157 Abaya Ave., office 44, Almaty, 050009, Kazakhstan,
tell/fax: +7 727 394 36 60, 394 36 94
info@lprc.kz, www.lprc.kz

***Professor Roger SMITH OBE***

# International Legal Aid Standards: a comparative analysis[1]

This paper summarises developments in quality assurance around the world. It ends with a brief section on possible application to Kazakhstan. It is in the following sections:

1. An introduction

2. Binding international obligations, in particular the UN International Covenant on Civil and Political Rights (ICCPR);

3. Advisory international standards, such as the *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*;[2]

4. National standards - with international implications - developed in a variety of circumstances and in particular:
    - 4.1 The notion of 'Active Defence' as developed in England and Wales
    - 4.2 Standard setting in three countries of the former Soviet Union
    - 4.3 Accreditation
    - 4.4 Peer Review
    - 4.5 Judging court performance
    - 4.6 Controlling caseloads
    - 4.7 Education/training
    - 4.8 Client evaluation

5. Potential application to Kazakhstan

---

[1]

This expert opinion has been prepared with financial support of the United States of America Embassy in Kazakhstan. The views and opinions contained in the conclusion, do not reflect the views of the United States of America Embassy in Kazakhstan.

[2] https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf

## 1. Quality assurance: a brief introduction

Systematic standard setting in legal aid provision began in the United States in the 1970s and gathered speed in the 1990s as a result of work undertaken in England and then Scotland, the two leading jurisdictions of the United Kingdom. There were a number of reasons for a growing UK interest in quality. These included the increasingly large amount of money being spent on legal aid in the jurisdictions of the UK (which were the most expensive per head of population in the world); an increasing concern generally within government about demonstrating value for money; considerable disquiet that a number of cases revealed that criminal legal aid defence lawyers had not prevented miscarriages of justice; and, finally, the statutory creation of a new body administering legal aid, the Legal Aid Board, that wished to demonstrate a public impact. The influence of UK work on quality assurance spread around the world encouraged by international networks such as the International Legal Aid Group and those linked to the Open Society Justice Initiative. As a result, there are now a number of models and elements that might be helpful to a jurisdiction such as Kazakhstan.

Quality: a definition

Quality comprises of a number of elements. One study suggested that quality in legal services consists of:

(a) technical competence;
(b) good client care;
(c) utility to the client.[3]

My own formulation would be that quality in a legal aid scheme consists of:

(a) the scope and eligibility rules of the legal aid scheme concerned

This should be tested by examining how far the scheme meet the minimum requirements of international agreements and the wider requirements of best practice.

(b) ethics

This involves not only gross issues such as avoiding corruption but also respect for the paramount interest of the client.

(c) technical competence
(d) good client care

The latter could be seen as a sub-category under ‘ethics’ but is sufficiently important to be identified as raising a set of issues on its own.

## 2. Obligations on states to provide effective access to justice

Kazakhstan signed the International Covenant on Civil and Political Rights (ICCPR) in 2003 and ratified it in 2006.[4] It is, therefore, bound by its obligations and, in particular, Article 14 (see Appendix 1). This specifies that all persons be equal before the courts and expressly requires that legal assistance be available in criminal cases where ‘the interests of justice require’. Doubts as to Kazakhstan’s compliance with Article 14 were raised in an NGO report to the Human Rights Committee in 2011.[5] This made various criticisms of the operation of the justice system and of legal aid which included:

[3] Mayson S *Civil Legal Aid: squaring the (vicious) circle* Legal Services Institute, September 2010 quoted in Legal Services Consumer Panel Quality in Legal Services November 2010
[4] http://indicators.ohchr.org
[5] http://www2.ohchr.org/english/bodies/hrc/docs/ngos/Almaty_report_HRC102.pdf

*One of the most wide-spread violations in criminal cases is the failure to provide timely access to qualified legal aid.*

The paper also alleged that:

*Criminal lawyers in Kazakhstan observe that they are often denied the right to speak with their clients in confidence.*

These are issues which will, unavoidably, affect the quality of legal aid. The Human Rights Committee itself made no comment on compliance with the legal aid provisions in Article 14 in its periodic report published in February 2015.[6]

Kazakhstan is not a signatory to the European Convention on Human Rights (ECHR) but it may be worth noting that the provisions of its Article 6 are very similar - though slightly different - to those of the ICCPR (see Appendix 2). The obligations of both in relation to legal aid in criminal cases are pretty well identical but the ECHR is more helpful on civil legal aid. The ECHR says nothing about the quality of representation required. However, the right to legal aid is subordinate to the overall objective of providing a 'fair … hearing' which implies a degree of effectiveness. Unlike the ICCPR, the ECHR is subject to interpretation by the European Court of Human Rights. This has traditionally been cautious on the extent of a state's obligation over the extent and quality of legal aid provision:

*A state cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes … [States are] required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention.*[7]

It has also stated:

*it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary) …*[8]

They key issue is that assistance should be sufficient to allow 'a reasonable opportunity' to a person to present his cases in a way which does not substantially disadvantage the party assisted.

