

**RESPONSE OF THE COMMERCIAL BAR ASSOCIATION TO  
THE LEGAL SERVICE BOARD'S  
CALL FOR EVIDENCE ON ONGOING COMPETENCE**

1. This is the response of the Commercial Bar Association (“COMBAR”) to the Legal Service Board’s call for evidence on Ongoing Competence.
  
2. COMBAR is the specialist Bar association for commercial barristers advising the international business community. COMBAR represents over 1,600 commercial barristers, the overwhelming majority of whom are self-employed barristers in independent practice at one of COMBAR’s 38 member Chambers. Those Chambers include all of the principal sets of chambers undertaking work at the Commercial Bar. COMBAR maintains strong links with the Commercial Court in London, but COMBAR’s members act in dispute resolution processes in all forms – litigation, arbitration and mediation – taking place all over the world.
  
3. In this paper, COMBAR responds to the first three aspects of the Legal Service Board’s call for evidence. The calls for evidence in respect of each of those aspects overlap. Accordingly, there is some unavoidable repetition in our responses at Sections 1 to 3 below.
  
4. COMBAR does not respond to the fourth area, namely competence assurance in other sectors. For reasons which will become clear below, comparison of the activities of the Commercial Bar with other areas within the legal sector is potentially uninformative. Comparison of those activities with those acting in completely unrelated sectors (such as healthcare or veterinary services) is not informative at all.

## **1. Defining Competence and Competence Assurance**

### **a. What is competence?**

5. The Legal Services Board notes that there is no single, shared definition of competence for legal professionals. That should not be a cause for surprise. Legal practice is highly varied.
6. The search for a single definition of competence (if that is what the Legal Services Board is seeking to do) raises the risk of proposing a definition that either (a) fails to reflect the varied nature of legal practice or (b) adds nothing to the existing framework of regulation.
7. This can be illustrated by reference to the Consumer Panel's suggestion that competence involves "*combining up-to-date legal knowledge and skills with good client care, to deliver advice in a way that is useful*". The Legal Services Board suggests that this is "*particularly helpful for our work*".
8. It is not appropriate to define competence merely by reference to the expectations of consumers (as to which see further below) and without reference to the other perspectives that are engaged by the regulatory objectives that are defined by the Legal Services Act 2007, including (most importantly) the expectations of the Court.
9. Commercial barristers, like all barristers, are subject to ten Core Duties set out in Part 2B of the BSB Handbook, including:
  - a) the barrister's duty to the Court in the administration of justice;
  - b) the duty to act in the best interests of each client;
  - c) the duty to keep the affairs of each client confidential;

- d) the duty to provide a competent standard of work and service to each client.
10. Those duties are expanded in rules set out in Part 2C and in particular at rC15-rC18. This existing regulatory framework reflects the variety of work undertaken by barristers (including both advocacy and advisory work) and the central importance of barristers' duty to the Court. That latter duty, i.e. to act in with independence in the interests of justice, is fundamental to the protection and promotion of the public interest. The jurisdiction of England and Wales is not alone in recognising the importance of lawyers' duty to the Court.<sup>1</sup>
11. A definition of competence which is focussed on achieving a consumer preference for the delivery of advice in a way that is useful (a) does not provide meaningful content to the barristers' core duty to provide a competent standard of work and service to each client and (b) risks overlooking the paramount importance of barristers' duty to the Court.

**b. How do you assure ongoing competence?**

12. We address the techniques by which competence is assured both initially and on an ongoing basis briefly below and in more detail in Section 3. However, it is important for the Legal Services Board to understand the structure pursuant to which barristers' services are provided when deliberating on the approach to competence assurance.
13. At the centre of that structure is the chambers model, in which self-employed barristers share premises and support staff, but operate independently. That structure, designed as it is to ensure independence, has been recognised as contributing to the success internationally of the market for barristers' services in England and Wales. It enables the concentration of specialism within chambers, whilst preserving the ability of clients to instruct specialist counsel without fear of a conflict of interest arising simply because of their chambers membership.

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<sup>1</sup> See, for example, section 4(a) of the Legal Profession (Professional Conduct) Rules 2015 of Singapore.

