

# **Draft statement of policy on ongoing competence – consultation paper**

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A consultation on our proposed policy on ongoing competence

**8 December 2021**

**Responses welcome by 7 March 2022**

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**This consultation paper will be of interest to:**

Approved regulators

Regulatory bodies

Legal representative bodies

Consumer groups

Members of the legal profession

Legal services providers

Government departments

Complaints bodies and tribunals

## Executive summary

1. The Legal Services Board (LSB) is the oversight regulator for legal services in England and Wales. We oversee the approved regulators, some of which have delegated their regulatory functions to independent regulatory bodies (regulators).<sup>1</sup> The LSB was established by the Legal Services Act 2007 (Act), which provides that in discharging its functions, the LSB must comply with and thus promote the regulatory objectives.<sup>2</sup>
2. We intend to issue a statutory statement of policy on ongoing competence under section 49 of the Act. We propose for the statement of policy to set out our expectations of the regulators in pursuing outcomes to assure themselves that those they regulate are competent at the point of authorisation and remain so throughout their careers, and that the public and consumers can be confident in the competence of authorised persons. The LSB would have regard to the statement of policy in carrying out its functions, in particular:
  - the maintenance and development of standards in relation to the regulation by regulators of persons authorised by them to carry on reserved legal activities under section 4 of the Act;
  - the maintenance and development of standards in relation to the education and training of persons so authorised, under section 4 of the Act;
  - considering applications to change regulatory arrangements; and
  - undertaking any enforcement action.
3. We also propose to have regard to the statement of policy in discharging our oversight function through assessing regulators under the regulatory performance assessment framework.
4. The proposals in the draft statement of policy aim to advance the regulatory objectives, including protecting and promoting the public interest, supporting the constitutional principle of the rule of law, protecting and promoting the interests of consumers, encouraging an independent, strong, diverse and effective legal profession and promoting and maintaining adherence to the professional principles.<sup>3</sup>

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<sup>1</sup> LSB [Approved regulators | The Legal Services Board](#).

<sup>2</sup> Legal Services Act 2007, s1.

<sup>3</sup> The professional principles are set out in Section 1(3) of the Act, including (a) that authorised persons should act with independence and integrity, (b) that authorised persons should maintain proper standards of work, (c) that authorised persons should act in the best interests of their clients, (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to

5. The LSB identified ongoing competence as one of its five-year priority policy objectives in September 2018. It is also central to our strategy for the sector, with our [State of Legal Services 2020](#) report identifying challenges that the sector needs to collectively address, including to ensure high-quality legal services and strong professional ethics.
6. Our view is that consumers should be able to trust that authorised persons have the necessary and up to date skills, knowledge, attributes and behaviours (i.e. are competent) to provide good quality legal services. The Covid-19 pandemic has shown how important it is for authorised persons to be competent and responsive to consumers' changing needs. It is regulators' responsibility to assure themselves that those they regulate remain competent throughout their careers and that risks to consumers from harm caused by poor competence are avoided.
7. Following extensive evidence gathering between 2019–2021, we have found that while regulators have comprehensive competence checks in place at the point of authorisation of authorised persons, there are few routine, formal measures to ensure those persons' ongoing competence thereafter, with the exception of the widespread adoption of continuing professional development (CPD).
8. Our research shows that consumers expect that there are robust checks in place and, when immersed in the detail of this area, the majority of the public thinks regulators should adopt more specific measures to ensure ongoing competence.<sup>4</sup> Further, the practice in the legal services sector is out of step with other regulated sectors, where regulators tend to adopt more robust measures to augment CPD and be assured that those they regulate remain competent, for example, using periodic reaccreditation, peer reviews, spot checks or feedback to identify learning and development needs.<sup>5</sup>
9. This consultation seeks views on the draft statement of policy. We have set out proposals that regulators must pursue outcomes to:
  - Set the standards of competence that those they regulate should meet at the point of authorisation and throughout their careers.

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proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and (e) that the affairs of clients should be kept confidential.

<sup>4</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#).

<sup>5</sup> LSB (2021), [Ongoing Competence: Call for evidence themes and summary of evidence](#).

- Regularly assess and understand the levels of competence within the profession(s) they regulate, and identify areas where competence may need to be improved.
  - Make appropriate interventions to ensure standards of competence are maintained across the profession(s) they regulate.
  - Take suitable remedial action when standards of competence are not met by individual authorised persons.
10. We consider that regulators, in adhering to the proposals in the draft statement of policy, will have assurance of the ongoing competence of those they regulate. This will help to ensure consumers have confidence that authorised persons remain competent throughout their careers and protect consumers from harm caused by poor competence. It will also help to ensure higher quality legal services, which could promote competition in the legal professions, as well as instil public trust.
11. Given the diversity of the legal services market, both in terms of providers and the needs of consumers, the draft statement of policy is intended to provide a flexible and permissive framework for regulators to identify targeted and risk-based approaches to ensuring ongoing competence in their profession(s), while ensuring consistency in the approaches that are adopted across the sector.
12. All the regulators already have some regulatory arrangements in place around competence, including to set out threshold competence requirements at the point of authorisation. Once the statement of policy is finalised and published, we will expect regulators to evaluate their current approach against the expectations and pursue work to ensure that they can meet the outcomes within 18 months of publication of the final statement.
13. We have drawn on a wealth of evidence in developing this draft statement, including our call for evidence findings, research into approaches to ongoing competence in other jurisdictions, research with the LSB's public panel, and contributions from stakeholders across the legal sector.
14. We have had regard to the better regulation principles<sup>6</sup> in developing the proposals and consider that this draft statement of policy will provide a proportionate, targeted and effective framework so that regulators have assurance of the ongoing competence of those they regulate and consumers have confidence that authorised persons remain competent throughout their careers.

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<sup>6</sup> <https://www.gov.uk/government/publications/better-regulation-framework>.

15. We welcome responses on this consultation on the draft statement of policy, including comments on how we can improve our approach to better meet our stated outcomes.

16. The consultation period begins on Wednesday 8 December 2021 and runs until Monday 7 March 2022.

## Background

### ***About the Legal Services Board***

17. The LSB is the independent body that oversees the regulation of legal services in England and Wales. The Act provides that in discharging its functions, the LSB and approved regulators must, so far as is reasonably practicable, comply with and thus promote the regulatory objectives.
18. Section 49 of the Act provides for the LSB to prepare and issue a statement of policy on any matter and in preparing it, have regard to the principle that its principal role is the oversight of approved regulators. The LSB must have regard to any relevant statement of policy in exercising or deciding whether to exercise any of its statutory functions.
19. Under section 50 of the Act, before publishing a statement of policy, the LSB is required to invite representations on a draft of the statement. This consultation paper constitutes a notice under section 50 of the Act accompanying the proposed statement of policy.

### ***Background***

20. The LSB identified ongoing competence as one of its five-year priority policy objectives in September 2018 and agreed it would promote the regulatory objectives to protect and promote the public interest and the interest of consumers. Our ongoing competence work is also relevant to the regulatory objectives to support the constitutional principle of the rule of law, encourage an independent, strong, diverse and effective legal profession and promote and maintain adherence to the professional principles.

### ***Previous LSB work***

21. Research from the Legal Services Consumer Panel (LSCP) had shown that consumers find it difficult to judge the competence of authorised persons (2010).<sup>7</sup> In 2012, the LSB and LSCP identified that there was a need to gather information about quality risks and adopt an outcomes focused approach to ensure any subsequent regulatory interventions drove quality improvements without hindering innovation.
22. During this period, the LSB and LSCP expressed support for formal periodic reaccreditation for advocates working in the criminal courts, noting concerns about overreliance on CPD to provide assurance of ongoing competence. We oversaw the development of the Quality Assurance Scheme for Advocates (QASA) between 2011-2014, which would have seen different tiers of competencies and quality assessments introduced for some Solicitors Regulation Authority (SRA), Bar Standards Board (BSB) and CILEx Regulation

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<sup>7</sup> LSCP (2010), [Quality in Legal Services](#).



authorised persons. Despite there being support, in principle, for more robust measures to ensure ongoing competence, QASA was not implemented.

23. The LSB also issued Guidance on regulatory arrangements for education and training (ET Guidance) during this period (March 2014).<sup>8</sup> Ongoing competence is referenced in both outcomes 3 and 4 of the ET Guidance:

- **Outcome 3:** Standards are set that find the right balance between what is required at the point of authorisation and what can be fulfilled through *ongoing competency* (emphasis added) requirements.
- **Outcome 4:** Regulators successfully balance obligations for education and training between the individual and the entity both at the point of entry and *ongoing* (emphasis added).

#### *Recent LSB work*

24. The aim of our ongoing competence work is to understand if regulators have appropriate frameworks in place to ensure that the authorised persons they regulate remain competent throughout their careers (and if not, what should change). We committed to having an open mind and being evidence-led to determine if the current arrangements are best meeting the interests of consumers and the public interest.

