



## **Ongoing competence: Call for evidence**

Law Society Response

July 2020



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## A response from the Law Society of England and Wales

### Overview

The Law Society welcomes the opportunity to contribute to the Legal Services Board's (LSB) call for evidence on ongoing competence in the legal professions and hopes that this will be part of an ongoing collaboration on this topic. The planning, completion and reflection on Continuing Professional Development (CPD) activities are key components of ensuring ongoing competence.

In the Law Society's view:

- CPD should be recognised as a key element of individual development and review of CPD should therefore be part of the annual performance review of any solicitor.
- Clear objectives should be set at the beginning of a CPD year, in agreement with a solicitor's supervisor/employer. The Law Society would be interested in seeing how the role of the COLP could be utilised to support this practice-level review and assurance of activity.
- At the end of each year a solicitor should revisit their CPD activities from the previous year, reflect on what they have learnt (the outcomes) and look at how the next year's objectives should be shaped.
- The focus should be on the outcomes (learning) of an activity, not the inputs (hours).
- Firms should have a responsibility to ensure that their employees are given adequate time and resources to undertake relevant and meaningful CPD in line with their agreed objectives.
- Any scheme should be flexible and non-prescriptive, allowing each solicitor, in agreement with their supervisor/employer, where appropriate, to determine what activities would be most beneficial to them.
- Activities that can count as CPD must extend beyond the scope of every day practice and be formalised as such. For instance, case preparation is part of a solicitor's work, but time taken to reflect on case preparation and how it could be done better, identifying future action points, would constitute CPD so long as it was undertaken in a formalised manner.
- CPD and management and other training: The changing patterns of legal services provision make it inappropriate to require particular management training at a fixed point in a solicitor's post-qualification career. The key principle is that CPD must be relevant either to the area of practice or to the solicitor's own future development. It is for the solicitor and their firm to identify at what point different types of development activity, such as management or financial development, are appropriate.
- Solicitors with responsibility for the supervision and training of trainee solicitors or junior solicitors, should undertake CPD training activities relevant to these

responsibilities at appropriate intervals, which can count towards their ongoing competence. This should be clearly set out in their objectives plan.

- Due consideration should be given, when setting an objectives plan, to regular equality, diversity and inclusion training and training on ethics.
- Consideration should also be given to the need for solicitors to have knowledge of relevant anti-money laundering and IT policies, particularly as the SRA has identified money laundering as a priority risk and the current Covid-19 situation has highlighted the importance of IT systems in working remotely, being up to date with legal tech and the consequence of these systems on service to clients.
- Whilst firms may be delegated responsibility by the SRA for ensuring that their employees undertake competence activities as set out above, the SRA should retain ultimate responsibility for monitoring compliance.
- The SRA should initiate a system of checks, some risk-based, others at random, to ensure compliance and that firms are adequately monitoring their employee's compliance.
- Non-compliance should have serious consequences and the SRA should take swift and decisive action where instances of non-compliance are established.

### **Continuing Competence**

1. One of the main issues of focus is what regulatory arrangements are most likely to create the incentives necessary for the profession to continue to invest appropriately in the professional development and ongoing competence of its members, and to do so in way that is focused on their professional needs and is cost-effective.
2. There must be a system of checks and balances to give assurance to the profession and to consumers that the quality of the solicitors' profession is being maintained. The Law Society would encourage the LSB to consider where quality assurance measures could be brought in to assure the quality of the CPD activities undertaken and levels of compliance and relevance to practice.
3. Some minor changes could be made, such as the yearly sampling of a small percentage of records, which could have a positive impact on the profession's engagement with continuing competence as a worthwhile and meaningful part of being a solicitor. This is particularly important at a time when economic pressures mean that solicitors are under enormous stress and may not have sufficient capacity to undertake the processes involved in continuing competence, nor the activities required.
4. Any proposals arising from this work should consider the nature of solicitors' work and the variance in employment models as well as the need, now more than ever, to avoid onerous processes and unnecessary costs.
5. The Law Society is aware that the SRA plans to review continuing competence in the coming year and will be considering the issues raised above around risk-based or randomised quality assurance and the potential for a risk-based approach to certain areas of law and requirements for those. This point is picked up below in looking at the work of the Law Society's accreditation schemes.

6. The LSB should consider the timings of any report to emerge from this research project so that it can take account of the SRA's work. It would not best serve the profession for these projects to report in isolation.

