a messaging application group to report on their daily activities, support each other and discuss successes and challenges, as well as for supervision and educational purposes. This is very important to the work of the Board, especially in remote parts of the country with limited or no internet access. Without this messaging group, it could take the Board days or weeks to receive activity reports, by which time clients may have been subjected to injustices and abuses in accessing both the formal and informal justice systems.

Paralegals use the group to post their activities for the week, including information on legal empowerment activities in the form of community and school outreach. From this, their supervisors can tell the number of planned visits to provide advice and legal assistance to clients. Paralegals give instant updates on a visit, for example, to a police station, and colleagues including supervising lawyers follow what is going on and provide assistance as and when necessary. Supervisors are able to assess the work of the paralegals in terms of the quantity or quality, and for instance, will demand answers when the paralegal focuses on particular chiefdoms or areas only, or where there is a focus on the formal courts vis-à-vis informal courts or vice versa. Another important issue is to determine whether the topics for outreach events are based on the justice needs of the targeted beneficiaries.

The communications also serve to collect data as, during visits to a correctional centre, paralegals post the following information immediately after the visit: prison population; inmates without indictments; inmates with indictment but not on trial; inmates on remand; and inmates awaiting judgement. This information is compiled at the end of the week for the attention of the Ministry of Justice for the filing of indictments, the Office of the Chief Justice in respect of inmates with indictments but who are not on trial, and the Ministry of Internal Affairs and prison authorities regarding overcrowding.

This information enables the lawyers to prioritize their work and services, more so in addressing human rights abuses. They may take quick decisions to change location in the provision of legal services depending on the information received in various areas of their place of coverage.

During the March 2018 presidential and parliamentary elections, the group was used to educate paralegals on electoral laws and processes as part of the Board's Anti-Election Violence Campaign, which was aimed at ensuring free, fair and credible elections. Paralegals were also able to alert lawyers to represent accused persons charged with electoral offences in a timely manner.

#### vi) *Employing experts*

Another way to achieve higher quality is to employ experts who can testify, explain or provide technical input to a defence case. According to **Guideline 12** of the UN Principles and Guidelines,

*the budget for legal aid should cover the full range of services to be provided to persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, and to victims. Adequate special funding should be dedicated to defence expenses such as expenses for copying relevant files and documents and collection of evidence, **expenses related to expert witnesses, forensic experts and social workers, and these persons' travel expenses.** Payments should be timely.*

#### **OFFICE OF EXPERTS AND TECHNICAL CONSULTANTS IN THE FEDERAL PUBLIC DEFENDER'S OFFICE OF ARGENTINA**

The office is composed of staffed forensic doctors, psychologists, psychiatrists and accountants, who can intervene throughout the entire criminal process. The Programme on Social Issues and Community Relations, comprising mainly of social workers, seeks to promote access to justice in terms of civil, economic, social and cultural rights of persons deprived of their liberty, by eliminating economic or social obstacles that may hinder access to these rights.

#### vii) *Choice of counsel*

There is no recognized right giving a choice of being represented by a particular individual lawyer when legal aid is funded and provided by the State. According to the Human Rights Committee, a defendant using a legal aid counsel is not guaranteed counsel of choice.<sup>130</sup> At the regional level, the **European Court of Human Rights** has noted that regard should be given to the views of the accused person regarding who is appointed as his or her legal aid lawyer.

<sup>130</sup> Communication No. 677/96, *Teesdale v. Trinidad and Tobago*, views adopted by the Human Rights Committee on 1 April 2002, para. 9.6; Communications No. 210/1986, 225/1987, *Pratt and Morgan v. Jamaica*, views adopted by the Human Rights Committee on 6 April 1989, para. 13.2.

It has also recognized, however, that these views may be overridden where there are relevant and sufficient grounds for considering this necessary in the interests of justice.<sup>131</sup> In the African context, there is soft law which recognizes a right of persons to contest the choice of his/her court appointed lawyer.<sup>132</sup>

However, some countries give legal aid beneficiaries the option to choose the lawyer representing them from a list which provides relevant information on the sex, specialization or experience of the lawyer. In countries that do not allow for this, the selection of a lawyer for a case should take into account the needs of the client, which may include certain specializations and education of the lawyer, or language skills.

In **England and Wales**, clients have a choice in who their legal aid provider is, provided that the firm has a contract in the relevant category of law of the case. Digital tools are available, such as “Find a Legal Advisor or Mediator”<sup>133</sup> or “Find a Solicitor”,<sup>134</sup> which enable the client to search in their local area. As part of the Legal Aid Agency’s role of administering legal aid, it runs tender processes to ensure that there is sufficient provision of advice across the whole of England and Wales for all categories of law. In **South Africa**, the Code of Conduct for Legal Professionals also recognizes the freedom of clients to be represented by a legal practitioner of their choice.

In **China**, the Jiangsu Provincial Legal Aid Centre applied measures to optimize designation of lawyers according to three criteria:

1. *Selection is client-oriented.* The Centre established a database of lawyers and, to the extent possible, clients’ preferences are respected;
2. *Selection is based on the complexity and nature of the case.* For example, lawyers with specialized knowledge are assigned to cases involving children, or female lawyers are designated first to provide legal aid for female suspects or defendants;
3. *Selection is done on the basis of continuity, as a principle.* Unless there is a special reason, the same lawyer would be designated to the same legal aid recipient at the stages of investigation, examination and prosecution, and trial, so as to enhance efficiency.

A different organizational measure could offer the beneficiary the possibility to choose the legal aid lawyer – not as a right to choose the legal aid lawyer, but as a right to indicate a preference. For example, article 27 of the Law of the **Republic of Moldova** on State Guaranteed Legal Aid states that “while assigning a defender, the Coordinator of the territorial office shall take into account the applicant’s request to appoint a certain defence lawyer, his or her degree of involvement in the enforcement of other decisions on the delivery of qualified legal aid, as well as other relevant circumstances.”<sup>135</sup>

In any case, even if the defendants cannot choose their lawyers, there needs to be an independent appointment process by the legal aid body.

<sup>131</sup>European Court of Human Rights, Appl. No. 13611/1988, *Croissant v. Germany*, Judgment of 25 September 1992, para. 29.

<sup>132</sup>African Commission on Human and Peoples’ Rights, Principles and guidelines on the right to a fair trial and legal assistance in Africa, art. H(d).

<sup>133</sup>Available online at: <https://find-legal-advice.justice.gov.uk/>.

<sup>134</sup>Available online at: <http://solicitors.lawsociety.org.uk/>.

<sup>135</sup>Available online at: [https://www.oijj.org/sites/default/files/law\\_on\\_state\\_guaranteed\\_legal\\_aid.pdf](https://www.oijj.org/sites/default/files/law_on_state_guaranteed_legal_aid.pdf).

## D. Establishing specialized legal aid services

The quality of services is of particular importance when it comes to the delivery of legal aid to groups with particular rights and/or specific needs, who should enjoy equal access to legal aid. **Principle 13** of the UN Principles and Guidelines establishes that the skills of lawyers should be commensurate with the crime and the needs of clients. Therefore, when providing legal aid to such clients, specific standards and training should be developed, as well as vetting and accreditation procedures for legal aid providers.

According to **Principle 10**, special measures should be taken when delivering legal aid to women, children and groups with specific needs, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons. States should also ensure that legal aid is provided to persons living in rural, remote and economically and socially disadvantaged areas, and to persons who are members of economically and socially disadvantaged groups.<sup>136</sup>

According to the findings of the Global Study, specialized legal aid services are most commonly available for children (as reported by 57 per cent of Member States), persons with disabilities (43 per cent), refugees, asylum seekers and stateless persons (38 per cent) and women (37 per cent). Some 29 per cent of Member State respondents indicated that specialized legal aid services are not offered in their countries. As many as nine in ten responding Member States reported that they have put in place a range of specialized units and/or specialized personnel to work with children who are suspected or charged with a criminal offence. However, it is noteworthy that, out of all professionals involved in such proceedings, lawyers are the least likely to be specialized (35 per cent), followed by the police (51 per cent), prosecutors (55 per cent) and judges (77 per cent).<sup>137</sup> This is a consequence of the obligations contained in the Convention on the Rights of the Child for States to establish a specialized juvenile justice system for children accused, suspected or charged with a criminal offence.

Generally speaking, measures to ensure quality of legal aid for marginalized or groups with special needs may include:

- *Specifying roles of legal aid providers and authorities:* It is important to specify the role and responsibilities of legal aid providers and authorities vis-à-vis each group with special needs. These can be drawn from the laws/policies/regulations in force in the jurisdiction. For instance, if there are specific legal aid schemes that afford protection to mentally disabled persons, which entail paralegals visiting mental hospitals to render services to mentally disabled, then it should be clearly specified to lawyers in their appointment letters or duty notes that they are required to visit the hospital a specific number of times in a week.
- *Special panels:* It is beneficial to have special panels to deal with specific special needs groups. This ensures that effective specialized legal representation can be provided.

<sup>136</sup> Countries may prioritize the needs of different groups or define additional groups they consider vulnerable. For example, in China there are specialized legal aid services for the elderly (senior people), for persons with disabilities, and to persons belonging to ethnic minorities. In South Africa, Legal Aid South Africa has identified pretrial detainees as a group with special needs, especially those granted bail but who are unable to pay it. In Viet Nam, the new legal aid law of 2017 recognizes ethnic minorities, people permanently residing in areas with exceptionally difficult socio-economic conditions, lonely elderly people and persons with disabilities.

<sup>137</sup> UNODC/UNDP *Global Study*, p. 149.

For instance, in the case of refugees or asylum seekers, not all lawyers might have the requisite knowledge that would enable them to provide quick redress in cases where there is fear of immediate deportation or detention.

- *Capacity-building*: If special panels are appointed, or even where legal aid providers are providing assistance to all groups, their training should include sessions on special needs groups – laws, policies, needs, and their responsibilities towards each group.
- *Specific reporting*: For each special category, specific reporting on legal assistance provided, particulars of cases, challenges faced and unresolved issues can be important in not only documenting legal services provided to particular groups but can also shape policy changes or push implementation of existing laws.
- *Training modules*: It would be helpful to prepare standardized training modules for imparting training to legal aid providers and administrators. This could include the use of innovative training techniques and methods for effective learning.
- *Guidebooks with standards and jurisprudence*: For the benefit of legal aid functionaries, as well as creating awareness among public and other interested groups, guidebooks can be prepared on the standards and jurisprudence for each special needs group. These can lay down basic minimum standards for quality legal aid services to such groups.
- *Periodic monitoring by legal services authorities*: As with any service, monitoring is essential to ensure quality of services provided. This encapsulates the other points mentioned above and can form part of the regular monitoring functions of legal services authorities.

## 1. Legal aid for persons with disabilities and mental health problems

Persons with disabilities require assistance in order to fully understand the legal proceedings and adequately participate in them without discrimination. The type of assistance required will differ depending on the type of disability, and may require certain adjustments in the court room, for example, allowing for entry of service dogs, making sure a translator for sign language is available, or ensuring that the court room allows for wheel-chair access. As explicitly stated in the United Nations Convention on the Rights of Persons with Disabilities:<sup>138</sup> “1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages; 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.” This should include legal aid providers.

In **China**, legal aid services provided in Guangzhou took into account the needs of persons with disabilities through a dedicated programme, which included, for example, legal aid information in Braille for the blind, sign language translators for the deaf, particularly during the process of lawyers’ interviews, as well as home visits for those with limited mobility. Lawyers participated in legal consultations and lectures on the legal needs of persons with disabilities, and legal aid institutes in the city designated lawyers to defend such persons, both as offenders and as victims.

<sup>138</sup> General Assembly resolution 61/106, Article 13 on “Access to justice”.

In **Argentina**, the Federal Public Defender’s Office provided legal representation to persons with mental and physical disabilities through the “Public Defenders of Minors and Incapacitated Persons”. Acting in the interests of the people they represent, public defenders can coordinate both judicial and extrajudicial actions. The “Programme on Healthcare, Disability and Older Adults Issues” aimed to provide a comprehensive range of services to enable persons with disabilities to fully exercise their human rights.<sup>139</sup> There is also a group of specialized lawyers created within the Office in compliance with the National Mental Healthcare Act, who represent persons with mental healthcare issues when they are involuntarily hospitalized.

**India** has a separate scheme for provision of legal aid for mentally ill people, including mentally ill prisoners.<sup>140</sup> Moreover, persons with disabilities are eligible for legal aid irrespective of their income levels.<sup>141</sup>

In **Israel**, the National Public Defender’s Office issued guidelines on representing persons with disabilities, on the basis of the legal right to representation by a public defender of persons with mental disabilities in every criminal proceeding, regardless of their financial situation. There is a dedicated department representing these clients; one of its core functions is to monitor the quality of representation by building professional knowledge in this specific area, providing continued training to external staff and supervising their work. This includes consultation with experts whose services are covered by the budget of the PDO. In order to cooperate with experts more efficiently, the PDO maintains a database that includes an updated list of experts sorted by area of expertise and professional experience. The department takes a holistic approach and deals with a variety of legal issues relevant to the client, including through cooperation with civil legal aid services. It also takes action against illegal practices such as unjustified physical restriction of these persons.

In **Lithuania**, secondary legal aid is provided regardless of property owned and income received of persons who have a severe disability or incapacity for work, or if a level of considerable special needs has been established. When a suspect or the accused is a person with physical or mental disability, the presence of a lawyer is mandatory.

## 2. Child-friendly legal aid

Legal aid providers have a significant role to play in ensuring that children in contact with the criminal justice system – as alleged offenders or victims participating in proceedings – are dealt with in accordance with the relevant rights and laws, including specialized processes. Legal aid providers can help to ensure that, from the outset, suspects and accused persons who are children are correctly identified as such and treated accordingly throughout the criminal justice process.

The UN Principles and Guidelines provide detailed analysis of the type of services required for child-sensitive legal aid in **Guideline 10**. For the first time, it defines the concept of child-friendly legal aid and develops the rights recognized in the Convention on the Rights of the Child into specific guidance on providing such assistance to children. Child-friendly legal aid is

<sup>139</sup>This included strengthening the Federal Public Defenders’ skills on issues related to the right to healthcare, and in defending the rights of persons with disabilities. One of the main activities carried out was the elaboration of the “Protocol on Access to Justice for Persons with Disabilities”, in consultation with the Prosecution and Ministry of Justice and with contributions from the United Nations Committee on the Rights of Persons with Disabilities. The Protocol was disseminated to justice administrators together with a training for trainers.

<sup>140</sup>NALSA (Legal Services to the Mentally Ill & Mentally Disabled Persons) Scheme (2015).

<sup>141</sup>Section 2(g), Legal Services Authorities Act (1987).

defined in **Guideline 11** as “the provision of legal assistance to children in criminal, civil and administrative proceedings that is accessible, age appropriate, multidisciplinary and effective, and that is responsive to the range of legal and social needs faced by children and youth. Child-friendly legal aid is delivered by lawyers and non lawyers who are trained in children’s law and child and adolescent development and who are able to communicate effectively with children and their caretakers.” **Guideline 11** also recommends that States take measures to establish child-sensitive legal aid systems. States tend to adopt an adult-centred approach, particularly when dealing with young suspects, which needs to be addressed so that the provision of child-friendly legal aid operates within the context of a child-friendly system of justice.

Child-friendly legal aid is an important topic that is covered in dedicated publications, notably the guidance tool *Child-Friendly Legal Aid in Africa*, jointly developed by UNODC, UNDP and UNICEF, to provide guidance to practitioners and policymakers.<sup>142</sup> There are many relevant international standards that apply to children in the criminal justice system,<sup>143</sup> which are beyond the scope of this publication, that any legal aid provider working with children should be familiar with. The United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice are the most recent standards and provide for States:

35 (b) To ensure that children have continued access to government-funded legal aid during all stages of the justice process; (c) To ensure that children can exercise their right to appeal a sentence and obtain the legal aid necessary to do so.

The discussion here focuses on measures that are relevant to ensuring quality of services, as captured in **Guideline 10** above. A high-quality system of legal aid for children requires the establishment of professional standards for legal assistance providers, and training which focuses on the unique needs of child clients and on the development implementation of specialized legislation related to children, as a recognized and respected area of legal specialization.<sup>144</sup> **Canada** has a Youth Criminal Justice Regime that ensures that legal aid is available for all young persons facing charges. In response, several Canadian legal aid plans have established specialty clinical programmes to serve young people charged with criminal offences.

#### GOOD PRACTICES FOR ORGANIZATIONS THAT PROVIDE LEGAL AID TO CHILDREN<sup>6</sup>

1. Identification of target areas for the provision of child-friendly legal aid based upon evaluation of the needs for child-friendly legal aid.
2. Coordination with other agencies and groups providing legal aid in order to minimize duplication of effort, as well as coordination with other service providers to ensure that children are linked into essential services.
3. Creation of minimum standards for providers of child-friendly legal aid.

<sup>142</sup>UNODC, UNDP, UNICEF *Child-Friendly Legal Aid in Africa* (2011), pp. 16–20.

<sup>143</sup>Relevant international legal framework on justice for children: the Convention on the Rights of the Child; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules); the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules); the Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines); the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime; and the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice.

<sup>144</sup>UNODC, UNDP, UNICEF *Child-Friendly Legal Aid in Africa* (2011), pp. 16–20.

4. Advocacy for comprehensive supported child-friendly legal aid programmes, including government and non-government actors.
5. Staffing and resourcing of legal aid delivery programmes that include lawyers and non-lawyers.
6. Provision of continuing education to staff service providers.
7. Encouragement and support for those who provide direct services to children.

<sup>4</sup>UNODC, UNDP, UNICEF, *Child-Friendly Legal Aid in Africa* (2011), pp. 16–20.

Model rules governing the conduct of lawyer and non-lawyer advocates for children should set forth the duties of such advocates and applicable standards of professionalism, including integrity, thoroughness, promptness, responsiveness, record keeping and ongoing training. While most countries have rules of professional conduct for lawyers, these standards do not contain specific guidance regarding the representation of children, including the nature of the relationship between advocate and child and the possible conflict between the duty of zealous representation and the duty to act in the child’s best interest. Guidance on how to represent children in cases of conflict with parents would also be useful. These codes of conduct should be amended to provide additional and more specific standards for providing child-friendly legal aid service, especially codes of conduct for legal aid providers, that could include provisions acknowledging and describing the special duties involved in the representation of children, and could also include provisions expressly authorizing the delivery of legal services to children by non-lawyers working with agencies, NGOs, bar associations and individual lawyers, as well as law students to practice law on behalf of children in supervised law school legal clinics. They should also include strict guidelines on vetting and registration of anyone working with children to protect children from potential abusers. Finally, model rules governing the conduct of lawyer and non-lawyer advocates for children could also be developed. These rules would set forth the duties of such advocates and applicable standards of professionalism, including integrity, thoroughness, promptness, responsiveness, record keeping, and ongoing training. The issue of age assessment is a common concern in many countries, in particular those where birth-registration is not yet universal, as well as for unaccompanied minors. Lawyers and paralegals may often be at the forefront of addressing this issue.

Regional standards exist, for example, within the **European Union**. In the European Union context, the Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings<sup>145</sup> is a recent instrument that specifically focuses on children. It foresees, inter alia, the suspected or accused child’s right to legal aid. The Fundamental Rights Agency (FRA) report on Children’s Rights and Justice recommends that “EU Member States should examine the possibility of providing legal aid unconditionally to all children independent of their age, and of their role as suspects/offenders, victims or witnesses in the judicial proceedings. Legal aid should include free access to advice for child witnesses and legal representation for child victims or suspects/offenders throughout the proceedings. The use of specialized children’s lawyers should be promoted.” Practical guidance has also been developed by civil society, led by Defence Children International.<sup>146</sup>

<sup>145</sup><https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0800>.

<sup>146</sup>A European Union co-funded project lead by Defence Children International included the development of a manual on representing children, entitled “Practical Guide for Lawyers: How to defend a child in conflict with the law?” (2018). Available online at: <http://www.mylawyermyrights.eu>.

*i) Providing specialized training for legal aid providers*

Children’s legal aid providers, whether or not formally educated in the law, should receive ongoing training in areas of relevance to the representation of child clients. To the extent possible, training in substantive legal concepts and applicable laws, regulations and rules, as well as skills training in communication, advocacy, negotiation and mediation should be problem-based and interactive. Laws relevant to children comprise of international law, in particular the CRC, national constitutional provisions, legislation and regulations, as well as international and regional standards. There is growing knowledge on how to train professionals and volunteers on children’s rights and on representation of children. The challenge is to convey this information in meaningful ways to those who are working on the ground on behalf of children. Since important core groups of leaders supporting the provision of child-friendly legal services are lawyers and judges, law schools should continue and expand the development of curricula on child rights and child law for undergraduate and post-graduate degree and non-degree courses. Legal aid providers should be also included in professional training provided for law enforcement, judges and prosecutors on children’s rights and child law. In Niger, UNODC trained the lawyers who had been listed by the juvenile judge for representing children on children’s rights and representation and with a special focus on children who had been exploited by terrorist groups.

**MANUAL FOR PRACTITIONERS**

In the context of a project that is funded by the Rights, Equality and Citizenship Programme of the European Union, a manual titled “Advancing the Defence Rights of Children Manual for Practitioners” was developed.<sup>a</sup>

<sup>a</sup> Available online at: <https://fairtrials.org/publication/advancing-defence-rights-children>.

*ii) Assessing the performance of providers of child-friendly legal aid*

To assess the quality of services delivered by providers of child-friendly legal aid, several good practices have been identified which could be used as a criterion against which providers’ actions may be evaluated:<sup>147</sup>

- Knowledge of laws, regulations, and practices relevant to the provision of child-friendly legal aid;
- Knowledge and skills necessary to establish relationships with children, based on knowledge of developmental differences between adults and children, that foster complete and effective communication so that all relevant information is known and considered in decision-making;
- Acknowledgment of the role of the child and his or her evolving capacity in making decisions about steps to be taken on his or her behalf, and accommodation of the role of the child in decision-making in the exercise of professional judgment by the legal aid provider;
- Exercise of effective advocacy on behalf of the child, including determining what model of advocacy will have the most positive short-term and long-term effects upon individual children and groups of vulnerable children;

<sup>147</sup>UNODC, UNDP, UNICEF, *Child-Friendly Legal Aid in Africa* (2011), pp. 16–20.

- Training and skill in understanding the cultural and community contexts in which legal aid is being provided;
- Thoroughness in understanding the problems faced by individual children and vulnerable groups of children and in designing solutions to those problems;
- Ability to conduct thorough investigations to discover all facts relevant to the provision of child-friendly legal aid;
- Ability to navigate multiple systems effectively utilizing the skills of advocacy, negotiation, mediation and in-court advocacy to achieve desired results;
- Knowledge and ability to link children with other essential service providers to ensure that children's needs are addressed in a comprehensive manner;<sup>148</sup>
- Basic knowledge of trauma and its impact on child victims and referral mechanisms to child-victim support centres.