The court has been stronger on specifying when representation should be provided and has embarked on a series of cases designed to ensure that States provide legal assistance during the first police or prosecution interview which may be form part of a prosecution case.[9]

In origin, both the ICCPR and ECHR derive from - and were inspired by - the UN Declaration on Human Rights 1948 which requires that: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'[10] and that 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.'[11] A number of other UN conventions stipulate the availability of legal assistance (presupposing it to be free in appropriate circumstances) in particular cases e.g. UN Convention on the Rights of the Child.[12]

Consideration of the quality of legal aid must take place within the overall context of the obligation on a state to enforce rights that facilitate effective defence. These provide the framework within which

[6] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/023/57/PDF/G1502357.pdf?OpenElement
[7] ECtHR 24 November 1993 Imbriosca v Switzerland No 13972/88
[8] ECtHR 15 February 2015 Steel and Morris v UK No 68416/01
[9] See Salduz v Turkey (27 November 2008)
[10] Article 10
[11] Article 11.1
[12] Article 37(d)

lawyers operate. If a state has not implemented these rights then it will not be open to lawyers to seek to enforce them and, thus, the quality of legal assistance might be inadequate. The following are some of the rights to which a state must pay heed in establishing a system which is, overall, fair:

(a) the right to be presumed innocent;
(b) the right to silence and the prohibition against self-incrimination;
(c) the right to be tried without undue delay;
(d) the overall requirement of a fair and public hearing;
(e) the right to information about the nature and cause of the accusation;
(f) the right to legal aid in criminal cases in certain circumstances;
(g) the right of private consultation with a lawyer;
(h) the right to investigate the case against the accused;
(i) the right to be tried in one's own presence and to participate in the process;
(m) adequate time and facilities to prepare a defence;
(n) the right to call and question witnesses;
(o) the right of free interpretation.

These are rights guaranteed by the ICCPR. The ECHR, both in its original form and as interpreted by the European Court of Human Rights, adds a further range of rights which might now also be regarded as key elements of a quality legal aid scheme e.g. the provision of representation from the time of the first significant prosecution or police interview.[13]

## 3. Principles and Guidelines: UN Standards

In 2013, the UN Office on Drugs and Crime (UNODC) published principles and guidelines on Access to Legal Aid in Criminal Justice Systems (see Appendix 3).[14] These had been approved by the General Assembly of the United Nations in 2012 as a 'useful framework' to guide Member States who were 'invited' to 'adopt and strengthen measures to ensure 'effective legal aid' in accordance with them. The UNODC also published a Handbook,[15] written by Professor Ed Cape, on implementation. The Principles, Guidelines and Handbook represent excellent resources in relation to the quality assurance of legal aid provision. They incorporate the broad approach to quality suggested in the first section above (see Appendix 4).

The Guidelines and Principles have proved a useful lobbying tool for the improvement of legal aid and ensured its consideration within the UN structure. A major international conference of legal aid experts and others concerned with the topic was held in South Africa in June 2014. It passed the 'Johannesburg Declaration' of support. The guidelines have helped legal aid to become integrated within UN discussion of crime and crime prevention. The 'Doha Declaration' passed after a conference in April 2015 on crime reaffirmed the commitment:

To review and reform legal aid policies for expansion of access to effective legal aid in criminal proceedings for those without sufficient means or when the interests of justice so require, including, when necessary, through the development of national plans in this field, and to build capacities to provide and ensure access to effective legal aid in all matters and in all its forms, taking into account the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.[16]

---

[13] Salduz v Turkey 27 November 2008, No 36391/02
[14] https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf
[15] http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/13-89016_eBook.pdf
[16] http://www.unodc.org/documents/congress//Documentation/ACONF222_L6_e_V1502120.pdf

For the sake of completeness, it should be noted that the European Union has been engaged in a programme relating to safeguards for defendants in criminal proceedings. a Roadmap on procedural rights was adopted in 2009 by the Justice Council proposing five legislative measures:

- the right to interpretation and translation ;
- the right to information about rights (Letter of Rights);
- the right to legal advice, before and at trial and legal aid;
- the right for a detained person to communicate with family members, employers and consular authorities ;
- the right to protection for vulnerable suspects ;
- a Green Paper on pre-trial detention.

