

Ongoing competence discussion event - summary note

13 October 2021

We hosted a discussion event to inform our work into the ongoing competence of legal professionals. We wanted to seek views from different parts of the legal services sector on the LSB's plans to introduce new expectations of how regulators should ensure the ongoing competence of those they regulate. We were joined by stakeholders from across the UK legal services sector, as well as regulators from other sectors and time zones.

The event was split into two sessions, one focusing on developing and embedding competence frameworks and the other on tools to prevent, identify and respond to competence issues. Discussion was encouraged in both sessions so that participants could provide their views and challenges to the LSB's emerging thinking.

Our view is that regulators should take steps to ensure the ongoing competence of legal professionals throughout their careers, which aligns with the public's expectation that there are robust checks on legal professionals' ongoing competence. However, we noted that there is currently a mismatch between the public's expectation and reality - while there are comprehensive checks on entry to the profession, there are few formal and consistent checks on competence throughout legal professionals' careers. This is out of step with other sectors such as healthcare, aviation and teaching. As a result, the legal services regulators do not currently have assurance that legal professionals are acting within their competence and so the status quo is not serving the public interest. We are currently developing new policy proposals to address this.

Session 1: Competence frameworks

Presentations

We gave a presentation ([slides available on the LSB website](#)) on the ongoing competence project to date. This centred on the intention to develop an expectation that all legal services regulators should set the standards of competence required by legal professionals at the point of authorisation and throughout their careers. We posed questions about the adoption of competence frameworks within the profession, including how to account for the diversity of the professions e.g. different practice areas and how to ensure competence frameworks are used in tandem with other ongoing competence tools.

The BSB spoke about its professional statement, which incorporates what the BSB expects barristers to meet as a day one 'threshold standard' and requirements for ongoing practice. The BSB said training providers need to embed the professional statement in their programmes, it provides the reference point for continuing professional development (CPD) requirements and it is the basis for competencies in specialist areas e.g. youth courts and coroners courts.

The SRA spoke about its statement of solicitor competence. It said the statement sets out what solicitors need to know and do, what the public should expect and how employers can put in support for solicitors. The SRA noted the challenges in designing the statement to get

the right level of detail and overall structure, which needed to be futureproof. It said it was also important to get buy-in from the profession.

Hook Tangaza spoke about the [research](#) it had conducted for the LSB into approaches to ongoing competence in other jurisdictions. The research had concluded that in-practice regulation is generally underdeveloped, with heavy reliance on ethical codes, the self-interest of legal professionals and traditional CPD. Hook Tangaza said that it was important to have an overarching competence framework setting out the what the regulator is trying to achieve and for whose benefit. In practice, implementing a competence framework should be about embedding behaviours rather than a particular requirement that people have to meet.

Q&A discussion

The following points were raised in discussion during the first session:

- Various existing competence statements were cited - CITMA, CILEX, IPReg, Law Society of Scotland, CLSB (out for consultation), Competence Profile from Law Society of New Brunswick and CCBE (Council of Bars and Law Societies of Europe).
- Competence frameworks share similar characteristics and structures across different regulated sectors. Those working in-house may come across different competence statements from other sectors e.g. accounting.
- There is a risk that any competence framework in legal services looks like a generic professional services framework if it is too high-level. The challenge for England & Wales is that there are so many legal professions, and a competence framework should allow people to identify what is particular to what type of legal professional.
- The issue of ensuring that a competence framework takes account of the diversity of the profession is important. Often, frameworks are geared towards legal professionals working in private practice, rather than those in the public sector, in-house, working in tribunals etc. A basic structure is needed to allow for flexibility within a competence framework.
- Further, competence frameworks should leave room for legal professionals to creatively develop their competence in ways not yet considered, and be responsive to cultural stimuli e.g. working culture, profile of client demographic.
- There are similar challenges with developing competence standards in the healthcare sector, although the situation is far more developed i.e. with revalidation in place in some professions.
- It is important to get buy-in from the profession and agreement on the assessment criteria, which should be transparent.
- There is less concern that legal professionals will not keep their knowledge of the law up-to-date, as it is a competitive market where they are incentivised to maintain their knowledge and they generally like what they do. So, the focus might need to be on other skills and behaviours they need to maintain or develop.
- Discipline-specific or profession-specific competencies in frameworks are less common. Most competencies are generic and apply as 'integrity and professional responsibility' and 'soft skills' and most complaints and claims against legal professionals fall into these broad categories. There was also discussion of whether the term 'soft skills' was appropriate, given the importance to consumers.
- A legal professional's wellness and their working environment has a big impact on their working competence, with standards often not met due to being overworked or in distress. One attendee referred to the recent LawCare report on the impacts on

mental health in the profession, with 69% of respondents reporting poor mental health in the last 12 months.