#### LIBERIA – PRACTICE MANUAL FOR PUBLIC DEFENDERS

Lawyers representing children should be knowledgeable in justice for child-related proceedings.

*Key provisions related to criminal responsibility:* Lawyers should acquaint themselves of key provisions related to “criminal responsibility” as provided in international and regional instruments with respect to children in conflict with the law – for example, the age of criminal responsibility. Normally, where there is uncertainty about the age of the child, the children's court orders age assessment as soon as possible. Lawyers should be involved during the age assessment process and ensure that the process is not prejudicial to the child in conflict with the law. Lawyers should be fully cognizant of the rules and procedures regarding diversion in their national laws so as to provide comprehensive legal aid and assistance to the child and ensure the fullest protection of the rights of the child in conflict with the law. If restorative justice programmes are available in the country, lawyers should participate in the court proceedings for using these alternative procedures and for guiding children/parents/guardians accordingly.<sup>a</sup>

<sup>a</sup>*Criminal Defense Practice Manual for Liberian Public Defenders*, developed for the UNODC 2013–2015 project “Promoting Rule of Law and Governance in the Criminal Justice System in Liberia”.

### 3. Legal aid for women

**Guideline 9** of the UN Principles and Guidelines on the implementation of the right of women to access legal aid provides that:

*States should take applicable and appropriate measures to ensure the right of women to access legal aid, including: (a) Introducing an active policy of incorporating a gender perspective into all policies, laws, procedures, programmes and practices relating to legal aid to ensure gender equality and equal and fair access to justice; (b) Taking active steps to ensure that, where possible, female lawyers are available to represent female defendants, accused and victims; (c) Providing legal aid, advice and court support services in all legal proceedings to female victims of violence in order to ensure access to justice and avoid secondary victimization and other such services, which may include the translation of legal documents where requested or required. Guideline 17 establishes that States should provide gender sensitive training to legal aid providers.*

<sup>148</sup>UNODC, UNDP, UNICEF, *Child-Friendly Legal Aid in Africa* (2011), pp. 16–20.

Quality of legal aid services that are in concert with human rights standards also implies establishing gender-sensitive measures. Women, as such, are not a vulnerable group but may be subject to specific obstacles in accessing justice and may face discrimination when coming into conflict with the criminal justice system. In many countries, women encounter difficulties in understanding and navigating the criminal justice system due to language barriers, illiteracy or insufficient knowledge of their rights, as well as cultural barriers within communities. Moreover, as suspects, offenders and prisoners, women face unique challenges in the criminal justice system – which is typically geared to deal with male offenders and mostly does not adequately address the different characteristics and needs of women. More often than their male counterparts, female prisoners have complex health needs, post-traumatic stress or drug use disorders, or attempt suicide in prison.<sup>149</sup> The table below shows challenges across the justice chain for women in conflict with the law.<sup>150</sup>

Justice chain	Challenges for women
Prevention/government at the national or local level	<ul style="list-style-type: none"> <li>• Unique experiences of women, including victimization, are not considered in national crime prevention policies.</li> <li>• Criminal law may define crimes that only (or mostly) women may commit.</li> </ul>
Initial contact/police	<ul style="list-style-type: none"> <li>• Women may especially suffer from illiteracy and lack of knowledge about their legal rights; they often lack the knowledge or experience needed to understand and navigate the criminal justice system.</li> <li>• Women have limited financial resources to effectively navigate the system; they cannot afford to pay bail or be released with sureties.</li> <li>• Women with child-caring responsibilities will be most affected by the decision to arrest them.</li> <li>• Legal aid or legal advice is not available in most cases at this stage; women may have no financial resources to pay for legal services.</li> <li>• Women who have been arrested or detained may be at risk of sexual and other forms of violence from State officials, or the threat of abuse.</li> </ul>
Investigation/police	<ul style="list-style-type: none"> <li>• Most police officers are male, and/or are not trained in gender-sensitive questioning.</li> <li>• Suspects and accused persons are at greatest risk of torture or other forms of ill-treatment, ranging from neglect and demands for bribes to coerced confessions and unlawful detention.</li> <li>• Illiterate women are at risk of signing statements that have serious legal implications and of being open to coercion.</li> </ul>
Pretrial/police and legal aid services	<ul style="list-style-type: none"> <li>• Women in pretrial detention are at risk of sexual violence and other forms of abuse.</li> <li>• Women who are being held in pretrial detention may lose their jobs as a result and suffer more stress when contact with children is interrupted.</li> <li>• Even at this stage, most persons accused will not have access to legal advice or representation before the trial.</li> <li>• Pretrial detention periods are long, and this subjects women to many forms of socio-economic consequences.</li> </ul>
Trial/court, prosecution, legal aid	<ul style="list-style-type: none"> <li>• Lack of legal representation can lead to fewer chances of defendants being considered for bail, backlogged judicial systems and leading to slow trials and lengthy pretrial detention.</li> </ul>

<sup>149</sup> UN Women, UNDP, UNODC, OHCHR, *A Practitioner's Toolkit on Women's Access to Justice Programming* (2018), Module 4: Women in Conflict with the Law. See the unique challenges women face in the criminal justice system, pp. 7–8. Available online at: [www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2018/wa2j-module4-en.pdf?la=en&vs=2657](http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2018/wa2j-module4-en.pdf?la=en&vs=2657).

<sup>150</sup> Ibid., table 4.1.

Sentence/court and prison/corrections service, social services	<ul style="list-style-type: none"> <li>• Judges do not rely sufficiently on social services reports to identify mitigating circumstances for women offenders.</li> <li>• Judges are not aware of women’s history and background and do not apply alternatives to imprisonment.</li> <li>• Imprisonment creates unique challenges for women: for example, gender-specific hygiene and health care needs, or lack of contact with the outside world (due to the location of women prisons and/or higher rates of abandonment and stigma).</li> <li>• Pregnant women and women with children are particularly affected: for example, specific health care needs, best interests of the child.</li> <li>• Women prisoners are at risk of sexual violence and other forms of abuse.</li> </ul>
Post-trial/prison service, probation service, social services	<ul style="list-style-type: none"> <li>• Women prisoners experience difficulties in finding housing and jobs; they have difficulties in reuniting with family members and their children. Women are more stigmatized and often rejected by local communities.</li> <li>• Overall, there is lack of access to post-release care and follow-up suited for women, and that address complex mental health needs.</li> </ul>

The CEDAW Committee has outlined some of the particular challenges to women’s access to justice as including “the centralization of courts and quasi-judicial bodies in the main cities, their non-availability in rural and remote regions, the time and money needed to access them, the complexity of proceedings, the physical barriers for women with disabilities, the lack of access to quality, gender-competent legal advice, including legal aid, as well as the deficiencies often noted in the quality of justice systems (gender-insensitive judgments/decisions due to the lack of training, delays and excessive length of proceedings, corruption, etc.) all prevent women from accessing justice.”<sup>151</sup>

Concerning women offenders and female victims and survivors of violence, this should also include institutional measures and standards to guarantee that sufficient female legal aid providers are recruited, retained or promoted to implement women’s right to speak to a female professional and be represented by female lawyers.<sup>152</sup>

The Committee on the Elimination of Discrimination Against Women has explained that a good quality of justice, to establish legal and equal protection of women’s rights “requires that justice systems are contextualized, dynamic, participatory, open to innovative practical measures, gender-sensitive, and take account of the increasing demands for justice by women”. Legal systems need to reform and develop to achieve this good quality of justice. The CEDAW Committee provided additional guidance in its General Recommendation 33 on access to justice for women, which was elaborated upon in the Practitioners’ Toolkit on access to justice for women.<sup>153</sup> The recommendation is to:

*Ensure that legal aid and public defence providers are competent and gender-sensitive, respect confidentiality and are granted adequate time to defend their clients Closely monitor sentencing procedures and eliminate any discrimination against women in the penalties provided for particular crimes and misdemeanours and in determining eligibility for parole or early release from detention Adopt gender-sensitive procedures in order to avoid revictimization and stigmatization, establish special protection units and gender desks in police stations, undertake investigations confidentially*

<sup>151</sup> CEDAW General Recommendation No. 33.

<sup>152</sup> Updated Model Strategies and Practical Measures, para. 16(k-l); UN Principles and Guidelines, Guidelines 9 and 15; and the development of enforceable standards of practice and behaviour and codes of conduct that promote justice and gender equality (updated Model Strategies and Practical Measures, para. 20(d)).

<sup>153</sup> Available online at: [http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access\\_to\\_justiceandruloflaw/toolkit--women-s-access-to-justice.html](http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruloflaw/toolkit--women-s-access-to-justice.html).

*and sensitively and ensure that, during investigations and trials, equal weight is given to the testimony of women and girls as to that of men.*<sup>154</sup>

Criminal justice practitioners are not immune to the social and cultural gender norms that dictate how women should behave. Therefore, when interacting with women in conflict with the law, these actors may enforce and perpetuate stereotypes by, for example, imposing harsher penalties on women in comparison to those imposed on men for certain crimes, such as child abandonment, prostitution or other actions that are perceived to violate the parameters of “proper behaviour” for women. To promote good quality institutions, criminal justice actors must remain aware of the stereotypes, perceptions and attitudes that can influence their actions and responses. CSOs, bar associations and legal aid providers – lawyers providing legal aid services – should have the appropriate experience and knowledge to provide adequate legal advice and should be well informed of women’s special needs, and where possible, female lawyers should represent women. In all cases, legal aid providers must have specific training on the relevant gender equality and related standards that are applicable to the case.<sup>155</sup>

In many countries, dedicated legal aid services for women were established in the form of legal aid centres for women.<sup>156</sup> These services are often linked to specialized units for women in the police or in the prison service.

In **China**, one example can be found with the Municipal Legal Aid Department of Guangzhou, which in coordination with the Guangzhou Women’s Federation has set up 11 legal aid stations for women, that, inter alia, work to initiate programmes for protecting women’s rights and provide assistance to eligible women victims of domestic violence and other crimes.<sup>157</sup>

In **Argentina**, the Federal Public Defender’s Office (FPDO) created the Commission on Gender Issues to facilitate women’s access to justice, provide better defence of their rights and facilitate the implementation of defence strategies with a gender perspective, in particular in cases where women are victims of violence and are in conflict with the criminal law. The staff are lawyers with specific training in international human rights and criminal law and orientation to gender issues. The Commission is entitled to take part in the creation of defence strategies that may be required by public defenders; provide support in cases that the FPDO declares of institutional special interest; take part in the drafting of projects of instructions or recommendations that seek to guarantee an appropriate defence of women’s rights; carry out programmes to raise awareness on the fundamental rights of women; promote cooperation agreements with governmental and non-governmental organizations mainly concerned with women’s rights; and implement mandatory training activities on gender issues for all members of the FPDO through mandatory seminars. The FPDO also created the Programme for Legal Aid to Confined Women to ensure access to justice for women deprived of their liberty and provide them with counselling and legal aid in non-criminal matters if necessary. One of the findings of the Programme was that family conflicts are predominant for women deprived of their liberty, thus counting for most consultations, particularly those related to the problems that children face when mothers are in prison.

<sup>154</sup>Ibid., Module 4, p. 25. Based on CEDAW GR 33, paras. 37(b), 51(m) and CEDAW GR 30, para. 81(h).

<sup>155</sup>UN Women *A Practitioner’s Toolkit on Women’s Access to Justice Programming* (2018), Module 4: Women in Conflict with the Law, p. 26.

<sup>156</sup>In some African countries, legal aid clinics, boutiques or one-stop centres for women were created. See UNODC *Handbook on Improving Access to Legal Aid in Africa* (2010), pp. 81-84.

<sup>157</sup>See also Conference Room Paper 4 of the 27th Session of the Commission on Crime Prevention and Criminal Justice, entitled “Outcome of the Cross-Regional Seminar on Access to Legal Aid in Criminal Justice Systems – Quality Assurance, Holistic Services and Equity in Access”, held in Guangzhou City, People’s Republic of China, 24–25 January 2018. Available online at: [http://www.unodc.org/documents/commissions/CCPCJ/CCPCJ\\_Sessions/CCPCJ\\_27/E\\_CN15\\_2018\\_CRP4\\_e\\_V1803080.pdf](http://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_27/E_CN15_2018_CRP4_e_V1803080.pdf).

In **Viet Nam**, legal aid services have been focusing on providing assistance to women victims of domestic violence as part of a national effort to address domestic violence. Under a UNODC project, training materials were developed for law enforcement, justice officers and legal aid providers who work with such victims. The project provided assistance and training to the National Legal Aid Agency (NLAA) in regard to strengthening its ability to support victims of domestic violence, collecting and analysing data on services provided, and raising awareness of the fact that domestic violence is not a “private issue” and is against the law. Training on providing legal aid to domestic violence survivors was delivered to local and provincial legal aid providers across the country. The project also supported NGOs who provide legal services to victims of gender-based violence.

#### UNODC/UN WOMEN WITH OHCHR: IMPROVING ACCESS TO LEGAL AID FOR WOMEN IN WEST AFRICA

Starting in 2018, the joint project aims at enhancing access to justice for women, targeting Liberia, Senegal and Sierra Leone. It focuses on improving the situation of women who are at particular risk of being “left behind”, namely victims/survivors of violence and women in the criminal justice system, whether as victims, witnesses, accused or prisoners. It promotes gender equality and social inclusion by promoting measures to close important legal and practical gaps that prevent women from accessing the criminal justice system on an equal footing with men, due to existing obstacles in access to legal aid. All project activities will pay specific attention to the multiple and intersecting forms of discrimination affecting some women even more than others (e.g., elderly women, women with disabilities, indigenous or minority women, etc.).

Implementation started with a comprehensive assessment in all three countries to identify gaps and obstacles for gender-sensitive legal aid delivery and recommendations on how women can be better supported in the three dimensions of the project: legal and policy frameworks; legal aid provision; and legal empowerment. Legislative and policy assistance is provided by organizing a series of workshops for relevant national stakeholders to support consensus building on recommendations and action planning with a view to align laws and policies on legal aid with international standards and norms. The capacity of legal aid providers will be enhanced through the development of a training tool, to be contextualized and used at national training-of-trainers-workshops, followed by training conducted by the trainers. Legal empowerment activities will include community legal awareness programmes, with a focus on training women leaders and engaging women’s organizations to enhance legal education and access to legal information for women, especially those who are most vulnerable.

## 4. Legal aid for victims

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:

Principle 4 on legal aid for victims of crime states:

*24. Without prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime.*

UN Principles and Guidelines, **Guideline 7** on legal aid for victims:

*48. Without prejudice to or inconsistency with the rights of the accused and consistent with the relevant national legislation, States should take adequate measures, where appropriate, to ensure that:*

- (a) *Appropriate advice, assistance, care, facilities and support are provided to victims of crime, throughout the criminal justice process, in a manner that prevents repeat victimization and secondary victimization;*
- (b) *Child victims receive legal assistance as required, in line with the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;*
- (c) *Victims receive legal advice on any aspect of their involvement in the criminal justice process, including the possibility of taking civil action or making a claim for compensation in separate legal proceedings, whichever is consistent with the relevant national legislation;*
- (d) *Victims are promptly informed by the police and other front-line responders (i.e., health, social and child welfare providers) of their right to information and their entitlement to legal aid, assistance and protection and of how to access such rights;*
- (e) *The views and concerns of victims are presented and considered at appropriate stages of the criminal justice process where their personal interests are affected or where the interests of justice so require;*
- (f) *Victim services agencies and non-governmental organizations can provide legal aid to victims;*
- (g) *Mechanisms and procedures are established to ensure close cooperation and appropriate referral systems between legal aid providers and other professionals (i.e., health, social and child welfare providers) to obtain a comprehensive understanding of the victim, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs.*

Globally, 61 per cent of Member States responding to the Global Study (only 50 per cent in low-income countries) indicated that legal advice and court services were provided in all legal proceedings to female victims of violence, including victims of sexual and gender-based violence. When asked about the most significant obstacles faced by women in accessing legal aid, national experts identified a wide range of issues, some of which have more prominence in certain regions than others. For instance, 80 per cent of experts in the Middle East and North Africa region reported that women in their countries often do not know how to access legal aid services; 82 per cent of experts in Asia-Pacific observed that women may not be aware that legal aid services are available at little or no cost; and 63 per cent of experts from Eastern Europe and Central Asia and 50 per cent from the Western European and Others Group noted that the lack of specialized legal aid services for women is a major hindrance.<sup>158</sup>

### **Legal aid for victims of gender-based violence**

Legal aid services that are of good quality are particularly important for victims of gender-based violence – typically predominantly women and girls – who face specific challenges in the criminal justice system. Many victims are unfamiliar with the criminal justice process, do not have access to legal aid services and are therefore uninformed of what is expected of them. Free legal aid or court support and interpretation services are also often lacking. The vulnerability of women victims of gender-based violence is not always taken into consideration and their specific needs are often not accommodated. Without adequate legal aid, such women may be at increased risk of secondary victimization, including by being required to testify several times, often in the presence of the accused, and face judicial gender-stereotyping and decisions that are not victim-friendly, which leads victims to withdraw from the case, attrition rates to increase

<sup>158</sup> UNODC/UNDP *Global Study*, p. 149.

and conviction rates to decline.<sup>159</sup> A particular challenge in cases of domestic or intimate partner violence is the economic control over the family income exercised by the perpetrator, which places the victim at a disadvantage, not only in leaving violent relationships but also in fulfilling eligibility requirements for legal aid once they have decided to pursue legal action.<sup>160</sup> Guideline 1 of the UN Principles and Guidelines provides that “If the means test is calculated on the basis of the household income of a family, but individual family members are in conflict with each other or do not have equal access to the family income, only the income of the person applying for legal aid is used for the purpose of the means test.”

The Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice provide:

*Member States [...] are urged, as appropriate:*

- *To ensure that women subjected to violence have full access to the civil and criminal justice systems, including access to free legal aid, where appropriate, court support and interpretation services (para. 18(c)).*
- *To establish, fund and coordinate a sustainable network of accessible facilities and services for emergency and temporary residential accommodation, health services, including counselling and psychological care, legal assistance and other basic needs for women and their children who are victims of violence or who are at risk of becoming victims of violence (para. 19(a)).*

#### MANUAL FOR LEGAL AID PROVIDERS ON CASES OF VIOLENCE AGAINST WOMEN IN VIET NAM<sup>a</sup>

In the context of a UNODC project to assist the government of Viet Nam in implementing its national law on domestic violence (2008), a handbook for legal aid providers was developed as a practical tool to guide the provision of services in cases involving victims of domestic violence. It gave guidance and information to enhance providers' knowledge and skills when dealing with cases involving such victims, in order to improve the overall quality of legal aid services available to all victims. The manual includes background information on domestic violence and the national legal framework, as well as identification methods of such victims and skills for handling legal aid cases. During the implementation of the project, the number of women seeking assistance from legal aid providers increased measurably.

<sup>a</sup> UNODC/Ministry of Justice, National Legal Aid Agency, *Handbook for Legal Aid Providers at Local Level to Provide Legal Aid in Domestic Violence Cases*, Ha Noi, December 2011.

In **Argentina**, the Federal Public Defender's Office has a strong tradition in representing victims before the courts. Within the office, a Programme on Legal Aid for Victims seeks to grant equal and effective access to justice free of charge. There is also a Programme on Legal Aid for Victims of Human Trafficking, staffed with specialized lawyers who grant legal assistance and representation for victims of such crimes. In 2017, a new law on victims was passed, generally known as the “Victims' law”, which created the so-called Public Defenders of the Victims inside the structure of the Office of the Federal Public Defender.<sup>161</sup>

<sup>159</sup> UN Women, UNDP, UNODC, OHCHR *A Practitioner's Toolkit on Women's Access to Justice Programming*, pp. 205–206.

<sup>160</sup> See *Essential Services Package*, Module 3, p. 30.

<sup>161</sup> National Law No. 27.372, “Law on the rights and guarantees of victims of crime”, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/275000-279999/276819/norma.htm>.

In the **Republic of Moldova**, the delivery of legal aid services for victims of crime is ensured by a specialized group of legal aid lawyers; their list is updated every 6 months. In Moldova, victims of crime are entitled to legal aid; children victims of crime and victims of domestic violence are entitled to free legal aid without a means test.<sup>162</sup> In other countries, victims are often represented by lawyers from prosecution services, for example, in **South Africa**.

#### ACCESS TO LEGAL AID FOR VICTIMS AT THE INTERNATIONAL CRIMINAL COURT (ICC)

The ICC pioneered a set of new victim-centred features in its normative and procedural framework (Trumbull, 2008). In particular, the ICC grants victims the right to participation in trial and the right to reparations. Victims' legal representatives ensure that at all stages of the proceedings, their views and concerns are heard on matters where their personal interests are affected. Victims may attend hearings and, subject to rulings by the Court, make oral and written submissions or be allowed to question witnesses. Throughout this participation in trial, the identities of victims are protected by a pseudonym attributed to them. A special section of the ICC, the Victims Participation and Reparation Section, facilitates interactions with the court and has registered thousands of victims as participants in the two decades of the ICC's existence. The Office of the Public Counsel for Victims (OPCV) provides legal representation to victims throughout proceedings, and supports external lawyers appointed by victims. Yet another section within the Court deals with facilitating victims and witness protection, as required.

For the ICC, Rule 90(1) of the Rules of Procedure and Evidence sets out as the general principle that "[a] victim shall be free to choose a legal representative". In reality, however, in almost all cases before the ICC, victims are organized into groups and assigned common legal representatives, paid through legal aid funds. Subsequent international and internationalized courts and tribunals have copied this system, and the use of common victim legal representation is increasingly standard practice. Such common representation can, however, only be meaningful if the victims' legal representatives attend to the victims' concerns and establish a relationship of trust with all of their clients at an individual level. This in turn can be challenging if one legal representative represents hundreds, or even thousands, of victims.<sup>a</sup>

#### Legal aid for victims in the European Union

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA *Article 13* – Right to legal aid: "Member States shall ensure that victims have access to legal aid, where they have the status of parties to criminal proceedings. The conditions or procedural rules under which victims have access to legal aid shall be determined by national law."<sup>b</sup>

<sup>a</sup> UN Women, UNDP, UNODC, OHCHR, *A Practitioner's Toolkit on Women's Access to Justice Programming* (2018), Module 3: Ending Violence against Women.

<sup>b</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0029>.

## E. Establishing tools for data collection and analysis

### 1. Goals of data collection

UN Principles and Guidelines, **Guideline 17** on research and data states:

*73. States should ensure that mechanisms to track, monitor and evaluate legal aid are established and should continually strive to improve the provision of legal aid.*

<sup>162</sup> Law of the Republic of Moldova on State Guaranteed Legal Aid (2007), available online at: [https://www.oijj.org/sites/default/files/law\\_on\\_state\\_guaranteed\\_legal\\_aid.pdf](https://www.oijj.org/sites/default/files/law_on_state_guaranteed_legal_aid.pdf).

