



# Legal aid audit summary

Practice themes from the 2016-17 quality and value audit programme

## Purpose

This report provides a summary of the major practice themes in the audit of 85 legal aid lawyers in the 2016-2017 financial year. It also analyses the comments made by the Auditors for consistent practices that may have contributed to the results achieved.

By doing so, our aim is that lawyers will understand more clearly the purpose of a legal aid audit, and some of the common themes in each of the results categories of excellent, very good, acceptable, poor and very poor.

This report gives specific examples of lawyers who have received excellent results, as well as where serious compliance concerns have been raised. These examples will contribute to lawyers understanding their obligations as set out in the Contract for services, as well as ways to demonstrate compliance.

This report can assist legal aid lawyers when they are reviewing their practice and help them to achieve better results if they were to be audited. More importantly, it ensures legal aid lawyers are delivering a consistent service for their clients that is effective, efficient and ethical.

## Background to the Audit Process

Each year Legal Aid Provider Services manages an audit programme for legal aid lawyers. This is part of the quality assurance framework for legal aid services under section 91 of the Legal Services Act 2011 (“the Act”).

Our target for the 2016-17 financial year was 85 or more audits. We completed 85. This was around 5% of the 1667 lead legal aid lawyers as at 30 June 2016.

Legal aid lawyers are selected for audit using a statistical tool based on a combination of factors, including:

- high legal aid earnings
- records of substantiated complaints
- previous unfavourable audit results.

Lawyers who have attained good results in a recent audit programme but are flagged due to other factors such as high earnings, would generally not be re-audited.

Experienced legal practitioners conduct the audits by reviewing the lawyer’s files and records of selected legal aid cases. For each lawyer, we audit 5 completed legal aid cases of a variety of types. Before the audit report is finalised, lawyers have an opportunity to comment on the draft report. Their comments, and any additional material provided, are considered by the auditor.

Completed audits receive an overall rating. This is an overall judgement on the quality and value of legal aid services supplied by the lawyer. Ratings are on a scale ranging from 1 to 5, with 1 being excellent and 5 being very poor. Auditors endeavour to provide feedback on both areas of good practices, as well as recommendations for improvement based on their experience as legal practitioners.

The [Audit and Monitoring Policy](#) and the [Audit Terms of Reference](#) have more details about the process.

Where an Auditor has indicated concerns in an area of the lawyer’s practice, or given an overall rating of 4 or 5, the Ministry of Justice may refer the lawyer to the Complaints Management process. The Ministry assesses the contents of the audit report against the Act, the Contract for Services (“the Contract”) and the Practice Standards for legal aid providers (“the Practice Standards”) to see whether the concerns should be substantiated.

Where it is appropriate to do so, action under the Complaints Management Policy may be taken.

Results of the Audit programme, and how they compare with previous financial years, are attached as Appendix 1 to this report.

# Practice themes identified in audits

## Qualitative audit results

Audit reports are a rich database of qualitative information about the delivery of legal aid services.

From the 2016-17 audits, we analysed a sample of the qualitative comments in all result categories — excellent to very poor.

We used qualitative data analysis methods to identify main practice themes. We collated the auditor comments under the main sections of the audit report template. We then reviewed the dataset looking for frequently occurring comments and patterns.

This section of the report lists particular features of practice for each of the overall ratings. Comments in blue boxes are direct quotes from auditors, which are particularly illustrative of how these themes were demonstrated at each rating.

The five main practice themes identified were:

1. Client outcomes
2. Communication with clients and other justice system users
3. Quality of legal advice
4. Value for money
5. File management and record-keeping practices

## THEME ONE – Client outcomes

Auditors considered a good client outcome was when a legal aid lawyer got the best possible result for the client considering the facts of their case, and also that it was achieved in a timely way. The skill and efficiency of lawyers was assessed by the work present on file. It is important to note that lawyers across the board generally did well in this area, and was not the dominant reason for a lower overall rating.

### *Excellent and very good results*

Audit reports rated excellent and very good consistently achieved the best outcomes for their clients. This included finding rehabilitation programmes or negotiating release on bail. Auditors noted that these lawyers seemed to genuinely care about their client's circumstances and worked hard to achieve the best outcomes.

“Clear that provider worked hard to obtain the best result for [the client] and this was achieved.”