As a non-member of the EU, these standards are not directly relevant to Kazakhstan. However, the Directives which have been agreed are useful indications of the duties accepted by EU States as arising from the ECHR and might be useful in drawing up any test of compliance with ECHR obligations.

## 4. National standards with international implications

Bar Associations can tend to be suspicious of calls to monitor, assess and improve the quality of the services provided by their members for two reasons: they may feel that their members will be hostile to such initiatives and they may also be jealous of their own autonomy, particularly in jurisdictions where this has only recently been won. In this regard, the experience of the UK and US may be helpful. Both are jurisdictions where a relatively large amount of public money has been spent on providing legal aid.

### 4.1 Active Defence: England and Wales

In England and Wales, by far the largest UK jurisdiction, bad publicity about the low standards of solicitors and their representatives during police station interviews led the Law Society (the relevant Bar Association) to take action on its own account in the early 1990s. To avoid further criticism, it sought to encourage solicitors to raise their standards. In particular, it commissioned a book setting out best practice for solicitors in criminal cases, *Active Defence*.[17] The idea behind active defence is suggested by its name. Defence lawyers must take initiatives rather than always being responsive to the prosecution. At significant milestones in a case, they must '… analyse and take stock of the information obtained so far; … consider the implications of this for the prosecution and defence cases … make decisions about the actions to be taken in consequence, particularly defence investigation.[18] In addition, the Law Society published *Criminal Defence: a good practice guide in the criminal courts.*[19] The commitment to active defence was given practical force by changes to the training programmes of lawyers; the development of specialist criminal accreditation schemes; and commitment in particular to the training of police station representatives to take an active role in ensuring the fair treatment of suspects being interviewed.

### 4.2 Standard setting in three countries of the former Soviet Union

The approach of specifying best practice standards has been followed in other jurisdictions. In Moldova, two lawyers with the Public Defender Office drafted a good practice guide which was published by the Bar Association. This sparked off discussion, assisted by the Open Society Justice Initiative, on standards within other countries within the same region. Similar initiatives were

---

[17] R Ede and E Shepherd, Law Society, 2000, now out of print.
[18] As reported in Ede and Edwards, p37
[19] R Ede and A Edwards, Law Society, 2002

supported by the legal aid authorities in Ukraine, Georgia and Moldova. As a result, representatives of the three countries came together for a series of meetings in 2013 and published in 2014 a Model Code of Conduct for Lawyers in Criminal Cases and Model Practice Standards for Criminal Defence (see Appendix 5).[20] This might be a particularly useful reference document for Kazakhstan as it reflects the experience of countries with a similar background.

### 4.3 Accreditation

A step beyond setting out best practice is the establishment of accreditation schemes as a means of encouraging minimum standards. These can accredit either specific areas of expertise or general management standards within the lawyers' practice. Again, the jurisdiction in the lead with this has been England and Wales - largely because of the large numbers of private practitioners in general and the particularly large engagement of those practitioners in publicly funded work. The Law Society developed a scheme for accrediting legally aided representatives during police station initial interview of a suspect. Responsibility for this has now been transferred to the Solicitors Representation Authority. Details are publicly available.[21] The scheme was originally limited to non-qualified representatives sent to police stations by lawyers but is now mandatory for any lawyer as well. In its current form, the police station qualification scheme is linked with a scheme for accrediting those who appear in the magistrates' (lower) criminal courts and forms part of a Criminal Litigation Accreditation Scheme. This is probably the most detailed accreditation scheme on criminal work in the world. For example, to pass the Police Station Qualification a candidate has to keep a portfolio of work. This should 'consist of four case reports of advice provided at a police station with the direct involvement of a duty solicitor. The first two reports are of instances in which you've observed the duty solicitor giving advice, and the other two are of instances in which you have advised a client, under the direct supervision of a duty solicitor'.[22] The candidate then has to pass a 'critical incidents test', described as follows;

> *This is a live role-play test, based on audio-tapes of simulated police-station interviews. You can offer advice during set pauses in the recording. You can also choose to interrupt the interview to give advice. Your responses are recorded and subsequently assessed.*[23]

Finally, any applicant without a recognised legal qualification has to sit a written examination covering 'knowledge and understanding of basic criminal law, the law of evidence, police station procedures, the adviser's role and necessary skills'.

The Law Society developed the police station accreditation scheme to respond to public concern. However, practitioners have also supported accreditation schemes developed for more positive reasons, notably to allow those who are experts in a field to advertise that fact. There are now 14 specialist accreditation schemes covering areas of law from planning to personal injury.

