

## **The Association of Consumer Support Organisations (ACSO) submission to the Legal Services Board (LSB) call for evidence on 'ongoing competence'**

The Association of Consumer Support Organisations ([ACSO](#)) welcomes the opportunity to respond to the Legal Services Board (LSB) [call for evidence](#) on 'Ongoing competence'.

ACSO was established in January 2019 to represent the interests of consumers in the civil justice system and the reputable, diverse range of organisations who are united in providing the highest standards of service in support of those consumers. Its role is to engage with policymakers, regulators, industry and the media to ensure there is a properly functioning, competitive and sustainable civil justice system for all consumers.

### **I. Defining competence and competence assurance**

There exist various definitions of *competence* within the context of the legal services sector. Most, if not all, understand *competence* to mean having the skills, knowledge and care required to deliver a good quality of work and service to clients. In this sense, we agree that the definition of *competence* provided by the Legal Services Consumer Panel (LSCP) suitably explains the term: "combining up-to-date legal knowledge and skills with good client care, to deliver advice in a way that is useful".<sup>1</sup> We note, however, that given the similarities of the various definitions of competence that exist, none of which appear in any way contentious, it is not necessary to create a set definition for the legal sector as a whole.

The landscape of the legal sector is undergoing considerable change, the result of a multitude of factors including technological innovation, regulatory developments and shifting consumer habits. The way legal services are being sought, structured and delivered are evolving. As such, it is essential that legal professionals acquire and maintain the necessary knowledge and skills to deliver legal services competently, effectively and ethically, in line with the pace of change within the sector.

A study conducted in Australia on the future of law and innovation in the legal profession identified seven skills and areas of knowledge that are likely to be of increasing importance for legal practitioners: technology; practice-related skills, such as collaboration, advocacy and negotiation skills; business skills, including basic accounting and finance; project management; international and cross-border law; interdisciplinary experience; resilience, flexibility and the ability to adapt to change.<sup>2</sup> These areas are relatively broad and open to interpretation. However, further consideration should be paid to determine how these skills and knowledge areas, as well as any others that are identified as becoming increasingly necessary, should be taught to legal practitioners.

At present, legal professionals are required to undertake competence assurance activities. Barristers are subject to Continuing Professional Development (CPD), defined as "work

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<sup>1</sup> Legal Services Consumer Panel (LSCP), [Quality in Legal Services](#), November 2010, p.1.

<sup>2</sup> The Law Society of New South Wales, [The Future of Law and Innovation in the Profession \(FLIP\)](#), March 2017, p.6

undertaken over and above the normal commitments of barristers with a view to such work developing their skills, knowledge and professional standards in areas relevant to their present or proposed area of practice, in order to keep themselves up to date and maintain the highest standards of professional practice”.<sup>3</sup> For solicitors, CPD was replaced in 2016 by the Solicitors Regulation Authority (SRA) approach to Continuing Competence, meaning “solicitors must reflect on their practice and undertake regular learning and development so their skills and knowledge remain up to date. All solicitors will need to make an annual declaration to [the SRA] that they have done this”.<sup>4</sup> Both schemes play an essential role in ensuring legal professionals keep up to date with the latest legislative developments and develop their professional capabilities. In this sense, competence is already tested throughout the career of a legal professional.

We note that the SRA’s Continuing Competence scheme does not require solicitors to complete a set number of hours of training, unlike most CPD models, or specific accredited courses. Instead, solicitors are able to reflect on their practice and decide which activities to undertake to address any gaps within their training and development. A report published by the SRA in 2019 found that since the CPD was replaced by the Continuing Competence regime in 2016, the vast majority of firms have maintained or increased their support for learning and development with 52 per cent of solicitors completing the same amount of learning and development and with 40 per cent doing more.<sup>5</sup> Furthermore, nearly 40 per cent of solicitors felt that the changes had improved the competence of solicitors.<sup>6</sup> Placing the onus on individual solicitors and firms to identify the areas of learning they need to improve upon appears to be a logical utilisation of practitioners’ time.

