

Sent by email to ongoingcompetence@legalservicesboard.org.uk

The logo for the Legal Services Consumer Panel is a blue rounded rectangle. Inside, the words "LEGAL SERVICES" are stacked above "CONSUMER PANEL" in white, uppercase, sans-serif font.

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2 July 2020

Legal Services Board: Call for Evidence on Ongoing Competence in legal services

The Legal Services Consumer Panel (the Panel) welcomes the opportunity to respond to the Legal Services Board's (LSB) call for evidence on ongoing competence for legal services providers.

Our response focuses on the first three themes in the call for evidence: defining competence, competence assurance in the legal services sector and consumer expectations of competence.

To build our evidence, we used our Tracker Survey data, anecdotal evidence from our recent qualitative research and previous papers we published on the topic. We also looked at transferable evidence from other sectors, bolstered by Panel members' expertise.

General reflections

The Panel believes that a lawyer's initial education and training cannot offer a career-long guarantee of competence. There can be substantive changes in the law, in its interpretation and a person's skills may need upgrading throughout their career. Therefore, it is vital that providers are subjected to ongoing assessment in order to ensure their services are of high quality and standard. This would benefit providers, consumers and even regulators, since evidence suggests that experienced solicitors are disproportionately more likely to face regulatory action.¹

It is the Panel's strong opinion that the final decision on how to regulate for ongoing competence should not rely solely on quantitative evidence of failings, wrongdoings or even evidence from other sectors. It is imperative that the decision is also rooted in "levelling up" the quality of services to consumers. This requires vigilance in ensuring ongoing competence. Given the lack of transparency in this market, the lack of 'hard' evidence does not necessarily imply that there is no issue to be addressed - "*no evidence of disease is not the same as evidence of no disease.*"²

¹ Pearn Kandola, *Research into Issues of Disproportionality – Initial Interim Report*, December 2009.

² Nassim Taleb, *The Black Swan: The Impact of the Highly Improbable*, 2008.

We therefore encourage the LSB to be bold in formulating its response to the sector by defining what good looks like, instead of just setting a minimum standard. Moreover, the oversight regulator should clarify the role firms must play in assuring the ongoing competence of their staff. In the health care sector, the Care Quality Commission (CQC) considered how regulated providers assure competence by looking at:

- If staff receive effective training on key aspects of their roles relating to safety, specific aspects of legislation, etc.
- How health organisations make sure that staff have the skills, knowledge and experience to delivery effective care and support, including how staff are supported to keep their professional practice and knowledge updated in line with best practice.

We would recommend that ongoing competence should apply both to law firms and to individuals (sole practitioners, freelance practitioners, solicitors and solicitors working in unregulated firms) in a proportionate way and at appropriate stages throughout their career.

Consumers' expectations of competence

Consumers do not have the means to assess whether lawyers who qualified a long time ago are still competent or have the same knowledge as those who have qualified more recently. This suggests that consumers are taking a “leap of faith” and assume that all lawyers have the requisite competence when they purchase legal services. This is evidenced by our research findings below.

The Tracker Survey shows that consumers are often not able to make fully informed evaluations about the standard of the legal advice when shopping around. Only 54% of consumers find it easy to assess the quality of the service.³

This year we commissioned qualitative research on consumers' experience of using quality indicators.⁴ This research highlights that where quality is concerned, most consumers are shopping blind. Consumers associate providers' longevity in the sector or the sleekness of their website as a positive indicator of quality.

Consumers have little choice but to rely on the checks and assessments made by regulators and employers on entry to the profession and during a legal professional's career. Indeed, they already assume that this happens.

Proactive and reactive competence checks should occur throughout a professional's career. Whilst these can be undertaken in a range of ways, checks should ideally involve some independent review of cases or advice, such as spot checks or mystery shopping.⁵

³ LSCP, *Tracker Survey 2020*, to be published in July 2020.

⁴ LSCP, *Quality research report*, to be published in July 2020.

⁵ LSCP, *Voluntary quality schemes in legal services*, November 2011.

Defining competence

The Panel is of the view that “competence” is about the skills and knowledge demonstrated by the individual providing a professional service, with a focus on technical competence and interpersonal skills. Competence is dynamic, needs refreshing and must respond to new demands and consumer needs.

Moreover, we believe it would be useful to describe the required competences for differing seniority of roles. This would facilitate evaluation of the level of competence achieved for the required skills and aid career management, including evaluation, gap analysis and training. This would also help assure that senior, experienced professionals, who attract higher fee rates, are delivering greater competence across the range of skills required by the role.

We welcome that the LSB has chosen to use the working definition provided by the Panel of what competence is, i.e. “combining up-to-date legal knowledge and skills with good client care, to deliver advice in a way that is useful.”