In addition, there is one general scheme, Lexcel, described as 'Law Society's legal practice quality mark for excellence in legal practice management and excellence in client care'.[24] The Law Society's explanation of the benefits of Lexcel qualification stresses the commercial advantages, as will be seen below. The Legal Aid Agency is also responsible for a separate but similar scheme which applies only to those providing legal aid. Accreditation by either is required of those undertaking legal aid.

---

[20] http://www.legalaidreform.org/criminal-legal-aid-resources/item/752-the-model-code-of-conduct-for-legal-aid-lawyers-in-criminal-cases
[21] http://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page
[22] http://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page#portfolio
[23] http://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page#portfolio
[24] http://www.lawsociety.org.uk/support-services/accreditation/ and http://www.lawsociety.org.uk/support-services/accreditation/lexcel/

An indication of the matters covered by Lexcel can be seen from the list of documentary evidence required. These relate to issues which, in many jurisdictions, would be left to practitioners themselves. After some initial grumbling, it is probably fair to say that most practitioners in England and Wales accept that these indicate the range of policies which all practices should adopt - and, indeed, that failure to have them is a potential. For further extracts from the Lexcel material produced by the Law Society discussing its advantages see Appendix 6.

Below are the sorts of documentation required for accreditation:

> *Your Business Plan*
> *Equality and Diversity Policy*
> *Signposting and Referral procedures*
> *Organisation Structure 2013 this should identify all members of staff, their job titles, and lines of responsibility*
> *Recruitment Process*
> *Induction Process*
> *Appraisal Process*
> *Systems for supervision*
> *File Management procedures*
> *Supervisor file review processes and procedures*
> *Process for selection and evaluation of suppliers*
> *Complaints Procedure*
> *Client Feedback Procedure*
> *Office Manual.*[25]

### 4.4 Peer Review of files

The legal aid authorities first in England and Wales and then Scotland have developed a methodology for a further quality assurance mechanism: peer review of files. Domestic legislation allows the legal aid authority to have access to the files of legally aided clients to check quality as an exception to the usual rule of legal privilege and confidentiality. The basic methodology is that an independent body (in England and Wales an independent academic institution) appoints experienced and respected practitioners as peer reviewers. They survey a random range of case files and grade them against specified criteria. A common training programme for reviewers is designed to encourage common standards. The files are graded on a five point scale from excellent to failure. Firms are then graded on the basis of the quality of their work as evidenced on the file.[26] The intention of the scheme is to improve standards, not reduce the number of practitioners, so those with failing scores are encouraged to improve. A separate scheme has now been introduced for telephone advice.[27]

A recent paper by those who devised peer review indicates the findings - in Scotland in this instance:

> *The programme has established that errors in legal advice, professional negligence or professional misconduct are relatively uncommon in Scotland. In particular, examples of misconduct, money- laundering or abuse of the legal aid scheme have been very unusual, although privately charging a client who is covered by legal aid is not that uncommon. The most typical causes of fails have been:*
> *- Delays in taking action or applying for legal aid*

[25] http://www.sqm.uk.com/faqs.html
[26] More information is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/314274/independent-peer-review-process.pdf
[27] https://www.gov.uk/guidance/legal-aid-agency-audits

*- Poor communication with clients relating to the operation of the costs rules for legally aided persons*
*- Poor file notes of phone calls or interviews*
*- No terms of engagement letters on file*[28]

A number of jurisdictions have followed those in the UK in introducing some form of peer review - most recently China and 'the UK model was demonstrated or piloted in Ontario, Finland, Northern Ireland, Moldova, the Netherlands and New Zealand.'[29] There is a degree of cost associated with introducing peer review - notably paying the reviewers - and in The Netherlands an issue arose (but now apparently overcome) over confidentiality because there was not the same statutory access to files for the legal aid administration.

### 4.5 Judging court performance

The technique of peer review is totally dependent on review of written material in the lawyer's file. In countries where it has been introduced, it is pretty clear that the quality of such files has radically improved. However, this approach to peer review needs adaptation to deal with assuring basic competence in court hearings. This has been a controversial area in the UK with a scheme eventually evolving which is dependent on assessment of quality by judges. The devisers of peer review indicate their unease:

> *Whilst this helps to overcome logistical problems it also brings some drawbacks. First, the judges are not peers, second, there are concerns that requiring judges to assess lawyers appearing before them will alter the relationships between lawyers and judges and may even undermine the independence of the lawyers appearing in such cases. The latter concerns have led to legal challenges. However, equally problematic is the fact that to cater for human variations in generosity of marking in peer review it is normally necessary to use a proportion of double marking and/ or to monitor the markings of the different reviewers, providing feedback as to variations between them. The current proposals for QASA contain no such safeguards.*[30]

The response of the legal aid authorities in Chile is interesting. Their inspectors, who are full-time appointees, actually listen to transcripts of court hearings in order to discuss them with the practitioners involved and to rate them.[31] Indeed, Chile may have one of the most rigorous quality assurance programmes in the world.[32] It even incorporates measurement against statistics for outcomes in relation to findings of innocence and sentence as measured against prosecution recommendation to the court.