We stress the need to ensure competence assurance regimes capture useful experiences and measure the benefits of what has been learnt, rather than being concerned with the length of time spent on training courses and/or whether a practitioner has reached an annual points target. As is often noted with traditional CPD requirements, solicitors and barristers are left in a last-minute rush to make up the hours or points needed towards the end of their CPD cycle, regardless of how relevant or useful the activity is in terms of their learning and development. Finally, we note that further research is required as to the relative benefits and failings of both CPD and Continuing Competence regimes, and others, in terms of measuring competency.

## **II. Consumer expectations of competence**

On understanding consumers’ perspectives on, and expectations of, competence in the legal services sector, we agree that consumers often find it difficult to assess the technical quality of legal services. Instead, consumers tend to measure the quality of the advice or service they have received based upon the output delivered. For example, a consumer will judge the competency of their legal representative on the favourable outcome of service, such as the size of an award or the avoidance of a custodial sentence. Similarly, the value of customer

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<sup>3</sup> Bar Standards Board, [Continuing Professional Development \(CPD\): Guidance for barristers](#), p.2.

<sup>4</sup> Solicitors Regulation Authority (SRA), [Continuing Competence](#) [online], accessed 12 May 2020.

<sup>5</sup> Solicitors Regulation Authority (SRA), [Understanding implementation of our approach to continuing competence](#), 2 July 2019.

<sup>6</sup> *Ibid.*

service to consumers has been widely recognised, such as regular communication with clients, delivering outputs and documentation on time, and engaging in a professional, empathetic manner.<sup>7</sup> High-quality customer service should always be encouraged within the sector, however it does not always correlate to the quality of the legal service provided.

While consumer satisfaction is undoubtedly important, a wholly consumer-focused approach to measuring the competency of a legal service is not necessarily a reliable indicator of the quality of advice a consumer has received. First, a consumer may not be satisfied with the advice they have been given, even if they have received the appropriate legal advice. Similarly, poor advice may be delivered by a legal professional whom the consumer trusts and is satisfied with. Indeed, between lawyers there exists the oft-joked-upon distinction between poor-quality advice presented in a confident and exuberant way, and poorly presented advice of a high quality.

Second, large areas of legal competence remain invisible to consumers accessing legal services, such as the specific complexity of a legal matter and what constitutes a fair and reasonable settlement in a case. Third, the technical process and use of ‘legalese’ – the specialised language and jargon of the legal profession- is difficult for many consumers to understand. Finally, consumer satisfaction is likely to be easier to obtain when they hold low expectations. For example, the findings of the 2019 YouGov survey of the ‘legal needs of individuals in England and Wales’, jointly commissioned by the Law Society and the Legal Services Board, found a third of all adults have low *legal confidence*, meaning they are unlikely to think they can achieve a fair and positive legal outcome in various scenarios.<sup>8</sup> A consumer who is relieved or satisfied with receiving legal assistance when they had expected to receive little or none, is not a reliable indicator of the quality of advice they have been given or of the competency of the legal professional who delivered the service.

Regulation is an important aspect of ensuring professional competence; it services the public by ensuring quality and, in turn, protects consumers. However, according to a recent report by the Legal Services Consumer Panel (LSCP), only 22 per cent of consumers know their provider is regulated and only 12 per cent are aware they are able to raise a complaint to the Legal Ombudsman (LeO) service.<sup>9</sup> This may highlight the failure of firms to communicate to consumers that they are regulated by the relevant bodies, alongside the failure of regulators to explain their role adequately. This issue is related to a far larger and more systematic issue within the legal sector. As identified within the influential 2016 report by the Competition and Market Authority (CMA), “the legal services sector is characterised by incomplete or asymmetric information. Consumers are often unable to judge quality before (or sometimes even after) they choose to buy a legal service”.<sup>10</sup>

Recognition of this issue has prompted the SRA to propose developing resources for the public and other stakeholders that explain the criminal and civil advocacy standards expected

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<sup>7</sup> Vanilla Research for the Legal Services Consumer Panel (LSCP), [Quality in Legal Services](#), September 2010, p. 4-5.

<sup>8</sup> YouGov, [Legal needs of Individuals in England and Wales](#), 27<sup>th</sup> January 2020.