14. Departure from the independent practice model (for example, by requiring ongoing chambers oversight of individual barristers' work) risks imposing a "*severe limitation on the administration of justice in this country. Especially in the context of specialist legal services, where it may be that only a handful of chambers practise within a particular specialty, it would mean that public choice of counsel would be drastically cut*".<sup>2</sup> Chambers oversight of everyday work might lead to the serious consequence of reducing client and consumer choice. In a number of critical areas there are relatively few specialist sets - shipping, banking, insolvency and insurance, for example. The Commercial Bar must maintain the independence of each practitioner in order to preserve choice for the clients.
15. As matters presently stand, commercial barristers undergo a rigorous process of training in pupillage, during which their written work and oral advocacy will be subject to assessment by practising barristers. This assessment goes well beyond that which is already required for qualification to the Bar: see paragraphs 31 to 35 below.
16. Following successful completion of pupillage, junior commercial barristers frequently work on large cases in which they will be instructed as a part of a team of counsel. The work of junior barristers will frequently be reviewed by a more senior member of the bar, as well as by instructing solicitors. This ensures standards are maintained and improved beyond pupillage: see paragraphs 37 to 43 below.
17. As (if not more) importantly the work of all commercial barristers is undertaken before judges (in open court) and commercial arbitrators. Indeed, the very essence of our work is that we are instructed to act in disputes which are presented before tribunals during which our work is subject to detailed scrutiny. This process (which is not remotely comparable to any process applicable in other parts of the legal sector, let alone the healthcare sector<sup>3</sup>) ensures high standards. Incompetent or sub-standard work is not tolerated by commercial judges or arbitrators: see paragraphs 44 to 45 below.

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<sup>2</sup> See *per Rix J* in *Laker Airways Inc. v F.L.S. Aerospace Ltd.* [2000] 1 W.L.R. 113 at p 123G.

<sup>3</sup> Healthcare services are not performed continually before panels of judges.

18. In addition, barristers are also obliged to undertake continuing professional development (“CPD”) each year. This process has recently been overhauled,<sup>4</sup> with every barrister required to plan a CPD programme each year which is tailored to his/her practice with a view to maintaining and building skills in the key areas of legal knowledge and skills, advocacy, practice management and ethics and professionalism. The CPD scheme is subject to external review by the Bar Standards Board. COMBAR facilitates the achievement of CPD goals by running its own continuing professional education programme.
19. COMBAR’s education programme is longstanding and well established. It consists of:
- a) a rolling programme of monthly lectures within the legal terms, which are given by a mixture of judges, practitioners and academics. We are able to attract speakers of the highest calibre. Most of our lectures focus on legal and procedural issues of topical interest: i.e. legal knowledge. However, some deal with professional skills like advocacy. We also hold events on career development: how to apply to become a QC or a judge, for example, or how to be appointed to the treasury panel. A list of lectures for 2018-2019 is attached at Appendix 1 to this response. As a result of the coronavirus lockdown, our lectures are currently remote via Zoom;
  - b) a Junior COMBAR programme which is more ad hoc and tends to focus on legal skills and practice management of particular interest to those in the early stages of their careers. For example: well-being; specific advocacy skills (e.g. cross examining experts); building a practice;
  - c) an annual North American Meeting which takes place overseas and attracts COMBAR members from England, Honorary Overseas Members from the US and Canada and guest judges;
  - d) an annual India Roundtable event which has taken place in New Delhi or Mumbai and is attended by COMBAR members from England, prestigious Indian practitioners and guest judges.

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<sup>4</sup> <https://www.barstandardsboard.org.uk/for-barristers/cpd.html>

20. Moreover, many commercial barristers apply to become Queen's Counsel. This process again involves rigorous examination of a barrister's competence and skills, including through judicial references.
21. In those circumstances, it is unsurprising that there is no evidence of a competence problem at the Commercial Bar requiring regulatory intervention. The present system in which standards of competence are assessed on entry to the Bar and on completion of pupillage, in which commercial barristers habitually work in teams for discerning commercial solicitors and in which barristers answer personally for the standard of their performance before Courts and arbitral tribunals already assures that the necessary standards of competence are met or exceeded.
22. The evidence that the present system at the Commercial Bar works is overwhelming. The high standard of advocacy services in London accounts for the continuing preference internationally for the jurisdiction of England and Wales.