25. Our focus has been on growing a robust evidence base and we have engaged with a diverse range of stakeholders including:

- regulators and approved regulators;
- regulators in other sectors e.g. the General Medical Council and Civil Aviation Authority;
- government agencies e.g. HM Land Registry and Legal Aid Agency;
- consumers groups e.g. Citizens Advice and Law Centres Network;
- complaints bodies and tribunals e.g. the Legal Ombudsman;
- representative bodies e.g. specialist bar associations;
- accreditation providers e.g. the Association of Personal Injury Lawyers; and
- regulators in other jurisdictions e.g. the Law Society of Alberta and the Netherlands Bar.

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<sup>8</sup> LSB (2014), [LSB Education and Training Guidance](#).

26. We set out to learn as much as we could about the current arrangements for ongoing competence adopted in the legal services sector, other professional sectors and by legal regulators in other countries. We also sought evidence of existing quality risks to consumers and to understand consumers' expectations of ongoing competence checks for authorised persons.
27. We carried out an extensive call for evidence<sup>9</sup> in the first six months of 2020, completing desk research and conducting over 50 meetings, gathering information, datasets and 31 formal submissions.<sup>10</sup> A findings report<sup>11</sup> that summarised the key themes from the evidence was published in February 2021. These are summarised below:

#### *Consumers' experience of legal services*

- Consumers find it difficult to assess the quality of legal services and assume that all authorised persons are competent.
- Guidance is not provided to consumers about what they should expect in terms of quality. Guidance (or similar information) is provided to consumers in other sectors such as healthcare.
- Consumer feedback is important for ongoing competence because it can inform learning and development needs, but it is not routinely sought or used for this purpose across the sector.

#### *Areas of increased risk to consumers*

- Stakeholders recognised that some consumers are at an increased risk of harm due to their vulnerability or other circumstances.
- Quality concerns in some practice areas were identified, including immigration and asylum, criminal advocacy and conveyancing. Examples were cited of consumer detriment caused by poor competence in these areas.
- While little objective data on the quality of legal services is collected or published, this does not indicate that there is no problem, as a lack of assurance is a problem in and of itself.

#### *Existing competence assurance measures in the legal sector*

- The sector tends to rely on self-assessed CPD for ongoing competence.

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<sup>9</sup> LSB (2020), [Call for Evidence: Ongoing Competence](#).

<sup>10</sup> LSB (2020), [Call for Evidence: Submissions](#).

<sup>11</sup> LSB (2021), [Ongoing Competence: Call for evidence themes and summary of evidence](#).

- Limitations with CPD were frequently cited, including the lack of assurance that CPD was of good quality or relevance, or that it relied on individuals to identify their own learning needs.
- Other assurance methods have been adopted in some parts of the sector, often with positive outcomes. This includes advocacy assessments, peer reviews, accreditation schemes and feedback mechanisms.
- These other competence checks have limited coverage, are often informal and/or are not necessarily targeted to risks.

#### *Potential new approaches to assuring ongoing competence*

- There was considerable support for more robust measures for assuring ongoing competence, including potentially those used successfully in other sectors such as healthcare, aviation, teaching and financial services.
- Key benefits cited include increased public trust and reduced risk of harm from poor quality legal services.
- Stakeholders focused on gathering feedback, improvements to existing CPD models and remediation as a means of addressing competence issues.

28. We also identified the need to commission research to address gaps in our evidence base. In June 2021, we published an independent report from Hook Tangaza setting out approaches to ongoing competence adopted by legal regulators in other jurisdictions.<sup>12</sup> This found that typically, ongoing competence has not been prioritised or linked to a wider understanding of what competence looks like in practising (as opposed to a new entrant) authorised persons. Some jurisdictions are now introducing competence frameworks, assessments, peer reviews and remedial approaches to addressing competence concerns.

29. In July 2021, we published a report from Community Research testing the public's confidence in the current arrangements for the ongoing competence of authorised persons.<sup>13</sup> This included a qualitative component, a 23-person deliberative panel, and a quantitative survey, with a separate sample of 1005 members of the public. Panellists were recruited from a range of locations, ages, genders, ethnicities and socio-economic groups. Some were also chosen as individuals who had a degree of experience to bring to the research, for example, because they worked in a regulated profession such as teaching or engineering. Survey participants were selected to be representative of the population.

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<sup>12</sup> Hook Tangaza (2021), [International Approaches to Ongoing Competence](#)

<sup>13</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#)

30. Both groups were given information about the current arrangements and invited to consider trade-offs of introducing new ongoing competence requirements, including that additional regulation could result in increased costs for consumers. The panel had four weeks to consider the information in depth and were asked to also recommend what measures would give them more confidence. Key findings included:

#### *The panel*

Panellists unanimously agreed that there should be more specific rules for checking competence throughout authorised persons' careers. They felt there were too many gaps in the current system, which meant poor competence could be left unnoticed, resulting in harm to consumers. Collectively, the panel identified that a combination of the following measures would give them greater confidence:

- A single competence framework for all authorised persons.
- Mandatory CPD requirements (including an assessed element and checks by regulators to verify compliance).
- Recertification based on proof of competence (e.g. individuals to provide evidence such as case/file reviews and feedback) and
- Random spot checks in areas of risk or for a certain percentage of authorised persons.

#### *Survey results*

- 79% of the public thought that there should be more specific rules for checking authorised persons' competence throughout their careers.
- 95% said that authorised persons should have to demonstrate they remain competent throughout their careers.
- 87% agreed that regulators should do more to reduce the risk of lack of competence undermining public trust in the legal system.

31. We have also drawn on our work (where relevant) on other LSB projects, including our work around empowering consumers of legal services and assessments of recent applications to change regulatory arrangements regarding education and training.

## Statement of Policy

### *Our aims*

32. Consumers should be able to trust that authorised persons have the necessary and up-to-date skills, knowledge, attributes and behaviours to provide good quality legal services (i.e. are competent). Our research and evidence show that there is a lack of reliable data about competence in the sector currently, with information not routinely collected or published. To us, this lack of evidence equates to a lack of assurance, which is of concern because it means regulators cannot confirm how often (or how rarely) authorised persons are lacking competence.
33. Regulators tend to rely primarily on self-assessed CPD for assurance, which is at odds with a number of other sectors where professionals are required to proactively demonstrate their competence throughout their careers, such as doctors, teachers and pilots. While there are some examples of other assurance methods being used in the legal services sector, including advocacy assessments, peer reviews and feedback mechanisms, these are informal and limited in scope.
34. The current arrangements are also out of step with consumers' expectations that authorised persons face robust ongoing competence checks. Our public research found that consumers were concerned that the current arrangements leave space for poor competence to go undetected and that there were too many gaps in the existing system. Participants felt that regulators should have more evidence to be assured that those they regulate remain competent throughout their careers.
35. Our view is the status quo is not best serving the public interest or the interests of consumers. We consider that regulators need to do more to understand, prevent and respond to competence issues. It is regulators' responsibility to assure themselves that those they regulate remain competent throughout their careers and that risks to consumers from harm caused by poor competence are avoided.
36. We see our work here as consistent with the regulatory objectives set out in the Act, in particular:
- Protecting and promoting the public interest;
  - Supporting the constitutional principle of the rule of law;
  - Protecting and promoting the interests of consumers;

- Encouraging an independent, strong, diverse and effective legal profession; and
- Promoting and maintaining adherence to the professional principles.

### ***Function of the statement of policy***

37. We consider that the most effective way to achieve our aims is to issue a statement of policy. In line with sections 49 and 50 of the Act, we are consulting on a draft statement of policy and invite representations on our proposals. We will take account of all feedback in preparing a final statement of policy.
38. The draft statement of policy outlines our proposals for high-level expectations of the regulators in undertaking their regulatory functions in relation to ongoing competence.<sup>14</sup> The LSB would have regard to how regulators adopt the statement in exercising our statutory functions. This statement would likely be most relevant where we assess regulators under our regulatory performance framework, when we consider applications from regulators proposing changes to regulatory arrangements, and where we consider taking any enforcement actions.
39. We consider that a statement of policy, used in conjunction with our other statutory functions, will provide a proportionate, targeted and effective framework to ensure that all regulators have a fit for purpose approach to assuring the ongoing competence of those that they regulate throughout their careers.

### ***Expectations and outcomes***

40. Our intention is to ensure regulators have assurance of the ongoing competence of those they regulate and provide consumers with confidence in the competence of legal services providers. We have therefore structured the draft statement of policy as a set of general outcomes (paragraphs 12-14), and specific expectations for regulators (paragraphs 15-34). The proposed outcomes are that the regulators must:
- Set the standards of competence that those they regulate should meet at the point of authorisation and throughout their careers.
  - Regularly assess and understand of the levels of competence within the profession(s) they regulate, and identify areas where competence may need to be improved.

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<sup>14</sup> We do not have jurisdiction over the approved regulators' representative functions.

- Make appropriate interventions to ensure standards of competence are maintained across the profession(s) they regulate.
- Take suitable remedial action when standards of competence are not met by individual authorised persons.

