

Meeting: Legal Services Board

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Item: Paper (22) 30

Title: Ongoing competence – Emerging themes from consultation

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Status: Official

Introduction

1. This paper presents the emerging themes from our analysis of the responses to our consultation on a draft statement of policy on ongoing competence.

Recommendation

2. The Board is invited to **discuss** the emerging themes and provide feedback. We have indicated in **bold** where we are proposing to clarify or change our approach based on our analysis of the consultation responses and other information provided by stakeholders during the consultation. This will inform the draft final statement of policy and draft consultation response document, which will be presented to the Board for approval in July.

Background

3. Our work on ongoing competence is designed to meet the regulatory objectives to protect and promote the public interest and the interests of consumers. It is central to the LSB's ambition to reshape legal services to better meet society's needs and provide consumers with fairer outcomes, stronger confidence and better services.
4. Through our work to date, we have identified that while legal services regulators have comprehensive measures to ensure legal professionals are competent on entry to the profession, there are few routine, formal measures to ensure ongoing competence, besides the widespread adoption of continuing professional development (CPD). None of the regulators have any meaningful evidence on levels of competence in the profession(s) they regulate after the point of initial qualification.
5. Our research shows that consumers expect that there are more robust checks in place and, when provided with information about the current arrangements, the majority of the public thinks legal services regulators should adopt more specific measures to ensure ongoing competence. Further, the approach in this sector is unusual compared with other professions, where regulators put in place measures to understand levels of competence and maintain

standards through periodic reaccreditation, peer reviews, spot checks or feedback as well as CPD.

6. We consulted on new ongoing competence proposals for legal regulators in the form of a draft statement of policy from December 2021 to March 2022. The draft statement of policy (Annex A) set out expectations that the regulators should:
 - a) Set the standards of competence that those they regulate should have at the point of authorisation and throughout their careers.
 - b) Regularly assess and understand the levels of competence within the profession(s) they regulate, and identify areas where competence may need to be improved.
 - c) Make appropriate interventions to ensure standards of competence are maintained across the profession(s) they regulate.
 - d) Take suitable remedial action when standards of competence are not met by individual authorised persons.

Emerging themes

7. Through the consultation, we received 40 submissions from a broad range of stakeholders across the legal sector and beyond. This reflects the continued interest and high quality of engagement we have had throughout the project. We also attended and hosted several stakeholder events, specifically targeted at practitioners, where we gathered further views that have informed our analysis.

Areas of agreement

8. Most respondents supported the overall intent of the draft statement, and many agreed with our proposed outcomes (a), (b) and (d). The general consensus was that these are sensible and appropriate outcomes for the regulators to seek.
9. Many respondents said that it would be essential for each regulator to take an evidence-led approach to implementing the statement of policy. In particular, they said any new interventions adopted should be proportionate and targeted to risks. **This is consistent with our position and the draft statement contains references to this effect. We propose to ensure that this intention is presented more clearly in the final statement and consultation response document.**
10. Respondents identified some areas suitable for collaboration between the regulators, including proposals that regulators should develop a shared understanding of what good reflective practice looks like and how it should be adopted e.g. in the context of collecting and reflecting on feedback from peers, clients and others in the sector. Elsewhere, some said that regulators should collaborate to ensure consistency in the standards of competence that they each set.

11. **We welcome these ideas and propose to emphasise in our response to the consultation that collaboration between the regulators will be important in implementing any new ongoing competence measures.** This will promote consistency in how the competence of authorised persons in the same practice areas (but potentially with different regulators) is assured. It would also reduce potential confusion among users of legal services wanting to understand the measures in place.
12. There are useful examples of regulators working together on competence matters, for example, the SRA, BSB and CILEx Regulation, alongside other stakeholders, have developed common guidance and resources for legal professionals working in the Coroners' Courts and Youth Courts.