<sup>9</sup> Legal Services Consumer Panel (LSCP), [Consumer Impact Report](#), March 2020, p. 45.

<sup>10</sup> Competition and Markets Authority (CMA), [Legal Services Market Study: Final Report](#), December 2016, p.7.

of solicitors.<sup>11</sup> The SRA hopes these resources will help clients to recognise when a solicitor is failing to meet the standards expected of them, and will be promoted to the public and stakeholders, for example, using the Legal Choices website. Similarly, LeO has sought views about the ways they could improve the transparency of its work and better report on the impact it has.

The marketplace is intended to regulate the competence of legal services and the client selects and rejects a legal service accordingly.<sup>12</sup> However, it is essential that consumers are provided with sufficient data and information on the quality of legal services. Providing consumers with a greater quantity and quality of data enables them to make better-informed decisions on which legal service provider to use. In addition, greater transparency benefits the firms and the wider sector by promoting best practice and enabling the identification of common or systemic issues. Further research is required on what data is most useful for consumers and how best to collate and present information. In light of this, ACSO urges the LSB to work with a broad range of industry stakeholders to help consumers understand what to expect from the legal services sector, what protections are in place, and to allow flexibility for the sector to grow and innovate. Again, ACSO would be very pleased to contribute further advice or evidence as required by the LSB.

As noted by the SRA, incompetency and poor-quality legal advice can cause significant harm to consumers, with the potential to disrupt their lives, liberty and finances.<sup>13</sup> For example, a solicitor who delivers poor legal advice could lead to their client receiving a custodial sentence, losing access to their children, or being denied of the compensation they merit following an injury. Furthermore, poor legal advice serves to tarnish the reputation of legal professionals whom, as noted in a 2019 Ipsos MORI report, are already deemed to be largely untrustworthy.<sup>14</sup> This has the potential to cause additional harm in the long-term to consumers by lowering both *legal confidence* and the number of people who believe justice is easily accessible.

We welcome the LSB's acknowledgment that consumers often use legal services at times when they are most vulnerable. For example, consumers are likely to be at a point of personal distress when needing to resolve a landlord or housing dispute. With this in mind, when a consumer senses a legal professional is failing to meet the required standard of competency, they may not feel they are able to raise a complaint without suffering financial and emotional difficulty.

Recently, a number of reports have been conducted throughout the sector on how best to protect the needs of consumers, in particular those with vulnerabilities. This includes the CMA report *Consumer vulnerability: challenges and potential solutions*, and the Civil Justice Council

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<sup>11</sup> Solicitors Regulation Authority (SRA), [Assuring Advocacy Standards: consultation](#), August 2019, p. 17.

<sup>12</sup> Legal Ombudsman Service (LeO), [Transparency and Reporting Impact: Discussion paper](#), October 2019.

<sup>13</sup> Solicitor's Regulation Authority (SRA) [Risk Outlook 2019/20](#), 29 October 2019.

<sup>14</sup> The Ipsos Mori report revealed that only 26 per cent of people believe lawyers to be trustworthy, far less than doctors (67 per cent) and teachers (58 per cent). Ipsos Mori, [Trust: the Truth](#), 17 September 2019.

report on *Vulnerable witnesses and parties within civil proceedings*, among others.<sup>15</sup> However, a continued focus is needed to determine how and why consumers become susceptible to detriment and to help determine the appropriate levels of care that firms should provide to support and protect them. Vulnerability is an issue where the solution will undoubtedly require the cooperation of a broad range of organisations across multiple sectors, including charities, ombudsmen and regulators as well as policymakers. As such, ACSO welcomes the opportunity to contribute further evidence as required by the LSB.

### III. Competence assurance in the legal services sector

On assessing existing competency assurance methods, we highlight the SRA's ongoing work on the standards of criminal and civil advocacy. Although the project remains nascent, it promises to touch upon a number of matters raised in this consultation. As such, we urge the LSB to engage with the regulator and coordinate areas of their research and analysis. The SRA is considering the need to review and update the current approach of the Higher Rights of Audience (HRA) qualification.<sup>16</sup> At present, the HRA is run by several different organisations with varying assessment models. This has led to concerns that candidates are not being assessed to an equivalent standard across providers. In addition, the SRA does not believe that the HRA adequately reflects the requirements of modern practice, including the increasing awareness of the needs of vulnerable clients and witnesses.

