

Ongoing competence: Call for evidence

Response template



This template can be used to respond to the [call for evidence](#) for the ongoing competence project. Please send completed forms to the [project team](#).

Defining competence and competence assurance

Understanding what it means to be a competent legal professional and how competence can be maintained and assured over time is a core objective of this work.

We would welcome your views on what you think is needed to demonstrate competence, whether competence needs to be tested throughout the career of a legal professional and how it could be assessed. This may cover areas such as:

- the characteristics or skills that should be part of a competency framework
- the types of competence particular to different types or work or legal disciplines (e.g. barristers, legal executives)
- different models for competence assurance that you use or are aware of

We would welcome qualitative and quantitative evidence in particular on: determining the components of professional competence; approaches to competence assurance; the effectiveness of CPD and other methods of assurance.

Please fill in the text box below using the prompts above, providing links to any evidence referenced. Alternatively, supporting documents (e.g. reports, datasets) can be provided separately.

Determining the components of professional competence, approaches to competence assurance at the point of qualification

Such frameworks are increasingly being used in professional settings in the UK.¹ They vary in detail and in the extent to which they are framed around lists of tasks to be performed or knowledge, skills and attributes to be possessed.² In the legal sector in England and Wales, there is some evidence that all the regulated professions other than the notaries have a framework of some kind pegged to the standard required at the point of qualification. The model of “competence” which they therefore endorse is therefore a regulatory one:³ a minimum or bottom line below which is (actionable) negligence or misconduct.

They are also found in other organisations, such as the Institute of Paralegals,⁴ the Forum

¹ Stan Lester, ‘Professional Competence Standards and Frameworks in the United Kingdom’ (2013) 39 *Assessment & Evaluation in Higher Education* 38.

² Stan Lester and Jolanta Religa, ‘“Competence” and Occupational Standards: Observations from Six European Countries’ (2017) 59 *Education and Training* 201.

³ Julian Webb and others, ‘Briefing Paper 1/2011: Competence’ (*Legal Education and Training Review*, 2011) <<https://letr.org.uk/wp-content/uploads/Briefing-paper-12011.pdf>>. See also Jorgen Sandberg and Ashly H Pinnington, ‘Professional Competence as Ways of Being: An Existential Ontological Perspective’ (2009) 46 *Journal of Management Studies* 1138.

⁴ Institute of Paralegals, ‘Competency Standards’ (Institute of Paralegals, 2018) <<https://theiop.org/competency-standards/>> accessed 3 June 2020.

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of Insurance Lawyers,⁵ and a number of employing organisations.⁶ They can also be found in Scotland, Canada⁷ and Australia⁸ and have been recommended to the legal professions in the Republic of Ireland.⁹

However, the use to which the regulators put these frameworks varies from the “guidance” approach of IPReg to the formal assessment of many (but not all) of the competences proposed by the SRA in the SQE.

There are a number of challenges in the approaches which have been taken:

- a) Having a single competence statement pegged to the point of qualification is problematic as it sets a minimum standard not only in level (ie standard of performance), but also in scope (range of activity). The SRA not only invites its regulated community to use its point of qualification competence statement to inform their CPD but has also now enshrined it as the regulatory benchmark by which to measure what is delivery of a competent service to clients.¹⁰ The Code of Conduct for individuals is described as “a framework for ethical *and competent* practice” [our italics]¹¹ and that for firms as a means of ensuring “the delivery of *competent* and ethical legal services to clients”¹² [our italics] This is not only a personal obligation, but an obligation on supervisors¹³ and on entities¹⁴ in relation to the entire workforce. Given the expectation in the enforcement strategy that those affected should “be able to explain and justify their decisions and actions”, this places the principal responsibility for competence on the profession.

However, reliance on the point of qualification competence statement overlooks the

⁵ Forum of Insurance Lawyers, ‘The FOIL Standard’ (*Forum of Insurance Lawyers*, No date) <<https://www.foil.org.uk/about/the-foil-standard/>> accessed 1 April 2020.

⁶ Julian Webb and others, ‘Briefing Paper: Knowledge, Skills and Attitudes Required for Practice at Present’ <<http://letr.org.uk/wp-content/uploads/012012-competence-frameworks-analysis.pdf>> accessed 1 April 2020.