### *Acceptable results*

Auditors rated as acceptable those audits from competent legal aid lawyers who generally achieved good outcomes for their clients. Auditors often commented that lawyers resolved

matters in the best way. File maintenance or communication sometimes led to auditors having to make educated guesses on what work had been done to achieve the outcome.

“An appropriate and satisfactory result. The case appears to have been handled competently and efficiently.”

#### *Poor and very poor results*

In some audits with poor results, good outcomes were nevertheless often obtained for clients. There were, however, also cases where errors were made, leading to delays in matters being resolved. Serious competence issues were rare.

“It was difficult to understand the state of the proceedings. The provider appears to be a good advocate for his clients’ interests.”

#### **THEME TWO – Communication with clients and other justice system users**

Auditors assessed the file for regular and appropriate communication with the client, the Court, the Crown and the Ministry of Justice. The Contract for Services and Practice Standards sets out specific expectations around communication. These expectations are not only to ensure the client is kept up to date with their case but to have a record of instructions if a complaint was made. The Auditors also considered how easily a new lawyer would get up to speed if the case had been transferred.

#### *Excellent and very good results*

In excellent and very good audits, regular reporting letters were sent that were appropriate to the clients’ circumstances. This included the lawyer’s sensitivity to the factual matters on the file. Lawyers advised their clients of progress after every event. It was easy to understand the advice given and confirmation of instructions were always sought before steps were taken.

“Apart from all the evidence of consistent good practice and file management on this and other files which are detailed elsewhere in the audit, the views on this file relate to the particularly sensitive, appropriate and efficient way in which the provider handled this very difficult factual matter.”

The same quality of communication extended to the Court and Ministry of Justice. All relevant parties were kept informed of the legal aid status of the client. Appropriate discussions with other parties, Police, Crown, Court and Ministry often led to a good outcome for the client and securing additional funding where appropriate.

“These letters were unusually helpful and comprehensive and were on each file. This resulted in there being no requests by Legal Services being necessary to obtain further information or clarification.”

### *Acceptable results*

Audits rated acceptable sometimes had incomplete or patchy client care documentation or no final reporting letters on file. This was a serious issue that could mean the overall rating was closer to a poor, if it was not for good performance in other practice themes.

Some lawyers who received an “acceptable” rating did not discuss the client’s obligations to the Ministry of Justice, such as repayment of all or part of their legal aid grant. File notes were not always taken and the auditors often had to piece together what advice had been given. A common issue was insufficient detail around election of trial by Jury. Lawyers were encouraged to ensure detailed letters were sent to the client and to retain a copy of the signed instructions on file.

“There were a number of file notes but there was no correspondence with the client and no record of any client care letter being sent or any reporting letters.”

However, several acceptable audits had a similar excellent level of client communication as audits rated very good or excellent. This included retention of emails or texts between the lawyer and client, and copies of correspondence with the Court and other parties kept on file in a well-organised system.

In some acceptable audits, the ability to meet the needs of clients and other justice system users varied from file to file. Auditors could sometimes not clearly see why fees had been invoiced to Legal Aid.

“It was not easy to ascertain the course of the case through the Court and in particular the course of the EM bail applications and how the sentence indication came about.”

### *Poor and very poor results*

Most audits rated poor or very poor had missing or incomplete client correspondence. In breach of the Rule of Conduct and Client Care 2008, client care and/or reporting letters were often not found on file. The lack of communication often led to Auditors’ confusion over what had happened on the case.

“The provider’s file does not contain the correspondence to the client or the Ministry of Justice that allows me to mark this file any higher.”

On many files there were no reporting letters, or written correspondence at all. This included no final reporting letter after the matter had concluded advising the outcome and any next steps that were necessary.

The Ministry of Justice was sometimes forced to refuse or reduce invoices for services as insufficient detail was provided. Problematic relationships often overshadowed the outcomes lawyers achieved for their clients.

“The invoicing problems appear to have occurred across a great many files and have been the subject of a considerable amount of acrimonious correspondence between the Provider and the Ministry.”

### **THEME THREE – Quality of legal advice**

Auditors assessed the quality of advice given by noting research undertaken on the file, as well as the content of reporting letters and submissions to Court. Auditors also looked at lawyer's ability to explain the law to the client in a way that could be easily understood.