### 4.6 Controlling caseloads

A quality issue that has arisen particularly in the United States has been the high number of cases required of salaried legal aid lawyers. In the debate about acceptable caseload standards, bodies representing practitioners have sought to impose maximum caseload standards to protect their

---

[28] 'Exporting Quality' A Paterson and A Sherr, Conference Paper, International Legal Aid Group, Edinburgh 2015
http://www.internationallegalaidgroup.org/images/edinburgh2015/conferencepapers/exportingquality.pdf
[29] as above.
[30] as above
[31] 'Ten Lessons for Legal Aid Contracting from Chile' Roger Smith http://www.internationallegalaidgroup.org/images/newsletters/26.pdf
[32] See http://www.internationallegalaidgroup.org/images/edinburgh2015/conferencepapers/PeerReview SysteminChile.pdf

members from what they see as exploitation. Thus, both the American Bar Association (ABA)[33] and the National Legal Aid and Defenders Association (NLADA) have published guidelines on the maximum number of cases that they consider a public defender can satisfactorily undertake or the payment that they should receive. The NLADA, rather hopefully, recommend that 'The public defender should be compensated at a rate not less than that of the presiding judge of the trial court of general jurisdiction'.[34] It has also put numbers to the maximum caseload that can safely be carried:

> *The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.*[35]

To establish the case for reasonable representation, the ABA and NLADA have effectively produced good practice manuals for practitioners and funders.[36] The concern with case overload is probably particular to public defender schemes - and much more of an issue in the US than elsewhere. It might be seen as largely a political measure to allow some sort of dialogue with funders over proper levels of staffing.

### 4.7 Education/training

During a previous consultancy undertaken in relation to the quality of legal aid in Moldova, it became clear that one of the problems actually related to the training of lawyers more generally. This may be an issue in Kazakhstan. Certainly, the feeling in Moldova was that a legacy from earlier times was a university law course that was very academic and there was none of the practical training of lawyers that is part - in different ways - of the UK or US model. Various recommendations were made in a paper for the United Nations Development Programme to which reference could be made if it was thought to be relevant.[37]

### 4.8 Client evaluation

One component of improving quality might be client evaluation of practitioners. A number of legal aid schemes require practitioners to obtain feedback from clients through the completion of forms. Mostly, this information is used directly by the legal aid administration and is a valuable component of a judgement on quality.

However, we are now beginning to see comparison sites appear on the internet - some using client evaluation and others cost evaluation. To encourage these, regulators in England and Wales have now agreed to release data on complaints and other interaction with providers.[38] There are already a number of sites that offer comparisons of lawyers along the lines of comparison sites for other service providers: comparelegalcosts.co.uk and legallybetter.co.uk are two examples. There are some difficulties with this. There can be an issue with the integrity of the data, particularly where reviews or information are posted only about practices that have registered and/or paid a fee for the

---

[33] http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf

[34] Standard 13.7 http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense

[35] Standard 13.12 as above

[36] See the list of NLADA standards at http://www.nlada.org/Defender/Defender_Publications/Defender_Pubs_IndigentDefense#Standards%20for%20the%20Defense and for the ABA criminal standards see http://www.americanbar.org/groups/criminal_justice/standards.html

[37] http://www.cnajgs.md/uploads/asset/file/en/326/Final_Report_Moldova_Legal_Aid_final_April_2013_EN.pdf

[38] http://www.lawgazette.co.uk/law/solicitor-data-to-be-opened-to-comparison-sites/5042634.fullarticle

service. In addition, clients' feedback on their lawyers tends to be less critical than objective assessments might suggest and also unduly affected by whether they won or lost in any dispute.

Nevertheless, client feedback sites seem pretty certain to develop. Any provider would have to be particularly careful to ensure any feedback was factually accurate and legally defensible since, if critical, it would be likely to be challenged. Unmediated access to a comparison website by disaffected clients might create difficulties in terms of potential dispute as to fact or objection to alleged libel. Particular considerations would apply if the website was, in any way, official - either established directly by a Ministry of Justice or a legal aid administration. There would be bound to be additional concerns that those running the website would not be independent in their judgement and so, for example, tended not to favour the more troublesome lawyers with a track record of, for example, suing the state. One advantage of a Bar Association running accreditation schemes, general and/or specific, is that it could validly produce lists of its members who had such accreditation which would be a transparent test.