⁷ Federation of Law Societies of Canada, ‘National Entry to Practice Competency Profile for Lawyers and Quebec Notaries’ <<http://flsc.ca/wp-content/uploads/2014/10/admission4.pdf>> accessed 3 June 2020.

⁸ Law Admissions Consultative Committee, ‘Competency Standards for Entry Level Lawyers’ <https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/Competency_Standards_for_Entry-Level_Lawyers_-_1_July_2015.pdf> accessed 1 April 2020.

⁹ Hook Tangaza, ‘Review of Legal Practitioner Education and Training’ (Hook Tangaza 2018) <<https://www.isra.ie/wp-content/uploads/2019/09/Review-of-Legal-Practitioner-Education-and-Training-Final-version.pdf>> accessed 3 June 2020.

¹⁰ Solicitors Regulation Authority, ‘Competence and Standard of Service’ (Solicitors Regulation Authority, 25 November 2019) <<https://www.sra.org.uk/sra/corporate-strategy/sub-strategies/enforcement-practice/competence-standard-service>> accessed 3 June 2020.

¹¹ Solicitors Regulation Authority, ‘SRA Code of Conduct for Solicitors, RELs and RFLs’ (Solicitors Regulation Authority, 25 November 2019) <<https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/>> accessed 3 June 2020.

¹² Solicitors Regulation Authority, ‘SRA Code of Conduct for Firms’ (Solicitors Regulation Authority, 25 November 2019) <<https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/>> accessed 3 June 2020.

¹³ Solicitors Regulation Authority, ‘SRA Code of Conduct for Solicitors, RELs and RFLs’ (Solicitors Regulation Authority, 25 November 2019) <<https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/>> accessed 3 June 2020 at 3.6.

¹⁴ Solicitors Regulation Authority, ‘SRA Code of Conduct for Firms’ (Solicitors Regulation Authority, 25 November 2019) <<https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/>> accessed 3 June 2020 at 4.3

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fact that solicitors will narrow the scope of their areas of practice as they move from benchmark competence to expertise in level of performance, and that they will also move into new areas of, for example, supervision and management that are not reflected in the competence statement. There are, however, some examples of competence statements for more senior practitioners such as the QC framework,¹⁵ the framework for solicitor-advocates¹⁶ and the more recent CITMA framework¹⁷ and the Institute of Paralegals uses a series of statements for different levels of expertise. Employing organisations may be more likely than regulators to use more than one statement representing different roles or career stages.

- b) It is not always clear how the competence statement has been generated. Semantic analysis suggests, for example, that the IPReg statements have been influenced by those of CILEx, possibly inadvertently then carrying across CILEx' assessment requirements such that it is a competence for IP attorneys to be able to prove their own competence. The original CILEx competences showed similarity to the SRA work-based learning outcomes. It seems likely that other approaches involve use of consultants and/or soliciting some level of consensus from members of the profession and perhaps others. Particularly for the broad-based professions, this consensus approach necessarily produces a lowest common denominator. It is not always clear what criteria other than consensus have been used (if any). Alternative methods include formal work evaluations such as those involved in the Solicitors and their Skills project reported in LETR, the USA¹⁸ or the approach used in Canada to generate a competence statement that assessed not only the frequency of tasks but also the risk inherent in tasks being performed incompetently.¹⁹ We are not aware of any such empirical processes being used to generate legal competence frameworks in England and Wales.
- c) Although we think there has been some reliance on pre-existing competence statements in the course of drafting, it is extraordinarily difficult to carry out a realistic comparison between them. Is it significant, for example, that a solicitor is required to "Recognis[e] ethical issues and exercis[e] effective judgement in addressing them,"²⁰ but a barrister to "Recognise potential ethical situations and identify ethical

¹⁵ Solicitors Regulation Authority, 'Competence and Standard of Service' (Solicitors Regulation Authority, 25 November 2019) <<https://www.sra.org.uk/sra/corporate-strategy/sub-strategies/enforcement-practice/competence-standard-service>> accessed 3 June 2020.