- Legal professionals do not have enough training in preparation for the professional environment and demands of legal practice. This needs to be part of their early and ongoing training.
- Work has been done on reflective practice and learning in law in Australia and Canada. For example, patent attorneys in Australia now need to use reflection as part of their CPD.
- Midwifery Practice Review in Australia also provides a good model for reflective practice from another sector.

Session 2: Ongoing competence toolkit

Presentations

Community Research spoke about the [research](#) it conducted for the LSB on the public's confidence in legal professionals' ongoing competence. This included a qualitative component, a 23-person deliberative panel, and a quantitative survey, with a separate sample of 1005 members of the public. The public thought that there should be more specific rules for checking legal professionals' competence throughout their careers (79% of those surveyed and all panellists). The panel, which considered information about ongoing competence in detail over four weeks, weighed up different trade-offs including costs when deciding what would provide them with greater confidence. The panel wanted to see a blended approach to assuring ongoing competence, including a single consistent competence framework, which could be supported by mandatory CPD requirements, recertification linked to competence and regular checks by the regulators.

The LSB gave a presentation ([slides available on the LSB website](#)) setting out its intention to develop expectations that legal services regulators should:

- assess profession-wide levels of competence, identifying areas of risk and designing upstream interventions; and
- take suitable remedial action where standards of competence are not met.

We signposted different ongoing competence tools that regulators could consider adopting - some of which are used in other sectors and jurisdictions - including better use of feedback, more preventative measures e.g. spot checks, more competence assessments e.g. peer reviews, and using remedial tools (training, supervision) to address competence issues.

Breakout discussions

The following points were raised in individual groups:

Group 1

- Feedback about a legal professional's competence may not take their mental health into account. Feedback also may not reflect legal experience and be more reliant on the outcome of a case/matter.
- There was a question about who barristers would best get feedback from – is it solicitors? Someone provided an example that it is already difficult to get references for government work, or that barristers might be working for a long time on a single case, from which it could be difficult to build up evidence of their competence.

- It can be difficult for consumers to judge what constitutes “good or bad” practice and some attendees’ experience is that there is often worse client satisfaction if there is no legal remedy available for that client’s issue or the outcome of the case was bad.
- Peer review processes can be effective, particularly as they can look at the quality of technical legal skills/knowledge, but need to be able to be appealed where necessary (so that one review does not become definitive of a person’s performance).
- Peer reviews should already happen through normal appraisal systems, but it is not clear how often or how consistently this is happening.

Group 2

- Fully incorporating reflection into all legal professionals’ practice would be a big cultural shift. This is fundamental to good competent practice, so legal professionals can identify where the gaps in their skills and knowledge are.
- One attendee shared the example of nurses and midwives who collect a portfolio of feedback for reflection. There was a sense that there might be a lot to learn from the healthcare experience of ongoing competence.
- CPD should be relevant to a legal professional’s practice area e.g. up-to-date with latest developments in the law, but current requirements do not require this.
- Clients’ expectations are changing, and there is an increased demand on legal professionals being held to account on diversity and inclusion.
- Assuring ongoing competence should benefit legal professionals as well as consumers, allowing them to be prepared to move between different practice areas, and instilling pride the profession.
- Framing competence around ‘supply and demand’ could help regulators identify their role in ensuring ongoing competence. On the supply side, regulators have a role in ensuring the quality of legal professionals so that it is clear what ‘good’ looks like for consumers; and on the demand side, regulators have a role in building consumer understanding of what they can expect from legal professionals.

Group 3

- The efficiency of standardised competence assessments was questioned, as people should be able to work out what is best for them to practice or learn. There was also a concern that these would be blunt instruments that used a huge amount of resource and only focused on some issues i.e. ‘what is in the exam question’.
- Some regulators are trying to engage judges to provide reports on the advocacy skills of legal professionals and to tackle the culture of not reporting concerns. People might be more willing to report on issues where the outcome is remediation rather than a person being punished and losing their livelihood. Alternatively, some might not report things because they believe no action will be taken, so care is needed in designing a remedial model.
- There is a market argument that if a barrister is not competent, they will not get any work referred, so this is motivation to remain competent.