## 5. Application to Kazakhstan

It may be daunting for Kazakhstan to apply the examples of quality assurance which have largely been developed in countries like the UK where spending on, and experience with, legal aid has been much more extensive. There are a range of initiatives which might be taken by institutions in Kazakhstan if they wished to raise the quality of legal aid provision. Possibilities would include:

a. a debate on the issue of quality of legal aid within Kazakhstan led by an appropriate body. The evidence to the UN suggests that there are critical bodies within the country which are aware of problems.

b. an audit of the current delivery of legal aid as against the UN guidelines and principles following the approach taken in the descriptive handbook referred to above or, more ambitiously, a review of legal aid within the effectiveness of the criminal defence system as a whole using the methodology developed by a team led by Professor Cape in eight European countries and Turkey[39] and then in a study of Bulgaria, Georgia, Lithuania, Moldova and Ukraine.[40] A key issue is likely to be whether there is practical and effective access for a suspect to a defendant during the initial police or prosecution interview.

c. a guide to good practice in criminal matters written by a respected criminal specialist in Kazakhstan. This could be undertaken under the auspices of the Bar Association, the Ministry of Justice or any legal aid administering authority or some other third party with an interest in the field. The identification of good practice is the core of quality assurance.

d. the engagement of the Bar Association in the improvement of legal aid practice. After all, despite an often demonstrated reluctance to intervene in the work of its members, the prime responsibility for the quality of lawyers rests with the legal profession's own regulatory bodies. The state and state institutions need to take are that they do not trespass on the self-regulation of lawyers. However, there are many ways which the Bar itself can do to maintain and improve the quality of legal aid provision by its members - something which it is in its enlighten self-interest to do.

   These include:
   (a) Ensuring that subjects like criminal law and practice are adequately covered in pre-qualification training;

[39] eg *Effective Criminal Defence in Europe* as above,
[40] E Cape and Z Namaradze *Effective Criminal Defence in Eastern Europe* Legal Aid Reformers Network, 2012

(b) Establishing or encouraging additional qualifications or competency schemes for specialist criminal lawyers eg by encouraging universities to run evening-based courses for criminal practitioners or establishing competency schemes for accrediting specialists.
(c) Encouraging compulsory professional development initiatives. English lawyers have to undertake a certain amount of training each year in order to maintain their right to practice.
(d) Encouraging discussion of issues relating to specialist fields of practice by helping to establish societies of specialists (such as the Criminal Bar Association or the Criminal Law Solicitors Association) and by themselves participating in comment on developing law and policy (for example, the Law Society has a criminal law committee which plays this role and has a membership of about 15 expert practitioners.
(e) Developing standards of practice.
(f) Considering whether their members would benefit from specialist accreditation schemes which could both improve practice and operate to recognise the expertise of specialist practitioners.
(g) Seeking to protect their members from exploitation by legal aid funders by eg establishing recommendations on the maximum number of cases which it is proper to expect any lawyer to undertake at one time.
(h) Consideration of whether a peer review scheme might be appropriate. My own view would be that it might be better to begin with the encouragement of best practice rather than to consider an intrusive regulatory regime of this kind.

e. a review of legal education - whether conducted by the Bar Association or others - both prior and post qualification with a view to encouraging more practicality and competence in dealing with legal aid matters.

f. Government consideration of explicit acceptance of ECHR standards in relation to fair trial - whether or not this extends to an application to join the Council of Europe, something that would have other, far-reaching implications.

***October 2015***

**APPENDIX 1**

## Article 14 International Covenant on Civil and Political Rights

*1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*
*2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*
*3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
*(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
*(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
*(c) To be tried without undue delay;*
*(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****.*
*(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
*(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
*(g) Not to be compelled to testify against himself or to confess guilt.*
*4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*
*5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*
*6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*
*7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*

**APPENDIX 2**

## Article 6 European Convention on Human Rights

*1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
*2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
*3. Everyone charged with a criminal offence has the following minimum rights:*
*(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
*(b) to have adequate time and facilities for the preparation of his defence;*
*(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****;*
*(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
*(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

**APPENDIX 3**

## UNODC Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

The fundamental principle is that:

*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.*[41]

Other key principles include prompt and effective provision:

*27. States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process.*

*28. Effective legal aid includes, but is not limited to, 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.*

Thus, issues such as confidentiality of communication are not just issues of quality for lawyers individually or legal professions collectively to consider but, as the UN Principles indicate, also lace requirements on states to ensure.