41. This approach is intended to provide a flexible and permissive framework for the regulators. In seeking to meet the outcomes, we recognise that regulators might need to pursue different approaches. For example, as regulators regulate different professions and reserved legal activities within the legal services sector and some may regulate both entities and authorised persons, the measures that the regulators adopt to adhere to this statement will vary accordingly. This is in recognition that a single approach may not be fit for purpose in a diverse sector serving a diverse range of consumers.

42. However, the specific expectations we propose provide for some degree of consistency, ensuring a minimum standard of ongoing competence requirements across the regulators. From our public panel research, the findings indicate that the public values consistency to provide them with confidence in the competence of authorised persons.

43. We are therefore proposing that regulators take as a starting point the specific measures set out in the statement of policy. While regulators are free to pursue alternatives, they must be able to explain why, with evidence, they have not adopted the measures in the statement and why their proposed alternatives are more appropriate.

### Questions

**Q1. Do you agree with the proposed outcomes?**

**Q2. Do you agree with our proposed expectation that regulators will demonstrate that evidence-based decisions have been taken about which measures are appropriate to implement for those they regulate?**

### ***Specific expectations***

#### *Setting the standards of competence*

44. In the draft statement of policy, we are proposing specific expectations (see Figure 1) for regulators to adhere to in meeting the proposed outcome to ‘set the standards of competence that those they regulate should have at the point of authorisation and throughout their careers.’

## Figure 1

18. In pursuing outcome 13(a), regulators must develop a competence framework or equivalent that clearly states what skills, knowledge, attributes and behaviours ('competencies') they expect authorised persons to have at the point of authorisation and throughout their careers.
19. In doing so, regulators should consider:
- a. Core competencies that authorised persons should have, such as knowledge of basic legal principles, client care and practice management.
  - b. Competencies around ethics, conduct and professional standards that ensure public confidence in the legal professions.
  - c. Specialist competencies that particular authorised persons should have, for example, in their role as advocates.
  - d. Recognition that competence varies according to circumstances and authorised persons may need competencies depending on factors such as:
    - job role;
    - area of practice;
    - stage of career;
    - changes to the law;
    - changes to consumers' expectations.
20. The LSB expects regulators to demonstrate that they have given consideration to the competencies set out in paragraph 19 and taken evidence-based decisions on which of these competencies are appropriate to be included in their competence frameworks or equivalent.
21. Where a regulator has determined that any of the competencies identified are not appropriate, the LSB expects the regulator to clearly demonstrate why and set out what alternative competencies it has adopted to meet outcome 13(a).

### LSB rationale

45. Competence frameworks have been widely adopted in the legal services and other professional sectors as structures that set out the different competencies - i.e. the different skills, knowledge, attributes and behaviours - that are required to provide good quality services to consumers. Competence frameworks are



generally considered to be useful for providing a transparent set of criteria and common understanding of what can be expected from a competent professional.

46. From the call for evidence, we found that regulators including the SRA, BSB, Intellectual Property Regulation Board (IPReg) and CILEx Regulation had developed their own versions of competence frameworks.<sup>15</sup> We also found examples used in other sectors such as aviation and teaching<sup>16</sup>, as well as some that are under development in other jurisdictions such as Australia and Canada.<sup>17</sup>
47. We are proposing that all regulators must develop competence frameworks (or equivalent document(s)) to define the skills, knowledge, attributes and behaviours authorised persons should have. This would have the benefit of setting minimum standards of competence across the different legal professions. It would also provide transparency for consumers about what they can expect from competent authorised persons, so that they can make informed judgements about the quality of legal services. Providing better information to consumers was highlighted as being very important during our call for evidence and is the key focus of the LSB's wider work to empower consumers.<sup>18</sup>
48. We are proposing that each regulator must develop its own framework, in line with our expectations of what those frameworks should include. This would allow flexibility for the regulators to identify the core and specialist competencies that their authorised persons should have, while ensuring some consistency in accordance with our specific expectations within the policy. It will also ensure there is transparency of what levels of competence consumers can expect from different authorised persons.
49. We are proposing that each regulator's competence framework could include the core skills, knowledge, attributes and behaviours that authorised persons should have. We have provided examples in the draft statement of policy including knowledge of basic legal principles, client care and practice management skills. This is a non-exhaustive list as our evidence shows that there is a wide range of potential competencies that could be included in regulators' frameworks. Stakeholders in the call for evidence and in further engagement noted emotional competencies (e.g. stress management) and digital competencies (e.g. technological skills) as being important.<sup>19</sup>
50. We are proposing that regulators' frameworks could include competencies around ethics, conduct and professionalism. This is in recognition of the regulatory objectives and the role of regulators in supporting the constitutional

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<sup>15</sup> LSB (2021), [Ongoing Competence: Call for evidence themes and summary of evidence](#), pp 13-14.

<sup>16</sup> LSB stakeholder meetings (2020-21).

<sup>17</sup> Hook Tangaza (2021), [International Approaches to Ongoing Competence](#), Annex B.

<sup>18</sup> <https://legalservicesboard.org.uk/our-work/ongoing-work/consumer-empowerment>.

<sup>19</sup> LSB (2021), [Ongoing Competence: Call for evidence themes and summary of evidence](#), pp 13-14.

principle of the rule of law and promoting and maintaining adherence to the professional principles, which support public confidence in the professions. The professional principles include that authorised persons should act with independence and integrity and maintain proper standards of work. We note that in some jurisdictions, CPD activities regarding ethics and professionalism are mandatory.<sup>20</sup>

51. We are also proposing that regulators' frameworks could include the specialist skills, knowledge, attributes and behaviours that authorised persons should have. Many stakeholders we spoke to stressed the need for specialist skills, particularly in practice areas such as criminal advocacy, youth law and personal injury.<sup>21</sup>

52. From our evidence, we know that competence requirements will vary according to the circumstances and we expect that regulators could account for this in their own competence frameworks. This could include making it clear that different competencies may be required by those with different roles, levels of seniority or working in practice areas; and that the competencies themselves may change with time, as the law changes or consumers' expectations evolve. This is consistent with the risk-based approach to regulation that regulators should generally adopt and this approach should ensure that regulators' competence frameworks are adaptable and remain fit for purpose.

### Other considerations

53. While our current thinking is that each regulator should develop its own competence framework for the reasons set out above, we are open to other views. We can see merit in an alternative option, which would see the development of a set of shared core competencies for all authorised persons. Regulators could then tailor their own approaches where they needed to define additional specialist skills for their regulated community or reflect that competence requirements will vary according to particular circumstances.

54. In the public panel research, the public identified that a single competence framework was one of the measures that would give them greater confidence in the competence of authorised persons, if it was implemented alongside other measures such as mandatory CPD requirements and spot checks.<sup>22</sup> The panellists said that a single framework could give consumers certainty of a minimum set of requirements that apply across all authorised persons. Other benefits include that it could provide an effective way to identify issues with competence and it is something that could be used to motivate lawyers to maintain their competence.

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<sup>20</sup> Hook Tangaza (2021), [International Approaches to Ongoing Competence](#), p 22.

<sup>21</sup> LSB (2021), [Ongoing Competence: Call for evidence themes and summary of evidence](#), p 13.

<sup>22</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), section 4.6.

55. During our engagement, some stakeholders have said that due to the diversity of the profession, it would be difficult to define a set of shared core competencies that were meaningful.<sup>23</sup> The public panel also recognised the concern that the framework may end up being so generalised that it would be ineffective at setting the standards of competence, or, it could end up being too complex to be effectively implemented.<sup>24</sup>

56. On balance, we are proposing that regulators develop their own competence frameworks as set out above. However, we welcome your views on this. Regardless of the approach we adopt in the statement of policy, we note that this is an area where there are useful opportunities for collaboration between regulators. We will encourage regulators to learn from each other's approaches and coordinate in areas of common interest.

### Questions

**Q3. Do you agree with the LSB proposal that each regulator sets the standards of competence in their own competence framework (or equivalent document(s))?**

**Q4. If not, would you support the development of a set of shared core competencies for all authorised persons?**

**Q5. Do you agree with the areas we have identified that regulators should consider (core skills, knowledge, attributes and behaviours; ethics, conduct and professionalism; specialist skills, knowledge, attributes and behaviours; and recognition that competence varies according to different circumstances)?**

### *Assessing levels of competence in the professions*

57. In the draft statement of policy, we are proposing specific expectations (see Figure 2) for regulators to adhere to in meeting the proposed outcome to 'regularly assess and understand of the levels of competence within the profession(s) they regulate, and identify areas where competence may need to be improved.'

### **Figure 2**

22. In pursuing outcome 13(b), regulators must adopt approaches for routinely collecting relevant information about those they regulate. This should

<sup>23</sup> LSB stakeholder meetings (2020-21).

<sup>24</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), section 6.2.

contribute to their assessments of levels of competence across the whole of their profession(s), and how they identify areas of risk or where competence may need to be improved.