### **Defining competence and competence assurance**

7. There are of course variations in how legal regulators define and assure competence for their professions. This reflects the range of work, responsibilities and business models of those professions and is correctly in the hands of the individual regulators. However, there are similarities that exist as well, such as the focus on maintaining knowledge and skills, of reflecting on practice and addressing learning needs.
8. The LSB could set and maintain a core set of principles that all legal professions could then base their schemes on. This would be an appropriate role for the LSB and would enable cohesion across professions while still maintaining their independence and allowing each regulator to put in place the most appropriate scheme for their profession.
9. As referred to above, the Law Society would support the introduction of principles that direct regulators to quality assure their schemes in a more robust way. Some form of third-party checks would have a positive effect on both engagement with and quality of ongoing competence activities taken. Solicitors are already expected to keep records of their continuing competence activities, it is not unreasonable to expect that these would be checked, or possibly checked.
10. Currently the SRA only looks at these records where complaints are made, or a competence issue is raised in another way. This system does not allow for early detection of potential competence issues and timely corrective action, which could avert more serious issues down the line.

### **Consumer expectations of competence**

11. Titles provide consumers with assurance of competence and hence come with an expectation that competence will be maintained and assured in some way. The Law Society agree with the [CMA assessment](#) that due to the nature of the legal services market it is difficult for consumers to assess the quality of legal advice. This view is supported by our consumer research which found that in general people have very little understanding of legal services and providers, and assume all providers are regulated to the same level, presumably meeting the same qualification and ongoing competence requirements.
12. The CMA recommended transparency remedies, to help consumers make more informed choices and shop around. Many of these remedies focused on price and less so on quality indicators which are more difficult to assess. The Law Society notes that the LSB plans to look at the quality indicators under their current business plan and is supportive of this.
13. Our research into [consumer behaviour, attached to this paper](#), shows that there is a clear risk that clients make decisions on the most obvious and easily understood information (price), as is common in a number of sectors, and either stop searching or overlook other important factors. This is not in the public interest. Therefore, it is important consumers can use quality indicators alongside price when making choices about legal service providers.
14. In addition, there is a need to raise awareness of what regulation means in relation to legal professionals. The consumer research found low consumer awareness of regulatory

arrangements. Many consumers did not clearly understand the differences between the terms 'solicitor' and 'lawyer'. When asked about regulation, many assumed the existence of some form of regulation but were unaware of who regulated or what regulation meant. These findings were also confirmed by the Legal Needs Survey which found the majority of people lacked basic knowledge about regulation and their rights.

### **Competence in the legal services sector**

15. The current system of assuring ongoing competence in the legal services sector, relies heavily on CPD activities undertaken by an individual, or in some cases, dictated by a firm or a requirement of a scheme membership. There are some areas of practice which bring with them higher competency risks and where it is appropriate to have higher levels of assurance of competence for practice.
16. The Law Society would encourage the LSB to interrogate complaints data from the Legal Ombudsman to determine whether there is anything that could be incorporated into a system of ongoing competence that would have a positive effect on the types or volume of complaints received. It would be helpful to understand the effects of the introduction of continuing competence on client complaint numbers and types of complaint, where those complaints are taken forward.
17. It has also been suggested that other sources of data could be useful in establishing a full picture alongside this complaints data. One example is HM Land Registry, which publishes regular data on numbers of transactions by firm, a break-down of the different types of transactions undertaken, numbers of requisitions on applications and numbers of rejections. HM Courts and Tribunals Service is also exploring the use of similar data. Regulators can look at firms with high numbers of requisitions/rejections and equally, high and low numbers of transactions, to test competence of members of that firm.
18. This may give the LSB a sense of direction when looking to understand what measures could be put in place to improve these. Continuing competence represented a huge change in the way the profession identifies issues and corresponding competence activities and the way in which they are carried out. A return to the box ticking system of CPD that preceded continuing competence should be avoided but the new system must be understood in context so that improvements can be made.

### **The Law Society's Accreditation Schemes**

19. The Law Society is aware that the SRA will be looking at strategically reviewing the continuing competence scheme in the coming year and a risk-based approach to certain areas of law will be something which is considered. The Society's schemes offer a model for how this can be approached and is one way in which the Society is already supporting members with their ongoing competence.
20. Maintaining and assuring competences and standards underpin each accreditation. Each individual accreditation has eligibility requirements setting out the requisite knowledge, skills and experience. The accreditation process requires applicants to demonstrate through an application and assessment process that they have attained the accreditation standards in a particular area of law. For certain accreditations, there are mandatory training courses which need to be completed prior to applying for accreditation. Each accreditation has a rigorous assessment process. Only applicants who meet the requirements of probity and knowledge & skills requirements will be accredited. We have quality assurance processes to ensure that assessment materials and the assessors conducting the assessments are of a high standard.