Group 4

- It is crucial that any new ongoing competence requirements are effective and instil consumer confidence – any box-ticking exercises should be avoided.
- Learning from research in other sectors is that people will find the easiest and cheapest way to meet CPD requirements especially if they are time/cash poor. This can lead to box-ticking mentality, which does not support ongoing competence.

- Some bodies have quality standards to guarantee the quality of service providers, with legal professionals having to provide evidence they met the standard required on an ongoing basis. This could be a good model to expand.
- Self-reflection is not at the forefront of legal professionals' minds; they are more interested in networking and keeping up-to-date.
- Legal professionals working in specialist areas are a dwindling workforce. There is a need to ensure the law is something people want to be a part of, rather than being put off by increased regulation.

Group 5

- Some organisations may have a wealth of data about competence matters to share e.g. the Legal Ombudsman.
- It is important that the way competence requirements are framed does not impinge on goals to increase inclusion and diversity in the legal services sector.
- Self-declaration is not enough and legal professionals are good at excusing themselves from rules, so there should be checks by regulators.
- Cost should not be an excuse for inaction. There could be some way to introduce cross-subsidies from larger firms or more lucrative areas of the law.

Group 6

- We need to consider the role for employers in ensuring ongoing competence (and the role of regulators regulating entities). There is a need to embed good culture and practises in the legal services sector. This includes addressing the fear and blame culture when someone makes a mistake. They should be supported to learn, not punished, if appropriate.
- Some regulators do not currently get a lot of complaints about legal professionals, so they are not aware of what competence issues there might be.
- Proportionality is important at all points: there should be proportionate competence assessments e.g. dip sampling, then proportionate responses to addressing competence issues.
- Sole practitioners may have less access to the tools and support needed to maintain their ongoing competence, although there are networks they can rely on.

Group 7

- Ongoing competence should be focused on resilience and whether legal professionals should be better prepared for the stresses and strains of work.
- Often people do not give feedback because e.g. they are concerned it could slow the case/matter, or they believe it would not make a difference.
- Feedback from judges can be problematic, given their need to remain independent and concern that they could be accused of bias.
- One attendee talked about existing accreditation schemes in the market and suggested these were good models for ongoing competence.
- It would be good to see how both regulators and larger firms use data and understand if there are opportunities to share good practice. Some small companies may have less resources and do not know yet how they could improve their approach to data collection and leveraging that data.

Group 8

- We should be aware of unregulated professionals working in the legal services sector, including unregulated professionals working in regulated law firms. We need to ensure that their competence is also considered.
- Many people giving feedback or providing peer reviews may not have been trained in how to do this effectively.
- There needs to be better public legal education for consumers about what a legal professional does, although they may not care about different types of legal professional e.g. solicitor or conveyancer.
- The approach to CPD should be more flexible as a lot of what is available now is poor quality and expensive, with this being a particular problem for the non-profit sector.

Discussion

The following points were raised in discussion during the second session:

- Most of the time, competence failures are not intentional and regulators should address the problem in a way that helps the legal professional. It is important to brand this as a positive measure for both the professional and the consumer. Remediation tends to be much cheaper than other interventions and can be branded as a way of learning.
- In some parts of the legal services sector, there is a culture of fear and blame. Regulators need to look at the culture in firms and entity regulation to ensure consumers are not at risk from legal professionals making mistakes under pressure.
- One regulator said it has experience of aiding lawyers in difficulty and intends to build this into its approach to ongoing competence.
- There is evidence of a lack of supervisory and management training in some parts of the sector and it should be easy for regulators to introduce a requirement that if you are in a supervisory role, you should do relevant training.
- The Dutch approach to ongoing competence requires every lawyer to register their main area of practice at the Bar and carry out ten hours of CPD every year. There is also a requirement to undergo regular competence assessments, including peer reviews.
- Some regulators cannot intervene at entity level, so different levers will be needed to combat those issues.

Close and next steps

We confirmed plans for a consultation in December on new ongoing competence expectations for legal services regulators. Attendees were encouraged to contact ongoingcompetence@legalservicesboard.org.uk with any questions or further comments in the interim.

Polls

We ran three polls during the event to gauge the opinion of those in attendance.