23. Regulators must consider what is an appropriate and proportionate frequency to collect relevant information. In determining what is relevant information, regulators should consider:

- a. Information from their regulatory activities, for example, regulatory returns, first-tier complaints and thematic reviews.
- b. Information from supervisory activities such as spot checks, audits, file reviews or equivalent oversight checks.
- c. Feedback, including from, but not limited to, consumers/users, intermediaries, supervisors, peers and judiciary.
- d. Information from other agencies such as the Legal Ombudsman, disciplinary tribunals and government agencies that have relevant data.

24. In pursuing outcome 13(b), regulators must be alert to risks to the public, including, but not limited to, when:

- a. users are in vulnerable circumstances;
- b. the consequences of competence issues would be severe; or
- c. the likelihood of harm to the public from competence issues is high.

25. The LSB expects regulators to demonstrate that they have given consideration to the types of information set out in paragraph 23 and taken evidence-based decisions on which of these types of information are appropriate to collect.

26. Where a regulator has determined that any of the types of information identified are not appropriate, the LSB expects the regulator to demonstrate why and set out what alternative types of information it has adopted to meet outcome 13(b).

58. We are proposing that regulators must adopt approaches to routinely collect relevant information about the competence of those they regulate to inform their assessment of levels of competence in the profession(s) and identify key risks and areas where competence may need to improve.

59. From the call for evidence, stakeholders identified that there are several types of information that would be most relevant and useful for this purpose. In our view, these different sources of information could provide regulators with assurance of the levels of competence across the profession. While regulators may already have some of this information, we are not aware of it being used to inform regulators' understanding of levels of competence.

### **Information from regulatory activities**

60. We know that regulators carry out a range of regulatory activities that would provide them with information they could potentially use to inform their understanding of levels of competence. This includes thematic reviews, analysis of first-tier complaints they receive, regulatory returns where they collect information from the regulated community and CPD compliance monitoring.<sup>25</sup> We consider that regulators could adapt, refine or better target their current regulatory approach to use this information to assess levels of competence in their profession(s).

### **Information from supervisory activities**

61. We found that there is a range of supervisory activities undertaken by some regulators, including inspections, spot checks and premises audits, although these are limited in scope. We note that this type of competence check is common in financial services and has been adopted by some public agencies such as the Legal Aid Agency, Office of the Immigration Services Commissioner and the Office of the Public Guardian.<sup>26</sup>

62. In the public panel research, participants thought that spot checks would encourage authorised persons to maintain their competence in the knowledge they could be checked at any time.<sup>27</sup> The panel recommended that spot checks could be used as part of a mix of measures to ensure ongoing competence. They said that spot checks should be adopted in areas of law where consumers face increased risks and combine client reviews, observation and file reviews. Our view is that spot checks would provide a useful opportunity for regulators to proactively check the competence of authorised persons and use this to inform their view of the competence of the wider profession(s).

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<sup>25</sup> LSB (2021), [Ongoing Competence: Call for evidence themes and summary of evidence](#), p 23.

<sup>26</sup> LSB (2021), [Ongoing Competence: Call for evidence themes and summary of evidence](#), p 29.

<sup>27</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), section 6.2.

## Feedback from various sources

63. Greater use of feedback was widely supported in the call for evidence for the dual purpose of informing assessments of competence and in identifying individuals' learning and development needs. In the legal services sector currently, some individual practitioners, firms and chambers already use feedback mechanisms to support learning and development, such as client feedback, 360 reviews and appraisals, but there is not a formal approach to capturing feedback.<sup>28</sup>
64. In a similar vein, some regulators have methods for receiving feedback about authorised persons and firms, however, it can be difficult to understand how feedback is used. We consider there is real merit in regulators' developing a more formal, transparent approach to collecting and using feedback as part of their ongoing competence approach.

## Information from third parties

65. Regulators may already be in possession of information from public agencies that have data about authorised persons, such as HM Land Registry or the Legal Ombudsman.<sup>29</sup> However, from our work we know that more could be done to access, collate, analyse and share this type of information. Our view is that this would be useful for providing an independent and objective source of data on competence at a profession-wide level.
66. We are also proposing that regulators must be alert to particular risks in developing their ongoing competence approach. This reflects our findings from the call for evidence, that some users are at an increased risk and potentially in greater need of protection from harm. This includes those who are in vulnerable circumstances (e.g. immigration/asylum or youth clients); when the consequences of competence issues would be severe (e.g. criminal advocacy); and when the likelihood of harm to consumers from competence is higher (e.g. conveyancing).<sup>30</sup> Further, in our public panel research, participants were particularly concerned about the risk of poor competence going undetected in areas where people face a greater risk of harm (e.g. where mistakes are more prevalent, where the potential consequences are serious or where people are more inherently vulnerable).<sup>31</sup>

## Other considerations

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<sup>28</sup> LSB (2021), [Ongoing Competence: Call for evidence themes and summary of evidence](#), pp 23-24; 26-27.

<sup>29</sup> LSB stakeholder meetings (2020-21).

<sup>30</sup> LSB (2021), [Ongoing Competence: Call for evidence themes and summary of evidence](#), pp 15-17.

<sup>31</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), p4.

67. We recognise that regulators will need to carefully consider how best to develop an appropriate and proportionate approach to routinely collecting information. For each of the types of information we have proposed that regulators could consider using to inform their understanding and assessment of the levels of competence, there are different factors that need to be taken into account in the design of regulators' approach.
68. For example, regulators may need to engage with and enter into memorandums of understanding (or similar) with third parties to access data. This is an example where, as with the development of competence frameworks, regulators may benefit from advancing a collaborative effort. We note that in our work on quality indicators and empowering consumers, we have signalled our preference for wider publication of independent data on the quality of legal services provided by authorised persons, and some of this could be useful in this context.<sup>32</sup> We are in ongoing discussions with several public bodies that hold relevant data.
69. With spot checks, regulators might want to consider the frequency of the checks (i.e. how often they are conducted); the coverage (i.e. who will be checked); whether the checks are announced (or unannounced); how thorough the checks are (e.g. how many files are reviewed/cases are observed); and who carries the checks out (are they independent and able to be objective). The public panel suggested that regulators might want to consider a combination of random and targeted checks, for example, checking those practising in areas of higher risk for consumers.<sup>33</sup>
70. With feedback, stakeholders responding to the call for evidence were clear that any mechanism for collecting and using feedback needed to be carefully designed. Stakeholders said that feedback should come from multiple sources and there should be multiple samples of feedback, so that no one source of feedback is taken to be a definitive assessment of competence.<sup>34</sup>
71. It was also important to consider the subjectivity of the feedback provider. In the public panel research, participants noted that, in isolation, feedback would not be of much use, rather, it could be important for understanding learning and development needs, surveying clients' experience of legal services or be used to support reaccreditation.<sup>35</sup> Regulators could learn from other professional regulators that have successfully embedded use of feedback in their ongoing

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<sup>32</sup> <https://legalservicesboard.org.uk/our-work/ongoing-work/consumer-empowerment>.

<sup>33</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), section 6.2.

<sup>34</sup> LSB (2021), [Ongoing Competence: Call for evidence themes and summary of evidence](#), p 26.

<sup>35</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), section 6.2.



competence approach, for example, the General Medical Council and Nursing and Midwifery Council.<sup>36</sup>

72. Our view is that regulators are best placed to weigh up these considerations and determine what approach is most appropriate for their regulated community. We also appreciate that there may be other approaches that regulators can use to assess and understand levels of competence and identify key risks. As such, we are proposing that if regulators can demonstrate consideration of these approaches, they may adopt alternative appropriate approaches to meet the outcomes. We welcome your views on alternative approaches as well as those we have proposed in the draft statement of policy.

### Questions

**Q6. Do you agree with the LSB proposal that regulators adopt approaches to routinely collect information to inform their assessment and understanding of levels of competence?**

**Q7. Do you agree with the types of information we have identified that regulators should consider (information from regulatory activities; supervisory activities; third party sources; feedback)?**

**Q8. Are there other types of information or approaches we should consider?**

**Q9. Do you agree with the LSB proposal that regulators should be alert to particular risks (to users in vulnerable circumstances; when the consequences of competence issues would be severe; when the likelihood of harm to consumers from competence issues is high)?**

### *Making interventions to ensure standards of competence are maintained*

73. In the draft statement of policy, we are proposing specific expectations (see Figure 3) for regulators to adhere to in meeting the proposed outcome to 'Make appropriate interventions to ensure standards of competence are maintained across the profession(s) they regulate.'

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<sup>36</sup> GMC <https://www.gmc-uk.org/registration-and-licensing/managing-your-registration/revalidation>;  
NMC <https://www.nmc.org.uk/revalidation/>.