74. For this purpose, States could introduce measures:

- (a) **To conduct regular research and collection of data disaggregated by the gender, age, socioeconomic status and geographical distribution of legal aid recipients and to publish the findings of such research;**
- (b) To share good practices in the provision of legal aid;
- (c) **To monitor the efficient and effective delivery of legal aid in accordance with international human rights standards;**
- (d) To provide cross-cultural, culturally appropriate, gender-sensitive and age-appropriate training to legal aid providers;
- (e) To improve communication, coordination and cooperation between all justice agencies, especially at the local level, to identify local problems and to agree on solutions to improve the provision of legal aid.

Research and data collection are important for improving the quality of legal aid as well as to monitor efficient and effective delivery and ensure the protection of human rights. Some global and regional studies have tried to examine these issues.<sup>163</sup>

The project “Enhancing the Quality of Legal Aid: General Standards for Different Countries” researched the approaches to quality of legal aid in several European countries, and developed Practice Standards based on selected good practices that were identified in the context of the project.<sup>164</sup> Several legal aid services have gone into research and consultation processes to identify areas for improvement.<sup>165</sup> However, as part of ensuring quality, it is important that the legal aid body should report regularly on its activities and identify areas for improvement – at least annually as recommended by the UN Principles and Guidelines. These reports can also serve to identify failures in the criminal justice system and alert of human rights violations.

Evaluations play an important role, including in identifying the need for training, resources, support, performance improvement plans or greater supervision.

#### DATA COLLECTION IN NATIONAL LEGAL AID SYSTEMS

In **South Africa**, to ensure that the quality programme remains relevant, all data obtained from the various quality assessments must be carefully analysed to identify gaps in the programme as well as areas of improvement. The findings made by the different assessors throughout the process are used to inform improvements in the quality intervention programmes as well as the introduction of new programmes and work methods. Since all findings are recorded after every quality review, quality interventions can be customized per practitioner, a category of practitioners, or even the entire organization. Finally, there is a programme in place to review annually all programmes that form part of the quality management programme as well as all associated instruments used in these programmes, so that refinements can be made to the programme.

<sup>163</sup>For example, Hill, *Innovating Justice, Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?* (2014), 46–47, tries to compare indicators for quality of legal aid and spending on legal aid. It concludes that there is a link between spending and quality, however, is it possible to achieve satisfactory quality with less spending. Similarly, Moorhead, Sherr et al, *Quality and Cost*, came to the same conclusion.

<sup>164</sup>Burchard, Ch., Jahn, M., Zink, S., Nikartas, S., Limantė, A., Totoraitis, L., Banevičienė, A., Jarmalė, D. *Practice Standards for Legal Aid Providers* (2018). Developed in the framework of the project “Enhancing the Quality of Legal Aid: General Standards for Different Countries”. Project partners: Law Institute of Lithuania, Goethe University Frankfurt am Main, Legal Aid Board, the Netherlands, Lithuanian Bar Association, State-Guaranteed Legal Aid Service of Lithuania.

<sup>165</sup>For example, in Australia in 2012.

**DATA COLLECTION IN NATIONAL LEGAL AID SYSTEMS (continued)**

In the **Republic of Moldova**, the legal aid lawyers could, and the public defenders are obliged to, report on a trimestral basis by informative notes to the National Legal Aid Council about deficiencies in ensuring the right to defence.<sup>a</sup>

In **China**, quarterly and annually reports on legal aid are required. Legal aid centres at provincial, municipal city and county levels generate a uniform report through the online legal aid management system to feed into the National Legal Aid Data Statistics Direct Report, which is audited by the legal aid agency of the Ministry of Justice. The report addresses several indicators: the number of cases; the classification of cases; the number of beneficiaries; the number and nature of consultations; and the status of cases in the criminal justice process. Applications are divided into three categories: direct application; transfer application; and approval. Data on beneficiaries with specific needs, such as women, children, persons with disabilities, migrant workers, senior citizens, minorities, soldiers and their relatives, foreigners, as well as stateless persons, is included. The case classification collects the number of cases for these different types of recipients. After the annual data approval for each locality is verified, the Ministry of Justice conducts a summary analysis of the national data, and ranks and publishes some key indicators nationwide, and at the same time uses some of the data as a reference factor for allocating funds for legal aid case transfer in the central government's transfer of funds for the next year. Findings of the data analysis will feed into developing future legal aid policies and annual planning.

In **Argentina**, the Federal Public Defender's Office is mandated to report on suspected cases of torture. For this purpose, a registering and monitoring system for cases of torture and other cruel, inhuman and degrading treatment or punishments was created within the Office, which consists of the cases mandatorily reported by all departments and divisions, and whose aim is to generate reliable statistics on the use of torture in Argentina, in compliance with the recommendations of various United Nations agencies with jurisdiction in the matter (such as the Human Rights Committee or the Committee against Torture). The data collected is systematized and used for the implementation of prevention policies.

In **India**, data is also used to raise systemic issues, either directly with the legal services authorities or as basis for filing public interest litigations in the High Court or Supreme Court.

<sup>a</sup>NLAC decision on approval of the technical and content requirements for drafting and presentation by the public defenders of the informative notes on deficiencies in the justice system connected to the right to defence (2015).

## 2. Tools for data collection/evaluation of quality

Tools for evaluation of the quality of the work of individual legal aid providers are described in detail in chapter 4. Some of these tools can be used in collecting data on the legal aid system as a whole and on the overall quality of legal aid services.

### i) Surveys

One way of assessing process and outcome measures is to survey a wide range of stakeholders (principally prosecutors, judges and defence lawyers) as to the general strengths and weaknesses of defence lawyers' performances in that jurisdiction. At best, such surveys reflect a general perception within these groups about general standards – not the standards of individual lawyers.

In the **European Union**, the project “Enhancing the Quality of Legal Aid: General Standards for Different Countries” assessed the system as a whole in three countries – not the individual lawyer's performance – and the results of the performed qualitative survey revealed that

experiences of beneficiaries of legal aid were similar in all countries. By presenting positive relations with lawyers providing state-guaranteed legal assistance, clients distinguished aspects such as pleasant communication, attention, assistance, availability of a lawyer and allocation of their time providing detailed information. Clients were most disappointed by a lack of attention, passivity, lack of legal representation (e.g., document collection, representation in hearings or interrogations, lack of contact with the client) and failure to provide information.

**Australia** conducted a comprehensive survey on legal needs in 2012.<sup>166</sup> Incorporating 20,716 interviews across the country, it was the largest legal needs survey to date conducted anywhere in the world. One of its main findings was that most people who seek advice do not consult legal advisers and resolve their legal problems outside the formal justice system. In addition, “there were sizeable gaps in the awareness of not-for-profit legal services”. Legal aid was the only not-for-profit legal service that had very high recognition rates in all jurisdictions. Legal services for Aboriginal and Torres Strait Islander people (ALSs) usually had more moderate recognition rates. In addition, other not-for-profit legal services, such as community legal centres (CLCs) and services provided by court registrars and staff, had even lower recognition rates. In Australia as a whole, the recognition rates were 88 per cent for legal aid, 67 per cent for ALSs, 36 per cent for CLCs and 34 per cent for court services.

#### *ii) Focus groups*

This is a more economical way of collecting data from key stakeholders. Focus groups consist of groups of key stakeholders that establish regular meetings on a structural basis amongst professionals within the field of criminal law. This can be done on a regular basis, or to explore specific issues. Focus groups may also include clients. For example, **Sierra Leone** uses organized focused group discussions to assess people’s understanding of the law and how the legal system works.

#### *iii) Data collection by electronic management system*

In addition to using a case management system to improve the efficiency of service delivery, it can also be used as a tool for data collection. Using electronic data collection tools and other technology is becoming more prevalent and the costs involved are not necessarily high, as the example from **Sierra Leone** below shows. In line with the recommendation in **Guideline 17** to “conduct regular research and collection of data disaggregated by the gender, age, socio-economic status and geographical distribution of legal aid recipients”, States could consider developing databases on legal aid. This would also be a useful mechanism for reporting on progress in achieving Sustainable Development Goal 16 of the 2030 Agenda, particularly its target 16.3.

The police also hold data concerning the use of legal advice which is captured electronically in some countries. This data could be downloaded anonymously, and the information can help to identify variations in the use of legal advice based on geography and personal characteristics, including the age, gender and ethnicity of suspects. The outcome decision is often also recorded, and analysis of large data sets could explore the potential for discriminatory factors influencing legal decision-making in the police station.

<sup>166</sup> Christine Coumarelos, Deborah Macourt, Julie People, Hugh M. McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsey, *Legal Australia-wide Survey: Legal Need in Australia* (2012).

In **England and Wales**, the Legal Aid Agency works almost entirely digitally. Legal aid providers submit applications for legal aid and make claims for payment electronically. The agency therefore has a wide range of data sets about each individual legal aid provider and can, for example, review the number of claims that any single provider submits that are rejected or have not provided enough evidence. The LAA sets out a series of Key Performance Indicators in the legal aid contract (e.g., setting out that the provider must conclude at least 95 per cent of cases, and therefore less than 5 per cent may be transferred to another contracted provider), allowing the monitoring of the performance of the contract holder. If a number of high-risk areas are identified, the provider may be visited by the LAA or may be required to undergo a specifically targeted audit, including peer review.

In **China**, the government is planning the establishment of an online criminal legal aid work platform. This would establish a joint meeting space for criminal legal aid work which would connect the Supreme Law, the highest inspection body, relevant Ministries including the Ministry of Finance, to jointly promote an inter-departmental information system and data sharing. It may address issues such as transfer applications and has the potential to improve work efficiency of a system that processes many cases on any given day.

#### **DATA COLLECTION AND USE BY THE SIERRA LEONE LEGAL AID BOARD**

The Board uses various ways to collect data. Lawyers, paralegals, outreach and ADR (Alternative Dispute Resolution) officers and other staff have to fill out relevant forms at the end of every activity. The forms are readily available on an online messenger system. Paralegals can complete and submit them online. This means that paralegals, especially those in remote and hard to reach areas of the country, do not have wait days or weeks to receive paper copies of the form. The information provided is used to compile the data for the Board. The Board has developed seventeen forms covering all of the core functions of the work of paralegals. They have to fill out the relevant form for every activity they undertake immediately following the conclusion of that activity. These include visits to police stations, correctional centers, Magistrate Court, High Court, Local Court, and Informal Court/Traditional Authorities including Paramount Chiefs, Satellite Offices (Community Advisory Bureau), or “dropping centers” (groups most prone to HIV/AIDS infection) and remand homes.

# 4. The legal aid provider

## A. The legal aid provider – competence and skills

### 1. Who are the providers of legal aid?

Traditionally, providers of legal aid were lawyers, but this has been expanded in many jurisdictions to include non-lawyers who have specific or specialized training in order to meet the demand for legal aid, especially in developing and low-income countries where the use of paralegals has greatly enhanced access to justice. For an overview of providers engaged in service delivery, please see above in chapter 2 under “delivery models”.

### 2. The role of legal aid providers

United Nations Basic Principles on the Role of Lawyers set out the following duties and responsibilities:<sup>167</sup>

- *Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.*
- *The duties of lawyers towards their clients shall include:*
  - (a) *Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;*
  - (b) *Assisting clients in every appropriate way, and taking legal action to protect their interests;*
  - (c) *Assisting clients before courts, tribunals or administrative authorities, where appropriate.*

The role of legal aid providers is to protect and advance the rights and legitimate interests of their clients. In doing so, the legal aid providers should:

- Loyal respect and take any necessary actions to further the interests of their clients, taking into account their specific needs and any relevant vulnerabilities, with due regard in particular to their age, gender, nationality or ethnicity, mental or physical disability, or sexual orientation.

<sup>167</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990.

- Seek to ensure that their clients know and understand their rights.
- Seek to ensure that their clients are treated with dignity, that their human rights are respected and that they are treated in accordance with the law.
- Provide advice and assistance to, and as appropriate representation for, their clients.
- Seek to ensure that the decisions of their clients are respected.
- Challenge, in an appropriate way, any unlawful or unfair treatment of their clients.
- Seek to ensure that their clients continue to receive legal advice, assistance and representation until their case is finally disposed of, including in any appeal.<sup>168</sup>

Additional responsibilities may be defined for those working with specific clients, or providing services in specific processes or proceedings, for example, during investigations or alternative dispute resolutions.

#### **ROLE AND RESPONSIBILITIES OF LEGAL AID PROVIDERS IN EARLY ACCESS TO LEGAL AID**

1. The role of the legal aid provider should be incorporated into regulations governing early access, relevant professional codes of conduct and/or contracts for legal aid provision. Action should be taken to ensure that police officers, detention officials, prosecutors and judges are made aware of, and understand, that role.

2. The responsibilities of legal aid providers in carrying out their role in respect of early access to legal aid include:

- Responding to requests for legal aid quickly and appropriately
- Gathering relevant information from the police, the client and other relevant sources
- Determining any vulnerabilities or special needs of the client, including by verifying whether he or she is a child; determining whether the client speaks or understands the language of the proceedings and whether he or she can read any relevant documents; determining whether the client has any other relevant vulnerability, and taking any appropriate action
- Checking the legality of actions taken by the police or other relevant authority, and taking appropriate action in the event of a breach
- Advising and assisting clients before, during and after any interview
- Making appropriate representations to the police or other relevant authority
- Liaising with the client's family and/or third parties (subject to the consent of the client)
- Ensuring representation at any subsequent court hearing, and particularly at a pretrial detention hearing
- Recording all relevant information.<sup>a</sup>

3. There can be factors that prevent lawyers ensuring early access to legal aid. These can include lawyers having difficulties in getting through to their clients in police custody, either over the telephone or in person. Legal aid remuneration can also have a negative impact on early access to legal advice, with some lawyers not contacting their clients until attending at the police station in time for the interview. This can leave clients waiting for many hours between requesting and then receiving legal advice.<sup>b</sup>

<sup>a</sup> UNODC/UNDP *Handbook on Early Access to Legal Aid*, pp. 90–101.

<sup>b</sup> Kemp, V. (2018b), *Effective Police Station Legal Rights: Country Report 2 – England and Wales*. Available at: <http://eprints.nottingham.ac.uk/51145/1/Country%20Report%20England%20and%20Wales%20Final%20.pdf>.

<sup>168</sup> UNODC/UNDP *Handbook on Early Access to Legal Aid*, pp. 90–91.

### THE ROLE OF LAWYERS IN PROMOTING RESTORATIVE JUSTICE PROGRAMMES<sup>a</sup>

Defence lawyers are a potential source of referrals of offenders to restorative justice programmes. Such referrals can assist in ensuring that the conflicts are addressed in an expeditious manner and can help reduce the backlog of cases scheduled for court appearance. Defence lawyers can play an important role in explaining to offenders the potential benefits of participating in a restorative justice process. They can help ensure that the rights of the offender are protected and that avenues of appeal remain available. They can also play a significant role in cases involving juvenile offenders by ensuring that their consent to participate in a restorative justice process is informed and freely given.

<sup>a</sup> UNODC *Handbook on Restorative Justice Programmes* (2006), p. 64. Available online at: [https://www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_Restorative\\_Justice\\_Programmes.pdf](https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf).

#### i) *Establishing quality standards*

**Guidelines 16 and 14** of the UN Principles and Guidelines provide that “States should take measures [...] to set quality standards for legal aid services.” This applies to both lawyers and paralegals. Lawyers may be already subject to professional standards of bar associations or other professional body to which they belong, although this is not necessarily the case in all countries, and it is not always an effective measure to regulate quality. Non-lawyers might or might not be subject to professional codes or codes of conduct. In all models of delivery, quality standards for legal aid providers should be included in the scheme. Such standards should cover the following areas: compliance with a code of conduct, competence, training, and references to specific groups.

Standards are important for quality – quality can be defined, yet it has to be defined in such a way that individual providers have clarity on what their job requires: for example, to apply for bail, visit the client, advance people’s rights. Performance standards can be measured in different ways, for instance, by looking at the outcome, which does not always have a direct correlation to the performance, or by considering clients’ satisfaction, which is an important factor. These requirements are important as they mirror the rights of the accused.

The **United Nations Basic Principles on the Role of Lawyers**<sup>169</sup> established that the duties of lawyers towards their clients shall include: (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients; (b) Assisting clients in every appropriate way, and taking legal action to protect their interests; (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession. Lawyers shall always loyally respect the interests of their clients.

In every legal system, it is possible to identify such minimum standards, which may also be referred to as performance standards, with varying levels of detail. They may “enumerate with specificity the activities that legal aid providers must or should perform in order to fulfil their duties to their clients”. Annex III provides some examples.<sup>170</sup>

<sup>169</sup> Basic Principles on the Role of Lawyers Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>170</sup> Based on information provided by individual experts on the basis of a UNODC questionnaire.

Levels of standards could include:

- A code of ethics that applies to all providers/specific ethical codes for legal aid providers.<sup>171</sup>
- Professional codes that apply to all lawyers (not only legal aid providers)/specific codes for lawyers.
- Practice codes for legal aid providers.
- Checklist/protocols for legal aid providers at different stages (investigation, trial, sentencing, post-trial, etc.).

Many jurisdictions have adopted standards as a means of establishing and, eventually, measuring and evaluating the specific obligations of defence counsel. These may include the following obligations:<sup>172</sup>

- To ensure equality of all parties to a dispute;
- To ensure a fair hearing;
- To act as a neutral arbiter between the parties;
- To help courts reach an equitable solution to disputes;
- To prevent a wrong decision in court;
- To minimize an unfavourable outcome for the legal aid recipient;
- To uphold and defend human rights and fundamental freedoms recognized by national and international law;
- To reveal the truth even if it is against the legal aid recipient's interests;
- To actively participate in proceedings to prevent the legal aid recipient from making statements against their interests;
- To assist clients in every appropriate way and take legal action to protect their interest.

### SERVICE DELIVERY STANDARDS

**Compliance with ethical standards:** Legal aid service providers should not interfere with the professional judgement of lawyers and paralegals employed by the service provider in determining what advice and assistance to give in individual cases. Lawyer–client confidentiality must be respected, and the legal aid service provider should regard itself as being bound by the same rules of confidentiality as apply to the legal aid providers who work for it.

**Accepting cases:** Requests for legal advice and assistance must be accepted unless there is a specified reason for not doing so, with such a reason to be recorded in writing.

**Response times:** Given the time sensitivity of early access to legal aid, legal aid service providers should work to defined standards relating to the time within which calls for legal advice and assistance gain a response. This is particularly relevant to call-in schemes, and may be expressed as follows: in “x” per cent of calls, a response (by telephone or in person) must be made within “y” minutes.

**Method by which advice and assistance are given:** Advice and assistance must be provided in person unless there is a specific reason for not doing so, with such a reason being recorded in writing.

**Written records:** Written records must be kept of all requests for legal aid and of action taken and, when legal aid is provided, of all relevant information. Consideration should be given to requiring the use of approved pro forma documents.

<sup>171</sup> Containing, for example, the prohibition to charge clients; see text box “Service delivery standards”.

<sup>172</sup> UNODC/UNDP *Global Study on Legal Aid* – questionnaire.

**Continuity of representation:** Consideration should be given to requiring legal aid service providers to provide continuity of representation so that, in the absence of specified reasons, the service provider, having accepted a case, continues to provide legal aid to the person until the case is completed.

**Prohibition on charging fees to legal aid clients:** No fee is to be charged to a client in a legal aid case, except when this is permitted by relevant legislation or regulations.

In settings of States emerging from conflict which face significant challenges in terms of capacity and expertise available in the country, legal aid programmes may encompass capacity-building component with the aim of strengthening in-house expertise of legal aid providers. For example, the aforementioned programme in **Haiti** has shown how legal aid projects can contribute to vocational training for a large number of young lawyers in an environment that encourages commitment, efficiency and integrity. Such projects can be “transformative” – they can help to bring about a far-reaching change in legal practices by introducing a new generation of legal professionals who have gained a culture of providing high-quality services, including help to indigent peoples.

## ii) *Practice codes*

Practice codes can provide more detailed guidelines to practitioners working in legal aid delivery. **Performance standards** are written guidelines that define with specificity the activities that legal aid providers must or should perform in order to fulfil their duties to their clients. Standards are intended to standardize the process of providing legal aid services. As one country’s justice department put it, “the key to uniform quality [is the] uniform application of standards at the state or national level, [...] an important means of limiting arbitrary disparities in the quality of representation based solely on the location in which a prosecution is brought”.

### **Well-crafted performance standards can:**

- Serve as the basis for legal aid provider training, mentoring and guidance;
- Mandate activities that produce outputs that are measurable and predictable;
- Be used as a tool for evaluation and improvement of lawyers’ individual performance/system.

According to Principle 26 of the United Nations Basic Principles on the Role of Lawyers, codes of professional conduct for lawyers should be established by the legal profession or by legislation in accordance with national laws and recognized international standards and norms. General codes of conduct that apply to lawyers should be in place to ensure ethical behaviour and prevent corruption. They are usually developed and supervised by bar associations, and all lawyers are subject to them. Legal aid providers may be subject to additional and more specific rules, for example, the prohibition to receive payments or other forms of compensation by clients that are entitled to free legal aid. Complaint mechanisms, enabling complaints to be brought against lawyers, have been cited as the main quality control measure by most Member States responding to the UNODC/UNDP Global Study.<sup>173</sup> However, the value of complaint mechanisms in evaluating the quality of work of legal aid providers is limited, as they are mostly intended to maintain the integrity of lawyers and not the quality of their work (see chapter 4 on evaluation).

<sup>173</sup>UNODC/UNDP *Global Study*, pp. 130–134, 160–161.

### REPORT OF THE SPECIAL RAPPORTEUR ON INDEPENDENCE OF JUDGES AND LAWYERS

“Unscrupulous lawyers may extort additional fees from their clients or make them pay for services that should be free or included as part of their fees, or they may even appropriate money belonging to their clients. Uneducated persons are especially vulnerable to such practices. Conversely, those who do not have the means to pay for the high fees of lawyers may be tempted to try to bribe their way through the justice system as a less expensive way to settle their case. The Special Rapporteur believes that, in order to encourage adherence to such codes, it is of the utmost importance that codes be developed with the full participation of the actors whose conduct they will regulate (judges, prosecutors and lawyers).”<sup>a</sup>

<sup>a</sup> A/67/305, paras. 81–82.

In **England and Wales**, the Solicitors Regulation Authority (SRA) provides the ethical rules to which solicitors are required to adhere when delivering legal services across England and Wales. These are set out in the *SRA Handbook*<sup>174</sup> and require solicitors to respect the following mandatory principles:

- Uphold the rule of law and the proper administration of justice;
- Act with integrity;
- Not allow your independence to be compromised;
- Act in the best interests of each client;
- Provide a proper standard of service to your clients;
- Behave in a way that maintains the trust the public places in you and in the provision of legal services;
- Comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner;
- Run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
- Run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity; and
- Protect client money and assets.