#### *Excellent and very good results*

Almost all lawyers who received an excellent or very good had carefully identified and analysed the legal issues, and exercised good judgement throughout the matter.

"[The lawyer] clearly has good research skills. His submissions are typically to the point and written in a way that make for easy reading. This is a case conducted in a very careful, competent manner."

Lawyers also tended to ensure that advice was tailored to the client's needs as evidenced by the following excerpt:

"[The lawyer] dealt with him in a highly sensitive and caring way, taking pains to make sure that [the client] knew what was happening and what his options were at all times."

Good quality legal research was reflected in suitable advice to clients and high quality written submissions. Auditors commented favourably on legal aid lawyers undertaking appropriate legal research and noted when the research was retained on file.

#### *Acceptable results*

In some acceptable audits, there was a high standard of representation and quality of court documentation. Auditors were assured that matters were dealt with competently. Lawyers appeared to capably handle difficult clients and demonstrated skilful negotiation and mediation on files.

"Advice given was simple and appropriate particularly given what appeared to be a rather difficult client."

Acceptable audits sometimes exhibited a lower quality of documentation such as poorly drafted documents that did not fully canvass all live issues. In one case, the auditor noted these exceptions in quality pushed the lawyer closer to gaining a poor rating rather than an acceptable one. In other cases advice on pleas were not recorded, or why trial by Jury was elected.

#### *Poor and very poor results*

Often little if any documentation was on file that showed how matters had been progressed. The quality of advice could often not be assessed, because it could not be found on the file. Where it was on file, however, the auditors found a good standard of advice and representation.

There were often small errors in case management. In one case, outdated templates were used which could have caused applications to be refused. In another, the final reporting letter misstated the length of Home Detention. The quote below shows that decisions on case progression were not always in line with best practice.

“The sentencing submissions...are not justified in each case. They are sparse, set out basic facts, contain very little case law and there is an absence of prosecution submissions. The material could easily have been given orally.”

#### **THEME FOUR – Value for money**

An important component of the quality and value of audits is an assessment of the extent to which legal aid lawyers provide value for money to the taxpayer. If a legal aid provider has access to and is spending public funds, they have an obligation to demonstrate that the funds have been spent in an appropriate manner, in line with Ministry policies.

##### *Excellent and very good results*

Auditors could find clear links between fees charged, invoices and time records submitted to Legal Aid Services, and work undertaken. Fixed fee files were transparent and there was information on file to support every fee invoiced.

Lawyers who sought additional funding through an amendment to grant had also ensured clear reasons were given. Lawyers had applied in a reasonable timeframe. There was an awareness of the Ministry’s invoicing and disbursements policies, which led to timely payment of accounts and a good working relationship with the Ministry.

“Total quality performance to client and LSA. Practitioner has been efficient, helpful and fully responsive to all issues arising. No delays or pointless procedures.”

##### *Acceptable results*

Acceptable audits usually showed evidence of appropriate and reasonable invoicing, supported by a good timekeeping system. Usually the value assessment was assessed as “met”, with appropriate documentation on file to support invoices to the Ministry.

However, a number of acceptable audits had defects in their invoicing practices. Files did not always support the fees claimed. On some files it appeared that the fee was claimed before the tasks had been completed, against the invoicing policy. Poor file management compounded this problem and led to a lower rating despite there being no concerns about deliberate over-charging.

“There are some concerns regarding claiming of fixed fees where it appears the work was not completed or there are “double ups”. More clarity in time recording would assist in resolving this.”

Auditors noted with concern the lack of time records on file. Lawyers are expected to keep records of hearing time and waiting time to support their invoices. Although formal timekeeping is not strictly necessary on cases managed by the fixed fee policy, there must be sufficient documentation to support the fees claimed. Where an amendment to grant was sought, detailed time records are necessary.

From time to time, concerns that would have brought the overall rating down to a poor, were resolved at the draft report stage. Recommendations for these lawyers often included changing time recording practices.



“There is no record of any preparation or hearing time having been recorded. The lack of time records is highly unsatisfactory and makes it difficult to make a value assessment. In a response to a draft of this report [lawyer] set out what she did in support of the hours claimed and that is accepted.”