Although it seems sensible to review the HRA, it should be noted that the SRA has found little evidence of a widespread problem within the standards of advocacy. For example, the SRA received only 89 complaints of poor advocacy from judges and courts between 1 January 2015 and 28 February 2018.<sup>17</sup> However, in agreement with the discussion paper, there exists the growing problem of advocates acting beyond their level of competence. It should be understood that financial pressure often plays a significant role in driving legal professionals to step beyond their own experience and levels of competence. In light of the economic disruption caused by the Coronavirus pandemic, the financial pressure upon firms will likely intensify.<sup>18</sup> On this matter, it is the role of the LSB to determine how best to strike the balance between protecting consumer interest and supporting the needs of firms, albeit with help and guidance from other regulatory bodies, ombudsmen schemes and other stakeholders.

On evidence sources that are likely to benefit the assessment of competence within the legal services sector, we have noted the SRA's ongoing work on the standards of criminal and civil advocacy.

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<sup>15</sup> Competition and Markets Authority (CMA), [Consumer vulnerability: challenges and potential solutions](#), 28 February 2019; Civil Justice Council (CJC), *Vulnerable witnesses and parties within civil proceedings: Current position and recommendations for change*, February 2020.

<sup>16</sup> Solicitors Regulation Authority (SRA), [Assuring Advocacy Standards: consultation](#), August 2019, p. 7.

<sup>17</sup> *Ibid.*

<sup>18</sup> The financial pressure on solicitors firms and barristers chambers caused by the outbreak of Coronavirus was recently discussed at a Justice Committee meeting held on 04 May 2020; [Oral evidence: Coronavirus \(Covid-19\): The impact on prison, probation and court systems](#).

Finally, on the effectiveness of existing competency assurance methods in the sector, peer-assessed measures such as *The Legal 500* (a system of ranking firms based on feedback from 300,000 in-house peers) are poor indicators of the quality of legal services. It should be noted that peer assessments often do little more than measure social relationships rather than performance. Again, we stress the need to ensure consumers are provided with adequate information regarding the performance of legal service providers. Improving transparency serves to support access to justice, raise industry standards and empower consumers.

#### **IV. Competence assurance in other sectors**

There exists a wide range of competency assurance methods adopted in various different sectors, such as medicine and education. The LSB should continue to engage with a broad range of industry stakeholders, regulators and ombudsmen services to identify the relative advantages and disadvantages of implementing similar systems of competency assessments within the legal services sector.

While acknowledging that areas of continuous professional development may need reform in some parts of the legal service sector, any reforms made will be of little benefit to consumers unless the meaning and value of the assessment is adequately communicated to them. We reiterate the need to address the problems of information asymmetry within the sector, as identified by the CMA. The LSB should work with regulatory bodies, ombudsman schemes and representative groups in order to research how best to improve business intelligence reporting and technological innovation across the wider legal sector. ACSO welcomes the opportunity to contribute any further views as required by the LSB.

#### **V. Conclusion**

To conclude, the legal sector, like many other services and industries, is evolving at a rapid pace due to disruptive innovations. In order to ensure that legal professionals continue to deliver their services in a competent, efficient and ethical manner, it is essential that they are equipped with and maintain the necessary knowledge, skills and values. As such, we understand the drive to assess the effectiveness of competency assessment measures, including the potential need to bridge the gap between knowledge-led and experiential learning. Further research is required as to what skills and knowledge are likely to be needed as the market continues to evolve, alongside additional research on the merits and flaws of various competency assurance regimes, including those used in other sectors.

Finally, echoing the findings of the 2016 CMA review of the legal service sector, we highlight the need for a greater quantity and quality of data and information to be provided to consumers on the competency of legal services. Transparency and openness enable consumers to make informed decisions on which firms are best suited for their circumstances, thereby increasing consumer empowerment and access to justice. We urge the LSB to consider ways to improve information accessibility for all consumers, with a particular focus upon the most vulnerable in society. ACSO would be very pleased to contribute further advice or evidence as required.

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