In Victoria, **Australia**, a practitioner representing an accused person in a criminal matter must:<sup>175</sup>

- 9.1 Obtain proper instructions from the client before presenting their case in court;
- 9.2 Advise the client promptly if it appears that there may be a delay in the progress of the case;
- 9.3 Inform the client of the case against them and advise the client on the applicable law, procedure and practice, including the charges, potential penalties, and the likely time their case will take to be concluded;
- 9.4 Ensure that before entering a plea the practitioner informed the client.

<sup>174</sup><http://www.sra.org.uk/solicitors/handbook/code/part1/content.page>.

<sup>175</sup> Practice Standards developed on the basis of the Legal Aid Act 1977, Responsibilities to clients. Available at: [https://www.legalaidact.org.au/sites/default/files/files/general\\_panel\\_practice\\_standards.pdf](https://www.legalaidact.org.au/sites/default/files/files/general_panel_practice_standards.pdf).

In **New Zealand**, a lawyer who receives a legal aid assignment must:<sup>176</sup>

- Decline to accept or return for reassignment any matter where he or she has a conflict or potential conflict of interest;
- When acting for more than one co-accused, take particular care to ensure she or he has considered the duties owed to each client and any potential conflicts and, if any doubt that there may be conflicting duties, he or she must decline to accept the matter or return it for reassignment;
- Make all reasonable effort to make contact with the client by the most practical method; and
- On assignment, and subsequently if necessary, consider the appropriateness of applications for name suppression and/or bail, and make any application in a timely manner.

In **South Africa**, a detailed Code of Professional Conduct for Employees of Legal Aid South Africa providing legal services in criminal matters was developed. This Code applies in addition to the code of conduct for legal professionals adopted in February 2017, for all legal professionals. It covers the following issues:

- Relationship with other professional codes of conduct
- Duty to protect the interests of the client
- Duty to act with integrity and independence
- Duty to act impartially and to avoid discrimination
- Duty of confidentiality
- Duty to the Court
- Duty to avoid conflicts of interest
- Duty not to offer or accept payments
- Relationship with the legal profession
- Change of legal representative
- Withdrawal of legal representative
- Public interest disclosure
- Excessive caseload
- Standards of conduct
- Complaints

In **China**, according to the “Opinion on the work of duty lawyer”, co-issued by several relevant courts and ministries in 2017, a private lawyer who was assigned as duty lawyer must:

- Obey relative laws the Standards of Lawyers’ Professional Ethics Practice Disciplines issued by China National Bar Association;
- Not to mislead the clients to do illegitimate procedural actions;
- Strictly forbid to accept any type of payments, including non-monetary rewards;

<sup>176</sup> *Practice Standards for Legal Aid Providers*, February 2017, 11–14, No. 13. Available at: <https://www.justice.govt.nz/about/lawyers-and-service-providers/legal-aid-lawyers/quality-assurance-framework/legal-aid-practice-standards/>.

- Strictly forbid to solicit a case for himself/herself or refer the case to other private lawyers;
- Obey the duty of confidentiality required by law.

However, in relation to lawyers, except the Professional Ethics and Practice Disciplines of the Bar Association, there are no specific ethical requirements for legal aid providers in most jurisdictions.

In **Argentina**, the Organic Law of the Federal Public Defenders' Office establishes core principles that must be observed by all its members when they carry out their activity. These are:

- Legal protection.* In its different areas of work, they respect and ensure the respect of the National Constitution, the international instruments of human rights, the laws, regulations, protocols of action and all rules relating to the protection and defence of persons, in particular the access to justice of those in condition of vulnerability or suffering structural discrimination, which shall be subject to a preferential processing.
- Prevailing interest of the assisted or defended person.* They act in fulfilment of different goals in accordance with their functional competence, promoting accessibility to the service and seeking to provide priority satisfaction to the concrete needs of the assisted or defended person.
- Supplementary intervention.* They cease to participate when the assisted or defended person exercises his or her right to appoint a private lawyer or to defend his- or herself, in cases and in the manner authorized by law, except in the event of intervention ordered by law or regulations of the service of public defence.
- Confidentiality.* They must keep all matters confidential, ensuring not to affect third parties and in accordance with specific regulations.
- Transparency and public information.* They guarantee the transparency of their activity, inform, in a simple language and a non-formal practice, the regulations and criteria orienting their actions and the results of their work, preserving the different rights at stake. Information of public interest must be accessible through the official website.

For cases involving **child clients** and other beneficiaries that have special rights and needs, there should be specific rules.<sup>177</sup> For more detailed information, please see above, chapter 3, section D.

### 3. Competence and accountability

**Principle 13**, on competence and accountability of legal aid providers, states:

*37. States should put in place mechanisms to ensure that all legal aid providers possess education, training, skills and experience that are commensurate with the nature of their work, including the gravity of the offences dealt with, and the rights and needs of women, children and groups with special needs.*

<sup>177</sup>UNODC/UNDP *Handbook on Early Access to Legal Aid*, pp. 84–87.

38. *Disciplinary complaints against legal aid providers should be promptly investigated and adjudicated in accordance with professional codes of ethics before an impartial body and subject to judicial review.*

In relation to lawyers, **Principle 13** implies a threshold requirement of legal education at the university level and, in most countries, membership of a bar association.

*i) Selection and accreditation*

To ensure that legal aid providers possess the necessary education, training, skills and experience, States should put in place accreditation requirements for legal aid providers.

According to the findings of the UNODC/UNDP Global Study<sup>178</sup>, Member States required either a proof of passing a professional examination (usually bar examination, 73 per cent of the respondents); membership in the national bar (60 per cent); separate testing to be accepted as a staff member of the institutional legal aid provider (only 20 per cent), or registration in a State-authorized roster of legal aid providers (23 per cent).

It also found that “countries that have undergone a reform of the legal aid system in the previous ten years tend to have a higher qualification requirement for legal aid providers of State-funded legal aid services than those countries that have not undergone a recent reform. ‘Recent reformers’ are also more likely to have formalized accreditation and/or certification processes for legal aid providers.”

**Guideline 15**, regulation and oversight of legal aid providers:

69. *In adherence to principle 12, and subject to existing national legislation ensuring transparency and accountability, States, in cooperation with professional associations, should:*

*(a) Ensure that criteria are set for the accreditation of legal aid providers;*

*(b) Ensure that legal aid providers are subject to applicable professional codes of conduct, with appropriate sanctions for infractions;*

*(c) Establish rules to ensure that legal aid providers are not allowed to request any payment from the beneficiaries of legal aid, except when authorized to do so;*

*(d) Ensure that disciplinary complaints against legal aid providers are reviewed by impartial bodies;*

*(e) Establish appropriate oversight mechanisms for legal aid providers, in particular with a view to preventing corruption.*

Accreditation criteria for legal aid providers may include any of the following:

- A law degree
- A diploma or certificate in legal practice
- Proof of passing a professional examination (such as the bar examination)

<sup>178</sup>UNODC/UNDP *Global Study*, pp. 98–99.

- A professional license
- Membership in the national bar
- Completion of an apprenticeship or internship with a practising lawyer
- Completion of an apprenticeship with a judge or other state justice agency
- A contractual relationship with the agency that oversees administration of legal aid
- Separate testing to be accepted as a staff member of the institutional legal aid provider
- Separate tests/exams by the legal aid authority for private lawyers wishing to do legal aid (or public exam through tender)
- Interview with legal aid administration or board
- Registration in a State-authorized roster of legal aid providers
- Demonstrate knowledge of national laws through experience or education
- Familiarity with the local justice agencies
- Demonstrate commitment to helping disadvantaged populations

In some countries, membership of the bar may be a sufficient requirement, when admission to the bar requires a strict selection process. In others, more detailed criteria for entry to the list of legal aid providers may be defined. When legal aid providers are part of the staff of the legal aid body or public defenders, they may need to go through additional exams and/or demonstrate minimum years of experience in criminal practice. Another approach is to require certification that lawyers have specialized in criminal proceedings in order to work as legal aid lawyers/court appointed lawyers.

For example, in order to be able to take on legal aid cases, the lawyers need to either apply for registration (**France, Scotland, Ireland** and the **Netherlands**), receive a contract of employment (**Ireland** and **Finland**) or a licence (**Finland**), or simply become a member of the bar association (**Germany, Poland** and **Finland**). Scotland has a dual registration obligation, both the individual lawyer and the practice he or she works for needs to be registered with the legal aid board in order to apply for legal aid on behalf of a client.<sup>179</sup>

One of the most developed accreditation schemes can be found in **England and Wales**, where lawyers and accredited representatives who provide criminal legal aid services must be accredited under the Law Society's Criminal Litigation Accreditation Scheme.<sup>180</sup> The Legal Aid Agency set the following quality requirements that providers are required to meet *prior* to being awarded a legal aid contract with the Agency: **Recognized Quality Standards** – the provider must either hold or commit to achieving one of the **recognized quality standards**, prior to the contract start date.<sup>181</sup> The organization must ensure that they maintain the quality standard throughout the life of the legal aid contract. If lawyers seek to be included in the list of lawyers who provide legal aid **continuously (on a constant basis)**, they have to pass a special selection exam.

In **Lithuania**, advocates can be included into the list of advocates providing legal aid if they fulfil the criteria set by law:

<sup>179</sup> Hill, *Innovating Justice, Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?* (2014), 46–47.

<sup>180</sup> See <https://www.lawsociety.org.uk/support-services/accreditation/criminal-litigation/>.

<sup>181</sup> See Specialist Quality Mark at: <https://www.gov.uk/guidance/legal-aid-agency-quality-standards>, or the Law Society's Lexcel Practice Management Standard at: <https://www.lawsociety.org.uk/support-services/accreditation/lexcel/>.

- Are lawyers practising the legal profession, with a Practising Lawyers License and recorded in the Practising Lawyer's List (managed by the Bar)? Meaning that they have the status of advocate and a right to practice as an advocate in Lithuania;
- Has the Bar Association issued a positive opinion on their eligibility for provision of state-guaranteed legal aid?
- A contract of the lawyers who had been contracted for secondary legal aid has not been terminated for not fulfilment of contractual obligations during the last 5 years.

In **South Africa**, the accreditation criteria for judicare practitioners includes an acknowledgment by them and Legal Aid South Africa of:

- a) The need for the development of a strong sense of national and social responsibility with regard to their respective roles in the provision of legal services to the poor and vulnerable.
- b) The need to provide legal services in the most efficient and economic manners at their disposal.
- c) The need to ensure that quality legal services are provided to clients; and
- d) The need, as far as possible, to match appointed practitioners' qualifications, skills, experience and expertise with the types and complexity of the cases for which such practitioner is appointed.

In the **Netherlands**, strict criteria are applied to the selection of lawyers working for the Legal Aid Board. Lawyers must be members of the Dutch Bar Association. In order to be a member of the bar, lawyers need to go through audit, participate in a three years long traineeship and go through on-going education and training. They are subject to disciplinary proceedings and must fulfil conditions set by the bar for basic registration. There may be additional conditions for registration set by the LAB. For some juridical fields extra terms apply, such as relevant training and experience, membership of specialization-association, peer review.

In **Argentina**, legal aid is provided through a pure public defender system. Public defenders are magistrates matched in hierarchy and payment with judges and prosecutors and also have the same functional guarantees, such as security of tenure, salary intangibility and immunity to arrest. To become magistrates, they need to go through a complex selection process that concludes with the appointment by the Executive after the agreement of the Senate.

In **Brazil**, the Federal Public Defender's Office (Defensoria Pública da União, DPU) covers criminal cases that deal with federal crimes, international drug trafficking and other forms of organized crime. Candidates need to be lawyers, members of the bar association and have at least two years of litigation experience, and undergo an entrance exam that lasts about one year and includes legal and non-legal subject areas. Lawyers who pass the test need to be members of the bar association and have at least two years of litigation experience in order to join the DPU. DPU defenders' remuneration is matched with experts working in the judiciary.

After admission to the list, there is a second stage of selection of lawyers to specific cases. For example, the Public Defender's Office in **Israel** has appointment departments in each district whose task is to appoint the most suitable attorney on the register to represent in each case, according to its unique characteristics. Selecting an attorney with the required field of specialization, language skills, availability, mobility, etc., is key to securing proper representation in legal aid cases.

Additional criteria may be applied for appointment of lawyers to provide legal aid in cases involving especially serious crimes, such as crimes carrying the death penalty, where, for example, at least 10 years of relevant experience should be requested, or for representing certain types of clients, such as children. Legal aid lawyers representing children should be trained in, and be knowledgeable about, children's rights. This could be presented as a requirement by legal aid authorities for accreditation of legal aid providers. For example, in **Australia**, a practitioner appointed to represent a child must have undertaken the National Independent Children's Lawyer training programme designed by the Family Court of Australia, the Family Law Section of the Law Council and National Legal Aid, be a member of any Independent Children's Lawyers panel established by Legal Aid Act, and comply with the Guidelines for Independent Children's Lawyers endorsed by the Chief Justice of the Family Court of Australia and the Federal Magistrates Court.<sup>182</sup>

ii) *Specific criteria for non-lawyers*

**Guideline 14** on paralegals states that:

67. *States should, in accordance with their national law and where appropriate, recognize the role played by paralegals or similar service providers in providing legal aid services where access to lawyers is limited.*

68. *For this purpose, States should, in consultation with civil society and justice agencies and professional associations, introduce measures:*

(a) *To develop, where appropriate, a nationwide scheme of paralegal services with standardized training curricula and accreditation schemes, including appropriate screening and vetting;*

(b) *To ensure that quality standards for paralegal services are set and that paralegals receive adequate training and operate under the supervision of qualified lawyers;*

(c) *To ensure the availability of monitoring and evaluation mechanisms to guarantee the quality of the services provided by paralegals;*

(d) *To promote, in consultation with civil society and justice agencies, the development of a code of conduct that is binding for all paralegals working in the criminal justice system;*

(e) *To specify the types of legal services that can be provided by paralegals and the types of services that must be provided exclusively by lawyers, unless such determination is within the competence of the courts or bar associations;*

(f) *To ensure access for accredited paralegals who are assigned to provide legal aid to police stations and prisons, facilities of detention or pretrial detention centres, and so forth;*

(g) *To allow, in accordance with national law and regulations, court accredited and duly trained paralegals to participate in court proceedings and advise the accused when there are no lawyers available to do so.*

<sup>182</sup> Australia, Practice Standards. Representing a child.

Criteria and accreditation schemes should be in place also for non-lawyers. These may include:

- Completion of a short course on legal representation;
- Completion of a professional paralegal training course accredited by the State;
- Completion of an apprenticeship or internship with lawyers;
- Experience working for the courts, prosecutors or police as assistants or clerks;
- Experience working as legal assistants to lawyers, but not formal educational training.

Legal aid providers who are not lawyers are not normally subject to a professional conduct regime. For these reasons, consideration should be given to incorporating quality standards for legal aid providers into *any* contracting, duty lawyer or other appointment scheme. Such standards can include the following:

- *Compliance with a code of conduct:* Legal aid providers should be required to comply with a professional code of conduct. If there is no relevant code of conduct for lawyers, or if legal aid providers who are not lawyers are not covered by any lawyers' code of conduct, consideration should be given to establishing an appropriate code of conduct. This may include provisions on the following duties: protecting the interests of clients; acting with integrity and independence; acting impartially and avoiding discrimination; meeting obligations to other parties, such as prosecutors and the courts; respecting client confidentiality; not acting when there is a conflict of interest (including conflicts between clients and conflicts between a client and the legal aid provider); not offering or accepting payments (except where payments are permitted by law); and not bringing the profession into disrepute.
- *Competence:* Consideration should be given to ensuring that legal providers do not take cases that are beyond their capabilities in terms of knowledge, skills and experience.
- *Training:* Consideration should be given to requiring legal aid providers to undergo relevant training on a regular basis in order to improve their knowledge and skills and to ensure that their knowledge of relevant law and procedure is up to date and appropriate to the needs of those to whom they provide legal aid.
- *Quality assurance:* Consideration should be given to requiring legal aid providers to submit their work for the purposes of quality assurance, as required by the relevant legal aid service provider or legal aid body.
- *Child protection:* In countries where relevant child-protection legislation on safeguarding and vetting exists, legal aid providers who provide legal aid to children should be vetted.<sup>183</sup>

In **England and Wales**, non-lawyers may provide advice to suspects in police custody. These “Police Station Accredited Representatives”, accredited under a specific scheme owned by the Solicitors Regulation Authority, do not have rights of audience – they cannot attend hearings, but they are specially qualified to provide assistance to individuals questioned in relation to an offence in police custody.

In **Sierra Leone**, the Legal Aid Board accredits paralegals that have been certified as having gone through the appropriate courses at the Judicial and Legal Training Institute or any other appropriate institution approved by the Board.<sup>184</sup> **Kenya** adopted a similar provision in its Legal

<sup>183</sup> See UNODC/UNDP *Handbook on Early Access to Legal Aid*, pp. 86–87.

<sup>184</sup> Sierra Leone Legal Aid Act (2012), Article 30.

Aid Act of 2016, defining a paralegal as “a person employed by the Service or an accredited legal aid provider who has completed a training course in the relevant field of study in an institution approved by the Council of Legal Education”.

In the **Republic of Moldova**, the National Legal Aid Council recruits candidates for the positions of paralegal through a public contest, while the tenure of office is conditioned on successful accomplishment of the training course provided by the NLAC. In **Lithuania**, the Bar Association shall confirm paralegals’ one-year practice report and they need an authorization of lawyers to represent a client in a particular case.

In 2017, **Ukraine** began developing a network of paralegals (public advisers) that help persons who are not aware of their legal rights to solve their problems through legal aid centres. The free legal aid system actively cooperates with a network of public advisers who connect clients with legal aid centres and explore the legal needs of communities.

## B. Evaluating the quality of legal aid providers – purposes of evaluation

The UN Principles and Guidelines recommend the development of monitoring and evaluation mechanisms to assess and continuously enhance the quality of services provided. **Guideline 16** calls upon governments to “set quality standards” for legal aid; “to establish monitoring and evaluation mechanisms to ensure the quality of legal aid services, in particular those provided at no cost”; and “[t]o work with all legal aid service providers to increase outreach, quality and impact...” According to **Guideline 17**, States **should continually strive to improve the provision of legal aid**. The UN Principles and Guidelines do not favour any specific model for evaluation.

As discussed earlier, there are various proxies for measuring quality. Which proxies are adopted depends in part on the purpose of the evaluation and what is to be measured. Therefore, it is suggested that States start by defining the purposes of evaluation.

### 1. Quality assurance vs. quality enhancement

On the one hand, at its most basic, evaluation may be designed to ensure that sufficient levels of quality are being maintained. This entails measuring performance against a set of agreed standards. This process can be repeated at different intervals, but on each occasion it is a snapshot of how the performance on the relevant date matches up with a static standard. On the other hand, the process of quality evaluation can contain mechanisms designed to enhance the quality of performance over time. In the case of legal aid services provided by public funds, quality assurance may also be related to value for money considerations – making sure that public funds are indeed used to provide levels of quality corresponding to the available funds.

For example, in **New Zealand** the stated purpose of audits is **to assess and review the quality and value of the services provided** by a provider under a grant of legal aid.<sup>185</sup> Audits provide assurance to clients, the public and key stakeholders about the quality of services provided; enable a provider to improve his or her performance; and enable the Secretary to take remedial action as necessary. This is to ensure that the legally aided person has received a satisfactory standard of

<sup>185</sup>New Zealand, *Quality and Value Audit Terms of Reference*, Version 5.0, May 2018.

advice and representation; ensure that legal aid or specified legal services are provided in an effective, efficient and ethical manner; ensure legal aid funds are properly managed and services are value for money; assess the fairness of the time and amounts claimed by the provider in relation to the nature and complexity of the file; ensure providers are compliant with the Act, Regulations, the Contract for Services with the Secretary, Practice Standards, and the Ministry's policies and procedures; ensure providers have systems, processes and controls in place to enable providers to be compliant with legislative, contractual, and professional obligations, as well as Practice Standards, policies and procedures; ensure providers are compliant with any conditions imposed on their approval/s; enhance the performance of providers of legal services through guidance and clarification, and outlining of expectations; investigate complaints, trends or particular conduct of providers; identify concerns in a timely manner and monitor conduct of providers so that remedial action can be taken or action can be taken to prevent breaches and protect the needs of legal aid clients; and to assess practice standards and trends for providers in general.

In **China**, a pilot for a management system of the quality of legal aid services has been set up. It is an evaluation mechanism which aims to continuously enhance the quality of services, rather than evaluate the specific case or individual legal aid provider. It is supposed to be a cyclic management system: the assessment will find out the commonalities shared with those systemic problems which need to be solved by further training or revising the guidelines.

## 2. Public trust in the criminal justice system

The UNODC/UNDP Global Study survey results reveal that more than half (55 per cent) of national experts cite people's lack of confidence in the quality of legal aid services as one of the most significant challenges facing poor and vulnerable groups in accessing legal aid. The existence of ethical rules for legal aid providers did not ensure confidence in them. Experts said that 66 per cent of legal aid providers were obliged to adhere to ethical rules established by the bar association, and 80 per cent said that a legal aid provider could refuse to take a case when he or she has a conflict of interest with the recipient. Similarly, the existence of ethical rules for legal aid providers did not prevent corruption from occurring in court proceedings for legal aid cases – 27 per cent of national experts perceived bribery to be one of the most influential factors in securing dismissal of charges or an acquittal in legal aid cases.

National experts from all regions, in particular those from Eastern Europe and Central Asia (79 per cent) and the Middle East and North Africa (67 per cent), perceived that people in their country did not have confidence in the quality of legal aid services. In addition, when asked about the first priority area of technical assistance in which their country would benefit, 82 per cent of national experts cited “develop[ment of] quality criteria for legal aid providers”. This priority area was also selected by 44 per cent of Member States.<sup>186</sup>

Some countries see ensuring the trust of users in the criminal justice system as the main purpose of monitoring quality of legal aid services, which, inter alia, implies increased use of reporting and conducting clients satisfaction surveys. This is, for example, the approach in the **Netherlands**,<sup>187</sup> where the Legal Aid Board monitors the quality of services and reports to the Justice Ministry and the Parliament.

<sup>186</sup> See UNODC/UNDP *Global Study*, pp. 62, 107–108.

<sup>187</sup> Survey on Best Practice Standards of Legal Aid in Criminal Proceedings, as part of the project “Enhancing the Quality of Legal Aid – General Standards for Different Countries”, for further information please see: <http://qualaid.vgtpt.lt/en/about-project/what-qual-aid>.

In **South Africa**, the goal of quality evaluation is also to ensure trust in the criminal justice system. The aim of the quality management programme is to ensure that there is one uniform quality standard in the entire organization. Every aspect of the services delivered to clients is subject to review to ensure that they are satisfactory. All staff members who render services to clients are subjected to a quality assessment or quality audit at predetermined regular intervals. The quality target to be achieved is determined by taking into account the type of work, as well as the level of the practitioner performing the work.