#### *Poor and very poor results*

Auditors had a range of concerns around invoicing practices and value for money. Work on file often did not support the invoices tendered, including instances when files were paid on a fixed fee basis. On some, overcharging was noted. Improvement to record keeping was recommended on almost all files as a necessary improvement. There appeared to be minimal engagement with the Ministry’s invoicing policies regarding what fixed fees could be claimed. These are available online or could have been clarified by a conversation with a Grants Officer. On one file, invoicing was so late that even if it was justified, the timeframe set out in the regulations would have prevented payment.

“An urgent reassessment of approach to billing [is needed] .... serious theme of billing irregularities, particularly in relation to claims for opposed bail/variations and specialist reports.”

On approximately half the poor and very poor audits, there was insufficient information for a value assessment to take place, despite the opportunity to provide missing information and documentation after the draft report had been sent to the provider. Sometimes this was a case of not having retained copies of invoices, in breach of the Practice Standards.

For a small group of lawyers who received poor or very poor audits, the Auditors noted excessive billing practices that appeared to not correspond to the complexity of the matter.

“The invoicing is very high for the work undertaken and the issues involved in running the defence of these proceedings. The matter did not proceed to hearing. It is of concern that the lawyer's immediate focus is consistently seeking an application for amendment for grant and the amounts sought in such applications are excessive for the work to be undertaken.”

#### **THEME FIVE – File management and record-keeping practices**

Auditors considered what information was kept on file, how it was organised, and whether it was complete. Records of all events and communication with client, as well as court appearances, should be retained so a new lawyer taking over the file can quickly get up to speed with the matter.

#### *Excellent and very good results*

Auditors often described these lawyers as having developed organised practices which supported the work they had undertaken. Files appeared to be a full record of the case. They had been organised into logical sections which retained records of discussions with clients, Police, Crown solicitors, other counsel and other parties. There were good and regular file notes made of attendances. Auditors commented that such good organisation allowed the audit process to be expedited and the quality of the lawyer’s work to shine.

On many of the files audited, lawyers had developed checklists and templates that confirmed all attendances had occurred and sufficient evidence was on file. Auditors also complimented many of the lawyers on helpful file summaries prepared for their benefit.

It was heartening to see a number of those who received “excellent” results were being re-audited due to problems raised in a previous audit. The recommendations of prior audits had been integrated into their business practice with positive results.

“Each file was well organised and presented in a way that greatly facilitated the auditing process. [The lawyer] had taken the time to prepare a typed note setting out a summary of the main events for each file. This was very helpful and was appreciated.”

#### *Acceptable results*

Some acceptable audits had sound office and record-keeping systems. Files were generally well organised, well presented and easy to follow. While some files were missing file notes, email correspondence or letters of engagement, overall sufficient documentation was retained. Like those who received excellent or very good ratings, files were sometimes accompanied by a letter summarising the file.

However, lapses in organisation were evident in other files, and auditors commented that it was at times difficult to ascertain key events, such as plea entries or outcomes of EM bail applications.

“In a letter to the Ministry which accompanied the file, [the lawyer] explained the relevant course of events. Without that letter it would have been difficult to ascertain the relevant events.”

Recommendations to lawyers who received acceptable ratings were usually focussed on file management and retention of all documents, including final reporting letters.

#### *Poor and very poor results*

Almost all of the poor and very poor audits had disorganised files and incomplete records. There were no recorded instructions and inadequate time records. Many providers did not keep a bound file but simply stacked papers loose leaf. Some providers had a habit of re-using already printed pages to record notes. Auditors found this added to the problems of comprehending the file and risked potential privacy breaches.

Files were often in such a state that the Auditor could not determine when or how matters were resolved. There were concerns that any lawyer who uplifted the file would struggle to get up to speed on the case. On one file, the Auditor commented that notes taken were so incomplete as to be almost incomprehensible.

“The file does not contain file notes, time records, correspondence with the applicant, the Police and legal aid, memoranda, submissions from the provider, or briefs.”

The disorganised state of files very clearly influenced the Auditor’s overall rating. The outcomes reached for the client were overshadowed and at times completely obscured by the poor state of the files.

## Conclusions

The audit is one of the major opportunities for the Ministry of Justice to confirm that contractual and professional obligations are being upheld by legal aid lawyers. This requires auditors to assess every aspect of the file.

