

Response to the Legal Services Board consultation on competence

Background: Transform Justice is a charity which advocates for a fairer, more humane, more open and effective justice system. We specialise in criminal justice. In 2019 we published a report on the quality of defence advice and advocacy in England and Wales – Zealous Advocate or Cog in the Machine? The sources we used are detailed in the report but include focus groups with defendants, a roundtable discussion, and a review of existing literature. This evidence is focussed on criminal justice only and includes barristers, solicitors and police station representatives. This evidence should be read in conjunction with the report itself.

Should competence be continually assessed?

We agree with the definition of competence as outlined in the document. We would contend that standards of competence in the case of criminal defence practitioners are critical, given that a competent lawyer or legal representative can support their client to behave appropriately in a police interview, to get bail from the police station and/or the court, to be acquitted or to get a less punitive sentence.

In the case of a criminal defence practitioner we expect at the minimum

- A high level of knowledge of criminal law and practice and of new developments in both
- Excellent written and oral communication skills including the ability to gain the trust of a client, to explain the process and to clearly lay out the options available. Timely responses to client communication.
- Advice which prioritises the needs and best interests of the client
- Good advocacy skills

Our report (p6) outlines the qualities cited by suspects and defendants as important including being honest, supportive and clear. In a Scottish study, defendants judged their lawyer not on outcomes but on how good they were at “listening to them; believing them; being able to explain the process; being accessible [and] ‘standing up for’ them”. In terms of competence, both criminal solicitors and barristers need good advocacy skills but police station representatives do not.

We believe the competence of criminal defence practitioners should be assessed better both before they start practice and throughout their career.

How competence is assessed and possible alternatives

We will focus on how competence is assessed during a criminal defence practitioners’ career, rather than before the start.

Police station representatives are commissioned by solicitors’ firms to offer legal advice to suspects in police custody suites. They are accredited only to do this legal work. To our knowledge they are completely neglected in any assessments of continuing competence. Having completed an initial test, they practice without any checks by anyone. In theory, suspects could complain about poor practice to the solicitor who commissioned the legal representative but it is not clear anyone does.

Individual criminal defence solicitors are not subject to any checks on their continuing competency, unless their own firm chooses to do so. Firms need to have a quality mark (either Or) and to subject themselves to peer review via the Legal Aid Agency but all these processes are focussed on the firm rather than the individual and are also based on documentary evidence such as case files.

Presumably if the peer reviewer picks up evidence of individual lack of competence they feedback their concerns to the firm for the latter to take action.

Barristers undergo pupillage but, after this, act as independent practitioners. In criminal defence, their main role is as advocates. There is no system for checking standards of advocacy after pupillage. A barrister may get informal feedback from colleagues but there is no formal approach to monitoring and feedback.

We do not believe that the complaints system will ever work to root out incompetence (since many suspects and defendants do not have the expertise to recognise incompetence) though it could be improved. Statutory and other routes to complain should be more clearly advertised by all criminal legal practitioners and used by them as a way of improving performance.

Who should judge competence?

Public legal education in England and Wales is woeful and many people's knowledge of criminal justice comes from TV programmes. Criminal law and the processes associated with it are very complex. Many suspects and defendants have English as a second language, and/or have mental health difficulties or learning disabilities and low levels of education. Though criminal suspects and defendants can in theory choose their own lawyer, this choice is seldom an informed one – because it is incredibly difficult for a layperson to judge what a good lawyer is and because there is insufficient information to aid choice. In the criminal defence market, consumer choice does not drive up performance or competence. This is illustrated by the fictional solicitors' firm of Keres and Co depicted in the book *Stories of the Law and how it's Broken by the Secret Barrister*. Clients choose Keres and Co and are loyal, despite the firm's incompetence.

The best people to judge the competence of lawyers are fellow lawyers, academics and judges. The views of suspects and defendants should also be sought, since experienced ones are discerning about the level and quality of service they receive.

Mechanisms for monitoring competence

We would suggest that current mechanisms do not properly monitor the ongoing competence of criminal defence practitioners. We have mentioned some of these above. In addition, monitoring of CPD is used by the BSB and SRA as a proxy for monitoring competence.

We are concerned that this is not sufficient. CPD is monitored by asking firms and chambers whether they are compliant. No detailed independent checks are made of the quality of CPD and it is evidence that many practitioners do not yet understand how to use reflexive practice to improve performance. We feel that is essential that competence is assessed and monitored by an independent organisation, since consumers cannot be left to assess competence themselves. The market does not guarantee competence. We would recommend some or all the following mechanisms for assessing competence

- 1) Observation of lawyers and accredited representatives advocating and consulting with clients in the custody suite, at court and in their offices. Feedback on observations given to the lawyer.
- 2) A re-accreditation process driven by regular 360 degree appraisal. This appraisal should include feedback from a range of stakeholders including clients.
- 3) Monitoring of ongoing CPD including reflexive practice and supervision.