21. All individual accredited members are required to maintain the standards of the accreditation through the course of their membership. There are conditions to the membership, including requirements to ensure ongoing competence by way of professional development. Professional development undertaken needs to demonstrate its relevance to ensuring that the accredited member has maintained their competency in that specific area of law.
22. Whilst all solicitors are subject to the SRA's requirement in respect of continuing competence, all accredited members, whether solicitors, chartered legal executives or non-qualified practitioners, must ensure that they undertake the required amount of professional development (PD) for their respective accreditation and record their learning outcomes and how this training has contributed to their development in their practice area.
23. Individual accreditation membership conditions contain requirements on reaccreditation. This is a formal reapplication and assessment process required periodically (e.g. three years)
24. Applicants are required to complete a record of PD hours when applying for accreditation or reaccreditation to evidence that they have met this requirement. These records are checked as part of the assessment process. Failure to comply with specific requirements (structured learning vs unstructured learning) or to acquire the requisite number of PD hours may constitute grounds for refusal, revocation or non-re-accreditation.
25. Although there is an hours requirement, this is not 'box-ticking' as the applicant needs to demonstrate the development undertaken, describe what they learnt and how it contributed to their ongoing competence in the specific area of practice. The previous system of CPD allowed any CPD to count towards a solicitor's hours, regardless of the relevance to their practice and there were many examples of poor-quality learning or questionable activities undertaken as a result.
26. During the assessment process, competence levels are measured by the completion of case studies, case reports or undertaking interview assessment with a Law Society approved assessor.
27. For entity accreditations such as Lexcel England and Wales and Conveyancing Quality Scheme (CQS), we have set standards which the firms need to maintain, which include training requirements. Lexcel for example has regular training requirements for:
  - a. Equality & Diversity
  - b. Anti-money Laundering training
  - c. Data protection
  - d. Information security
  - e. Conflict of interest
28. As part of the Lexcel standard for legal practices (4.3), practices are required to have a learning and development policy, which must include:
  - a. Ensuring that appropriate training is provided to personnel within the practice
  - b. Ensuring that all supervisors and managers receive appropriate training
  - c. A procedure to evaluate training
  - d. A learning and development plan for all personnel
29. These requirements are assessed annually by an independent assessor. On CQS, we have introduced random audits. We have a target of 300 audits in the next 12 months.

30. Having clear standards and requirements around training and client care contributes to the culture of compliance that we aim to achieve with the entity accreditations. It sets a basis for active risk management. This can be seen objectively when reviewing the Legal Ombudsman’s complaints data for the period 1 April 2019 to 31 March 2020. Out of the 1806 decisions, 70% of decisions where there was an adjudication with a remedy that required payment of a remedy amount were against firms that do not hold accreditations.
31. These accreditations aid both individuals and practices in demonstrating expertise to potential clients, helping them to make an informed buying decision. The schemes promote high standards in legal service provision and ensure that clients are easily able to identify legal practitioners with proven competency in given areas of law. We also ensure that scheme members maintain relevant standards of competency and expertise by means of periodic reselection, re-accreditation and re-authorisation.
32. Quality assurance is an important element of all our accreditation schemes. The Law Society runs a range of activities to promote accreditation scheme membership as a mark of excellence for consumers of legal services and as such ensuring competence is an area constantly reviewed and developed by the accreditation team.

### The Law Society’s Learning Management System

33. The Law Society is about to launch a new approach to educating our members. It will primarily be delivered digitally via Law Society Learning, our new Learning Management System (LMS); however, there will be blended and face-to-face options as the platform matures. A foundational part of the new platform is our new curriculum, which is composed of eight tracks. This is a hybrid model which reflects the technical and softer skills demands of contemporary practice. All content on the new LMS will be mapped to the curriculum, and members will have individual learning records, so creating and maintaining a learning pathway mapped to the curriculum will be easy to update and access.

### **Competence in other sectors**

34. The LSB refers to schemes that apply to other professions, which are very different in the way they are managed and the way in which those professionals are employed. The model of assuring ongoing competence should be specific to the profession it is assuring, and should come from knowledge of that profession, the business models and the types of work undertaken.
35. The Law Society notes that the LSB references the GMC’s revalidation scheme, quoting Sir Keith Pearson’s 2017 report that concludes that, “significant benefits”<sup>1</sup> were being delivered by revalidation. However, the report also notes that concerns were raised by doctors that “revalidation is unnecessarily burdensome”.
36. Conversely, the Umbrella report of February 2018<sup>2</sup> concluded that revalidation “may not necessarily improve professional practice” and that only a “significant minority” of doctors had changed their practice as a result of the introduction of revalidation, whilst some doctors “identified potentially negative impacts”.