The quality of representation is of fundamental importance, and the audit should demonstrate that legal aid clients are provided with effective, efficient and ethical services. The results of the audits demonstrated the majority of lawyers were doing so.

An equally important purpose of the audits is to ensure that public funds are accounted for, and that files show in a transparent way, exactly what has been done by the lawyer. Almost all audited lawyers were achieving good results in court. The auditors noted however that their other obligations were not always met, particularly around file maintenance and communication with clients.

Lawyers are expected to maintain files that support the work they have done, the fees they have claimed, and the outcome that is achieved. Auditors' comments on file maintenance linked this aspect with a better understanding of the case's progression through the Court, and why tactical decisions had been made. Auditors commented favourably on files where documents were labelled and divided, and where a file summary had been provided.

Client communication is a similar area of difference between high and low rated files. Auditors expected reporting to the client to be completed after each event, and copies of signed instructions to be kept on file. For criminal files, appeal opportunities were expected in final reporting letters. While there are times where it is inappropriate to contain this information in writing, auditors were concerned that they were often required to guess if any communication had occurred. Copies of letters, emails, and texts, along file notes of conversations, were expected. This ensured the auditors could be satisfied the client relationship was managed in an appropriate way. Further, complaints are commonly lodged by clients around failure to communicate or follow instructions. Having a complete file where communication can easily be pointed to, allows these to be quickly resolved.

Concerns are raised in the audit programme, and summarised in this document to remind lawyers to comply with all their contractual and professional obligations. It is heartening to see the way recommendations for improvement contained in an audit report has been implemented by some lawyers who were re-audited in this programme, with corresponding improvement in the overall rating. Ultimately this report should increase the transparency of the audit programme, as well as provide practical ways lawyers can ensure a positive experience should they be audited.

### Next steps

Our quality and value audit programme for the 2017-18 financial year started in July 2017. The new commitment for 2017-18 is 100 or more audits, which is approximately 6% of legal aid lawyers who are listed as lead providers. This aligns with the number of audits completed in comparable overseas jurisdictions. For the first time, some of these audits will be completed via an onsite visit, and will include an interview with the lawyer. The opportunity to respond to the draft report will remain unchanged.

## Appendix: 2016-17 audit results

In 2016-17 we conducted 85 audits of legal aid lawyers working at the private bar and in the Public Defence Service. Figure 1 presents the quantitative results of these audits.

**Figure 1 – 2015-16 audit results**

RATING	RESULTS
Excellent	7
Very Good	28
Acceptable	35
Poor	13
Very Poor	2
Total	85

Of the 85 legal aid lawyers audited in 2016-17, 70 were rated acceptable or above. This was indicative of the high quality of services provided to legal aid clients.

Figure 2 shows a year by year profile of the audit results. The 2016-17 results show a slightly higher number of providers with “poor” results over 2015-16. However, it is important to remember the total number of audits completed also increased. Numbers of “very poor” results remained stable.

Providers who receive a “poor” or “very poor” audit result are given practical recommendations to improve the issues identified. The recommendations are given by the auditor in the final report, and implementation is often monitored closely through follow-up audits in subsequent years.