¹⁶ Solicitors Regulation Authority, 'Statement of Standards for Solicitor Higher Court Advocates' (Solicitors Regulation Authority, No date) <<https://www.sra.org.uk/solicitors/resources/cpd/accrreditation/higher-rights-audience/statement-of-standards-for-solicitor-higher-court-advocates/>> accessed 20 April 2020.

¹⁷ Chartered Institute of Trade Mark Attorneys, 'Advanced Competency Framework for Chartered Trade Mark Attorneys' (Chartered Institute of Trade Mark Attorneys, 22 January 2020) <<https://www.citma.org.uk/resources/chartered-trade-mark-attorney-advanced-competency-framework.html>> accessed 3 June 2020.

¹⁸ Susan M Case, 'The NCBE Job Analysis: A Study of the Newly Licensed Lawyer' (2013) 82 Bar Examiner 52.

¹⁹ Federation of Law Societies of Canada, 'National Entry to Practice Competency Profile Validation Survey Report' (Federation of Law Societies of Canada 2012) <<https://flsc.ca/wp-content/uploads/2014/10/admission6.pdf>> accessed 1 April 2020.

²⁰ Solicitors Regulation Authority, 'Statement of Solicitor Competence' (Solicitors Regulation Authority, 25 November 2019) <<https://www.sra.org.uk/solicitors/resources/cpd/competence-statement/>> accessed 14 May 2020 at A1 a).

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issues”²¹ and a trade mark attorney to “Identify how you will act in accordance with the Code”²²? We are aware that QSA is not a happy precedent, but its competence statement did attempt to a) measure the essentials of competent advocacy whether carried out by a barrister, solicitor or legal executive and b) provided a sequence of competence statements for different levels of expertise. The LETR report in 2013 advised creation of an umbrella set of competences for legal practice, below which individual professions could create their own, mapped to the umbrella set. Such an approach would have the benefit of assuring a baseline definition of minimum competence across the regulated sector either in toto, in high-risk activities such as advocacy or in activities such as conveyancing authorised to multiple professions, but allowing individual professions to mark out their own specific fields of expertise. One possible model for umbrella competences of this kind might be those of the International Accounting Education Standards Board.²³ This would involve mandation or an element of collaboration but the similarities between the existing legal competence statements suggest that some element of standardisation may be going on under the table.

- d) Competence statements should define both “scope and quality”²⁴ of performance of tasks or of knowledge, skills and attitudes that inform performance. “Quality”, that is the standard of performance, is difficult to determine. The standard expected in X might be very different, for example, of a trainee solicitor in a City firm, or of a paralegal in a small criminal specialist firm and the standard of the SQE may not be the same as either.
- e) Where a competence statement is used to measure the standard required at the point of qualification, the test may nevertheless not be taken, temporally, at or near to the point of qualification. So, under present plans, the SRA’s SQE may be taken, by any applicant not on the apprenticeship pathway, up to two years before the point of qualification. It is, therefore, assumed that that baseline competence is retained for a comparatively long period, during which competence might be extended or enhanced, or might degrade.
- f) Competence statements appear to be designed with the requirements of practice in mind, rather than the requirements of assessment. Many requirements of practice are demonstrable over periods of time, or in situations of uncertainty and pressure, or are resource intensive to assess. Where there is a competence statement attached to an assessment, compromises may be made, or competences ostensibly defined as essential for competent practice may be excluded from the assessment.²⁵ This may vary across different professions and may not be generally understood.

²¹ Bar Standards Board, ‘The Professional Statement for Barristers’ <https://www.barstandardsboard.org.uk/media/1787559/bsb_professional_statement_and_competences_2016.pdf> accessed 3 June 2020, at 1.16b)

²² Intellectual Property Regulation Board, ‘Competency Framework - Trade Marks’ <<https://ipreg.org.uk/sites/default/files/IPReg-Skill-Set-Table-TM-Final1.pdf>> accessed 3 June 2020, p 6

²³ International Accounting Education Standards Board, ‘IAESB’ (*IFAC*, 17 August 2018) <<https://www.ifac.org/iaesb>> accessed 1 April 2020.