## C. Measures and tools for evaluation of legal aid providers

### 1. Measuring process vs. measuring outcomes

In relation to the four groups of quality measures mentioned in chapter 3, section A, the two most important sets of variables when it comes to measuring quality of legal performance are *process* and *outcome* measures. *Process measures* focus on the performance of work by legal aid providers “from the first point of entry into the system through the handling of the case and onwards to maintenance of files and documents”. As such, they encompass the appropriateness of the legal work done, its effectiveness and its closeness to the stated wishes of the client, so far as these may be respected in the specific circumstances. Therefore, they indicate the lawyer’s competence from fact gathering and legal analysis to client handling, advice and assistance, and practice management.<sup>188</sup> **As mentioned above, one way to establish such measures is through performance criteria for providers.** Such criteria could be very detailed and address what is generally expected from a competent legal aid provider at different stages of the criminal justice process, when working on specific types of crimes, and with specific groups of clients.<sup>189</sup> These are the specific actions that the lawyers have to perform in order to deliver a quality service to their clients. The assessment of lawyers’ actions can be based on negative criteria, or positive criteria, where lawyers are graded in accordance with excellence criteria. Process variables are generally harder to measure than input and structural ones, but where this has been done, they are regarded as better proxies for quality of performance. Research suggests that the most effective ways of measuring process variables include observation, file review by peers and the use of “model” or standardized simulated clients.<sup>190</sup>

*Outcome measures* look at the outcome of the legal process. This implies either a peer review to assess the quality of the outcome or a statistical approach to compare results in similar cases. The latter is difficult to implement, especially considering that the factors that influence the outcome are many, and some outside the influence of the individual provider. Outcome variables are amongst the hardest to measure satisfactorily. There are several reasons for this – the need to control for case bias in the distribution of cases between practitioners; the difficulty in

<sup>188</sup> Professor Alan Paterson and Professor Avrom Sherr, *Peer Review and Cultural Change: Quality Assurance, Legal Aid and the Legal Profession* (ILAG, 2017).

<sup>189</sup> In Israel, the Public Defender’s Office developed 15 guidelines for quality performance for all public defenders. In 2016, guidelines were issued on the subject of “shackling detainees in psychiatric hospitals” and “handling cases of insulting a civil servant”. Recently, another was published on “sample testing of drugs”. A number of other guidelines are in the process of being drafted: guidance on “representing persons with disabilities”, and updated guidance on “disqualification of evidence”, *Report on Annual Activities*, 2016, p. 79. In 2018, the subjects of “representation of defendants with cognitive disabilities” and “the limited defence of intoxication in purpose offences” were taken on.

<sup>190</sup> Model clients are particularly effective in relation to the assessment of access issues and the understanding of lawyers’ advice.

establishing a consensus as to what constitutes a “good” outcome in a particular case; and the need to show that the “successful” outcome was actually achieved as a result of the efforts of the lawyer, and not as a result of other factors such as luck, a poor opponent, a weak judge, etc. Additional outcome measures include case cost, time taken, success rates and client satisfaction. Outcome measures may also refer to the ultimate goals of the quality programme and can be informed by idealistic factors such as the organization’s vision, or even the aspirations of the justice system or country as a whole.

## 2. Defining a scale of quality

The modern debate about “quality” began in Japan in relation to manufacturing cars.<sup>191</sup> The idea of quality as excellence morphed into: (1) quality as conforming to international standards; (2) “fitness for purpose”; and (3) “value for money”. In relation to the first concept, the relevant standards are described in chapter 1. Conformity with such standards can be measured on the basis of practice codes and checklists to ensure that adequate defence is provided. However, to meet the other objectives of quality assurance mentioned, such as ensuring public trust in the system and monitoring the spending of public funds, additional elements were introduced.

From the notion that quality was either black or white, it became recognized that it was a continuum from non-performance up to excellence. In the days when “quality” was used synonymously with “excellence”, quality was seen as a binary concept, it had either been attained or it had not. In modern times it has become accepted that, in fact, quality is a continuum:



Figure 1. *The Quality Continuum*<sup>192</sup>

Whilst in this model the pass mark is “threshold competence”, the actual pass mark expected by the quality assurance regime in different jurisdictions may vary.<sup>193</sup> In **England and Wales**, the legal aid authority has an ambition that providers should achieve excellence or competence plus since this indicates that the provider is conducting work to a high degree of competence, but the pass mark remains “threshold competence”. In **Scotland**, the quality assurance programme assesses practitioners and files on a fivefold scale which maps onto the continuum of quality:

<sup>191</sup>Tom Peters and Robert Waterman, *In Search of Excellence* (1982).

<sup>192</sup> Copyright Sherr, A. and Paterson, A., “Professional Competence, Peer Review and Quality Assurance in England and Wales and in Scotland”, 45 (2008), *Alberta Law Review* 151.

<sup>193</sup>In a similar fashion the required standard for quality of performance varies in different contexts, thus the requirements of “best practice” differ from “good practice” and even more so from “adequate practice” – which may be used for negligence or professional discipline purposes.

- 1 Non-performance
- 2 Inadequate professional service
- 3 Competent
- 4 Very good
- 5 Excellent

Over time, as the Scottish programme has evolved; additional scores have been inserted to distinguish marginal fails “3–” from marginal passes “3” and good passes “3+.” As we will see later, this enables those running the quality assurance programme to adopt a more risk-based approach to the programme so that those with marginal fails are given the opportunity to improve before being reassessed and those with marginal passes to be reassessed several times in the cycle as compared with those with good or very good passes who are examined only once in the cycle. This also enables the programme to focus on continuous improvement as opposed to a static pass mark. Countries may use different scales,<sup>194</sup> but the essential foundation remains the same.

What is the impact of this marking on the individual legal aid provider? How does it affect the motivation and future performance? The score attained has different impacts in different countries, for example, it can be used as a badge of quality by the provider, a reassurance to the programme organizers, and as a guide as to the frequency with which the firm or practitioner is reassessed in the cycle. In the legal aid programme in **Nova Scotia, Canada**, lawyers’ pay depends on their competency rating, which is determined through annual performance reviews with enumerated criteria. More senior counsel can also receive pay increases through receiving a senior counsel designation – these are highly sought after and have strict criteria, with a fixed number available.

### 3. Tools for evaluation and assessment

A wide range of tools and methods have been used to assess the performance of legal aid providers against quality standards. When adopting measures to ensure quality, States should also consider adopting measures to evaluate quality on an on-going basis. The section below lists the main tools currently used by Member States, briefly outlining their relevance and applicability as well as key examples, to allow for such consideration.

The UNODC/UNDP Global Study on Legal Aid identified the following measures to conduct monitoring and evaluation of services at the national or local level:

- An administrator from the State institution overseeing the practice of legal aid providers reviews a sampling of legal aid case files periodically;
- An administrator from the state institution overseeing the practice of legal aid providers observes their performance in court periodically;
- The bar association, legal aid board or public defender institution organize peer reviews of providers’ work;
- Civil society organizations monitor legal aid providers’ work;

<sup>194</sup>In England and Wales and in New Zealand the same fivefold scale is used, except 1 is “excellence” and 5 is “non-performance”. In Scotland, the Netherlands, Finland, Republic of Moldova, China and the Ukraine, the fivefold scale is as set out in the text.

- The monitoring institution conducts interviews with, or surveys legal aid recipients following case resolution;
- The monitoring institution surveys judges about their observations of providers' work;
- The monitoring institution surveys prosecutors about their observations of providers' work;
- The monitoring institution surveys police about their observations of providers' work;
- The monitoring institution surveys judges about their observations of providers' work;<sup>195</sup>
- Legal aid providers report to their supervisors on steps they take;
- Legal aid providers report to the monitoring institution on their actions (self-assessment);
- Legal aid recipients can file complaints if they are dissatisfied with the assistance they have received;
- Dissatisfied legal aid recipients can appeal against conviction on the grounds of ineffective assistance of counsel.

In addition to linking such measures to the purposes of evaluation, one should also refer back to relevant structure measures in place as well as input measures. For example, a legal aid system with built-in supervision allows for supervisor assessment of quality. Case management systems allow for analysis of the outcomes of different cases, and professional standards allow measuring performance in comparison to an established checklist. **Therefore, a variety of measures may be employed, and each has its own strengths and weaknesses. Some measures could be used in combination to validate the findings through triangulation of evaluations.**

#### *i) Checklists*

As mentioned in chapter 3 above, another way to develop, disseminate and evaluate quality standards is through a checklist: a list that includes step-by-step instructions on what legal aid providers should do when representing a variety of clients, at different stages of, and in, the criminal justice process. These could be checklists for providers in cases of early access to legal aid, checklists for persons representing children, and so forth. Checklists are a useful way to capture complicated and complex procedures and assist in preventing administrative errors.<sup>196</sup> They allow the lawyer to focus on the legal arguments and make sure he or she has taken all the necessary steps, for instance, in terms of informing the client or following dates of hearings. Checklists also allow for capturing knowledge and experience of other practitioners and sharing it with less experienced practitioners, who might find it difficult to remember all necessary actions and steps.

Checklists can easily be translated to electronic or even online tools, and form part of case-management systems, which also allows for wide dissemination to providers located in remote areas or new providers that do not immediately have the opportunity to be trained in person in a central location. Checklists can also be used for developing performance indicators, not only for the individual lawyer but also for the specific office and the legal aid system at large, and allow for easy review by managers or auditors of the actions taken by the legal aid provider.

<sup>195</sup>This option was not part of the list of the Global Study, however is applied in practice in some jurisdictions, for instance in China and South Africa.

<sup>196</sup>See Atul Gawande, *The Checklist Manifesto* (Metropolitan Books, New York, 2010).

In **Victoria, Australia**, Legal Aid’s staff lawyers are required to use a series of checklists at different stages of indictable crime cases with a specialized checklist for sexual offence cases. As well as prompting lawyers on required tasks, the checklist has a focus on the development and articulation of case strategy. Annexed to the checklists is a template to guide an analysis of the elements of the offence. The completed checklists remain on the file and are available for review by managers or senior staff. In preliminary consultations, strong interest was expressed in the use of checklists. It is accepted that if such checklists were also to be made mandatory for the private profession, then the latter would have to input into the phrasing and content of the checklists.<sup>197</sup>

#### INTERNATIONAL LEGAL FOUNDATION CHECKLIST

This checklist approach is applied by the **ILF** in its projects. For example, in **Afghanistan**, general standards were transformed into specific indicators. Individual lawyer indicators addressed: the number of days between appointment and consultation/initial client interview; the number of days between consultation and comprehensive client interview; and the complete interview form in the case file. Office-wide indicators include: the percentage of cases in which lawyers perform the initial client interview within 24 hours of appointment; and the percentage of cases in which lawyers perform the initial client interview within 48 hours of appointment. System-wide indicators include: the percentage of cases in which the accused is represented at interrogation; the percentage of cases in which accused is represented at remand hearing; and the percentage of cases in which accused is represented at first merits hearing.

Checklists are more useful in relation to the assessment of *input* and *structure* measures than *process* and *outcome* ones. Research monitoring the efficacy of such checklists in relation to quality assurance pointed to the fact that checklists should ideally be administered by lawyers, since non-lawyers or persons lacking legal training could, for example, check that consideration had been given to an appeal but could not test whether the legal advice given to the client was accurate or appropriate. It should also be ensured that each item on a detailed checklist is interpreted as consistently and objectively as possible.<sup>198</sup>

#### ii) Surveys and focus groups

Another way of assessing process and outcome measures is to survey a wide range of stakeholders, principally prosecutors, judges and other defence lawyers, as to the general strengths and weaknesses of a defence lawyer’s performance in that jurisdiction. In **Lithuania**, the State Guaranteed Legal Aid Service conducts annual stakeholder surveys that include judges, prosecutors and police officers. The survey questions contain information on frequency of contact with legal aid providers, their opinion on the frequency of requests for a lawyer to postpone the hearing and how reasonable these requests are, and can provide free comments on the quality of legal aid providers’ work.<sup>199</sup>

<sup>197</sup> *Delivering High Quality Criminal Trials* (Victoria Legal Aid, 2014).

<sup>198</sup> See Avrom Sherr, Richard Moorhead and Alan Paterson, *Transaction Criteria: Quality Assurance Standards in Legal Aid* (HMSO, London, 1992); and Sherr et al, *Lawyers, The Quality Agenda* (1994).

<sup>199</sup> Burchard, Ch., Jahn, M., Zink, S., Nikartas, S., Limantė, A., Totoraitis, L., Banevičienė, A., Jarmalė, D., *Practice Standards for Legal Aid Providers* (2018). Developed in the framework of the project “Enhancing the Quality of Legal Aid: General Standards for Different Countries”. Project partners: Law Institute of Lithuania, Goethe University Frankfurt am Main, Legal Aid Board, the Netherlands, Lithuanian Bar Association, State-Guaranteed Legal Aid Service of Lithuania.

A survey of stakeholders (judges, prosecutors, police officers, lawyers) was conducted in the context of the European Union project “Enhancing the Quality of Legal Aid: General Standards for Different Countries” in **Lithuania**, the **Netherlands** and **Germany**, in order to identify and analyse the needs of selected target groups in criminal proceedings and to assess whether their needs in regard to legal aid quality were met in the current national legal aid systems.<sup>a</sup> In terms of quality, respondents were able to identify important issues such as remuneration, training, specialization, relationships with the client and monitoring.

<sup>a</sup>“Tools and Criteria for Measuring Legal Aid Quality: Guidelines for EU Member States” (Nikartas, S., Limantė, A. 2018), pp. 34–35. The authors of the report recommend conducting such assessments “with caution, as these officials are another party to the process, with objectives other than defence”. The following aspects were discussed during interviews: the quality of legal aid provided by lawyers in general; the competence and motivation of lawyers providing legal aid; the difference between the quality of work of lawyers providing legal aid and lawyers working on the basis of private contracts; the need of establishment of the practice standards of legal aid providers; qualitative criteria for the evaluation of the activities of a lawyer; and aspects of improving and developing activities of lawyers providing legal aid.

Such surveys reflect a general perception within stakeholders’ groups about general standards and cannot be used to measure the performance of individual lawyers. Focus groups are a more economical way of collecting data from key stakeholders by bringing representatives together at a specific time instead of collecting input individually. This can lead to improvement of the system in the long run and identify high-priority issues.

### iii) *Client interview / survey of satisfaction*

One relatively commonly-used method of assessing the quality of performance of legal aid or court appointed lawyers is to survey or interview clients after their case is over.<sup>200</sup> Client satisfaction, albeit mostly based on perception, is an important indicator to assess people’s trust in the system.

In **Indonesia**, the Regional Monitoring Board implements the Legal Aid Provider Key Performance Index by interviewing 5 per cent of each legal aid provider’s clients and give its score based on four criteria: a) client satisfaction; b) integrity; c) information of each stages of legal process; and d) information about legal aid.

Sometimes the survey takes the form of a telephone survey of all legal aid clients in a particular period, sometimes it is a questionnaire sent to the accused in a particular case, and sometimes it is an interview with the accused. Such surveys are primarily used to assess *outcomes* and *process* rather than *input* or *structure* measures. This approach to quality assurance presents challenges. If any significant time period has elapsed between the case and the follow up contact, such surveys tend to have a high non-response rate. General surveys of clients produce a better response, but cannot easily be tied to a review of the file in the client’s individual case or an assessment of any advocacy in the case. The principal challenge, however, is that individual clients (especially first-time users) find it easier to assess aspects of communication and relationship – how attentive the lawyer was, how accessible, how sympathetic, how empathetic and how good a listener – rather than how accurate and appropriate is the advice and work done for them by the lawyer.<sup>201</sup>

<sup>200</sup> UNODC/UNDP *Global Study*. See also A. Paterson, *Professional Competence in Legal Services* (1990).

<sup>201</sup> See R. Moorhead et al. (2003), “Contesting Professionalism: Legal Aid and Non-Lawyers in England and Wales”, 37 (2003) *Law and Society Review* 765, p. 785.

The aforementioned survey of the experiences of legal aid users in **Lithuania**, the **Netherlands** and **Germany**<sup>a</sup> found that clients in all three countries focused on aspects such as pleasant communication, attention, assistance, availability of the lawyer, allocation of their time, and so forth. The clients were most disappointed with lack of attention, passivity, failure to attend hearings, lack of contact with the client, and a perfunctory performance by the lawyer or failure to provide requested information.

Such results show that clients in these three jurisdictions tend to assess the performance of lawyers mostly against non-legal or service criteria. The legal aspects of lawyers' work, i.e., the quality of the documents prepared by lawyers, or the quality of their advocacy, was not frequently mentioned by the respondents.

<sup>a</sup> In the scope of the project "Enhancing the Quality of Legal Aid: General Standards for Different Countries", <http://qualaid.vgtpt.lt/en>.

Clients consult lawyers because they have the expertise that the client lacks. Such information asymmetry<sup>202</sup> makes them vulnerable to low-quality work by the lawyer. Clients are also vulnerable to "image management",<sup>203</sup> which tends to distort their perception of the criminal justice system and therefore undermines their utility as a reliable source for assessing the operation of that justice system. At the same time, such surveys could be very useful in improving general quality of legal aid offices and identify management failures, such as prolonged waiting times for appointments, lack of general information packages, availability of information on the phone or internet, and so forth. In **Finland**, clients respond to questionnaires identical to the ones filled in by the lawyers themselves, which allows for comparison. Clients answer anonymously, and outcomes are used to generate averages. They also have the opportunity to provide written feedback to their lawyer.<sup>204</sup>

#### iv) *Complaints mechanisms*

According to the findings of the UNODC/UNDP Global Study, complaints mechanisms were the most common measure used by States to monitor quality: 57 per cent of respondents relied on a review of complaints received from legal aid recipients. Usually the complaints are from clients, but they suffer from the same information asymmetry problems as client satisfaction surveys.<sup>205</sup> That said, where the complaint is for flagrant or egregious behaviour on the part of the lawyer that even "one-shot" clients can detect, for example, solicitation of bribes, failing to attend at key court hearings or ignoring the legitimate instructions of the client, a complaints system can lead to the appointment of a (hopefully) more competent lawyer.

<sup>202</sup> On the debilitating effects of information asymmetry on clients, see also B. Lesjak and D. Lesjak, "Informal Quality Assessment of Legal Services (by citizens) in Slovenia" (2013), Conference Paper.

<sup>203</sup> Research has shown that some lawyers use "image management" as a way of managing their clients' expectations and impressions, thus skewing their perceptions of the quality of work being done by their own and by other lawyers. See, for example, Douglas Rosenthal, *Lawyer and Client: Who's in Charge?* (1974); Abraham Blumberg, "The Practice of Law as a Confidence Game" 1 (1967), *Law and Society Review* 15; Carl Hosticka, "Lawyer-Client Negotiations of Reality" 26 (1979), *Social Problems* 559.

<sup>204</sup> See also Burchard, Ch., Jahn, M., Zink, S., Nikartas, S., Limantė, A., Totoraitis, L., Banevičienė, A., Jarmalė, D., *Practice Standards for Legal Aid Providers* (2018). Developed in the framework of the project: Enhancing the Quality of Legal Aid: General Standards for Different Countries. Project partners: Law Institute of Lithuania, Goethe University Frankfurt am Main, Legal Aid Board, the Netherlands, Lithuanian Bar Association, State-Guaranteed Legal Aid Service of Lithuania, p. 28.

<sup>205</sup> For a similar critique of complaints mechanisms and client surveys, see Nikartas, S. and Limantė, A. "Tools and Criteria for Measuring Legal Aid Quality: Guidelines for EU Member States" (2018).

In **Lithuania**, the State Guaranteed Legal Aid Service collects and processes complaints regarding legal aid quality. The most common ground for the complaints submitted as to legal aid is that the lawyer is too passive (50 per cent) – the clients objected that some appointed lawyers systematically avoided meeting with them or failed to take active steps to represent them (did not file a complaint to a court or prepare legal documents). The second most common ground relates to the work quality of an appointed lawyer – that prepared documents were faulty, or that the lawyer had no expertise in a matter. The third most common ground is the lawyer’s behaviour towards the client – being disrespectful or even offensive. This confirms that most of the complaints related to service issues rather than areas requiring expertise on the part of the client.

Yet complaints are always reactive rather than proactive, and they under-report the degree of dissatisfaction since research results indicate that even dissatisfied clients are reluctant to complain against their lawyer.<sup>206</sup> Research undertaken in **Slovenia**<sup>207</sup> concluded that complaints mechanisms are ineffective methods of quality assurance. Research has shown that two thirds of those who are dissatisfied with their lawyer’s services do not formally complain and, if they do complain, such complaints are seldom upheld by the complaints service. In **India**, a recent report on legal aid for prisoners<sup>208</sup> noted that “client feedback is an important element, though certainly not the only one, to gauge the quality of legal representation”. In total, 256 complaints were received by the legal services institutes<sup>209</sup> about legal aid lawyers. These complaints led to the removal of 65 lawyers from the panel. The report concludes: “Given the number of legal aid providers, the number of legal aid cases taken up and the oral complaints from the inmates, the number of complaints is miniscule. This could be because either the inmates are not aware of the grievance redressal mechanism or cannot access the mechanism.”

A further drawback is that complaints investigators can only look at the case which gave rise to the complaint. Quality reviewers, on the other hand, can check to see if an issue which has arisen in one file of a lawyer is replicated in other files of that lawyer – in other words they can check to see if the problem is systemic. Finally, complaints are most frequently sent to bar associations rather than to legal aid authorities. As a result, whilst they may lead to discipline or compensation, they are less likely to form part of remedial training or mentoring with a view to improvement.

Complaints mechanisms are therefore methods of primarily assessing process and outcome measures, and to a much lesser extent to assess input and structure measures. However, they may provide useful information for other purposes related more generally to the fairness of the system and preventing corruption.

In addition, improving the collection of feedback from beneficiaries can produce better information and data. Dr Vicky Kemp, in developing an application<sup>210</sup> to inform suspects in police stations of their legal rights, is building in a digital feedback form through which suspects can comment anonymously on their experience in police custody. She aims to explore the potential

<sup>206</sup> A study of consumers in the United Kingdom conducted by the Office of Fair Trading (OFT, 2013) into complaints about lawyers in the United Kingdom found that 15 per cent of those who use legal services were dissatisfied. However, only a small minority (13 per cent) of those who were dissatisfied went on to make a formal complaint. This is a considerably lower proportion than in relation to wider consumer problems – previous OFT research found that, of those who had experienced a consumer problem and felt they had genuine cause for complaint, almost two-thirds complained or did something about the problem (OFT, 2008); [http://www.of.gov.uk/shared\\_of/reports/consumer\\_protection/OFT992.pdf](http://www.of.gov.uk/shared_of/reports/consumer_protection/OFT992.pdf).

<sup>207</sup> B. Lesjak and D. Lesjak, “Informal Quality Assessment of Legal Services (by citizens) in Slovenia” (2013), Conference Paper.

<sup>208</sup> Commonwealth Human Rights Initiative, *Hope Behind Bars? Status Report on Legal Aid for Persons in Custody* (2018).

<sup>209</sup> The name given to the legal aid authorities in India.