**Figure 2 – Audit results 2012-17**

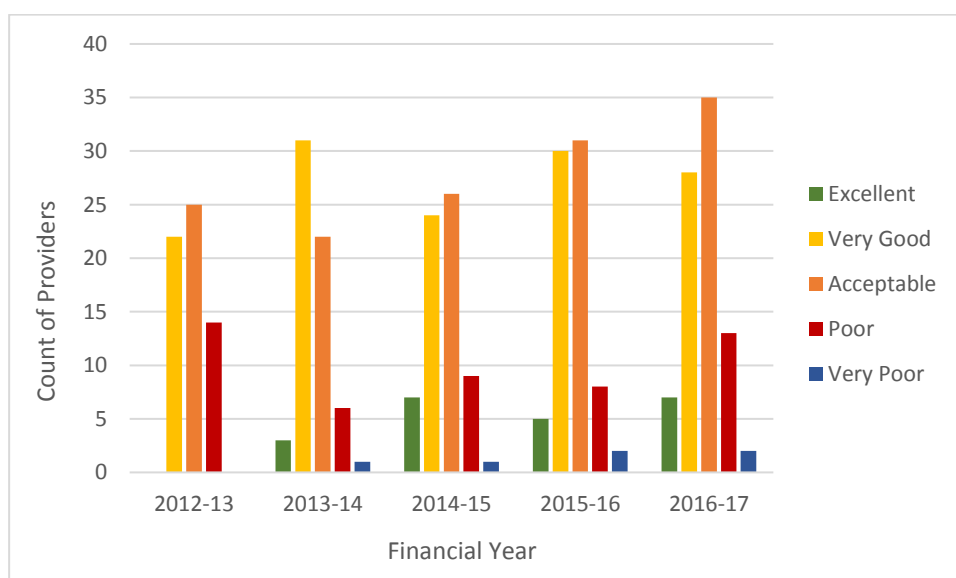
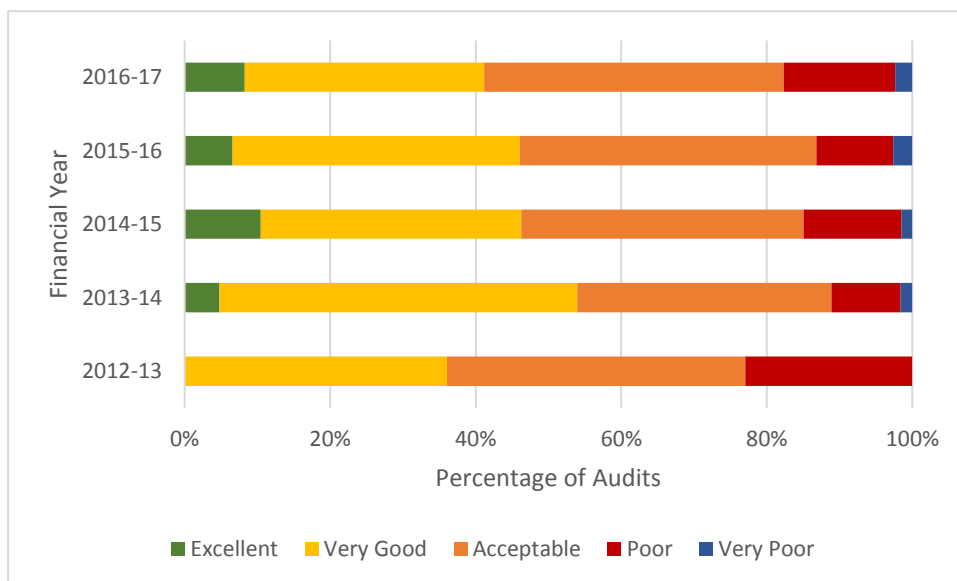


Figure 3 shows the same data as above in Figure 2 expressed as a percentage. This helps to illustrate the proportion of results at each rating and the changes over time. The percentage of providers who received an acceptable or higher has decreased slightly from 86% to 82% since 2015-16. However, this still indicates the vast majority of legal aid lawyers are providing effective, efficient and ethical services to their clients.

**Figure 3 – Audit results 2012-2017 as a percentage of Audits**



### How are overall ratings decided?

The overall ratings are decided by the Auditor after the lawyer had been given an opportunity to provide submissions on the draft report. It assesses the services the lawyer is providing both substantively and administratively. Peer review of selected reports and auditor training ensures nationwide consistency. However, given the discretionary nature of auditing and the complex subject matter, pointing to definitive aspects of practice that ensure an excellent or very good rating over an acceptable is difficult. Quantitative analysis such as the above cannot provide a full picture of what is expected for a legal aid lawyer who may be audited.

### Audit Outcomes

Where there is sufficient concern, lawyers may be issued with a reminder of expectations, a First, Second or Final Notice, or referral to Performance Review Committee. In doing so the concerns raised are considered in the context of the lawyer's Quality Assurance History. The lawyer can request a review of the outcome decision.

Figure 4 shows the outcomes of the 41 audits finalised in the 2016-17 financial year where follow up action was deemed necessary by the Ministry of Justice. It is possible for a re-audit to be recommended in conjunction with another sanction. The aim for a re-audit is to give the provider an opportunity to demonstrate improvement before more serious sanctions such as cancellation are considered.

**Figure 4 - Audit outcomes**