²⁴ Michael Eraut, *Developing Professional Knowledge and Competence* (Falmer Press 1994), p 167.

²⁵ Solicitors Regulation Authority, ‘Assuring Advocacy standards: Consultation’ (Solicitors Regulation Authority 2019) <<https://www.sra.org.uk/globalassets/documents/sra/consultations/assuring-advocacy-standards-consultations.pdf?version=4a42f9>> accessed 17 January 2020, para 21.

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- g) Competence statements are not a panacea, although they have advantages in helping to develop education and training models and assessments. They may have advantages in creating leverage for employees to press their employers for opportunities to develop specific competences. They will always be a minimum – although that does not preclude stepped sets of competences for increasing expertise or sets of competences for specialist areas. Assessment in simulation can only reach as far as Miller’s “shows how”²⁶ rather than what a practitioner actually does every day in practice. For regulators, therefore, they are perhaps most useful defensively where the scope and level has not been achieved, “honoured more in the breach than in the observance”.

CPD and competence assurance.

The majority of the regulated professions in England and Wales have now moved from inputs-based to outputs-based or cyclical CPD systems. All three models have their advantages and disadvantages, including the extent to which they allow business objectives to thwart personal development and the extent to which they expect, or facilitate, development beyond static point of qualification competence towards expertise.²⁷

With the exception of the mandatory courses for, for example, solicitor-advocates, new practitioner barristers and occasional requirements for CPD to include specific topics, such as the CILEx mandatory ethics component, the cyclical or outputs models focus on the regulation of the process of learning to improve practice rather than demanding minimum time periods ostensibly spent in educational activity (inputs) or prescribing the content of what is learned. That content is self-determined by the individual, which aligns well with the responsibility elements of those parts of the competence frameworks that emphasise reflection and taking responsibility for personal learning. The regulators’ requirements that their community provide a proper standard of practice are not generally – with the exception of the SRA – specifically linked with the effects of CPD activity. As with the competence statements, from a regulatory perspective CPD requirements may operate more effectively as a method of making practitioners accountable than in assurance of maintained minimum competence. It should also not be overlooked that learning takes place in many contexts, many of which may not be recognised or formalised by the individual practitioner as “CPD”,²⁸ and even formal CPD may be focused on acquiring expertise, rather than maintaining minimum competence. A failure to engage in required formal CPD may therefore be, but is by no means necessarily, an indicator of a cavalier attitude to competence, but it does not ensure or necessarily assure maintained minimum competence.

Consumer expectations of competence

Understanding consumers’ perspectives on, and expectations of, competence in the legal services sector is crucial to our work in this area.

We would welcome your views on what ways consumers can have greater confidence that they have a competent advisor. This may cover areas such as:

²⁶ George E Miller, ‘The Assessment of Clinical Skills/Competence/Performance’ (1990) 65 Academic Medicine S63.

²⁷ Pamela Henderson and others, ‘Solicitors Regulation Authority: CPD Review.’ (Solicitors Regulation Authority 2012) <<http://irep.ntu.ac.uk/id/eprint/20486/>> accessed 3 June 2019.

²⁸ Jane Ching, ‘Young Litigation Solicitors and Their Perceptions of Movement from Qualification to the 3 Year Watershed’ (Ph D, Nottingham Trent University 2009) <<http://irep.ntu.ac.uk/id/eprint/43/>> accessed 3 June 2020.

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- the ways consumers can make judgements on the quality of the advice or service that they have received
- what role consumer feedback could or should play in helping legal professionals to build their competence and helping to foster trust
- the frequency of competence checks that would reassure consumers
- different types of consumers, consumer problems or legal activities that are more likely to experience quality issues, or be vulnerable to greater harm from quality issues

We would welcome qualitative and quantitative evidence in particular on: meaningful ways to demonstrate competence to consumers; how professions can provide information to consumers on the quality they should expect; the relative risk and impact of poor quality advice on consumers.

Please fill in the text box below using the prompts above, providing links to any evidence referenced. Alternatively, supporting documents (e.g. reports, datasets) can be provided separately.