### Figure 3

27. In pursuing outcome 13(c), regulators must adopt approaches that ensure standards of competence are maintained across the profession(s). In doing so, regulators should consider a range of measures including:
- a. Effective communication and engagement with the profession(s) to draw attention to key risks and areas where competence may need to be improved.
  - b. The promotion of reflective practice and use of feedback, including in pre-authorisation education and training, to identify learning and development needs.
  - c. Specifying training, learning and development requirements (including mandatory requirements).
  - d. Competence assessments, for example, observation or examinations.
  - e. Reaccreditation models (i.e. requiring periodic proof of competence to maintain a practising certificate).
28. The LSB expects regulators to demonstrate that they have given consideration to the measures set out in paragraph 27 and taken evidence-based decisions on which of these measures are appropriate to adopt.
29. Where a regulator has determined that any of the measures identified are not appropriate, the LSB expects the regulator to demonstrate why and set out what alternative measures it has adopted to meet outcome 13(c).

### LSB rationale

74. We are proposing that regulators must adopt interventions to ensure standards are maintained across their profession(s). In the call for evidence, stakeholders cited the measures below, ranging from measures to support the identification of learning and development needs and more targeted training requirements, to competence assessments and periodic reaccreditation. We found that some of these measures have already been implemented successfully in the legal services sector, but have limited coverage (they are only used in some practice areas) or are informal (they have been adopted by some firms or chambers only).

### **Engagement with the profession(s) on key risks and areas where competence may need to improve**

75. In the call for evidence, we found that regulators already engage with their profession(s) on competence risks using a range of measures such as regulatory reporting (e.g. thematic reviews), commissioning research and issuing guidance.<sup>37</sup> One example is the recent work from the BSB, CILEx Regulation and the SRA to develop resources for authorised persons working in the Coroners' Courts, including an explanation of the competences expected, advice on communication and engagement, links to supporting organisations and information about learning and development resources.<sup>38</sup> We consider this type of engagement has benefits for regulators' regulated communities, as well as the users they serve, and encourage regulators to find more opportunities for engagement on competence risks, including sharing lessons learned and good practice.

### **Promotion of reflective practice and use of feedback to identify learning and development needs**

76. We found that CPD currently plays a central role in regulators' ongoing competence approaches, with all regulators having CPD requirements.<sup>39</sup> CPD has been widely adopted in other jurisdictions around the world and Hook Tangaza's report sets out the CPD arrangements for lawyers in over 70 different jurisdictions.<sup>40</sup> It is also widely used in other sectors including financial services, engineering and healthcare.<sup>41</sup>

77. However, in Hook Tangaza's research and in the call for evidence stakeholders cited concerns with regulators relying on CPD to provide assurance of ongoing competence.<sup>42</sup> Key concerns were that lawyers are not always well equipped to identify the CPD they needed; CPD may not be relevant to their practice; or it may be 'tick box' instead of targeted. These concerns were also highlighted by participants in the public panel research, who said CPD is not effective as a standalone measure.<sup>43</sup>

78. We found that reflective practice i.e. assessing one's own actions to inform continuous learning and development can be used to better identify relevant, targeted CPD activities. In healthcare, doctors, nurses and midwives use feedback from different sources and lessons from events in their practice to

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<sup>37</sup> LSB (2021), [Ongoing Competence: Call for evidence themes and summary of evidence](#), p 23.

<sup>38</sup> For example, BSB (2021) [Resources for those practising in the Coroners' Courts](#).

<sup>39</sup> LSB (2021), [Ongoing Competence: Call for evidence themes and summary of evidence](#), p 20.

<sup>40</sup> Hook Tangaza (2021), [International Approaches to Ongoing Competence](#), Annex A.

<sup>41</sup> LSB stakeholder meetings (2020-21).

<sup>42</sup> Hook Tangaza (2021), [International Approaches to Ongoing Competence](#), pp 14-21; LSB (2021), [Ongoing Competence: Call for evidence themes and summary of evidence](#), p 21.

<sup>43</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), p 53.

identify learning and development needs.<sup>44</sup> Some regulators require authorised persons to use reflective practice, but stakeholders said there was a lack of understanding of what good reflective practice looks like and/or support to do it well.<sup>45</sup> We can see real merit in regulators better promoting reflective practice and providing more support for authorised persons to identify their learning and development needs.

### **Specifying training requirements, including mandatory requirements**

79. Few regulators currently expect authorised persons to complete mandatory training courses as part of their CPD requirements, although we found some examples where training programmes have been widely adopted to address known risks, for example, the Advocacy and the Vulnerable training for advocates.<sup>46</sup> In the call for evidence, some stakeholders said that authorised persons should be required to have specialist training to work in high-risk practice areas, such as youth or criminal advocacy; others suggested that disability and mental health awareness training was essential.<sup>47</sup>
80. In Hook Tangaza's research, mandatory training linked to particular roles (e.g. practice management) or career stages (e.g. newly qualified) was identified.<sup>48</sup> In the public panel research, participants said there should be mandatory CPD with checks by regulators and assessed elements.<sup>49</sup> Our view is that different mandatory requirements could provide greater assurance of ongoing competence, particularly in areas where regulators have identified areas of risk or where competence needs to improve.

### **Competence assessments (e.g. observation or peer reviews)**

81. Competence assessments, such as exams, in-practice observation, file reviews or peer reviews, have been adopted in other professional sectors. Observation, for example, has been embedded in the ongoing competence approach for both aviation and teaching. Pilots are regularly examined in-flight and periodic simulator testing is required by the European Aviation Safety Agency, while teachers are assessed in the classroom as part of Ofsted's rating of education providers.<sup>50</sup>

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<sup>44</sup> GMC <https://www.gmc-uk.org/registration-and-licensing/managing-your-registration/revalidation>; NMC <https://www.nmc.org.uk/revalidation/>.

<sup>45</sup> LSB stakeholder meetings (2020-21); [Ongoing Competence: Call for evidence themes and summary of evidence](#), p 27.

<sup>46</sup> LSB (2021) [Ongoing Competence: Call for evidence themes and summary of evidence](#), p 21.

<sup>47</sup> LSB (2021) [Ongoing Competence: Call for evidence themes and summary of evidence](#), pp 14; 16; 28-29.

<sup>48</sup> Hook Tangaza (2021), [International Approaches to Ongoing Competence](#), pp 23-24.

<sup>49</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), section 6.2.

<sup>50</sup> LSB (2021) [Ongoing Competence: Call for evidence themes and summary of evidence](#), pp 22-23.

82. Competence assessments have also been adopted in other jurisdictions. In Scotland, the Faculty of Advocates carries out in-court observation of advocates, which Hook Tangaza's research said appears to have been effective in engaging the profession in refreshing and upgrading skills. In the Netherlands, there is a mandatory annual quality assessment where advocates can choose to undertake a structured peer discussion, interview with an assessor or peer review (including file reviews).<sup>51</sup>
83. The benefit of a competence assessment is that it provides a tangible check of an individual's competence and, in aggregate, can ensure standards of competence are maintained. We found very few instances of competence assessments being used in the legal services sector currently. In one example, the Crown Prosecution Service requires all advocates to be assessed twice annually and at least one assessment should relate to a contested case (i.e. a trial), which involves the advocate being observed while in practice in the courtroom.<sup>52</sup> Our view is that wider adoption of competence assessments could provide a valuable source of competence assurance.

### **Reaccreditation models**

84. We found that reaccreditation, where individuals are formally assessed to confirm that they are competent on an ongoing basis, is used in some parts of the legal services sector. This includes schemes such as Lexcel and the Association of Personal Injury Lawyers (APIL).<sup>53</sup> APIL, for example, requires evidence that the majority of fee earning time is spent on personal injury cases and that professional work is to the required standard, as well as proof of CPD and feedback from clients, peers and supervisors, every five years. Reaccreditation has also been introduced in the healthcare sector (called revalidation) for doctors, nurses and midwives.<sup>54</sup> These processes involve reflective discussion, supplying evidence of CPD completion and gathering feedback from peers on performance.
85. In the public panel research, participants responded positively to revalidation as a measure for maintaining standards of competence and suggested that the existing process for authorised persons' recertification i.e. practising certificate renewal could be better linked to competence, for example, through requirements to provide evidence of client feedback and case files.<sup>55</sup> We consider there is real merit in regulators exploring how to better link their existing recertification processes to take account of competence.

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<sup>51</sup> Hook Tangaza (2021), [International Approaches to Ongoing Competence](#), Annexes A&B.

<sup>52</sup> LSB (2021) [Ongoing Competence: Call for evidence themes and summary of evidence](#), p 23.

<sup>53</sup> LSB (2021) [Ongoing Competence: Call for evidence themes and summary of evidence](#), p 24.

<sup>54</sup> GMC <https://www.gmc-uk.org/registration-and-licensing/managing-your-registration/revalidation/>; NMC <https://www.nmc.org.uk/revalidation/>.

<sup>55</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), section 6.2.