<sup>210</sup> See chapter 3 under “Early Access to Legal Aid”.

for the feedback form to be used as a first-stage complaints mechanism, with suspects registering a complaint against their lawyer or against the police.<sup>211</sup>

#### v) *Model clients*

Model clients are actors hired to play clients that – using a common script – present the same legal issue to several different lawyers to assess the quality of services. The assessment of the advice provided is done later by lawyers based on what the clients had understood. These were first used in the consumer world before spreading to more professional fields. An early use of model clients was in the **Netherlands**, where they were used to assess the skills of doctors in handling patients. This approach to quality assurance permits the quality programme to control the inputs for legal aid providers thus ensuring that any differences in process and outcome are more attributable to the legal aid performer.<sup>212</sup> However, model clients are not trained lawyers. As a result, whilst they can assess more than a “one shot” client, they cannot so easily assess the quality of the legal advice which they receive from the legal aid provider. Lawyers can, of course, assess the materials and advice the model clients have received, and also find out in a conversation what the model clients understood from the advice given to them.

#### vi) *Lawyer self-assessment*

Another possible tool is to ask the legal aid lawyer whose performance is under scrutiny to conduct a self-assessment. This approach is regularly used in **Finland** through a set of questions – with the same questions being used for the lawyer and the client, therefore allowing for comparison – and in **South Africa**, where practitioners employed by Legal Aid South Africa are required to complete a quality self-assessment instrument for all files that they close on the IT system, which is then compared to the assessment done by the managers. Self-assessment has also been tried in **China** and **Chile**.

In **Finland**, the legal aid evaluation system consists of five evaluation areas containing a total of 36 evaluation statements. Some of the statements are assessed by the clients, some by the attorneys, some by both. The quality statements are based on the Code of Conduct for Lawyers developed by the Finnish Bar Association. This code indicates what can be expected of a good lawyer.

The quality statements are scored using a 5-point scale:

5 = Exceptionally excellent performance

4 = Excellent performance

3 = Good performance

2 = Satisfactory performance

1 = Poor performance

X = In a particular case where the statement is not suitable for assessment

Self-evaluation encourages the attorneys to reflect about their work and develop themselves further. The evaluation also provides a basis for discussion of the quality of public legal aid.

<sup>211</sup> Kemp, V., “Digital Legal Rights for Suspects: Users’ Perspectives and PACE Safeguard” (2018a). Available at: <http://eprints.nottingham.ac.uk/52777/1/Final%20Report%20for%20Publication%204.7.18.docx.pdf>.

<sup>212</sup>The model client methodology can raise ethical issues, for example, deception or the misuse of scarce legal resources. However, with careful planning such issues can be avoided. See Moorhead et al, *Quality and Cost* (2001).

Self-assessment has been found less useful in quality assurance than other measures,<sup>213</sup> since either the lawyers claimed to be uniformly excellent, or the more modest or nuanced lawyers found themselves at risk of being penalized for their candour. If used in combination with other tools, it can be a measure for continuing personal development through identification of areas for improvement and review of relevant guidance. When in use, self-assessment may be triangulated with assessments of supervisors and clients and based on objective performance criteria.

#### vii) *Third party assessment*

The evaluation of quality by appropriate third parties (i.e., those qualified to assess the quality of performance) is becoming increasingly well established and allows for more compressive and professional evaluation of quality. There are two main forms of such assessments: (a) examination of the lawyer's files and any documents which he/she has drafted; or (b) observation of the lawyers' performance in court. With the assistance of an appropriate set of criteria and marking scheme (and a monitoring system of the assessor's performance to ensure their consistency), there are no major technical problems with either approach. However, the use of clients' files may raise confidentiality issues. Equally, observation often entails logistic problems since there is often no guarantee that if a trained and remunerated assessor turns up in court to review the performance of a particular advocate, the case will not be discontinued, settled or abandoned, leaving the reviewer with nothing to review. This risk could be addressed by planning the visits in a more coordinated manner, by checking the court schedule in advance. Nevertheless, in **South Africa** and **Ukraine**, the legal auditors do conduct court observations using a checklist or set of criteria.

In **South Africa**, court observations have "proven very challenging because often the cases that the auditors plan to observe at court does not take place at court for any number of reasons. Auditors then have to make quick alternative arrangements to view other practitioners so that their time is not totally wasted".<sup>a</sup>

<sup>a</sup> B. Nair, "Legal Quality and Outcomes", paper delivered at the ILAG Conference in the Netherlands, 2013.

#### viii) *Staff/supervisor assessment*

In jurisdictions where all or a significant proportion of criminal defence work is handled by a public defender organization or by state centres with salaried lawyers attached, there is an obvious potential for legally qualified supervisors to assess the quality of the lawyers either through their files or their performances in court, or sometimes, both.<sup>214</sup>

In **Israel**, the internal staff of the Public Defender's Office supervises the work of external staff and assesses their work on a regular basis, as occurs also in the **United States** in substantial salaried lawyer programmes such as the New York and Maryland Legal Aid Societies, or in **Australia** in the North Australian Aboriginal Justice Agency. This will often include a mixture of mentoring, supervision, file review, client satisfaction surveys and (sometimes) court observation.

<sup>213</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 often related to their level of experience but not to the level of their actual performance. See Sherr, A. *Client Care for Lawyers: An Analysis and Guide*, 2nd edn (Sweet and Maxwell, London, 1999); Sherr, A.H. (1999), "Lawyers and Clients: The First Meeting" (1986) 49, *Modern Law Review*, 323–358.

<sup>214</sup>This potential is not always realized. It is clear from Binder, Cape and Namoradze, *Effective Criminal Defence in Latin America* (OSI, 2015) that several national Public Defender organizations in South America are too stretched to supervise the performance of their lawyers effectively.

In **Thailand**, the Rights and Liberties Protection Department of the Ministry of Justice (RLPD) use supervisors to check the accuracy of the legal advice given by their staff lawyers by reviewing the file notes on the IT management system and encourage clients to complete paper or email client satisfaction questionnaires. If the client is telephoning a call-centre hotline, they will be asked to complete a satisfaction survey over the phone at the end of the call. Similarly, where the client receives legal advice at a Proactive Legal Assistance outreach session, they will be asked to complete a client satisfaction survey.

However, more work needs to be done to set out the detail of these arrangements and the mechanisms for ensuring that supervisors respect the professional judgement and ethic of their staff lawyers and, secondly, that there is consistency between supervisors. A useful example can be found in **South Africa**, where a key intervention in the context of quality assurance was to increase the supervisory capacity at local offices. The primary function of these supervisory positions was to oversee the implementation of various legal programmes as well as to monitor the quality of the work of legal professional staff. A Supervisory Competency Assessment is conducted at regular intervals and all supervisors are assessed based on a number of criteria. The ratio of legal staff to supervisors is also monitored on a continuous basis, as is the ratio of admin staff to legal practitioners. Supervisors are required to monitor productivity by ensuring that practitioners plan cases for all court days, and that cases are not unreasonably delayed. Supervisors are expected to conduct checks on the files of practitioners under their supervision on a daily basis. The requirement to check these files daily can only be relaxed if the support needs of the practitioner are more favourable. With every file check, the supervisor must enter his comments and instructions on the case file and follow up on these. All practitioners have set quality targets that they have to meet. If practitioners fall below these targets, then individual intervention plans are agreed between the practitioner and their supervisor. These scores are monitored on a quarterly basis by both provincial and national management of Legal Aid South Africa and have an influence on the performance monitoring of each Local Office.

#### **INTERNATIONAL LEGAL FOUNDATION (ILF) – PUBLIC DEFENDERS MODEL AS A TOOL FOR QUALITY**

In its technical assistance projects, the ILF has introduced public defender models in different countries, particularly in conflict settings, with a number of strengths and efficiencies in the context of quality of services:

- Why choose a public defender office? – Possibility of day-to-day, case-by-case intensive mentoring and/or on-the-job training of every lawyer, building culture of defence/changing engrained practices.
- Teaching new skills/challenging detention – Pretrial motion practice, independent defence investigation, strategic litigation.
- Sustained litigation efforts – for example, right to discovery in Nepal, challenging unlawful detention in Tunisia.
- Pilot mechanisms and multi-stakeholder advocacy for early access to legal aid – for example, applied in police stations in Afghanistan.
- Comprehensive data-gathering of large numbers of cases allows us to identify challenges and find solutions, as well as to illustrate to the government the impact of quality legal aid.
- Setting high standards for other legal aid service providers (e.g., in mixed model systems that also use assigned counsel and/or contract services – see Massachusetts Committee for Public Counsel Services.

### ix) *Judicial assessment*

The evaluation of the work of lawyers by judges who work on the same cases might, intuitively, be seen as a highly appropriate approach to quality assurance. They “have a high level of legal knowledge and experience observing and communicating with legal aid providers during the process. However, it is important to avoid interference with the independence of the lawyers,”<sup>215</sup> especially when lawyers are assessed by the judges that determined the outcomes of their cases.

For this, and other reasons, ever since this source of quality assessment was first mooted in the United States in the 1980s, judges have had mixed feelings about the proposal. Judges have the experience and the expertise to assess lawyers who appear before them, however, they are no longer peers and as such may not be aware of certain aspects of legal practice. Nor will they usually have access to the defence lawyer’s file<sup>216</sup> and the client’s instructions and therefore, while they may be curious as to why a particular witness was not brought or questioned in court, without the file they will not know whether this was an oversight by the lawyer or a result of the client’s instructions. Moreover, particularly in smaller courts, judges are dependent on the relationship with the local lawyers to ensure the smooth operation of the court, which would sit uneasily with a formal assessment role.

Recently it was proposed that the judiciary in **England and Wales** should formally assess all the lawyers who appeared before them as to their competence to undertake criminal proceedings on four different levels of complexity. On each level the judge hearing the case would assess the advocate as competent or not competent in relation to nine criteria, namely if the advocate: (1) has demonstrated the appropriate level of knowledge, experience and skill required for the level; (2) was properly prepared; (3) presented clear and succinct written and/or oral submission; (4) conducted focused questioning; (5) was professional at all times and sensitive to equality and diversity principles; (6) provided a proper contribution to case management; (7) handled vulnerable, uncooperative and expert witnesses appropriately; (8) understood and assisted the court on sentencing; and (9) assisted clients in decision-making. The Quality Assurance Scheme for Advocacy was designed to ensure that lawyers did not appear in cases beyond their competence. It was unclear if the scheme was designed merely to focus on input and process or whether it extended to outcomes. The scheme was attacked by criminal lawyers and also caused misgivings with many judges, and despite being ultimately upheld in the United Kingdom Supreme Court,<sup>217</sup> it was formally abandoned by the Bar Standards Board in November 2017.

Nonetheless, it has always been the case in the **United Kingdom** and in the **Netherlands** that judges who have concerns about the competence or quality of lawyers appearing before them may send a notification to the President of the Bar Association or the complaints section of the Bar Association. In **Argentina**, the judges can complain about the competence of the defence attorneys appearing before them, but it is rare for them to do so.<sup>218</sup>

<sup>215</sup>Burchard, Ch., Jahn, M., Zink, S., Nikartas, S., Limantė, A., Totoraitis, L., Banevičienė, A., Jarmalė, D. *Practice Standards for Legal Aid Providers* (2018). Developed in the framework of the project: Enhancing the Quality of Legal Aid: General Standards for Different Countries. Project partners: Law Institute of Lithuania, Goethe University Frankfurt am Main, Legal Aid Board, the Netherlands, Lithuanian Bar Association, State-Guaranteed Legal Aid Service of Lithuania.

<sup>216</sup>Moreover, in countries where the judge has access to the defence file, this can be seen as threatening the independent role of the judge. See Binder, Cape and Namoradze, *Effective Criminal Defence in Latin America* (OSI, 2015), p. 8.

<sup>217</sup>*R v. Legal Services Board* (2015), UKSC 41.

<sup>218</sup>See Binder, Cape and Namoradze, *Effective Criminal Defence in Latin America*, p. 150.

In **Scotland**, it was established in *Anderson v. HMA* in 1996 that defective representation by counsel, if severe enough, could deny the accused a fair trial. Interestingly in “Anderson appeals”, the appeal court can invite the trial counsel to submit comments on the ground of appeal – an invitation which counsel are at liberty to decline, although as officers of the court they are expected to comply with such requests. **In such cases therefore, judicial assessment of quality is combined with self-assessment by counsel.** Often, the “pass mark” for adequate quality in defective representation cases is quite low – as in below adequate, good and best practice.

#### x) Peer review

The challenges and limitations of non-lawyer assessors of process and outcome aspects 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.

As any other third-party assessment, it can be done as a case-file review or court observation (see above). Peer assessment of court performance can be conducted by actual observation in court by peers or listening to audiotapes as done, for example, in **Chile**. As mentioned before, there is an inherent logistical challenge of running an observation-based programme when trials are frequently postponed due to a late guilty plea. This has led most peer review programmes to focus on the assessment of legal aid files by peers who have experience in the relevant field of law but who are independent of, and not competitors of, the lawyers who are being assessed. Nonetheless, in **South Africa** and **United Kingdom** the legal auditors do conduct court observations using a checklist or set of criteria, and in **Chile** the peer reviewers rely on audiotapes of court hearings as well as observation.

#### Definition and purpose

In keeping with this, 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 drive behind quality assurance in the public sector in the **United Kingdom** in the last 25 years has been a concern for “value for money”, with the aim to obtain objective evidence that public money is being well spent. As the programme has evolved, however, it has become clear that the true purpose of peer review is not simply to assure the public and the government that quality standards are being maintained, but also that quality standards are being continuously enhanced.

#### Who are “peers”

The concept of peer review is predicated on the presumption that those best equipped to assess the professional work of providers are other professionals. However, it is not as straightforward as it may appear. The professionals should clearly be professionals in the same field of law practising in the same jurisdiction. Must they be specialists in the relevant field of law or only experienced practitioners in the field? In **England** they have chosen the former,<sup>219</sup> in **Scotland** the latter. In practice, specialists tend to mark harder than generalists and this can drive up the pass mark as well as the cost of the peer review programme. Must the experience of legal practice be current?

<sup>219</sup>All lawyers in England now tend to be specialists. Accordingly, they insist on a high level of specialist experience and current caseload as well as skills as a supervisor for their reviewers. Whereas in Scotland, with a much smaller profession, it is rather less specialized.

If so, how current? In the United Kingdom the position has been taken that it must be current, the limit being one year away from the practice. This means that peer reviewers can never work full time as quality assessors, for to do so entails ceasing to be a peer. It also effectively prevents prosecutors and judges from being treated as proper peers. In **Chile**, there is no requirement of currency. Peer reviewers are full time and have not practised for five or more years, running the risk of not only being out of touch with current standards but also being perceived as out of touch by practitioners – which could lead to a lack of respect from those they are reviewing. Similarly, in **South Africa**, practitioner acceptance of assessment results has increased where the legal auditor is regarded as more senior or experienced. In the **Republic of Moldova**, the external monitoring of the quality of legal aid is performed by a special Commission of 7 members created by NLAC: one representative from NLAC, 3 lawyers from the legal aid system and 3 private lawyers selected through public contest. In such a way “peers” are not only legal aid lawyers but also general private defence lawyers who are not part of the legal aid system. Such an approach contributes to the perceived independence and credibility of the monitoring commission as well. There is an annual plan of external monitoring – 10 per cent of the total number of lawyers in the legal aid system are included in the annual plan of external monitoring of the quality of the legal aid services.<sup>220</sup>

### Criteria

The criteria used by peer reviewers for assessing files are developed from practice manuals, professional standards, legal skills treatises and discussions between practitioners. The criteria may be generic or specialist – tailored for particular fields of law, for example, relevant to children. It is important that peer reviewers and the profession in general are consulted about the criteria or proposed changes to them, so that they can take ownership. The **Scottish** Legal Aid Board agreed new peer review criteria and guidance for reviewers in 2018, with detailed guidance on the criminal quality assurance scheme available online as information for all interested parties.<sup>221</sup> The more generic the criteria, the greater the range of cases that they can encompass. Indeed, the generic nature of the **Scottish** civil criteria entailed that they could be applied with relevant adjustments in the **Netherlands** and **China**, which have very different legal systems. The criteria used in peer review may be chronological – starting at the first client interview and ending with the termination of the case – or thematic, for example, fact and information gathering, advice giving and preparation, interaction with third parties, or ethical considerations. Research and experience strongly suggest that reviewers struggle to mark consistently where there are more than 30 criteria to be assessed in relation to a case or file.

### Case selection – risk based

The selection of cases varies between and within jurisdictions. In some, different numbers of files are selected at random depending on whether it is, for example, a children’s lawyer or a criminal lawyer who is being reviewed. Also, a percentage of the lawyer’s files could be reviewed in which the client is considered to be vulnerable, for example, where the case involves an adult with a disability or an immigrant. In others, the same number of files will be selected from a firm in each review based on a statistical test of randomness applicable to all firms. In **England and Wales**, the selection of the firms is risk based. However, the same number of files will be selected from the firm in each review and in a large firm it is likely that no files of a particular lawyer will be selected for review. Where a review is failed in Scotland, a larger sample of files will be selected for the follow-up review.

<sup>220</sup> A. Mahnke and S. Libedinsky, “Peer Review System in the Chilean Public Defender Office (DPP) - Improving Quality Assurance”, paper delivered at the ILAG Conference in Edinburgh (2015).

<sup>221</sup> Detailed guidance with all criteria available online at: [https://www.slab.org.uk/export/sites/default/common/documents/profession/Criminal\\_quality\\_assurance/New\\_Crim\\_QA\\_Criteria\\_29\\_Oct\\_2018.pdf](https://www.slab.org.uk/export/sites/default/common/documents/profession/Criminal_quality_assurance/New_Crim_QA_Criteria_29_Oct_2018.pdf). Further information that explains the scoring can be found at: <https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-c/rule-c3/guidance/c3-peer-review-criteria-guidance/>.

### Marking

The marking of criteria and files or hearings by a peer reviewer is always an act of professional judgement. As such it is necessarily partly subjective. To keep as much objectivity and replicability as possible, it is advisable to keep the range of marks used by reviewers relatively short. As mentioned earlier, files and practitioners (or even firms) will be commonly be marked from 1 to 5, with 3 as the pass mark. This leaves two marks for failing and two for those performing above the pass mark. Whilst it would be possible to use a much broader range of marks, experience has shown that a group of reviewers marking independently will struggle to mark consistently, both as between themselves and in terms of their own marking over time, if a much broader range is used. Even with a fivefold range, in practice, the pass mark grade tends to attract the bulk of the marks, while marks of “1” and “5” are relatively unusual (less than 10 per cent in total). In **Scotland** and the countries that have followed its peer review system, the individual criteria are marked out of three marks only,<sup>222</sup> with two further marks for “not applicable” and “unable to assess form the file”. As a protection against variability between reviewers, it is advisable to arrange for a proportion of files to be “blind double marked”, i.e., marked by another reviewer who is unaware of the marks given by the first reviewer. In **Chile**, there is a fourfold marking scale for reviewers: “Compliant”, “minor observations”, “major observations” and “insufficient”. It is therefore important to use a marking scheme that has a quite limited range in order that the inevitable variance between “hard” and “easy” markers cannot be extensive.

### Training and monitoring

Given the inherent subjectivity in peer reviewers exercising their professional judgment in the application of criteria and the marking scheme, it is not enough to rely on a limited number of criteria (30 or less) and a restricted range of marks for assessing them. Probably the key to an effective peer review programme is to introduce and maintain a strong training programme. In the **United Kingdom** and countries that follow their model of peer review, normally a minimum of three days training split over six months is required, followed by regular training debriefs. The purpose of the initial training is to introduce reviewers to the concept of quality and the range of methods of assessing it. Thereafter, they are introduced to the criteria, taking each one in turn in some detail, and the marking scheme and discussions are encouraged as to how these should be interpreted and applied. The trainees are exposed to actual files, either in pairs or small groups, possibly including existing reviewers, with the aim to expose them to differences of opinion and how these might be resolved. The reviewers are also trained in writing of summary reports on the files they have reviewed. In **Scotland**, new peer reviewers have all their marks in the first six months double marked by more experienced reviewers. After six months, they are shown their marks (and those of their colleagues) and then exposed to difficult files to discuss in small groups and collectively. Thereafter, as with all reviewers, their marking will be monitored and fed back to them individually and collectively in debrief training days, which occur at least once every year. The purpose of the monitoring is to seek to reduce the gap between “hard” and “easy” markers.<sup>223</sup>

### Quality Assurance Committee

It is important for the long-term viability of peer review that it be conducted through a partnership between the Bar Association, the Legal Aid Authority and the State. One way to do this is

<sup>222</sup>“1” = below expectations – a fail, “2” = a pass – this is a broad mark, and “3” = above expectations, with the additional marks “not applicable” and “unable to assess form the file”. The shorter scale for criteria was adopted since the early research indicated that reviewers as a group struggled to grade out of seven possible marks consistently amongst themselves. Overall, files are marked from 1–5, as are practitioners, as explained above.

<sup>223</sup>And to ensure consistency between peer reviewers. The problem of hard and easy markers is not confined to Scotland – in South Africa it was noted that some managers were more conservative in their assessments whilst other managers were more liberal. See B. Nair, “Legal Quality and Outcomes”, paper delivered at the ILAG Conference in the Netherlands (2013).

to establish a Quality Assurance Committee with membership of the aforementioned, and informed laypersons with an interest or expertise in quality. The role of this Committee is to give a score for each review and to communicate the outcome of the review to the firm/practitioner under review. It can also arrange periodic monitoring and retraining, checks that the criteria are kept up to date, monitor the progress of the cycle and determine the frequency with which weaker providers are reassessed.

### **Peer review and current issues in quality assurance**

Peer review has been applied or piloted in a wide range of countries including the **Netherlands, Chile, South Africa, Canada (Ontario), Finland, Republic of Moldova, Georgia, Ukraine, China** and **New Zealand**. Interest in the process is growing in the European Union with the passing of the new Legal Aid Directive in 2016, which requires Member States to assure that their legal aid lawyers are performing adequately. As a measure for quality assurance, it has an advantage as it looks at both process and outcome variables rather than input and structure issues only. Peer review is, relatively seen, the most objective way of assessing the quality of services of legal aid providers, and it provides assurance that all lawyers' work meets a minimum standard of competence on an ongoing basis.<sup>224</sup>

However, some concerns have been raised with peer review, which has not always been well received by the legal profession. First, it should be established that peer review will not interfere with lawyers' **professional independence**. This is a legitimate concern if supervisors or peer reviewers were to comment adversely on the lawyer's strategy in a case, other aspect of their professional judgement, or even their professional conduct. In practice, problems of independence can be overcome by: a) only reviewing closed or completed files, as is the case in **England, Chile** and **Scotland**; b) through clear terms in the staff lawyers' contract of employment, if he or she is providing services under such contract; and c) by ensuring that outcomes of peer review are proportionate. In any case, it should be clear from the outset that **peer review has to be independent of government interference**.