The UN Principles assert that states have direct obligations in relation to ensuring quality:

*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.*

*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.*

The UN Principles are fleshed out by guidelines. For example:

*… 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.*[42]

and

*… States should take measures, in consultation with civil society and justice agencies and professional associations:*

*…*

*(b) To set quality standards for legal aid services and support the development of standardized training programmes for non-State legal aid service providers.*[43]

[41] Article 2
[42] Guideline 15
[43] Guideline 17

**APPENDIX 4**

**UNODC Early Access to Legal Aid in Criminal Justice Processes: a handbook for policy makers and practitioners**

The section on quality is as follows, and is worth quoting extensively:

*The approach to quality assurance will depend upon how legal aid, and specifically early access to legal aid, is organized and delivered. In particular, it will depend upon whether: (a) there is a legal aid body responsible for administering legal aid; (b) whether there is a contracting relationship between the legal aid body and legal aid, and legal aid service, providers; and (c) whether legal aid is provided through a public defender service.*

*In view of the wide variation in approaches to the organization and delivery of legal aid, it is not appropriate to be prescriptive in describing how quality assurance should be approached. 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. In the absence of such arrangements, quality assurance may be left to bar associations and individual legal aid service providers, which is often not satisfactory.*

*Nevertheless, whatever types of arrangements for delivering legal aid exist, it is possible to describe the kinds of quality assurance mechanisms that should be considered, making a distinction between those which are relevant to legal aid service providers and those which may apply to legal aid providers.*

*Legal aid service providers*

*In considering the standards that may be required of legal aid service providers, a distinction can be made between service delivery standards and organizational (or management) standards. The relevance of any particular standard will depend upon the mode of delivering early access to legal aid. For example, response times will be relevant to call-in schemes but not to visiting schemes, whereas ethical and quality standards will apply to both types of schemes.*

*Service delivery standards*

*With regard to service delivery standards, the following aspects should be considered:*

- *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 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 are responded to.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 specified reason for not doing so, with such 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 (see chapter V on the role and responsibilities of legal aid providers in that regard)*

*• 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*

*Organizational standards*

*With regard to organizational standards, the following aspects should be considered:*
*• 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 who has the necessary qualifications, knowledge and experience to provide such supervision, and other appropriate mechanisms for supporting staff must be provided. Supervision should include the 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)*
*• Caseloads: 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.*

*Legal aid providers*

*Legal aid providers who are lawyers may be subject to the professional standards of the bar association or other professional body to which they belong, and in some countries this is regulated by law. However, in some countries, lawyers are not required to be a member of a bar association, and they are not subject to an obligation to comply with professional standards. Where bar associations do exist and do have a disciplinary function in relation to quality, there is considerable variation in the extent to which they effectively regulate quality. 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 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 (see annex I)*

*• 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*

The Principles, Guidelines and Handbook represent excellent resources in relation to the quality assurance of legal aid provision. It may be, however, that it is worth separating out various strands within them as follows:

(a) the binding obligations on states through international human rights conventions ie to provide an effective system that complies with minimum requirements e.g. within countries covered by the European Convention makes available legal assistance for the initial police or prosecution interview. These are covered in the first section above.

(b) the desirable contractual provisions which states might wish to apply to those delivering legal aid service e.g. requiring some form of quality assurance. These will be dealt with further in the sections which follow.

(c) the ethical requirements on any legal aid provider to behave professionally eg with due independence from the prosecution. Such ethical requirements would, in most states, lay primary duties on the regulatory bodies for the legal profession, often the profession itself in terms of the Bar Association where one exists. The state incurs only a secondary duty ie to ensure that the profession enacts appropriate requirements rather than to implement them itself. These also will be dealt with below.

**APPENDIX 5**

**Model Code of Conduct for Lawyers in Criminal Cases and Model Practice Standards for Criminal Defence (Ukraine, Georgia, Moldova)**

A flavour of the detail in the document can be seen in the following extract:

> *1.2. Preparation for first client interview.*
> *1.2.1. Prior to conducting the initial interview with the client, the lawyer, should ensure that they are familiar with:*
> *(ci) the elements of the offence and the potential punishment of any charges which it is known that their client is facing;*
> *(cii) generally relevant substantive and procedural criminal law and its application in their particular jurisdiction, as well as all other relevant law; (ciii) relevant jurisprudence of national courts;*
> *(civ) the relevant provisions of the European Convention on Human Rights and, in particular, Articles 3, 5 and 6; (cv) the relevant jurisprudence of the European Court of Human Rights; (cvi) recent developments in domestic national court jurisprudence and the European Court of Human Rights.*
> *1.2.2. The lawyer shall take measures to verify if there is no barrier to communicating with the client - whether in terms of language, the client's mental capacity or otherwise - and, if such might exist, request involvement of the relevant additional services.*

### Law Society of England and Wales: Benefits of Lexcel Accreditation

This is the 'Law Society's legal practice quality mark for excellence in legal practice management and excellence in client care'.[44] There are now two versions of Lexcel: one for national and one for international practices. The Law Society's explanation of the benefits of Lexcel qualification is interesting because it stresses the commercial advantages, as will be seen below. A similar scheme (the specialist quality mark) is overseen by the body administering legal aid. Accreditation by either is required of those undertaking legal aid.