### Other considerations

86. We recognise that regulators will need to carefully consider what approaches are appropriately targeted and proportionate for those they regulate. For each of the measures we have proposed that regulators should consider, there are different factors that need to be taken into account in the design of regulators' approach.
87. For example, the implementation of competence assessments could be resource-intensive, particularly if they were carried out at scale. During the call for evidence, stakeholders indicated this could be addressed by developing targeted models, for example, that cover higher risk areas of practice or individuals, or sample a percentage of the profession(s).<sup>56</sup> Participants in the public panel research also suggested competence assessments could be targeted (as above) or following an intervention (such as remediation) where poor competence was identified. The Faculty of Advocates approach cited above samples approximately 20 per cent of the practising bar per annum, in order of seniority, which means over the course of five years, every advocate is assessed.<sup>57</sup>
88. Similar concerns about the resource burden were raised in relation to the introduction of reaccreditation. Public panel participants were alive to this potential issue, but considered reaccreditation would not be too onerous if authorised persons were keeping good records of their cases, CPD activities and feedback they received. They said they expected authorised persons would be doing this regardless.<sup>58</sup> They also suggested that regulators should adapt existing processes, such as the practising certificate fee renewal process. This would allow regulators to leverage systems and processes that were already well embedded in authorised persons' practice. We note that our discussions with healthcare regulators highlighted the benefits of using existing processes to minimise the burden on the profession(s).<sup>59</sup>
89. We expect regulators to consider the merits of both competence assessments and reaccreditation, particularly in consideration of how best to address areas of risk or where competence needs to improve. Regulators should not rule out the introduction of such formal measures on the basis of costs alone, particularly noting the evidence that these measures would give the public greater confidence in the ongoing competence of authorised persons. In the public panel research, participants, when asked to weigh trade-offs, said they would be willing to pay more if it meant they could have greater confidence in the

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<sup>56</sup> LSB stakeholder meetings (2020-21).

<sup>57</sup> Faculty of Advocates (2019-20), [Quality Assurance Statement](#).

<sup>58</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), p 55.

<sup>59</sup> LSB stakeholder meetings (2020-21).

competence of authorised persons.<sup>60</sup> Regulators should consider potential benefits such as this to consumers in making their assessments.

90. We appreciate that there may be other approaches that regulators can use to maintain standards of competence. As such, we are proposing that if regulators can demonstrate consideration of the approaches we have proposed, they may adopt alternative interventions to meet the outcomes if appropriate. We welcome your views on alternative approaches as well as those we have proposed in the draft statement of policy.

### Questions

**Q10. Do you agree with the LSB proposal that regulators adopt interventions to ensure standards of competence are maintained in their profession(s)?**

**Q11. Do you agree with the types of measures we have identified that regulators could consider (engagement with the profession; supporting reflective practice; mandatory training requirements; competence assessments; reaccreditation)?**

**Q12. Are there other types of measure we should consider?**

### *Taking remedial action in response to competence issues*

91. In the draft statement of policy, we are proposing specific expectations (see Figure 4) for regulators to adhere to in meeting the proposed outcome to ‘Take suitable remedial action when standards of competence are not met by individual authorised persons.’

### **Figure 4**

30. In pursuing outcome 13(d), regulators must develop an approach that provides for appropriate remedial action to be taken to address competence issues. Remedial action in this context means activities intended to improve or correct competence issues.

31. Remedial action must be designed to support authorised persons to improve their competence. It could include, but is not limited to, requiring a period of supervised and/or restricted practice, or requiring specific training.

<sup>60</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), p 8; p 34.

32. Regulators must provide transparency of their approach and clearly set out the process for when and how they will take remedial action. In doing so, regulators should consider:
- a. What evidence they will rely on to verify the competence issue.
  - b. What factors they will use to determine that remedial action is suitable to address the competence issue, including reference to any aggravating or mitigating factors.
  - c. What factors they will use to determine the most appropriate remedial action.
  - d. How they will follow up the competence issue to prevent recurrence.
33. The LSB expects regulators to demonstrate that they have given consideration to the approaches set out in paragraph 32 and taken evidence-based decisions on which of these approaches are appropriate for those that they regulate.
34. Where a regulator has determined that any of the elements identified are not appropriate, the LSB expects the regulator to demonstrate why and set out what alternative elements it has adopted to meet outcome 13(d).

### LSB rationale

92. We are proposing to set an expectation that regulators must develop an appropriate approach for remedial action to address competence issues. Remedial action in this context means activities intended to improve or correct competence issues.
93. In the call for evidence, stakeholders provided information about the use of remedial measures to address issues with a professional's competence.<sup>61</sup> Those most frequently cited include requiring someone to undergo a period of supervised practice or undertaking mandatory training to improve their competence. For example, they are used in the financial services sector when competence concerns have arisen following oversight visits or CPD checks.
94. Use of these measures was also noted in healthcare and aviation. In aviation, it is central to the safety culture; pilots have a duty to report safety concerns in order to share learning and prevent safety failures. The focus is on having insight into what went wrong, rather than punishing the wrong. Support, such as additional training, will be offered where necessary. At a discussion event, stakeholders noted the importance of good culture in the legal professions and

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<sup>61</sup> LSB (2021) [Ongoing Competence: Call for evidence themes and summary of evidence](#), pp 27-28.



said there was a need to address the ‘fear and blame’ culture when someone makes a mistake.<sup>62</sup>

95. We can see real merit in regulators developing appropriate remedial measures as part of their ongoing competence approach. There is obvious scope for them to learn from the approaches adopted in other professional sectors. We also note the findings from the public panel research, with benefits of remediation cited as a supportive approach to maintaining competence and that such an approach could allow regulators to identify issues early and potentially prevent more serious competence issues with greater impacts to consumers.<sup>63</sup>

### Other considerations

96. The public panel also raised some concerns about implementing a remedial approach in practice, including questions about who would judge when remediation is needed and on what basis they would judge this.<sup>64</sup> Some participants felt that remediation would only be effective if it was combined with other ongoing competence assurance measures such as reaccreditation.

97. In order to address these concerns, we are proposing that regulators must provide transparency of their approach, including when a remedial response will be appropriate and how they will take action. We expect that regulators will consider the seriousness of the competence issue, any evidence they are relying on to verify the competence issues and any aggravating or mitigating factors. We also expect that regulators should be clear on how they will prevent the competence issue from recurring, for example, by putting in place appropriate opportunities to check the progress of remedial action or follow up after the remedial action.

98. We consider that regulators’ pursuit of other outcomes proposed in the draft statement of policy will support them to develop an appropriate and proportionate remedial approach. Where we have found that currently, regulators do not routinely collect and make use of information about the competence of the individuals and firms they regulate, this is proposed to change and that this data is collected and used in future.

### Questions

**Q13. Do you agree with the LSB proposal that regulators develop an approach for appropriate remedial action to address competence concerns?**

<sup>62</sup> LSB (2021) [Ongoing Competence Discussion Event: Summary Note](#).

<sup>63</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), section 6.2.

<sup>64</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), section 6.2.



**Q14. We expect that regulators should consider the seriousness of the competence issue and any aggravating or mitigating factors to determine if remedial action is appropriate. Are there other factors that regulators should consider when deciding whether remedial action is appropriate?**

**Q15. Do you agree that regulators should identify ways to prevent competence issues from recurring following remedial action?**

## **Implementation**

99. Following the consultation, we will have regard to the responses received in finalising our proposals, before we publish our response and issue the final statement of policy. Our intention at this stage is for the final statement of policy to take effect immediately on publication. Our proposal is that regulators should meet the outcomes set out in the statement within 18 months of publication of the final statement. We expect that regulators will be in a position to do so at that time.

100. We are proposing an 18-month period in recognition of the fact that it is likely that regulators will need to introduce new measures in order to meet the outcomes, including gathering evidence and using that evidence to inform their approaches.

101. Under the Act, the LSB must have regard to any relevant statement of policy in exercising (or deciding whether to exercise) any of its functions. These include our functions to approve applications to change regulatory arrangements, and our oversight role of assessing regulators under the regulatory performance assessment framework. As such, for example, we will assess whether regulators have adhered to the statement in considering applications for approval of rule changes in areas that are relevant to the statement (for example, around the current and any new arrangements for education and training, supervision or enforcement). This includes considering any equality impacts of regulators' work.

102. Subject to the outcome of the consultation, we intend to monitor regulators' progress against the statement of policy through the regulatory performance framework. We have begun to undertake a review of our regulatory performance framework and as part of this we intend to consult on any proposed changes to the framework in due course.

## Questions

**Q17. Do you agree with our proposed plan for implementation?**

**Q18. Is there any reason why a regulator would not be able to meet the statement of policy expectations within 18 months? Please explain your reasons.**

## **Equality impact assessment**

103. The LSB has given due consideration to its obligations under the Equality Act 2010, including consideration of the public sector equality duty.<sup>65</sup>

104. The draft statement of policy includes risks that regulators should consider when developing their approaches for different authorised persons, including:

- in response to the needs of consumers in vulnerable circumstances;
- if the severity of the potential consequences resulting from poor competence increases the risk to consumers; and
- if there is existing evidence of harm to consumers from poor competence.

105. It also includes specific expectations that regulators will account for the diversity of the profession, in respect of the competencies required by authorised persons, which includes accounting for specialist skills and the different competencies that are required by those working in different practice areas and roles.