Proportionality

13. Respondents made two points on proportionality. First, some respondents argued that there is an absence of evidence of a widespread lack of competence, and therefore it would be disproportionate to expect regulators to introduce new measures.
14. We do not consider this to be wholly accurate. Indeed, one of the issues we have identified is that none of the regulators is regularly making a comprehensive assessment of competence across its regulated community. We are seeking to address this gap through our proposed expectations in the draft statement.
15. It is for regulators to gain an understanding of levels of competence, and then identify areas where competence may need to improve. This is set out in outcome (b), which was broadly supported by respondents to the consultation. There is at present limited evidence on which to determine what measures might be needed to ensure standards of competence are maintained.
16. Further, we consider from our analysis that there is a risk that, during practice, authorised persons' skills and knowledge will become out-of-date. This might be due to changes in the profession and the wider world (for example, changes in consumer behaviour or technology). Therefore, we consider that regulators should be alert to this risk and take suitable steps to mitigate this through the measures they adopt, so that competence issues do not arise over time and the risk of harm to consumers is reduced.
17. Secondly, some respondents said that our approach to the specific expectations relating to draft outcome (c) (paragraphs 27-29 of the draft statement) was disproportionate. They said that the approach places an unreasonable expectation on the regulators to justify why they are not adopting each of the specific measures set out. The outcome sets out examples of measures that regulators could put in place to maintain standards of competence. It sets expectations that regulators will consider adopting these or other appropriate measures that they identify through their evidence-gathering. Some respondents said that this approach places an unreasonable expectation on the regulators to justify why they are not adopting each of the specific measures set out.

18. The intention behind outcome (c) is to be clear that regulators must act on evidence that they gather on levels of competence during practice and take a proactive approach to identifying areas where competence may need to improve. The responses indicate that our intention behind outcome (c) has not been clear to stakeholders. Regulators should then implement targeted and proportionate measures.
19. **In response, we propose to amend the specific expectations in the draft statement to ensure that they clearly represent our policy intention.** Our chief expectation is that regulators put in place measures that are effective at maintaining standards of competence. Regulators should be able to provide the necessary assurance to their regulated community, the LSB and the public that they have identified these measures on the basis of considered analysis of their evidence base, and that such measures are targeted and proportionate to risks. The draft statement of policy itself offers a range of options to assist regulators in determining their approach. These measures have been identified based on a thorough programme of evidence-gathering and research, drawing on practices in the legal services sector and elsewhere.

Implementation timeframes

20. Many respondents raised concerns about the proposed implementation period of 18 months and said it was not clear how much we expect should be achieved within that timeframe. Respondents said that it was not realistic to expect regulators to have fully met each of the outcomes within 18 months.
21. In preparing the consultation, our intention was that regulators would develop a clear plan of action to meet the outcomes, including reasonable timeframes to achieve these. As progress is made, we expect that it would remain important for regulators to demonstrate to us the steps they are taking to meet the outcomes – both in terms of evaluating their own measures, but also by assessing levels of ongoing competence in their regulated community.
22. We acknowledge that the regulators are at different stages of meeting the expectations in the draft statement of policy and some already have more sophisticated approaches to ensuring ongoing competence, even if not implemented on a consistent basis. Considering the responses, we are also mindful that regulators might best take a phased approach to meeting the outcomes. For example, we expect that regulators would likely need to focus on the development of a suitable competence statement, before improving their information-gathering.
23. Following that, it would then be appropriate to implement measures to address any issues identified. It is important however that regulators recognise the significance of ensuring ongoing competence to consumers and the sector at large, and so proceed with ambition and pace.
24. Reflecting on the feedback, we consider that it might be useful to set some out some milestones and indicative timeframes by when regulators will achieve certain goals in meeting the overall expectations, such as creating an action plan, putting in place a competence framework or equivalent, and then

identifying further measures. **Therefore, we propose to be clearer in the consultation response document about what we expect from regulators in the short and longer term.**

25. We note that there are some areas where regulators already have evidence of competence issues that should be addressed through targeted interventions. Some respondents said regulators should focus on these high-risk areas as a priority, targeting interventions to improve competence in, for example, criminal advocacy, conveyancing, immigration/asylum and will-writing/probate. **We propose to emphasise that where regulators already have evidence of high risk of harm to consumers, action should be prioritised.**

Next steps

26. Subject to the Board's consideration and discussion, we will make changes to the draft statement of policy. We will return to the Board in July with our amended draft final statement and draft consultation response document containing full analysis of all responses for approval to issue and publish.

Risks and mitigations	
Financial:	N/A
Legal:	There is an element of legal risk in developing new policy of this nature. Colleagues have taken steps to minimise risks.
Communications and engagement:	We engaged widely with stakeholders during the consultation period and will take account of their feedback in developing the final statement of policy.
Equality and diversity:	We carried out initial analysis of potential equality impacts of our proposals and will complete an equality impact assessment on the final statement, which will be presented to Board in July.
Resource:	N/A

Annexes

Annex A – Draft statement of policy on ongoing competence

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
N/A	N/A	N/A