The variety of competence statements, together with competition between professions to assert their specialist status clearly complicates the position for lay clients (although it may not do so for clients who are, for example, in-house lawyers). In some cases there is intersectionality: for example, in an IP case, should the client select a trade mark attorney with rights of audience, or a barrister with knowledge of trade mark law?

There are areas of law that could be identified from, for example Legal Ombudsman and professional disciplinary data or from first principles, as higher risk to the individual lay client: advocacy, immigration, insolvency and debt, welfare benefits. These do not necessarily align with the reserved activities in the LSA 2007. They are also likely to be concentrated within smaller, less well-resourced legal services providers, which may be more likely to be populated by BAME lawyers.

In addition to the professions' brand marketing, there are a number of "quality marks". Some, such as APIL qualifications, are available across professions. Others, such as rights to conduct litigation, rights of audience or rights to accept instructions from the public, are confined to specific professions which train and assess for the same activity, but in different ways and to different articulations of outcomes or competences. Some act as specialist licensures and involve a summative assessment, whilst others merely badge the individual or the organisation as specialist in some form. The award of the latter, as indicated by LETR, is not always on a robust basis. It may also not be clear whether the award attaches to an individual lawyer, or to the whole organisation.

Non-licensure specialist quality marks are available elsewhere, as in Texas²⁹ and in Germany.³⁰

²⁹ Texas Board of Legal Specialization, 'Board Certified' (Texas Board of Legal Specialization, 2020) <<https://www.tbls.org/findlawyer>> accessed 3 June 2020.

³⁰ Bundesrechtsanwaltskammer, 'Fachanwaltsausbildung' (Bundesrechtsanwaltskammer, 2020) <<https://brak.de/fuer-anwaelte/qualitaet-durch-fortbildung/fachanwaltsausbildung/>> accessed 3 June 2020.

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Competence assurance in the legal services sector

Understanding the current competence assurance frameworks adopted by regulators and the profession is important, as is confirming, qualifying and quantifying any examples of poor-quality services or suggested risk areas.

We would welcome your views on this, and it may cover areas such as:

- practice areas which do or could impose greater competency risks
- legal professionals that may be more at risk of competency challenges
- existing competency assurance methods used in the sector and their effectiveness
- the respective roles of regulators, providers and individuals to assure ongoing competence
- any potential barriers to assuring the competence of legal professionals

We would welcome qualitative and quantitative evidence in particular on: competence or quality issues for particular types of work; service and non-service-related issues experienced by consumers; the effectiveness of current competence assurance practices.

We would also welcome identification of potential evidence sources that are not readily available but that we could seek access to.

We would also welcome any evidence of competence assurance practices used in legal services sectors in other jurisdictions.

Please fill in the text box below using the prompts above, providing links to any evidence referenced. Alternatively, supporting documents (e.g. reports, datasets) can be provided separately.

We have suggested some examples in the previous section drawn from other sectors and other jurisdictions.

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Competence assurance in other sectors

Understanding what other sectors do to assure ongoing competence is useful because it helps us to learn what has worked well in other professional services sectors and identify any opportunities to adapt the approach in legal services.

We would welcome your views on what ways the legal services sector can learn from the competence assurance approaches adopted in other professional sectors. This may cover areas such as:

- methods to gain competence assurance that have been tailored to different professional environments
- the benefits to consumers and the profession of different competence assurance schemes e.g. revalidation, observation or simulation
- how assurance data is collected, recorded and made accessible to consumers

We would welcome qualitative and quantitative evidence in particular on: consumer views on the benefits of competence assurance schemes; the robustness of different methods for competence assurance; the competence assurance systems which produce the most reliable assessments.

We welcome evidence from the sectors provided as examples above as well as other sectors not specified in this paper.

Please fill in the text box below using the prompts above, providing links to any evidence referenced. Alternatively, supporting documents (e.g. reports, datasets) can be provided separately.

Revalidation

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Revalidation in the medical professions was in its early stages when the LETR empirical data was collected. There was, therefore, a considerable degree of uncertainty in the professions about what it would entail and in particular whether it would entail “retaking the driving test” – something with which the SRA reliance on the point of qualification competence framework also has, we suggest, some difficulty.

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