106. In our engagement with stakeholders, some stakeholders raised concerns that increased competence requirements could be a barrier to entry to or re-entry for some individuals (e.g. if the requirements present an undue burden following a period of leave during pregnancy and maternity).<sup>66</sup> There was also a concern from participants in the public panel research that people from minority ethnic groups might be unfairly targeted for remedial action, echoing trends in remedial and disciplinary action taken in other professions.<sup>67</sup>

107. Our view is that regulators can avoid or mitigate these potential negative impacts through the design of their ongoing competence measures. The statement of policy is deliberately flexible, allowing regulators to determine how

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<sup>65</sup> GOV.UK (2012), [Public sector equality duty - GOV.UK \(www.gov.uk\)](https://www.gov.uk/public-sector-equality-duty)

<sup>66</sup> LSB stakeholder meetings (2020-21).

<sup>67</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), pp 59-60.

best to adhere to our expectations and in doing so, ensure any negative impacts are avoided or mitigated.

108. As such, we do not consider there is anything in the draft statement of policy that will materially negatively impact those groups with protected characteristics, but would particularly welcome views from stakeholders on this through the consultation. During the consultation period, we will engage with key stakeholders to ensure that we fully take account of any issues that may lead to particular impacts on those with protected characteristics, and consider mitigating measures.

109. We have also proposed to actively consider any impacts on groups with protected characteristics as the policy is implemented through our work. This includes considering applications for changes to regulatory arrangements and the regulatory performance assessments of regulators. This would allow us to determine any trends over time and take action, if required.

### Questions

**Q19. Do you have any comments regarding equality impact and issues which, in your view, may arise from our proposed statement of policy? Are there any wider equality issues and interventions that you want to make us aware of?**

## **Impact assessment**

110. The LSB has considered the likely impact of the proposed draft statement of policy on the approved regulators, regulators, their regulated communities and consumers.

111. We recognise that introducing new ongoing competence expectations for regulators may result in an increased burden on authorised persons, including regulated entities. This was raised as a concern during our stakeholder engagement, with greater costs (time and money) and potential impacts on the competitiveness of the sector with other jurisdictions cited as potential results of further requirements.<sup>68</sup>

112. Our view is that these increased costs would likely be outweighed by the benefits to consumers, including increased confidence in the competence of authorised persons and protection from harm from poor competence. In the public panel research, consumers indicated willingness to pay more if they had

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<sup>68</sup> LSB stakeholder meetings (2020-21); LSB (2021) [Ongoing Competence: Call for evidence themes and summary of evidence](#), pp 25-26

greater assurance of the competence of authorised persons.<sup>69</sup> Further, competition in the sector may be improved if regulators can demonstrate they have greater assurance of the high quality of services provided by those they regulate.

113. Ultimately, regulators are best placed to assess and quantify these impacts based on the activities they decide to pursue to adhere to the statement of policy, noting the permissive approach allows for targeted, risk-based regulation. Our policy approach is intended to ensure that issues of ongoing competence are established within the LSB's regulatory framework and that there is consistency in the ongoing competence measures that are adopted across the sector. We have prepared a high-level draft statement which proposes to provide regulators with flexibility to use a range of regulatory arrangements and other appropriate activities to pursue the specified expectations and so meet the general outcomes.

114. We have had regard to the better regulation principles in our development of the proposals. We consider that the statement of policy will be a proportionate, transparent, targeted and effective means of ensuring regulators have assurance of the ongoing competence of those they regulate, consumers have confidence that authorised persons remain competent throughout their careers, and that risks to consumers from harm caused by poor competence are avoided.

115. We welcome comments on the potential impact of the draft statement of policy and any quantification of the likely costs and anticipated benefits, to further inform the LSB's assessment of the regulatory impact of the proposed policy.

### Questions

**Q20. Do you have any comments on the potential impact of the draft statement of policy, including the likely costs and anticipated benefits?**

**Q21. Do you have any further comments?**

## **Next steps**

116. This consultation closes on Monday 7 March 2022. Once the consultation has closed, we will consider all feedback received and make any resulting changes as appropriate to the draft statement of policy.

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<sup>69</sup> Community Research (2021), [Ongoing Competence in Legal Services: Research into Public Attitudes](#), p 8; p 34.

117. We will publish our response to the consultation when we issue the final statement of policy later in 2022.

## Responding to the consultation

118. The questions posed in this consultation are listed below for reference:

**Q1.** Do you agree with the proposed outcomes?

**Q2.** Do you agree with our proposed expectation that regulators will demonstrate that evidence-based decisions have been taken about which measures are appropriate to implement for those they regulate?

**Q3.** Do you agree with the LSB proposal that each regulator sets the standards of competence in their own competence framework (or equivalent document(s))?

**Q4.** If not, would you support the development of a set of shared core competencies for all authorised persons?

**Q5.** Do you agree with the areas we have identified that regulators should consider (core skills, knowledge, attributes and behaviours; ethic, conduct and professionalism; specialist skills, knowledge, attributes and behaviours; and recognition that competence varies according to different circumstances)?

**Q6.** Do you agree with the LSB proposal that regulators adopt approaches to routinely collect information to inform their assessment and understanding of levels of competence?

**Q7.** Do you agree with the types of information we have identified that regulators should consider (information from regulatory activities; supervisory activities; third party sources; feedback)?

**Q8.** Are there other types of information or approaches we should consider?

**Q9.** Do you agree with the LSB proposal that regulators should be alert to particular risks (to users in vulnerable circumstances; when the consequences of competence issues would be severe; when the likelihood of harm to consumers from competence issues is high)?

**Q10.** Do you agree with the LSB proposal that regulators adopt interventions to ensure standards of competence are maintained in their profession(s)?

**Q11.** Do you agree with the types of measures we have identified that regulators could consider (engagement with the profession; supporting reflective practice; mandatory training requirements; competence assessments; reaccreditation)?

**Q12.** Are there other types of measure we should consider?

**Q13.** Do you agree with the LSB proposal that regulators develop an approach for appropriate remedial action to address competence concerns?

**Q14.** Do you agree that regulators should consider the seriousness of the competence issue and any aggravating or mitigating factors to determine if remedial action is appropriate?

**Q15.** Are there other factors that regulators should consider when deciding whether remedial action is appropriate?

**Q16.** Do you agree that regulators should identify ways to prevent competence issues from recurring following remedial action?

**Q17.** Do you agree with our proposed plan for implementation?

**Q18.** Is there any reason why a regulator would not be able to meet the statement of policy expectations within 18 months? Please explain your reasons.

**Q19.** Do you have any comments regarding equality impact and issues which, in your view, may arise from our proposed statement of policy? Are there any wider equality issues and interventions that you want to make us aware of?

**Q20.** Do you have any comments on the potential impact of the draft statement of policy, including the likely costs and anticipated benefits?

**Q21.** Do you have any further comments?

119. Any representations should be made to the LSB by 5pm on **Monday 7 March 2022**. Please ensure that responses reach us by the closing date as we cannot guarantee that responses received after this date will be considered.

120. We would prefer to receive responses electronically but hard copy responses by post are also welcome.

121. Responses should be sent to:

- Email: [consultations@legalservicesboard.org.uk](mailto:consultations@legalservicesboard.org.uk)
- Post: Legal Services Board, 3<sup>rd</sup> floor, The Rookery, 2 Dyott Street, London, WC1A 1DE

122. We intend to publish all responses to this consultation with personal data redacted, on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We will record the identity of the respondent and the fact that they have submitted a confidential response in our summary of responses.

123. If you wish to discuss any aspect of this paper or need advice on how to respond to the consultation, please contact the LSB by one of the methods described above or by telephone (020 7271 0050).
124. Any complaints or queries about this process should be sent to the Legal Services Board via the consultations inbox or by post.

## Draft statement of policy – ongoing competence

Issued under section 49 of the Legal Services Act 2007

### Purpose of this document

1. This statement of policy is issued under section 49(2) of the Legal Services Act 2007 (Act) and in preparing it the Legal Services Board (LSB) has had regard to the principle that its principal role is the oversight of approved regulators.<sup>70</sup>
2. The purpose of this statement of policy is to set expectations of the regulatory bodies (regulators) in the interests of the public and consumers. These expectations relate to ongoing competence, which in this context means the necessary and up-to-date skills, knowledge, attributes and behaviours to provide good quality legal services.
3. In exercising or deciding whether to exercise any of its functions, the LSB must have regard to any relevant statement of policy published under section 49 of the Act. This statement of policy on ongoing competence is likely to be most applicable to:
  - a. The maintenance and development of standards in relation to the regulation by regulators of persons authorised by them to carry on reserved legal activities under section 4 of the Act;
  - b. The maintenance and development of standards in relation to the education and training of persons so authorised, under section 4 of the Act;
  - c. The approval of changes to a regulator's regulatory arrangements in accordance with section 20 and Part 3 of Schedule 4 to the Act; and
  - d. Enforcement functions under sections 31 to 45 and 76 of the Act.
4. The LSB will also have regard to regulators' compliance with this statement of policy in discharging its other oversight functions, including in its assessment of regulators under the regulatory performance assessment framework.
5. In discharging its functions, the LSB must, so far as is reasonably practicable, act in a way which is compatible with the regulatory objectives and which it considers most appropriate for meeting those objectives. This statement of policy is relevant to all the regulatory objectives, and in particular the following:
  - a. Protecting and promoting the public interest;

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<sup>70</sup> Section 49(3) of the Act (<https://www.legislation.gov.uk/ukpga/2007/29/contents>).