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<sup>1</sup> [https://www.gmc-uk.org/-/media/documents/Taking\\_revalidation\\_forward\\_Improving\\_the\\_process\\_of\\_relicensing\\_for\\_doctors.pdf\\_68683704.pdf](https://www.gmc-uk.org/-/media/documents/Taking_revalidation_forward_Improving_the_process_of_relicensing_for_doctors.pdf_68683704.pdf)

<sup>2</sup> [https://www.gmc-uk.org/-/media/documents/umbrella-report-final\\_pdf-74454378.pdf](https://www.gmc-uk.org/-/media/documents/umbrella-report-final_pdf-74454378.pdf)

37. Medical revalidation is not, in any case, an obvious model for the LSB to be considering. The medical profession is employed and funded in a very different way to the solicitor's profession. Doctors are largely employed by large public bodies, who fund any necessary training and have large scale systems for generating the necessary information required. By contrast, most solicitors operate in private firms of varying size where any regulatory costs must be met by themselves or their firm.
38. The Society would suggest that looking at other professions to draw comparisons and understand good practice is not as relevant as comparisons with other jurisdictions. Other legal jurisdictions may have examples of good practice that could inform the principles behind any systems in this jurisdiction. In particular, the LSB should seek to identify examples of quality assurance being done well and whether there are jurisdictions where complaints data is used to inform the types of competence activities the profession is asked to complete.
39. The Council of Bars and Law Societies of Europe (CCBE) is an association gathering together bar associations of 32 countries in Europe and an additional eleven associate and observer members. Given the international nature of law and the position of this jurisdiction as a jurisdiction of choice internationally, it seems especially relevant to ensure that any schemes are in line with neighbouring jurisdictions, as well as further afield internationally.
40. Recent research<sup>3</sup> was undertaken in the Recognition of foreign training activities for lawyers (REFOTRA) project<sup>4</sup>, which is an EU-funded project focused on the recognition of CPD undertaken by EU lawyers in another Member State. As part of the project, research was carried out into the lawyer CPD systems existing in the Member States.
41. The research showed that:
- Of the 27 EU Member States and 3 EEA Member States which replied, 20 (66%) have compulsory continuing education or CLE.
  - A further four Member States' legal professions indicated plans to introduce compulsory CLE in the near future, along with Iceland from the EEA.
  - Only 4 EU Member States' legal professions – Czech Republic, Greece, Portugal and Spain – indicated no current or planned system, and of EEA Member States, only Liechtenstein.
42. It is notable that out of the many countries with compulsory CPD, only England and Wales has a regime without any specific rules as to how CPD should be carried out. In the quote from the SRA in the report is as follows:
- “What there isn't, is a specific CPD rule. We have a requirement that solicitors must provide a proper standard of service. That is different to a rule which requires CPD or CLE. Someone could decide that they are up to date and competent and therefore did not need to do any CPD. Provided they were able to offer a proper standard of service to their clients, they would be compliant with our requirements.”
43. The SRA's current system of continuing competence is out of step with our European comparators, all of whom have detailed rules that lawyers need to follow. We do not have to go back to the tick-box system of the previous CPD regime but that does not

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<sup>3</sup> <https://elf-fae.eu/wp-content/uploads/2019/07/Assessment-report-on-the-situation-in-EU-and-EEA-Member-States-regarding-recognition-of-foreign-training.pdf>

<sup>4</sup> <https://elf-fae.eu/refotra/>

mean that substantive improvements cannot be made to our current system, in line with other jurisdictions.

44. The Law Society's international team has excellent links with international bars and would be happy to aid the LSB in exploring this area further and by facilitating introductions.

## The Law Society's accreditation schemes

Below are guidelines on what's expected in terms of PD hours for each individual scheme:

Accreditation Scheme	PD Requirements	
	Initial	Re-accreditation
<b>Children Law</b>	3 complete years, 6hrs PD per year. Plus 3 day mandatory course	3 complete years, 6hrs PD per year
<b>Clinical Negligence</b>	3 complete years, 10hrs PD per year	3 complete years, 10hrs PD per year
<b>Criminal Litigation</b>	N/A	N/A
<b>Family Law</b>	3 complete years, no requirement of hours	3 complete years, 6hrs PD per year
<b>Family Law Advanced</b>	3 complete years, no requirement of hours	3 complete years, 6hrs PD per year
<b>Family Mediation</b>	3 complete years, 10hrs PD per year	3 complete years, 10hrs PD per year + PPC Log 4 hrs per year
<b>Immigration</b> - ( <i>Trainee Casework assistant, Casework assistant, Senior Caseworker, Supervising Senior Caseworker</i> )	3 complete years, 6hrs PD per year	3 complete years, 6hrs PD per year <i>*Does not apply to Trainee Casework assistant, Casework assistant</i>
<b>Immigration - Advanced Caseworker</b>	3 complete years, 6hrs PD per year	N/A
<b>Mental Capacity</b>	3 complete years, 6hrs PD per year. Mandatory course does not count towards 6hrs.	N/A
<b>Mental Health</b>	6hrs PD from preceding year. Mandatory course does not count towards 6hrs.	3 complete years, 6hrs PD per year
<b>Personal Injury</b>	3 complete years, 8hrs PD per year	3 complete years, 8hrs PD per year