



The Law
Society

Legal Services Board

Ongoing competence - Call for evidence

Junior Lawyers Division
Response to consultation
June 2020

Ongoing competence – Call for evidence

Response of the Junior Lawyers Division

The Junior Lawyers Division (JLD) is a division of the Law Society of England and Wales with an independent representative voice. The JLD is one of the largest communities within the Law Society with over 70,000 members. Membership of the JLD is free and automatic for those within its membership group including Legal Practice Course (LPC) students, LPC graduates, trainee solicitors, solicitor apprentices and solicitors up to five years qualified.

The JLD welcomes the opportunity to respond to this Call for Evidence and thanks the Legal Services Board for granting a short extension to do so.

The JLD relies on junior lawyers volunteering their spare time to complete consultation responses, and as such it has not been possible to conduct a comprehensive research exercise which goes beyond the fairly extensive work that the LSB has clearly already conducted.

We hope that this response will however assist the LSB by making principle-based observations which may be a helpful lens through which it can view its own evidence (and that received by others).

The JLD entirely agrees with the LSB's view that consumers should be able to trust that legal professionals have the necessary skills, knowledge and attributes to provide good quality legal services, and that they are kept up to date and relevant over time.

Solicitor competence and the current framework

The JLD supports the SRA's definition of solicitor competence, namely "the ability to perform the roles and tasks required by one's job to the expected standard" (Eraut & du Boulay, 2001). As the SRA notes, this definition provides flexibility in terms of how the expectations of a solicitor may legitimately change in line with their role or experience.

With the arguably increasing crossover between solicitors and barristers (the former conducting advocacy either via Higher Rights or in tribunal settings where Higher Rights are not required, and the latter providing advice via Direct Access structures), it seems sensible to review whether more crossover is warranted in terms of any future continuing competence frameworks.

The JLD suggests that the SRA is the most authoritative source in terms of current frameworks to ensure continuing competence for solicitors. Our overview is that the system relies on CPD activities being undertaken in a cycle of self-appraisal, reflection and planning. This is effectively a catch-all baseline; many solicitors in medium-to-large firms will additionally take part in annual appraisals or structured in-house training schemes (as opposed to sole

practitioners, freelancers, some in-house practitioners or those in very small firms, who may not have the resources or structures to do the same).

The difficulty with the above system – of which the LSB is already aware - is that it relies on subjective self-assessment, thereby introducing the risk that areas of weakness are not appropriately identified and/or addressed.

However, the JLD notes that there are currently various interrelated incentives for solicitors to ensure that they are competent, varying from commercial considerations (clients will not come back if they are unhappy), civil liability (clients may sue following an error - with cost and reputational implications) and regulatory aspects (the SRA might strike a solicitor off the roll).

Tests for change

The JLD's test for supporting changes to the current system would rely on (1) evidence that there is a clear need for change and (2) assurance that any changes would be effective in addressing any identified issues and workable in practice. The JLD notes that the LSB is reviewing cases from the Legal Ombudsman and that there is some evidence that conveyancing and probate matters are particularly open to error - this might satisfy the first limb of the test in these areas for example. However, we submit that further evidence of the current framework being deficient is required - setting out the underlying reasons - before any significant changes are made.

Current vs potential systems

The current CPD-based framework is arguably at the least intensive end of any spectrum of assessing continuing competence, where the checks of practitioners are effectively based on issues being reported to the SRA.

The JLD notes that the LSB has provided two examples of more interventionist systems used in other professional contexts - the GMC revalidation model and the Ofsted observation model. A third option of examination-based assessment (or a fourth model which combined elements of the other three) would be the most interventionist method.

Although evidence that there are significant issues in some areas of law (conveyancing and probate) suggests that the current model is not perfect, it should be noted that alternative, more interventionist models have drawbacks. The revalidation model relies on a significant amount of subjectivity, and there is evidence that it does not necessarily improve clinical practice.^{1 2} The Ofsted observation model would be problematic to say the least in terms of client confidentiality, and the evidence about its efficacy seems mixed (although we acknowledge that we have only reviewed the tip of the iceberg in terms of academic

¹ <https://www.gmc-uk.org/About/What-we-do-and-why/Data-and-research/Research-and-insight-archive/Evaluating-the-regulatory-impact-of-medical-revalidation>

² <https://www.hsj.co.uk/quality-and-performance/medical-appraisal-and-revalidation-a-pretence-that-is-reassurance-not-assurance/7024648.article>

assessment of the model).^{3 4} We note that these systems appear to be significantly resource-intensive and rely on significant involvement from the respective independent regulatory body.

It is important to note that the legal sector is tremendously heterogeneous in terms of practice delivery (ranging from freelancers to in-house lawyers to high-street firms to multinational listed companies) and specialisation (whereby some solicitors will operate in a single field such as clinical negligence, and others will dip in and out of discrete topics as their clients' demand). This poses significant challenges for any revised system of assessing continuing competence, as frameworks which can be absorbed within larger entities may be problematic for individual practitioners (who can provide an appraisal for a freelancer, or for a sole in-house lawyer?) The plurality of specialisms could also be problematic in terms of assessing knowledge levels, as appraisers or assessment-setters may not have the requisite knowledge to meaningfully test obscure areas of practice.

A further challenge for developing an effective framework of assessing continuing competence is the paucity of objective data in the legal sector. Pupils can have marks tracked and (many) clinical procedures can have their effectiveness measured. Legal outcomes rarely lend themselves to comparative measurement in the same fashion.

The implications of SQE on continuing competence

The JLD and others have raised significant concerns about the SRA's proposals for the Solicitors Qualifying Examination, and in particular that it will lead to a lowering of standards in the profession as the multiple-choice framework to assessing legal knowledge is unsatisfactory (and would allow a candidate to 'fail' one area of law but still receive an overall pass, for example). We are confident that the LSB will give the SRA's imminently anticipated final application for approval of SQE the due diligence that it requires, and we submit that if SQE in its current format is approved then the LSB/SRA will have a much greater need to take interventionist steps in terms of assessing competence, as the 'floor' will be lower for practitioners who have taken the SQE route to qualification. In short, it is questionable if some of these practitioners will be competent in the first place.

Conclusion

In summary, although the JLD certainly recognises the potential flaws with the current system and notes the cited probate/conveyancing areas of concern, we believe that the case for change will need to be evidenced more broadly before more interventionist methods of assessing continuing competence are warranted - and any such areas will need to convincingly address any identified issues, whilst being workable across the heterogeneous matrix of legal practice.

The views expressed in this consultation response are those of the Junior Lawyers Division and do not necessarily reflect the view of the Law Society of England and Wales or any other organisation unless stated.

³ <http://cep.lse.ac.uk/pubs/download/cp358.pdf>

⁴ <https://www.sciencedirect.com/science/article/abs/pii/S0272775703000815>