A second challenge is the issue of **client confidentiality**. This doctrine exists in every jurisdiction, although its ambit may vary, with the purpose to encourage clients to have confidence and trust in their adviser by limiting when and to whom communications can be disclosed. Due to the practicalities of everyday work in the legal environment, a general acceptance has formed that the lawyer's staff and partners or supervisors in the firm are also permitted to have access to confidential information of the client and the file, and the client is considered to have either impliedly or expressly consented to this. In jurisdictions where a client lodges a formal complaint against a lawyer or sues for negligence, the client will be deemed to have waived the doctrine of client confidentiality to the extent necessary for the lawyer's defence. This enables the bar association or the court to access confidential aspects of a case. In most jurisdictions (and all Common Law ones), it is accepted that clients can consent to the details of their case being seen by an independent lawyer for quality assurance purposes. In some civil law countries, a doctrine of "professional secrecy" exists, and the bar associations have sometimes sought to argue that, while clients could consent to others in their lawyer's firm seeing the details of the case, and to other lawyers seeing details where there is a client complaint or negligence suit, the client could not unilaterally consent to an independent lawyer seeing the details of the case. Such arguments could appear self-serving.<sup>225</sup> Ultimately, some jurisdictions have passed legislation to deal with this issue.<sup>226</sup>

<sup>224</sup> Professor Alan Paterson and Professor Avrom Sherr, "Peer Review and Cultural Change: Quality Assurance, Legal Aid and the Legal Profession", paper delivered at the ILAG Conference in Johannesburg (2017).

<sup>225</sup> Although lack of competence is misconduct in many jurisdictions, the level of prosecutions in such cases is very low.

<sup>226</sup> For example, Article 109 of the New Zealand Legal Services Act (2011).

In practical terms, the most sensible way to deal with the confidentiality is to always seek client consent, and to make sure that the peer review programme is a partnership between the Bar Association and the Legal Aid Authority and funded by the State.

Finally, it is sometimes argued that peer review is too **expensive** since it involves using experienced legal aid lawyers on a paid basis. Recent research in **Scotland** reveals that the cost of the peer review programmes there amounts to around 4 per cent of the annual budget for administering the entire legal aid scheme.<sup>227</sup> Each file review costs less than 200 Euros, whereas the cost of each complaint file – which is assessed by the independent regulator – amounts to about 2,500 Euros per case. In such a context, not only would peer review be a much better way of objectively assessing quality than client complaints, but it would also be considerably more cost-efficient.

In considering the relevance and applicability of peer review and other quality assurance measures, the current reality in many countries has to be addressed. For example, could peer review be applied where there is a shortage of lawyers, and paralegals have a key role in providing legal aid? This is the case in most African countries. In **South Africa, Kenya, Sierra Leone** and **Malawi**, paralegals are supervised by experienced lawyers as a measure of quality assurance. A possible approach could be using experienced paralegals as peer reviewers, working with a Quality Assurance Committee that oversees the process and of which one or two lawyers are members, but this has not been tested in any country as of yet.

In countries that only have complaints mechanisms (currently, most Member States responding to the UNODC/UNDP Global Study), there is an urgent need to establish quality assurance systems. Such a system can be based on one measure or a basket of several measures applied together. In designing the different elements of the system, governments should take into account the specific characteristics of their system such as the delivery model, as well as actual and perceived independence of institutions. Chapter 5 below addresses some of the key considerations.

## D. Outcomes of evaluation

### 1. Data analysis

Assessing the outcomes of evaluation will depend also on the underlying purposes of evaluation in the first place. In the **United Kingdom**, peer review was introduced to demonstrate that legal aid provides value for money for the taxpayer and to establish a quality baseline in relation to the process and outcomes achieved in legal aid cases. In some other jurisdictions, the assessment of quality is used primarily to remove poorly performing lawyers from the legal aid panel. More recently, quality assurance has focused on compliance with international standards or directives, or a desire to establish a culture of continuous improvement.

Of the tools for evaluation discussed above, only those that cover a large proportion of legal aid providers in a jurisdiction are likely to yield sustained quality data for analysis. This probably excludes judicial, prosecution and police assessment, self-assessment and model clients. Surveys and focus groups have been used to get a snapshot picture of perceptions of quality in a jurisdiction, although the picture that emerges can be partial or static. Client satisfaction questionnaires are used in a wide range of jurisdictions and can provide valuable feedback as to the general quality of the service provided to clients in as much as it relates to questions of access, empathy, listening

<sup>227</sup>The administrative budget in Scotland is around 8 per cent of the cost of running the legal aid scheme as a whole.

and attentiveness. Such surveys do not assist with assessing the quality of advice and action taken for the client. Complaints systems can provide information on the quality of the service delivered, but complaints tend to be reactive, under-reported, limited largely to matters of service and, in some jurisdictions, expensive to run. Nonetheless, both client satisfaction surveys and complaints systems can lead to the removal of badly performing lawyers from the programme.

Supervisor assessment of salaried lawyers can, on the other hand, yield excellent data on the quality of service, process and outcome delivered in a jurisdiction if the salaried service provides all legal aid in a jurisdiction, or in a sector of the legal aid programme in a country. Finally, peer review, provided that it covers a reasonable cross section or indeed all of legal aid providers in a country – as in **South Africa, Chile** and **Scotland** – can offer a clear picture of the quality of service process and outcome provided by the legal aid programme in a country. In **Scotland**, only 2 per cent of criminal legal aid practitioners and 5 per cent of criminal legal aid files evidenced an unacceptable level of quality in the first complete cycle of reviews.<sup>228</sup> Moreover, by taking the scores given for each criterion as applied to every practitioner's files, the software demonstrated clearly which criteria attract the worst and best marks for the whole profession.<sup>229</sup> This is evidence not only for what the profession was weak at, but where additional training should be targeted.

Data analysis can also be used for prognosis purposes. For example, in **Lithuania**, a problem arose when one large-scale criminal case demanded a significant number of state-guaranteed legal aid lawyers. As a result, it became difficult to find lawyers to cover other criminal cases in Vilnius city. In such a situation, prognosing and preparing for a possible shortage of lawyers would be appropriate. A possible solution could be closer cooperation with the bar, seeking to encourage the involvement of a larger number of lawyers for a certain period. It could be necessary to allocate additional financial resources or to attract lawyers from other regions where the workload of lawyers is lower.

## 2. Outcomes for the individual legal aid provider

### *i) Sanctions for underperformance*

Where a legal aid provider is reviewed by a supervisor, a legal auditor or peer reviewer, and attains a score which is below the expected pass mark, there will almost always be a consequence. In **Chile**, the practitioner who has been found to have a deficient performance may be subject to technical supervision, sanctions or even termination of employment.<sup>230</sup> In **South Africa**, the 5 per cent of practitioners who do not meet their performance target are provided with feedback from the legal auditors, and supervision and mentoring at their Justice Centre before being reassessed in six months. If they have not improved, they will be subject to performance management processes which could result in these practitioners being dismissed if no significant improvements are noted. In **Indonesia**, Article 41(1) of the Legal Aid Regulation provides that in the event that a violation is found in the provision of legal aid by a provider, the Minister may: a) cancel the agreement of implementation of legal aid; b) terminate the grant of

<sup>228</sup>In South Africa, the percentage of practitioners who do not achieve their targets is 5 per cent.

<sup>229</sup>In Scotland, it is clear that legal aid lawyers are excellent at initial fact and information gathering and providing accurate and appropriate initial advice. They are poorest at aspects of communication with clients and the sending of appropriate letters of engagement in particular. In South Africa, the most common failings are failing to record all the material advice given to the client, failing to obtain copies of the charge sheet and not evidencing the legal and factual analysis of the case.

<sup>230</sup>A. Mahnke and S. Libedinsky, "Peer Review System in the Chilean Public Defender Office – Improving Quality Assurance", paper delivered at the ILAG Conference in Edinburgh (2015).

the budget for legal aid; and/or c) no longer grant a budget for legal aid in the next budgetary fiscal year. Paragraph (2) further states: “In the event the Minister cancels the agreement mentioned in letter a) of paragraph (1) above, the Minister shall appoint another Provider of Legal Aid to assist or carry out the power of attorney from the Receiver of Legal Aid.”

In **Scotland**, if a practitioner fails the initial file review, they will either have a further, more extensive, file review immediately if the initial fail is deemed to suggest that the practitioner is a risk to the public, or, in the 90 per cent of “failing” practitioners, where no such risk is detected, the lawyer will be given detailed feedback as to the strengths and weaknesses of his or her performance and reassessed later on the work done within six months. Over 85 per cent of criminal legal aid practitioners who are given six months to improve go on to pass the next review. This may be an indication that, as private practitioners who rely on legal aid for the great bulk of their income, the initial fail serves as a timely “wakeup call”.<sup>231</sup> If the reassessment also produces a fail, the practitioner has one final assessment after a further nine months in which detailed feedback is provided along with the offer of mentoring and/or additional training.

**In cases of serious or egregious non-performance by the lawyer** where the client may suffer detriment, countries should ensure that remedies are in place if no legal aid provider arrives or if a legal aid provider is unprepared or unqualified (see chapter 2). This may include the result that the proceedings are deemed invalid (for “ineffective assistance of counsel”), or that the proceedings are postponed, or that a replacement legal aid provider is asked to represent the party instead of the assigned provider.

**Where lawyers disagree with the outcome of their quality assessments**, it may be possible to request that their review be reassessed. In **Chile**, the peer reviewer’s report is checked by another peer reviewer from a different region (to promote geographic consistency) and then approved by a senior inspector. The practitioner who has been assessed can challenge the findings of the peer review by writing to the Head of the Evaluation Unit in the Public Defender’s Office. In **South Africa**, the lawyer can ask the legal auditor to review their assessment and the auditor can vary his or her assessment if persuaded by the arguments of the lawyer. If the auditor still marks the practitioner at below the recommended performance target, the practitioner can appeal the assessment to the manager of the Legal Quality Assurance Unit. In **England and Wales**, a lawyer who fails his or her assessment can make representations to the legal aid authority. These will be considered in writing by the original reviewer and another senior reviewer who will ensure that all the points raised by the lawyer are dealt with. The decision will be monitored by a further independent senior reviewer to check that the panel has followed the correct procedure and the final mark is in accordance with the written report. A further review on a different file sample is then carried out by different reviewers either immediately (in cases of extreme concern for clients) or after a period of six months. Where the second review is also a fail and the firm has its contract to do legal aid withdrawn, they may appeal to the Legal Aid Agency and subsequently challenge a decision in the courts through judicial review. In **Scotland**, a practitioner who has failed his or her review can make representations to the Criminal Quality Assurance Committee who will consider them, taking account of any second marker’s views (if it was double-marked), and may overturn the review outcome or ask for a further review. However, even where the fail is confirmed, the lawyer will usually have a further review in six months’ time by two different reviewers. If that review is a fail, the practitioner has one final review in nine months with two further reviewers. A lawyer cannot be removed from the legal aid programme without being failed by at least five separate reviewers. Even thereafter, such a lawyer could challenge the decisions in the courts through judicial review.

<sup>231</sup>In Scotland, practitioners who are marginal passes will also have a further review after a year or 18 months.

## ii) *Disciplinary measures and removal*

If the lawyer who has failed the assessment is a staff lawyer, a range of measures may start, including retraining or support measures or even removal or closer supervision for a defined period of time. If there is still no improvement, the lawyer may be dismissed. If there are conduct issues involved in the failure which the employer refers to the bar association, or if a complaint from the client is upheld, then the bar association may choose to impose a disciplinary sanction on top. In case of a private lawyer, any sanction that comes from one or more failed assessments will be possible exclusion from the programme. However, professional discipline will only occur if a complaint or referral has been made to the bar association. Although quality assessment may involve representatives of the bar association being on a Quality Assurance Committee, it should be kept separate from professional discipline, which lies with the bar association or independent regulator, if there is one. Evidence that emerges from a quality assessment which suggests that the lawyer has been guilty of a crime or professional misconduct should normally be intimated to the bar association for action outside the quality programme.

In **Argentina**, Article 55 of the Organic Law states that, in the event of non-fulfilment of their duties, the Federal Public Defender General may impose on the magistrates' members of the Federal Public Defender's Office the following disciplinary sanctions: warning; written notice; fine of up to 20 per cent of monthly remunerations. Every disciplinary sanction is adjusted taking into account seriousness of the breach, records of the function and effective harm caused. The grounds for disciplinary breaches are settled after a summary proceeding, pursuant to a regulation norm issued by the Federal Public Defender General, which must guarantee procedural due process and the right to a defence. In cases where the sanctioning body considers the sanction of removal, it must submit the summary proceedings to the Indictment Jury so that it examines the reproachable behaviour and determines the corresponding sanction. Disciplinary sanctions applied in the context of the Office can be administratively appealed in accordance with the regulations. Once the administrative remedies are exhausted, sanctions may be challenged at the judicial level.

In the **Republic of Moldova**, obtaining "insufficient" at internal or external monitoring could lead to exclusion from the Legal Aid System; then, if not excluded from the legal aid system, an internal monitoring will be performed in a three month period. A second "insufficient" leads to automatic exclusion from the legal aid system; in case there are reasonable doubts of infringement of the ethical code of the lawyers, the notification of the Bar Commission of the Ethics and Discipline is compulsory.<sup>232</sup>

## 3. Outcomes for beneficiaries of legal aid services

The Human Rights Committee, in its General Recommendation 32,<sup>233</sup> established that counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused. Unlike in the case of privately retained lawyers,<sup>234</sup> blatant misbehaviour or incompetence, for example the withdrawal of an appeal without consultation

<sup>232</sup> See Binder, Cape and Namoradze, *Effective Criminal Defence in Latin America* (OSI, 2015), p. 150.

<sup>233</sup> Human Rights Committee, 90th session, Geneva, 9–27 July 2007, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial.

<sup>234</sup> Communication No. 383/1989, *H.C. v. Jamaica*, para. 6.3.

in a death penalty case,<sup>235</sup> or absence during the hearing of a witness in such cases,<sup>236</sup> may entail the responsibility of the State concerned for a violation of article 14, paragraph 3 (d), provided that it was manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.<sup>237</sup>

In the **European Union** context, Article 8 of the European Union Directive 2016/1919 – Remedies – provides that Member States shall ensure that suspects, accused persons and requested persons have an **effective** remedy under national law in the event of a breach of their rights under this Directive.

In each country, different laws or regulations should apply, but the important point is that there should be some remedy for lack of effective defence, in the form of correction and/or compensation. These remedies are usually linked to complaints mechanisms and not to quality assurance mechanisms, yet Member States may wish to consider whether other measures should be available when performance does not meet quality standards but does not necessarily amount to misbehaviour or negligence (e.g., the possibility to have a new provider assigned to the case).

In the **United Kingdom**, an accused person who has received an inadequate service from their lawyer is entitled to compensation from that lawyer or his or her firm if the client complains. This is part of the complaints' mechanisms and not a part of the quality assurance programmes. Even where the lawyer has failed the client egregiously, the quality assurance systems provide no compensation for the client unless the client has been charged privately by the firm when they were classified as a legally aided client. In such circumstances, the Scottish Criminal Quality Assurance Committee will order that the private charges be repaid to the client.

<sup>235</sup> Communication No. 253/1987, *Kelly v. Jamaica*, para. 9.5.

<sup>236</sup> Communication No. 838/1998, *Hendricks v. Guyana*, para. 6.4. For the case of an absence of an author's legal representative during the hearing of a witness in a preliminary hearing, see Communication No. 775/1997, *Brown v. Jamaica*, para. 6.6.

<sup>237</sup> Communications No. 705/1996, *Taylor v. Jamaica*, para. 6.2; No. 913/2000, *Chan v. Guyana*, para. 6.2; No. 980/2001, *Hussain v. Mauritius*, para. 6.3.

## 5. Quality in action

To assist Member States in the implementation of quality assurance and evaluation measures, this present chapter aims to present a practical approach to establishing quality in the legal aid system, starting from assessment of the existing system, developing national strategies and action plans, establishing laws and institutions, adopting standards and putting in place evaluation schemes. It is based on the premise that quality assurance should be included in early planning stages of a comprehensive legal aid system and the reality that in most states such systems are yet to be developed. United Nations technical assistance projects and programmes on legal aid should also be guided by these considerations, and some examples are provided below.

### A. Conducting legal aid baseline assessments

The first step to developing strategies and programmes on legal aid is to establish a baseline and identify gaps by conducting an assessment of the current situation. The evidence base created can serve not only as a snapshot in time but can also be used to measure progress in achieving goals.

The UNODC Criminal Justice Assessment Toolkit (CJAT), developed in 2006, is a standardized and cross-referenced set of tools designed to enable those engaged in criminal justice reform to conduct comprehensive assessments, and suggests following this general structure:<sup>238</sup>

1. *Clarify* – understand what the terms of reference are seeking and what the assessment is aimed at. For whom is it intended? What is the purpose?
2. *Prepare* – conduct research and collect background materials to develop an understanding of the realities of the country or region that is assessed. What are the capacities? What are the political priorities?
3. *What should be your attitude during the assessment* – towards interviewees and anyone who is providing information? There should be a code of behaviour. Corroborate information from a wide range of stakeholders.
4. *After the assessment* – confer with individuals, institutions and organizations met during the assessment regarding observations that may need explanation or issues that remain unsolved or unclear.

<sup>238</sup>The points that follow are extracted information; more details can be found in the introduction of the Toolkit ([https://www.unodc.org/documents/justice-and-prison-reform/cjat\\_eng/Introducing\\_the\\_Toolkit.pdf](https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/Introducing_the_Toolkit.pdf)), and the separate thematic modules.

It is important to map the stakeholders that can, and should, provide input and data for the assessment. This is crucial, as many of them will be key partners in implementing future reform efforts, and their expertise and knowledge when analysing the situation and choosing measures to improve the system is invaluable.

Finally, assessors need to consider which types of data they can generate and whether there are sources that are already available to them without further effort, such as court, prosecution or police statistics, and data generated by legal aid providers.

Before developing detailed questionnaires as proposed below, any assessment should start with outlining what exactly it aims to achieve – such as a general review of the state of legal aid nationwide, or in a particular city or region, whether it will focus on the needs of specific groups, and so forth. It is then important to specify core areas and go into further detail where needed, such as the national legal system (whether adversarial or inquisitorial), the model for the delivery of legal aid (e.g., institutional providers or contract lawyers), the existence of a national body to provide and/or monitor legal aid services and the role of the bar in legal aid delivery, the demand and supply of lawyers and non-lawyers, the role of other criminal justice actors in ensuring access to legal aid, levels of criminality, and which crimes occur most frequently (see chapter 2).<sup>239</sup>

When assessing the legal framework, the assessment should look into the applicable international instruments (see chapter 1), and how they are currently applied (some States may have received specific recommendations on legal aid from human rights bodies) and make recommendations accordingly. It should also look into relevant laws and regulations and identify the concept of quality as currently understood by stakeholders.

The UNODC CJAT includes a module on legal defence and legal aid. While it precedes the adoption of the UN Principles and Guidelines, it still contains relevant questions for assessing quality and identifying factors that influence quality, under “adequacy of representation” (4.6).<sup>240</sup> Furthermore, the questionnaires used for data collection of the UNODC/UNDP Global Study on Legal Aid for both Member States respondents and individual experts can serve as a basis for a thorough assessment of the legal aid system.<sup>241</sup>

#### **CJAT MODULE ON LEGAL AID AND LEGAL DEFENCE, QUESTIONS ON ADEQUACY OF REPRESENTATION**

A. How conscientious and zealous are lawyers in the representation of their clients? When do most lawyers first meet their clients? Do lawyers meet with their clients before court appearances? Do they visit them in jail? Do they interview them about potential witnesses/defences they may have? Do they obtain information about their connections to the community that may convince the court to release a detained client pending trial? Do they advise their clients about what the legal options and strategies may be? Do they consult with their clients to determine their preferences and wishes? Do they appear to be prepared? Do they know the alleged facts of the case? Do they conduct their own investigations and legal research? (do they have the resources to do so?) Have they obtained an interpreter where one is needed to work with their clients? Do defence lawyers keep their clients apprised of the status of their case?

<sup>239</sup>It may be useful to check the country profiles in the UNODC/UNDP *Global Study* for basic information on the national system.

<sup>240</sup>UNODC *Access to Justice: Legal Defence and Legal Aid Criminal Justice Assessment Toolkit* (2006), pp. 14–15.

<sup>241</sup>UNODC/UNDP *Global Study*, pp. 173–235.

B. Do defence lawyers appear in court with their clients? Is it common for lawyers to skip court appearances? Do the judges proceed without them? Are there any consequences when they fail to appear or is this the normal practice?

C. Do lawyers routinely waive the appearance of their clients at legal proceedings? Is this custom or is it connected to difficulties in transporting detained clients to court? Do lawyers obtain the consent of their clients in waiving their appearance?

D. How vigorously do lawyers advocate on behalf of their clients? Do defence lawyers challenge or object to motions by the prosecution? Do they object to witness testimony or the introduction of evidence? Do they challenge the reliability of evidence proffered without a proper foundation establishing its relevance? Do they challenge the admissibility/voluntariness of statements made by their own clients? Do they waive proof of critical aspects of their clients' cases?

E. Do defence lawyers, when they have a good faith basis, alert the court to coercion, abuse or torture experienced by their clients at the hands of the authorities? If not, why not?

F. Do defence lawyers who represent juveniles advocate for their diversion from the criminal justice system whenever possible? Do they make a clear record of the special needs of juveniles? (Please see "Cross-Cutting Issues: Juvenile Justice" for additional information on the special needs of juveniles in conflict with the law.)

G. If plea agreements are possible, or when entering a plea of guilty and forgoing a trial (where possible, as some countries require a trial no matter what the plea), does the lawyer review with the client what rights the client is waiving, such as the right to a public trial, the right to examine witnesses, the right to present evidence, the right to call their own witnesses, the right to appeal the verdict, the right to appeal the admission of evidence that has been objected to, etc.? Is this waiver of rights done on the record in court?

H. Do lawyers typically offer evidence of their clients' history, qualities and special needs at sentencing hearings? Do they present testimony, i.e., character witnesses, psychological assessments? Do they rely on the pre-sentencing reports? Do they verify the accuracy of the pre-sentencing reports and challenge inaccuracies?

I. Do lawyers typically pursue appeals on behalf of their clients? Move for reconsiderations of rulings or sentences? Does defence counsel assist in parole hearings?

J. What are the differences in the advocacy of a privately retained defence lawyer in comparison to a publicly funded lawyer? How do judges or prosecutors treat privately retained counsel or their clients in comparison to publicly funded counsel and their clients?

K. What mechanisms, if any, are available to replace defence counsel if it becomes clear to the court or the client that the defence counsel of record is not fulfilling even the most basic duties and obligations to his/her client? What are the consequences to that lawyer?

To allow for the development of adequate quality assurance measures, assessments should look into the following questions: Are providers being evaluated institutional providers/individual providers/full time/part time/pro bono?; who would be responsible for applying the measure?; who would perform the evaluation, and can they be non-lawyers?; at what stage of the criminal process should evaluations be conducted, and should they include court observations, case-file review or surveys?; are there any objective criteria/clear standards that providers are aware of?; can evaluations be done online or use other types of information technology?; what would be the impact of evaluations on the independence of lawyers?; what are the relative costs of each measure?; and finally, what would be the impact on quality improvement?