Competence assurance in the legal services sector

Ensuring ongoing competence

The Continuing Professional Development (CPD) Certification Service defines CPD⁶ as the learning activities professionals engage to develop and enhance their abilities. The CPD is used in the legal sector and can range from learning, training workshops and conferences to e-learning programs and best practice techniques.

Currently, CPD requirements differ between each of the regulatory bodies. Many of the regulators, including the Solicitors Regulation Authority and the Bar Standards Board,⁷ now have CPD schemes that have largely moved from the traditional CPD hours and points-based system to an outcome-focused model. The Panel supports this outcome-focused approach, which we believe should be rolled out to other parts of the regulated sector. We also agree that CPD can, and should, work around individuals.

The Panel has previously said that the CPD arrangements need to be strengthened to match the needs of practice areas.⁸ We endorsed the removal of any cap on the number of points that can be attained via CPD and we noted that activities performed as part of normal practice cannot count towards CPD activity. We also advised that providers should be given the discretion to undertake those activities that best meet their objectives.⁹

However, we also said that the CPD arrangements alone, even if they are improved, are not sufficient to test ongoing competence, because there are no checks and balances on the technical quality of advice.¹⁰ Thus, we made a case for introducing more rigorous mechanisms, that would consist of periodic re-

⁶ <https://cpduk.co.uk/explained>

⁷ <https://cpduk.co.uk/news-articles/view/cpd-training-for-solicitors-barristers-requirements>

⁸ LSCP, *Quality of legal services*, November 2010.

⁹ LSCP, *CLSB consultation: Continuing Professional Development*, February 2020.

¹⁰ LSCP, *Quality of legal services*, November 2010.

accreditation, peer review, and a review of permission to practice after a fixed time, similar to health care practitioners.¹¹ Re-accreditation could include regulatory checks such as file review or periodic exams. In theory, this could apply to the whole practising certificate, but would have more value if they were linked to specific practice areas where the quality risks are highest.¹² The frequency of reviews could be adjusted to reflect the pace and volume of change in legislation and skills requirements.

The Health and Care Professions Council uses the registration process every two years to ensure that the healthcare professionals it regulates are revalidated.¹³ Doctors must also take an annual external assessment and re-register every five years.

The Panel has previously said that lawyers also need effective and appropriate interpersonal skills when delivering services to consumers, especially vulnerable ones.¹⁴ High technical skills or competence is not enough. Therefore, we recommended that any future revalidation process includes emotional competence as an essential skill for lawyers at all stages of their career.

This view has been echoed by the Equality and Human Rights Commission's (EHRC) recent report¹⁵ that "legal professionals do not consistently have the guidance or training they need to be able to recognise impairments, their impact, or how adjustments can be made." EHRC has recommended that disability awareness should be a professional requirement and a mandatory element of criminal lawyers' CPD. The Panel considers this should apply to other areas as well, such as family law, employment law, social security and housing law.

More recently, it has become apparent that the use of lawtech in practices is bringing new challenges, and that regulators should now consider building and maintaining lawyers' competence in the application of lawtech and technology related skills.

Consumer feedback and complaints data

Lawyers should seek consumers' feedback and use it in their annual appraisals process to improve and consider what CPD courses to undergo.¹⁶ In management consulting, top firms use a Skills Competence Framework (SCF) that defines the skills required at different levels of competence that relate to seniority. In individual cases, the SCF is used to rate performance against the rest of the team and consumers' feedback is included. Also, CQC uses a mixture of observation on inspection, consumer feedback and document review such as induction, training and development planning records.

¹¹ Ibid.

¹² Ibid.

¹³ <http://revalidation.nmc.org.uk/welcome-to-revalidation.1.html> and www.gmc-uk.org/registration-and-licensing/managing-your-registration/revalidation/how-do-we-check-doctors-are-giving-good-care.

¹⁴ LSCP, *SRA consultation: A new route to qualification: New regulations for the Solicitors Qualifying Examination*, July 2017.

¹⁵ www.equalityhumanrights.com/en/our-work/news/criminal-justice-system-failing-disabled-people

¹⁶ LSCP, *BSB consultation on rule change: New information and registration requirements for the Bar*, September 2017.

Another helpful way in which legal service providers (both firms and individuals) can maintain their competence, on top of using CPD, is to adopt a practice of continuous learning, including promoting a transparent culture where mistakes (and notable successes) are reported and seen as learning opportunities. Providers should use complaints data as an opportunity to feed into their CPD plan as areas they need to improve. We however note that there are gaps and inconsistencies in the collation and publication of complaints data in the sector.

Next steps

We would like to see the LSB produce an action plan further to this call for evidence to address the gaps in maintaining the competence of legal professionals.

We would like to see the LSB test its ideas with the newly formed public panel as a means of building the consumer voice into the future direction of this work.

I hope you find these comments helpful. Please contact Lau Ciocan, Consumer Panel Associate, if you have any enquiries.

Yours sincerely,



Sarah Chambers

Chair

Legal Services Consumer Panel