## **2. Consumer Expectations of Competence**

23. Barristers who are members of COMBAR-affiliated chambers undertake work in the field of commercial law, dealing with legal disputes affecting businesses. Indeed, a large proportion of our work is international, involving foreign parties, events which occurred overseas and/or hearings abroad.
24. COMBAR members are instructed by commercial solicitors, or by in-house lawyers of commercial companies. As such, members of COMBAR very rarely act for “consumers”, in the sense which that word is used in the Consumer Rights Act 2015, namely “*an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession*”. The principal users of the services of COMBAR members are highly sophisticated and experienced users of legal services.
25. That being so, customers of COMBAR sets are well placed to judge the quality of the advice, advocacy and other services which they receive. Incompetent or sub-standard

work is not tolerated by solicitors and clients in the fields of commercial litigation and arbitration. Further, there are no barriers to raising complaints about incompetent work.<sup>5</sup> On the contrary, there is a constant dialogue between commercial barristers and our customers. The clerks at COMBAR sets ensure that they have good lines of communication with our clients and foster client relationships. In this way, clients are able to and do provide direct feedback as to what they require from the barristers they instruct and how our services could be improved and strengthened. There is a high degree of trust between barristers, their clerks, their instructing solicitors and their clients. This is reflected by the fact that commercial barristers build relationships with their instructing solicitors and clients which are long-lasting and result in repeat instructions.

26. Moreover, the informed user base of the Commercial Bar ensures that competition between chambers and individual barristers (within and between chambers) is extremely high. Indeed, barristers are not merely competing against other barristers. They are also competing against solicitors (many of the professional clients of COMBAR sets have their own advocacy capability, but still recognise that it is in the interests of their clients to use the independent commercial bar for their disputes) and overseas lawyers.
27. The consistently high standard of work at the Commercial Bar is evidenced by the popularity of barristers amongst commercial clients. The excellence of the English Commercial Bar has undoubtedly contributed to the Commercial Court and London generally being consistently among the top choices for forums in which to resolve international commercial disputes. The evidence to this effect is overwhelming and includes:
  - a) the City UK publication on UK Legal Services 2019 which records that the Bar is renowned for the quality of its advocacy and that London is the leading global centre for international dispute resolution;<sup>6</sup>

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<sup>5</sup> In the event of dissatisfaction, COMBAR chambers each have complaints procedures which are communicated to clients upon a barrister being instructed. This ensures solicitors and clients are aware of their rights to complain.

<sup>6</sup> <https://www.thecityuk.com/assets/2019/Report-PDFs/294e2be784/Legal-excellence-internationally-renowned-UK-legal-services-2019.pdf>

- b) the Queen Mary University Arbitration Survey 2018<sup>7</sup> which recorded that London was selected as the preferred seat for international arbitrations by respondents to the survey in all regions across the world.
28. By contrast, there is no evidence of significant dissatisfaction with the service provided by COMBAR members. On the contrary, Legal Ombudsman decision data for 1 April 2019 to 31 March 2020 shows that only one complaint out of 122 made against barristers had been made against a member of COMBAR and that had not been upheld. Given the size of COMBAR’s membership, this data suggests that customers of COMBAR sets are satisfied with the competence of the barristers they instruct.
29. For all the above reasons, we do not consider that there are any areas in which COMBAR members practise which are likely to experience quality issues, or which are vulnerable to greater harm from quality issues. There is good evidence to demonstrate: (1) that levels of competence at the English commercial bar are very high; (2) that there is good feedback from solicitors and clients to barristers; (3) that there are processes in place to maintain and ensure high levels of competence for commercial barristers; and (4) that those using the services of commercial barristers are sophisticated and experienced users of legal services who do not require any particular protection. Moreover, it has never been suggested that periodic or ongoing “*competence checks*” are required to achieve the existing recognised high quality outcomes achieved by the Commercial Bar.

### **3. Competence Assurance in the Legal Services Sector**

30. The competence of COMBAR members is measured and assessed nearly every day of their professional lives.
- a. **Becoming a commercial barrister**
31. The LSB is aware of the rules relating to the training of barristers, and the pre-requisites to being permitted to act as a barrister from a regulatory perspective. It may

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<sup>7</sup> <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>.

not be so well aware of the commercial and competitive imperatives which ensure that only highly competent practitioners begin to practise at the Commercial Bar.