> *Why apply for Lexcel accreditation?*
> *It is vital to manage the quality of your legal services effectively. A quality management system that is independently assessed demonstrates your commitment and ability to consistently deliver services that meet client expectations, improve overall satisfaction and assist regulatory compliance.*
> *Increase client satisfaction*
> - *Achieve consistent levels of client service across your practice or department / organisation.*
> - *Reduce the number of client complaints and increase overall satisfaction levels among clients.*
>
> *Win more new business*
> - *Leverage Lexcel to attract new work and provide an advantage in tender processes.*
> - *Tailor Lexcel to your practice's or department's / organisation's processes to help provide a clear point of competitive differentiation.*
> - *Lexcel is accepted by the Legal Aid Agency, instead of the SQM.*
>
> *Gain operational efficiencies*
> - *Increase profitability and efficiency through use of standardised processes throughout the practice or department / organisation.*
> - *Access more competitive insurance premiums.*
>
> *Minimise the risk of claims*
> - *Protect your brand and reputation by using standardised processes to reduce risks of claims or complaints that may lead to negligence claims.*
> - *Improve compliance with regulatory requirements.*

Lexcel qualification or an equivalent is now mandatory for solicitors delivering legal aided services. However, it has become virtually the industry-standard. The Law Society publishes testimonials from solicitors using the scheme which includes that below:

> *Dermot Furey, Founding Partner of Gartlan Furey gives his opinion on the Law Society's practice management standard:*
> *Why did the firm seek Lexcel accreditation?*
> *"Gartlan Furey prides itself on being a progressive firm which strives to do things as efficiently and effectively as possible. We sought an independent audit to confirm we were providing the best service for our clients in all areas.*
> *We also wanted to make changes where change was needed and to get a third party assessment of our practice. We have been successful in achieving these aims.*
> *We chose Lexcel as it is more comprehensive and far-reaching than other accreditations. The standard has developed over a long period, has scale and has the advantage of the backing of the Law Society of England and Wales to develop, support and administer it, which is key to its continued success. International recognition of Lexcel in overseas markets is an added bonus for our clients abroad."*

---

[44] http://www.lawsociety.org.uk/support-services/accreditation/ and http://www.lawsociety.org.uk/support-services/accreditation/lexcel/

*How has Lexcel impacted on the business?*
*"Our approach to file and people management have been most impacted by Lexcel. For example, due to standardisation across the business, a fee earner can pick up a file from someone else in the practice and be instantly familiar with the status of the file.*
*The level of internal communication has increased as a result of Lexcel – this has been a very positive change."*
*Has it been worth it?*
*"It has been extremely worthwhile to go through this process. The single greatest contribution is in the area of Risk Management but there were many other 'wins'. There are gains in efficiency and effectiveness but also a positive impact on morale through revised HR processes and improved internal communication."*
*External stakeholders: What do they think*?
*"The standard is recognised by many clients – particularly those who have a presence in the UK (e.g. banking clients) and by our insurers.*
*We firmly believe it has been to our advantage to include our Lexcel accreditation when tendering for business and in a very competitive marketplace this can be a positive distinguishing factor."*
*How did you find the application and assessment process?*
*"The application and assessment processes were both positive. The application was relatively straightforward*
*– you should be sure you are ready (or almost ready) for assessment when you apply as your assessment must be completed within three months of application.*
*The assessment process was quite involved but our assessor ensured that it had minimal impact on our business as possible. His feedback was insightful and helpful."*
*Tips for practices interested in Lexcel?*
*"Firstly, review yourself against the Lexcel self assessment checklist so that you are truly aware of the requirements. Your firm may already meet some of these. From here, you should create a plan to work on the accreditation – this must have partner involvement who will champion change from the top down. Approach the issues which affect your entire firm first as these will take longest to implement. We used a number of toolkits on offer from the Law Society which were extremely useful as a basis for providing templates, forms and approaches. Of course, these have to be customised, but they are a very useful starting point."* [45]

[45] lexcel-case-study-gartlan-furey-2.pdf