Examples of national legal aid assessments with a focus on quality:

#### LEGAL AID ASSESSMENT IN THE REPUBLIC OF MOLDOVA, 2012<sup>a</sup>

In 2012, Roger Smith, on behalf of UNDP BRC, conducted a capacity-needs assessment of the National Legal Aid Council, focusing on quality of legal aid. He discovered that quality was an issue for Moldova's legal aid system and this concern was expressed by various observers. For the purpose of the report, the concept of quality of legal aid was broken down under the following three headings: (a) technical; (b) ethical; (c) professional/practical. For example, meaning: (a) technical – keeping files properly, attending punctually, being efficiently organized (these are matters to be monitored by the funding authority (i.e., the NLAC) as justification for remuneration); (b) ethical – avoiding outright corruption but also respecting the paramount interest of the client, successfully identifying conflicts of interest and appropriately resolving them (this is a matter for the bar association); (c) professional/practical – making judgements as to the appropriate law, identifying the strategy to be taken, communication with client, gathering the facts, ensuring the client's instructions are followed. It presented the question whether quality of legal aid was "practical and effective, not theoretical and illusory".

As an example, the following are some of the relevant questions which were identified specific to representation and pointed to how quality might be assessed: (a) was there, overall, an equality of arms (implication of Article 6.1)?; (b) was the trial fair (6.1)?; (c) was the presumption of innocence maintained by the defence (or, for example, did the defendant's lawyer too easily accept the guilt of the client) (6.2)?; (d) did the lawyer make sure that the defendant was informed of all the relevant matters relating to the case against him (6.3(a))?; (e) were there adequate time and facilities for the preparation of the defendant's case (6.3(b))?; (f) were witnesses for the prosecution properly examined (6.3(c))?; (g) were witnesses for the defence properly sought and examined (6.3(c))?; (h) did the lawyer appropriately discuss the case with the defendant?; (i) did the lawyer properly organize the case?; (j) did the lawyer collect all available evidence favourable to the defendant?; (k) did the lawyer properly support the defendant?; (l) did the lawyer check the legality of the defendant's detention?

<sup>a</sup> Quality of Legal Aid Services: A capacity needs assessment for the National Council for State Guaranteed Legal Aid from the Republic of Moldova, supported by UNDP (Bratislava Regional Center and UNDP Moldova) (2013), pp. 8-9.

#### LEGAL AID ASSESSMENTS IN UKRAINE, 2013 AND 2016

The first independent monitoring of the Free Legal Aid (FLA) system was done by the Ukrainian Legal Aid Foundation and the Ukrainian Helsinki Human Rights Union in 2013. It included a pilot peer review programme in which the performance of the vast majority of FLA lawyers was assessed as "satisfactory" or "good". The lawyers who were examined had positive feelings on peer review. However, the National Bar Association criticized the lawyers who took part in the peer review pilot. Three years later, the Council of Europe produced an experts' report.<sup>a</sup> This afforded the first all-round view of the Free Legal Aid system once it was up and running. The experts looked at the recruitment of legal aid lawyers, the allocation of work amongst them, the independence of the legal aid authority (CCLAP), the method of payment used for legal aid lawyers and the quality assurance methods for the programme. Their conclusions were overwhelmingly positive about the work of the FLA, although they had some reservations as to the working of other parts of the justice system. They found that Quality Assurance was undertaken to a limited extent by legally qualified quality managers, including client interviews and observation of court performances, however, the National Bar Association were opposed to the quality managers conducting peer review of client files. Following a further expert report on Peer Review for the Council of Europe in 2018, the CCLAP agreed with the Ukrainian Bar to undertake a pilot peer review programme in 2019.

<sup>a</sup> Assessment of the Free Secondary Legal Aid System in Ukraine in the Light of Council of Europe Standards and Best Practices (2016). Available online at: <https://rm.coe.int/16806ff4a8>.

### LEGAL AID ASSESSMENT IN AFGHANISTAN, 2017<sup>a</sup>

A comprehensive assessment of legal aid in Afghanistan, conducted in 2017, addressed different aspects of quality. It reviewed ethics and professional conduct rules established in laws, regulations and codes of conduct, as well as mechanisms for disciplinary measures. It looked into awareness of providers to principles of quality and found that 90 per cent of legal aid executives and managers stated that they measure quality along various indexes. These included case file reviews, client satisfaction assessments, feedback from justice system personnel, case outcomes, reputation, regular supervision, and outside auditors/monitors. It found that supervision remained untapped resource for improving quality, that quality control mechanisms were not implemented effectively, and that evaluation was under-utilized as quality assurance.

<sup>a</sup> The Asia Foundation, *Legal Aid Assessment and Roadmap* (2017).

## B. Developing national strategies

National strategies on legal aid should include measures to establish and evaluate quality from the outset, ideally on the basis of dedicated assessment findings.

The UNODC/UNDP *Handbook on Early Access to Legal Aid* suggests a “national strategy checklist” on early access which can be easily adapted to a national strategy checklist on quality:

- Identify the key requirements on quality in the United Nations Principles and Guidelines and the strategic objectives required for meeting those requirements.
- Assess existing laws and regulations relevant to quality of legal aid services (preferably using a human rights framework which takes into account factors such as sex, gender, race, age and disability), identify what legal changes are necessary and develop a plan for introducing and implementing such laws and regulations.
- Identify the supply of legal aid, including the number of lawyers and non-lawyers, their geographical location and their specializations and experience, in particular in working with vulnerable groups and those with special needs.
- Consider the current arrangements for funding and administering legal aid and, where necessary, identify, plan and implement appropriate structures and mechanisms for sustainable funding and administration of legal aid.
- Establish what are the current arrangements for training and assuring the quality of legal aid providers, and for training other criminal justice officials in relation to early access, and devise and implement appropriate mechanisms for the provision of ongoing and up-to-date training and for ensuring the quality of legal aid providers.
- Develop and implement appropriate mechanisms for monitoring and evaluating quality of legal aid and implementing the lessons learned from such monitoring and evaluation.<sup>242</sup>

While a national strategy is key to implementing the provisions of the UN Principles and Guidelines, in some countries, developing a strategy at the national level may take some time to achieve. The lack of a national strategy does not mean that no action can be taken to introduce quality measures such as the ones described above in chapter 3. The elements of such an action plan were outlined in chapter 3:

<sup>242</sup>UNODC/UNDP *Handbook on Early Access to Legal Aid*, pp. 116–117.

### Elements of an action plan or strategy

- Define a national vision of quality as well as the purposes of quality assurance and evaluation
- Identify a body/bodies responsible for quality assurance/monitoring (or appoint one)
- Adopt criteria for accreditation of legal aid providers that ensure quality of services
- Adopt ethical codes, practice standards, performance standards and checklists for providers
- Develop training programmes for providers
- Develop specialized services for children and for persons with specific needs, as well as specific criteria and training
- Develop structures and institutions to support effective legal aid delivery at all stages of the criminal justice system, as well as equal access for women
- Develop monitoring and evaluation mechanisms to assess quality
- Assess, evaluate, collect data and regularly publish reports on the quality of legal aid with recommendations for improvement

The National Legal Aid Policy of **Rwanda**, for example, includes a specific output on quality control:

<b>RWANDA – NATIONAL LEGAL AID POLICY</b>	
<b>OUTPUT 8: QUALITY CONTROL SYSTEM FOR LEGAL AID PROVISION DEVELOPED AND IMPLEMENTED</b>	
<b>Indicators:</b>	<b>Policy actions:</b>
1. Legal aid guidelines for all legal aid providers developed and updated	1. Develop and update a legal aid guidelines document
2. Operational and Quality Standards system operational	2. Setting up Operational and Quality Standards for Legal Aid Provision
3. A co-management framework between MINIJUST and MINALOC for MAJ staff operational	3. Developing effective co-management framework between MINIJUST and MINALOC for MAJ staff
4. An RBA mechanism for enforcing and monitoring the requirements for pro bono service provision operational	4. Encourage RBA to create a mechanism for enforcing and properly monitoring the requirements for pro bono service provision
5. A professional organization established	5. Encourage indigent and other citizens to resolve their disputes and conflicts using Citizen Assemblies, Abunzi, MAJ and local government mechanisms and go to court only as a last resort
6. Effective monitoring and evaluation system and reporting tools developed and implemented	6. Develop and implement an effective monitoring and evaluation system and reporting tools on legal aid provision
7. Number of inspection visits conducted	7. Conduct inspection visits both in the field and in courts
8. Number of official reports prepared and published	8. Prepare and publish official reports on legal aid provision
9. Improvement in the overall quality the quality of services provided	

As clearly outlined in chapter 2, access to legal aid can also be considered in the context of applying human rights standards and is not limited to criminal justice reform. For example, **Ukraine** adopted a National Human Rights Strategy<sup>243</sup> in 2015 that includes specific findings, goals and outcomes on legal aid. The relevant ones are presented in the box below.

<sup>243</sup> Available online at: <http://hro.org.ua/index.php?id=1488449514>.

**UKRAINE NATIONAL HUMAN RIGHTS STRATEGY (2015)  
ENSURING THE RIGHT TO A FAIR TRIAL**

[The] system of legal aid does not include new categories of people who need it.

*Strategic goal:*

- To ensure the right to independent and fair trial in reasonable time frame;
- To create an accessible and effective system of legal proceedings that will conform to European values and standards of the protection of human rights.

*Expected outcomes:*

- access to justice is provided to everyone;
- safeguards for professional activity of lawyers are ensured;
- quality standards of the free legal aid are improved; their observance is guaranteed;
- possibilities for providing primary and secondary free legal aid in civil and administrative cases are extended;
- high-quality and accessible legal aid is provided through the bar and efficient system of free legal aid;
- [...]
- access to justice is provided to children, disabled persons, legally incapable adults and persons whose legal capability is limited in line with European standards.

**Kenya** recently developed the “National Action Plan Legal Aid 2017–2022: Towards Access to Justice for All”.<sup>244</sup> The Plan was developed to operationalize the strategies outlined in the National Legal Aid and Awareness Policy and serves as a road map for coordinated implementation of legal aid interventions by the government and legal aid stakeholders across development sectors for maximum impact. Strategic Objective 2 focuses on providing quality, effective and timely legal assistance, advice and representation for the poor, marginalized and vulnerable. Priority areas under this objective are to choose a suitable legal aid model, to form strategic partnerships, integration of legal aid in community initiatives, and the outcome legal aid services enhanced in quality and quantity, covering all counties in the country to improve access to justice for the poor and vulnerable. It developed a log frame for achieving relevant objectives that include outcomes on quality as presented in the table below:

**KENYA NATIONAL ACTION PLAN LEGAL AID 2017–2022: TOWARDS ACCESS TO JUSTICE FOR ALL  
STRATEGIC OBJECTIVE 2:**

To provide quality, effective and timely legal assistance, advice and representation for the poor, marginalized and vulnerable

<i>Activity/ programme</i>	<i>Implementation level</i>	<i>Outcome</i>	<i>Output (proof of delivery)</i>	<i>Timeframe</i>	<i>Cost</i>	<i>Lead agency</i>	<i>Other agencies</i>
Roll out a National Legal Aid Scheme	National, county and community levels	Increased access to clients through partnerships with civil societies and the legal fraternity	Number of additional regional offices established	Immediately		NLAS	CSO, NGOs, Judiciary, NCAJ, Probation, Police, OAG & DOJ, COG, development and implementing partners
		Increased access points to legal aid services	Number of clients accessing the services				
		Improved specialized legal service delivery	Number of specialized legal services delivered				
			Survey reports Annual report				

<sup>244</sup> Available online at: <http://www.statelaw.go.ke/wp-content/uploads/2017/12/NAP-Legal-Aid-2017-2022.pdf>.

<b>KENYA NATIONAL ACTION PLAN LEGAL AID 2017–2022: TOWARDS ACCESS TO JUSTICE FOR ALL (continued)</b>							
<b>STRATEGIC OBJECTIVE 6:</b>							
To establish an implementation, monitoring, regulatory and support framework							
<i>Activity/ programme</i>	<i>Implementation level</i>	<i>Outcome</i>	<i>Output (proof of delivery)</i>	<i>Timeframe</i>	<i>Cost</i>	<i>Lead agency</i>	<i>Other agencies</i>
Establish training and accreditation system	National level	Established training system Functional accreditation system Reputable institutions providing legal aid Quality of service Satisfaction of service	Training manuals Existing and applied accreditation criteria Application for accreditation process Number of institutions accredited Customer survey satisfaction Annual reports Survey reports Media reports	One year		NLAS	OAG & DOJ, Judiciary, NCAJ, ODPP, Police, CSOs, NGOs and other implementing partners
Establish quality assurance systems	National and county levels	Accessible, effective and efficient legal aid services Minimize request for postponement of cases by legal aid lawyers Implement recommendations that affect legal aid in Kenya Building networks with relevant stakeholders that provide legal aid	Guidelines on quality assurance developed Mechanisms for implementing quality assurance put in place Inspection reports Media reports Partners' reports NLAS reports	One year		NLAS	OAG & DOJ, Judiciary, NCAJ, CSOs, NGOs and other implementing partners
Develop monitoring, review and evaluation tools and mechanisms	National level	Sustained collection, analysis and dissemination of data to inform programming Strengthened internal M&E systems Policies and procedures to correspond to emerging trends in legal aid services Existence and full application of a Monitoring, Evaluation and Regulatory (MER) and learning framework to inform programming	M&E tools M&E reports Evaluation reports Annual reports Reports on the reflection meetings Reports on legal aid and access to justice Partners' database and reports	Continuous		NLAS	CSOs, NGOs and other implementing partners

Focusing on legal aid reform in a structured manner can also be very useful in supporting democratization processes, the rule of law and building up institutions in post-conflict settings. In 2018, the **Central African Republic** adopted its “National Strategy on Legal Aid (2017–2022)”.<sup>245</sup> Among many other relevant topics, it includes a provision on “Promoting the Quality and Sustainability of Legal Aid Services”, with the general objective of improving effectiveness and synergy of actions undertaken. Specific objectives for capacity-building are inclusive and recognize the civil society organizations in the delivering legal aid services as “agents of change”. The Strategy also sets out to standardize training for paralegals, traditional leaders, human rights administrative authorities, and highlights the importance of tailored trainings on children’s and women’s rights, conflict resolution procedures, active listening and mediation techniques, as well as support for legal clinics.

## C. Developing programmes and projects

When developing programmes and projects, in the planning phase, as first steps, the vision is set and results and outcomes are defined. Subsequently, the implementation phase gets under way and monitoring becomes an essential task, helping to ensure that the desired results are being achieved. Monitoring and evaluation are key components of the process, because feedback loops help managers to build on evidence to adjust strategy, design and implementation as needed.<sup>246</sup>

In general, the development of programmes and projects should be based on: priority activities; identifying the responsible government entity; resources required and how to mobilize them; expected challenges; and key partners and their roles.

### 1. Typical programming challenges

The challenges to implementing efficient, effective legal aid schemes are common across countries and contexts:<sup>247</sup>

- Lack of political will and/or institutional knowledge
- Lack of a coordinated, comprehensive approach to legal aid delivery
- Lack of a robust culture of defence
- No mechanism to ensure early access and access at all stages, and lack of training and interest of legal aid providers to provide early access
- No mechanism to challenge violations of rights
- Difficulty with monitoring and evaluation
- Struggle/failure to provide proper funding (no equality of arms)
- Resistance from justice sector institutions (police, prosecutors, judges, detention facilities)
- Resistance from the defence bar/bar associations
- Limited number of lawyers to cover legal aid needs
- Legal aid is geographically inaccessible

<sup>245</sup> Stratégie Centrafricaine d’Aide Légale 2017–2022. Unofficial translation from French.

<sup>246</sup> UNODC *Handbook on Results-based Management and the 2030 Agenda for Sustainable Development* (2018).

<sup>247</sup> See, for example, UNODC/UNDP *Global Study*, p. 62.

- People may not understand how legal aid services can help them; people may not be aware that legal aid services are available at little or no cost
- Little support among the population for spending funds to defend accused criminals
- Lack of public confidence in the quality of legal aid services

## 2. Programming considerations and options

National or local programming should not only respond to challenges but also follow the motivation for reform, and respond to changing needs in the legal areas and changes in legal standards. For example, legal aid reform in Europe was very much inspired by the need to implement the *Salduz* decision of the European Court of Human Rights on access to legal aid in police stations<sup>248</sup> and the new EU Directive on legal aid.<sup>249</sup> In other regions, high numbers of unsentenced prisoners<sup>250</sup> and a lack of qualified lawyers<sup>251</sup> motivated legal aid reform. In some regions, especially where transition was made from totalitarian to democratic regimes, independence of lawyers is a key motivation.

It is recommended to run a pilot project in a region, city or even district with the support of all these stakeholders to test whether the chosen method applies to the local context, as well as the needs of the population, whether it is adequate and sustainable. Once a model has been chosen, regular analysis of performance of the system and critical study can help enhance performance.

### SHORT-TERM AND LONG-TERM PRIORITIES IN POST-CONFLICT STATES' CRIMINAL JUSTICE REFORM<sup>a</sup>

"Given the level of human rights abuse that might have occurred at the hands of the justice system, vetting must be undertaken to remove implicated individuals from the system ... After vetting has been carried out, a widespread recruiting campaign must be launched to bring new professionals into the justice system. These individuals will need to be trained quickly yet effectively ... Where capacity is present but weak, capacity development initiatives will be required. Capacity development (including mentoring and coaching) can also support and expand ... existing paralegal aid services."

Accountability and oversight of the justice system: formal oversight mechanisms, such as a judicial services commission, national office of the ombudsperson, or a human rights commission, will likely not be in place immediately after conflict. They will take time to establish, but advisers should make them a priority over the long term, because they provide accountability of the courts, prosecution service, and the defence service. Longer-term efforts should likely also focus on the adoption of codes of ethics for judges, prosecutors, court staff and defence counsel. Case management committees can provide coordination and expedite backlog. Civil society oversight is as important as oversight from official government agencies. The establishment of local committees made up of justice agencies and local community representatives who meet regularly is a useful mechanism for managing the judicial caseload and reviewing the justice system in the locality.

<sup>a</sup> UNODC *Criminal Justice Reform in Post-conflict States: A Guide for Practitioners* (2011), pp. 88–89.

<sup>248</sup> *Salduz v. Turkey* (2008) Appl. No. 36391/02. Establishes the right to a lawyer of suspects in police stations.

<sup>249</sup> Directive 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

<sup>250</sup> Also chosen as one of the global indicators in the global indicator framework of the 2030 Agenda to measure progress in achieving target 3 of SDG 16 ("Promote the rule of law at the national and international levels and ensure equal access to justice for all"): 16.3.2, Unsented detainees as a proportion of overall prison population.

<sup>251</sup> UNODC *Handbook on Access to Legal Aid in Africa* (2012).

## GLOSSARY OF FREQUENTLY USED TERMS

**Legal aid** – According to the UN Principles and Guidelines, “legal aid” includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with, a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. **Furthermore**, “legal aid” is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes (UN Principles and Guidelines, Introduction, para. 8).

For the purposes of this *Handbook*, it is sometimes necessary to make a distinction between these two elements of the definition. It is also necessary to distinguish between legal services funded by the State, whether national, regional or local, and those funded by other means, such as by civil society organizations. Therefore, the following definitions are adopted for the purpose of this *Handbook*. “Legal aid” means legal advice, assistance and/or representation and the provision of it at no cost (or in some cases reduced cost) to the person entitled to it. For the purposes of this *Handbook*, “legal aid” is not used to denote legal education, nor to denote alternative dispute resolution or restorative justice processes, which are referred to specifically as appropriate. This *Handbook* covers the provision of legal aid in criminal cases. Legal aid may also be provided for civil cases, but these are not covered in this *Handbook*.

**Bar association** – An organization of lawyers responsible for the regulation of the legal profession in their jurisdiction (by promoting professional competence, enforcing standards of ethical conduct); or professional organizations dedicated to serving their members; or both.

**Child** – As per the Convention on the Rights of the Child, Article 1, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

**Criminal justice system** – The UN Principles and Guidelines are concerned with access to legal aid in criminal justice systems, and adopt the definition of “justice process” found in the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime. “Justice process” encompasses detection of the crime, making of the complaint, investigation, prosecution and trial and post-trial procedures, regardless of whether the case is handled in a national, international or regional criminal justice system for adults or juveniles, or in a customary or informal system of justice. For the purposes of the UN Principles and Guidelines, “criminal justice process” also encompasses extradition, transfer of prisoners and mutual legal assistance proceedings.

**Early access to legal aid** – Early access to legal aid means access to legal aid from the time that a person is suspected of, arrested or detained in respect of, or charged with, a criminal offence (whichever is the earliest), and throughout the period up to and including the first appearance before a judge for the purpose of determining whether the person is to be detained or released pending trial.

**Evaluation** – A rigorous and independent assessment, as systematic and impartial as possible, of either completed or ongoing activity, project, programme, strategy, policy, topic, theme, sector, operational area, or institutional performance. It analyses the level of achievement of both expected and unexpected results by examining the results chain, processes, contextual factors

and causality using appropriate criteria such as relevance, effectiveness, efficiency, impact and sustainability.<sup>252</sup>

**Informal justice systems** – The resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law.

**Legal aid provider** – A legally trained professional (lawyer or paralegal or other suitably trained person) who provides State-funded legal aid on a full-time or part-time basis.

**Legal aid service provider** – The organization that provides legal aid services, or on behalf of which a legal aid provider works. The UN Principles and Guidelines establish that lawyers are the “first” providers of legal aid, but that States may involve a wide range of stakeholders as legal aid service providers such as non-governmental organizations (NGOs), community-based organizations, charitable organizations, professional bodies or associations, Public Defender institutions, private lawyers funded by the State to carry out legal aid and educational institutions.

**Monitoring** can be defined as the ongoing process by which stakeholders obtain regular feedback on the progress being made towards achieving their goals and objectives.

**Paralegals** – Non-lawyers trained in legal matters and authorized to perform specific tasks requiring some knowledge of the law and legal procedures appropriate to the needs of the community, but not requiring a law degree. Distinct from clerical assistants to lawyers, paralegals can in certain circumstances in some states perform certain tasks independently. They may be volunteers who have received a short training on relevant legal issues, but in some states may have similar qualifications to the professional lawyers.

**State-funded legal aid** means State funding of legal advice, assistance and/or representation, which is provided at no cost to the recipient, or state subsidy of the cost to the recipient (i.e., the recipient pays a contribution, with the remainder of the cost paid for by the State).

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<sup>252</sup>Definition inspired by UNODC *Evaluation Handbook Guidance for Designing, Conducting and Using Independent Evaluation at UNODC* (2017); and the UNDP *Handbook on Planning, Monitoring and Evaluating for Development Results* (2009).





# UNODC

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