32. All new tenants must have passed the necessary exams, of course, but the more challenging steps are (a) obtaining a pupillage at a COMBAR member set and (b) obtaining a tenancy at a COMBAR member set.
33. It is not possible to obtain a pupillage at a COMBAR member set without an outstanding academic record. COMBAR sets are making great efforts to widen the pool of applicants, but it remains the case, and has to remain the case, that successful applicants will be academically formidable. They must, of course, also be highly articulate and all applicants are required to undertake a number of interviews with panels of practising barristers before being offered pupillage. Competition for pupillage at the Commercial Bar is fierce.
34. It is not just the pupils who have to compete. COMBAR member sets also compete between themselves and with other chambers, and indeed other professions, to attract the best. COMBAR member sets take the training of pupils very seriously, as it directly impacts upon sets' future success. They are competing with each other to secure the best applicants, and applicants have never known more about the actual training they will receive from different sets: publicly available research includes regular surveys of actual pupils and new tenants who critique their training.<sup>8</sup>
35. Once an applicant has embarked on pupillage, she or he needs to win a tenancy in chambers. COMBAR sets recruit tenants from pupils in different ways, but all have formal assessments and all rely on detailed feedback from pupil supervisors and other practising barristers who have seen the pupils' work over a number of months. Such is the competition that even very good pupils can be unsuccessful.
36. All in all, it is most unlikely that an incompetent practitioner would ever become a tenant of a COMBAR set. If they did, they would quickly be found out in practice.

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<sup>8</sup> <https://www.chambersstudent.co.uk/the-bar>; <https://www.legalcheek.com/the-chambers-most-list/>

**b. Commercial imperatives in practice**

37. Competition between barristers is the daily rhythm of life at the bar. Every barrister is competing for every piece of work, and they compete in a sophisticated, highly developed market in which those who instruct barristers have access to excellent information about the available barristers.
38. Virtually all COMBAR work comes from qualified lawyers: mostly from practising solicitors; sometimes from lawyers working inhouse and/or abroad. They are frequently more specialist in a particular area of law than the barrister - the barrister brings more specialist knowledge of advocacy and procedure - so any barrister who was not up to speed with the law would be identified and, most likely, sacked from the case.
39. The lawyers who instruct commercial barristers are generally sophisticated litigators who know the available pool of suitable barristers. It is common for solicitors to interview a number of barristers before appointing their team. Some firms have databases of barristers in which good and bad feedback is recorded. Others will email around their colleagues to seek advice before appointing someone.
40. For those who do not already know the identities of suitable barristers, there are a number of commercial directories who commission annual research into commercial barristers. The two best known are Chambers & Partners and the Legal 500.<sup>9</sup> Each has a large number of researchers who spend months interviewing clients, solicitors and barristers to rank barristers in particular areas of work, generally also including comments about them. So it is not difficult for someone who wants to instruct a barrister to identify those who have good reputations for particular areas of work.
41. Nor does competition stop at the date of instruction. Clients and solicitors are generally entitled to terminate a barrister's instructions at any time for any or no reason. If for whatever reason a client or solicitor is not happy with a barrister, they simply terminate the instructions.
42. The upshot is that a barrister's work is being assessed and reviewed every day by clients and solicitors and other instructing lawyers. If the barrister is no good, he or

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<sup>9</sup> <https://chambers.com/guide/uk-bar?publicationTypeId=14>; <https://www.legal500.com/united-kingdom-the-bar/>

she does not get any work. As already mentioned, it is highly unlikely that an incompetent barrister would achieve tenancy at a COMBAR set, but it does happen that a barrister, once in practice, finds that his or her practice is not flourishing (for whatever reason) and, if that happens, will leave the bar for another career.

43. Further, this is not a career where once you are in you can take your foot off the accelerator and coast. There are no salaries at the independent bar - the barrister earns from the work he or she can win. No barrister has any certainty at any stage of their career that they will continue to be successful. "You are only as good as your last case" is a well-worn aphorism at the bar, but that is because it has real substance. At the bar, if you fall behind in skills or client management or general practice standards, you will fail to win work and, in the end, either have to buck up your standards or leave.