- b. Supporting the constitutional principle of the rule of law;
  - c. Protecting and promoting the interests of consumers;
  - d. Encouraging an independent, strong, diverse and effective legal profession; and
  - e. Promoting and maintaining adherence to the professional principles.
6. In developing this statement of policy, the LSB has had regard to the [Better Regulation Principles](#) under which regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed.
7. This statement of policy takes into account the LSB's Guidance on regulatory arrangements for education and training, issued under section 162 of the Act, which refers to ongoing competency requirements in the outcomes.<sup>71</sup>
8. The provisions of the Act, and any rules made under those provisions, will prevail over this statement of policy.
9. The LSB may review this statement of policy and issue a revised version if its policy changes.

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[https://legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/20140304\\_LSB\\_Education\\_And\\_Training\\_Guidance.pdf](https://legalservicesboard.org.uk/what_we_do/regulation/pdf/20140304_LSB_Education_And_Training_Guidance.pdf).

## LSB statement of policy – ongoing competence

### Background

10. This statement of policy has been developed following a significant programme of work. This included a call for evidence that gathered information about the arrangements for ongoing competence in the legal services and other professional sectors, research into approaches to ongoing competence adopted in other jurisdictions, consumer research into public attitudes to ongoing competence and engagement with a wide range of stakeholders.
11. Consumers should be able to trust that legal professionals have the necessary and up to date skills, knowledge, attributes and behaviours (i.e. are competent) to provide good quality legal services. It is regulators' responsibility to assure themselves that those they regulate remain competent throughout their careers and that risks to consumers from harm caused by poor competence are avoided.

### General outcomes

12. The LSB will have regard to the general outcomes and specific expectations set out below in discharging its functions set out in paragraphs 3 and 4.
13. Regulators must pursue the following outcomes:
  - Set the standards of competence that those they regulate should meet at the point of authorisation and throughout their careers.
  - Regularly assess and understand the levels of competence within the profession(s) they regulate, and identify areas where competence may need to be improved.
  - Make appropriate interventions to ensure standards of competence are maintained across the profession(s) they regulate.
  - Take suitable remedial action when standards of competence are not met by individual authorised persons.
14. The LSB recognises that regulators regulate different professions<sup>72</sup>, reserved legal activities<sup>73</sup> and authorised persons<sup>74</sup> (including both individuals and

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<sup>72</sup> Including, for example, Solicitors, Barristers, Patent Attorneys and Licensed Conveyancers.

<sup>73</sup> Under Section 12 of the Act, reserved legal activity means '(a) the exercise of a right of audience; (b) the conduct of litigation; (c) reserved instrument activities; (d) probate activities; (e) notarial activities; (f) the administration of oaths.'

<sup>74</sup> Under Section 18 of the Act, 'authorised person' means (a) a person who is authorised to carry on the relevant activity by a relevant approved regulator in relation to the relevant activity (other than by

entities), and, as a consequence, may adopt different approaches to pursue the stated outcomes. The LSB expects that in pursuing the outcomes, regulators will be clear on the application of their approach.

### Specific expectations

15. In implementing this statement of policy, the LSB has specific expectations of the regulators in pursuit of the outcomes at paragraph 13, which are set out in this section.
16. The LSB expects regulators to demonstrate that they have given consideration to all of the measures set out within this section. Regulators must be able to demonstrate that evidence-based decisions have been taken on which of these measures are appropriate to implement for those that they regulate.
17. Where a regulator has determined that any of the measures identified are not appropriate to implement, the LSB expects the regulator to clearly demonstrate why such measures are not appropriate for those they regulate. Regulators must set out what alternative measure(s) they have adopted to meet the outcomes.

### Setting the standards of competence

18. In pursuing outcome 13(a), regulators must develop a competence framework or equivalent that clearly states what skills, knowledge, attributes and behaviours ('competencies') they expect authorised persons to have at the point of authorisation and throughout their careers.
19. In doing so, regulators should consider:
  - a. Core competencies that authorised persons should have, such as knowledge of basic legal principles, client care and practice management.
  - b. Competencies around ethics, conduct and professional standards that ensure public confidence in the legal professions.
  - c. Specialist competencies that particular authorised persons should have, for example, in their role as advocates.
  - d. Recognition that competence varies according to circumstances and authorised persons may need competencies depending on factors such as:

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virtue of a licence under Part 5), or (b) a licensable body which, by virtue of such a licence, is authorised to carry on the relevant activity by a licensing authority in relation to the reserved legal activity.

- job role;
- area of practice;
- stage of career;
- changes to the law;
- changes to consumers' expectations.

20. The LSB expects regulators to demonstrate that they have given consideration to the competencies set out in paragraph 19 and taken evidence-based decisions on which of these competencies are appropriate to be included in their competence frameworks or equivalent.

21. Where a regulator has determined that any of the competencies identified are not appropriate, the LSB expects the regulator to clearly demonstrate why and set out what alternative competencies it has adopted to meet outcome 13(a).

### Assessing levels of competence in the professions

22. In pursuing outcome 13(b), regulators must adopt approaches for routinely collecting relevant information about those they regulate. This should contribute to their assessments of levels of competence across the whole of their profession(s), and how they identify areas of risk or where competence may need to be improved.

23. Regulators must consider what is an appropriate and proportionate frequency to collect relevant information. In determining what is relevant information, regulators should consider:

- a. Information from their regulatory activities, for example, regulatory returns, first-tier complaints and thematic reviews.
- b. Information from supervisory activities such as spot checks, audits, file reviews or equivalent oversight checks.
- c. Feedback, including from, but not limited to, consumers/users, intermediaries, supervisors, peers and judiciary.
- d. Information from other agencies such as the Legal Ombudsman, disciplinary tribunals and government agencies that have relevant data.

24. In pursuing outcome 13(b), regulators must be alert to risks to the public, including, but not limited to, when:

- a. users are in vulnerable circumstances;
- b. the consequences of competence issues would be severe; or

- c. the likelihood of harm to the public from competence issues is high.
25. The LSB expects regulators to demonstrate that they have given consideration to the types of information set out in paragraph 23 and taken evidence-based decisions on which of these types of information are appropriate to collect.
26. Where a regulator has determined that any of the types of information identified are not appropriate, the LSB expects the regulator to demonstrate why and set out what alternative types of information it has adopted to meet outcome 13(b).

### Making interventions to ensure standards of competence are maintained

27. In pursuing outcome 13(c), regulators must adopt approaches that ensure standards of competence are maintained across the profession(s). In doing so, regulators should consider a range of measures including:
- a. Effective communication and engagement with the profession(s) to draw attention to key risks and areas where competence may need to be improved.
  - b. The promotion of reflective practice and use of feedback, including in pre-authorisation education and training, to identify learning and development needs.
  - c. Specifying training, learning and development requirements (including mandatory requirements).
  - d. Competence assessments, for example, observation or examinations.
  - e. Reaccreditation models (i.e. requiring periodic proof of competence to maintain a practising certificate).
28. The LSB expects regulators to demonstrate that they have given consideration to the measures set out in paragraph 27 and taken evidence-based decisions on which of these measures are appropriate to adopt.
29. Where a regulator has determined that any of the measures identified are not appropriate, the LSB expects the regulator to demonstrate why and set out what alternative measures it has adopted to meet outcome 13(c).

### Taking remedial action in response to competence issues

30. In pursuing outcome 13(d), regulators must develop an approach that provides for appropriate remedial action to be taken to address competence

issues. Remedial action in this context means activities intended to improve or correct competence issues.

31. Remedial action must be designed to support authorised persons to improve their competence. It could include, but is not limited to, requiring a period of supervised and/or restricted practice, or requiring specific training.
32. Regulators must provide transparency of their approach and clearly set out the process for when and how they will take remedial action. In doing so, regulators should consider:
  - a. What evidence they will rely on to verify the competence issue.
  - b. What factors they will use to determine that remedial action is suitable to address the competence issue, including reference to any aggravating or mitigating factors.
  - c. What factors they will use to determine the most appropriate remedial action.
  - d. How they will follow up the competence issue to prevent recurrence.
33. The LSB expects regulators to demonstrate that they have given consideration to the approaches set out in paragraph 32 and taken evidence-based decisions on which of these approaches are appropriate for those that they regulate.
34. Where a regulator has determined that any of the elements identified are not appropriate, the LSB expects the regulator to demonstrate why and set out what alternative elements it has adopted to meet outcome 13(d).