**c. Judicial reviews**

44. Much of the barrister's written work and all oral advocacy is heard and reviewed by a judge or relevant tribunal. Particularly good or poor performance is reasonably frequently mentioned in publicly available judgments. A judge can refer poor advocacy to the barrister's head of chambers, or, if more serious, the BSB.
45. The study referred to by the LSB in the Call for Evidence - *SRA and BSB: Judicial Perceptions of Advocacy (2018)* - had nothing to do with the commercial bar. It was solely about criminal advocacy. As already mentioned, there is no evidence of any problems about lack of competency at the commercial bar. Quite the opposite: COMBAR members are competing and winning work not just in England and Wales, but all around the world, against advocates from all jurisdictions.

**d. Other professions**

46. A career at the bar is unlike other professions. It is not like medicine, or teaching, where most professionals receive a salary and where consumers have little choice. Students and patients generally cannot choose their teacher or doctor, and if they could, would have little information to go by. It is well understandable that relevant regulators find it prudent to ensure standards are kept up to date.
47. The bar is much more precarious and, on a daily basis, much more competitive. Commercial barristers are already constantly assessed for competence: from judges,

tribunals, instructing lawyers and, to some extent, colleagues. Those who are not up to date and competent do not receive work. It is as simple, and brutal, as that.

48. In summary, the present system ensures and maintains high standards. Further regulatory intervention is not required and could be harmful.

DATED: 23 June 2020

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APPENDIX 1: COMBAR PROFESSIONAL EDUCATION PROGRAMME 2018-2019

2018

23 January

Legal Professional Privilege: Recent Cases

Rosalind Phelps QC, Nik Yeo, Tamara Oppenheimer, Rebecca Loveridge

27 February

Disclosure reforms

Lady Justice Gloster, Mr Justice Knowles, Chief Master Marsh and Ed Crosse

20 March

Repudiatory Breach and Damages for 'Loss of Bargain'?

Professor Edwin Peel

24 April

Contractual Interpretation – Recent cases

Alan Maclean QC and Andrew Scott

15 May

Shareholder Actions and Group Claims: Some Legal Issues

Helen Davies QC

31 May-1 June

COMBAR North American Meeting in Vienna attended by Mr Justice Poplewell

12 June

Negotiating Damages

Adam Kramer and Professor Edwin Peel

29 September

COMBAR India Roundtable in Mumbai attended by Dame Elizabeth Gloster CBE, Justice Gautam Patel and Hon Justice Srikrishna

16 October [Annual Lecture]

Commercial Cases in the Supreme Court: Another round in the Case of Certainty & Principle v Fairness & Flexibility

The Rt Hon Lord Neuberger of Abbotsbury

6 November

Ten years on, what have we learned from Lehman Brothers?

Professor Sarah Worthington

11 December  
Commercial Negligence: Recent Developments  
Simon Salzedo QC

2019  
22 January  
The COMBAR Judicial Assistant Scheme: Experiences of the JAs  
Sam Rabinowitz, Owen Lloyd, Lia Moses and Alyssa Stansbury

12 February  
How far can you go? The limits of contractual estoppel  
Sir Kim Lewison

26 March  
The Attorney General's Panel of Civil Counsel and the Current Panel Competition  
Simon Harker, Government Legal Department

30 April  
Commercial Arbitration against State Entities  
Dame Elizabeth Gloster DBE, Alexander Gunning QC, Christopher Harris QC and Charlotte Tan

21 May  
Order discharged: avoiding embarrassment at the inter parties hearing (letters of request, freezing injunctions and others  
Mrs Justice Cockerill

30-31 May  
North American Meeting in New Orleans attended by Mr Justice Teare and Chief Judge Carl E. Stewart of the US Court of Appeals for the Fifth Circuit

18 June  
Update on developments in contract law  
Professor Edwin Peel

16 July  
Is the Trial process in the Business and Property Courts fit for purpose in the 21st Century?  
Mr Justice Zacaroli

13-14 September  
COMBAR India Roundtable in New Delhi attended by Lord Hoffmann and Justice Nariman from the Indian Supreme Court.

15 October  
Rectifying Rectification FSHC Group Holdings v Glas Trust [2019] EWCA Civ 1361  
Rosalind Phelps QC and Professor Paul Davies

12 November [Annual Lecture]  
Future proofing for commercial lawyers in an unpredictable world  
Sir Geoffrey Vos

10 December

Third party costs orders: Travelers Insurance Co v XYZ [2019] UKSC 48  
Colin Edelman QC and Jamie Carpenter