RESPONSE OF THE CHANCERY BAR ASSOCIATION

To the LSB Consultation regarding Competence

The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of some 1,350 members handling the full breadth of Chancery legal work at all levels of seniority, both in London and throughout England and Wales. It is recognized by the Bar Council as a Specialist Bar Association. Chancery work is that which was traditionally dealt with the Chancery Division of the High Court of Justice but, from 2 October 2017 has been dealt with principally by the Business and Property Courts ("B&PCs"), which sit in London, and in regional centres outside London. The B&PCs attract high profile, complex and, increasingly, international disputes. Our members offer specialist expertise in advocacy, mediation and advisory work including across the whole spectrum of company, financial, property and business law. As advocates, members are instructed in all courts in England and Wales, as well as abroad. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

Introduction

1. We wholeheartedly agree that consumers should be able to trust that legal professionals are competent to provide good quality legal services.

2. We recognise that the LSB's role is to ensure that *all* of the approved regulators and regulatory bodies over which the LSB has oversight promote competence amongst those particular groups of legal professionals for which they are each responsible. Levels of competence may differ between legal professions and considerations which are applicable to one profession may not be applicable to others. We acknowledge that Chancery barristers represent a small fraction of the professionals within the LSB's purview, but we consider that the Statement of Policy must permit the Bar Standards Board sufficient flexibility to implement only such competency assessments and processes as are relevant to us.

3. We note that one of the "*Better Regulation Principles*" referred to in paragraph 6 of the Draft Statement of Policy is that regulatory activities should be "*targeted only at cases in which action is needed.*" We do not believe there is any evidence suggesting that action is needed

to improve the competence of members of the ChBA.

4. The standard of legal services provided by members is consistently very high. Standards are maintained by the comprehensive programme of education and training resources provided by the ChBA, which has a consistent record of high attendance by members. The programme has evolved in step with changes to the regulatory environment and changes to the practice and procedure of the Courts. By way of example, the programme includes:

   (1) An Annual Conference, normally held over a Friday afternoon and Saturday morning each January, regularly attended by around 200 members of the ChBA.

   (2) A shorter summer conference, primarily aimed at more junior members of the association, regularly attended by around 100 members.

   (3) A series of around 7 or 8 seminars every year, normally once a month and now regularly online (or hybrid), with 50 to 100 attendees.

   (4) Additional seminars for new practitioners.

   (5) An annual lecture given by a senior member of the judiciary.

5. Moreover, in the field of Chancery work, most barristers are generally instructed by solicitors or other professionals who are well able to determine their own requirements and to assess the competency of those they instruct. An incompetent Chancery barrister would quickly find it very difficult to obtain instructions. Market forces are the best guarantee of competence in our field. The current risks to consumers of poor service from Chancery barristers are negligible.

6. Indeed, an increased regulatory burden on busy self-employed barristers is likely to result in increased fees being charged, to the detriment of consumers. It is unrealistic to suggest in paragraph 112 of the consultation paper that consumers would be willing to pay more in order to obtain a greater assurance of the high quality of the service. The evidence suggests that consumers already find the costs of litigation too high.

7. Whatever problems may exist in other areas, we are against a Statement of Policy which

could force the BSB to introduce time-consuming assessment processes for Chancery barristers. The administrative burden on the BSB and on barristers would be out of all proportion to any perceived risk to consumers. Our responses to the questions below should be read with this in mind.

Q1. Do you agree with the proposed outcomes?

8. We agree that regulators should set standards of competence to be met at the point of authorisation and throughout a career. We agree that regulators need to assess and understand the levels of competence within the professions they regulate, *but* the regularity with which they need to do so, and the means by which they do so, should be adapted to suit the nature of the profession in question. Where there are limited risks of incompetence, such as in relation to the Chancery bar, assessment does not need to involve frequent or laborious examinations of each individual's performance.

9. The language of "*interventions*" is, we believe, misplaced. It suggests that there is something wrong and implies interference with a practitioner's business. The choice of mechanism by which competency should be assessed is a matter for each regulator and does not need to be intrusive to be effective. We agree that suitable remedial action needs to be taken when standards of competence are not met, but we believe that there is no need to interfere with the system already put in place by the Bar Standards Board.

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?

10. Yes, but it should not follow that new measures need to be introduced.

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))?

11. Yes, this is critical. We believe the BSB has already done this.

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

12. Not applicable; but we are against attempting to define shared competencies. The core work done by each of the professions is different from the others.

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)?

13. We agree with these areas at a very high level of generality.

14. We are sceptical as to whether it is possible to prescribe areas of knowledge applicable to Chancery practice. Chancery practice covers many varied specialisms (e.g. trusts, probate, tax, insolvency, company law, commercial law, banking and finance) and many Chancery practitioners are specialists in one or two of these areas. It is unrealistic to expect that every practitioner will require the same legal knowledge, or even the same knowledge of Court procedure, which will depend on the type of work undertaken.

15. We also doubt whether it is possible to define standards of written or oral advocacy. Different approaches are required for different cases and a technique which is effective in one situation may be less effective in others.

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?

16. We take issue with the word "*routinely*." As explained above, the regularity with which it is necessary to collect information must be adapted to suit the nature of the work done. We

agree with the comment in paragraph 23 of the Draft Statement of Policy that regulators should consider "*what is an appropriate and proportionate frequency to collect relevant information.*" The appropriate frequency will depend on what information is being collected: if it is information on regulatory returns, annual collection may be appropriate. Beyond this, where there are limited risks of incompetence, such as in relation to the Chancery bar, assessment does not need to involve frequent examinations of each individual's performance. We consider that it should be open to a regulator to conclude that more intrusive information gathering (such as spot checks, file reviews and feedback) is not appropriate at all.

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)?

17. We agree that it is appropriate to collect information from regulatory returns and first-tier complaints.

18. In regard to spot checks, audits, file reviews or equivalent checks, we query how such checks would work in relation to Chancery barristers. It is, of course, normally possible for anyone to observe a barrister in Court, although it would need to be borne in mind that many Chancery practitioners do not go to Court every day and that some hearings are short, or deal with procedural matters. It would not, for example, be possible to carry out a spot check by turning up at barrister X's chambers on a particular day and expecting to see them in Court, let alone to see them cross-examining or conducting a trial. It is not clear what else could be checked on the spot. Turning up unannounced to ask a Chancery barrister about a particular area of law or procedure would be no test of competence: that barrister might never encounter the particular area in practice, or might perfectly properly need to look it up (which is what happens all the time in the real world).

19. So far as premises audits and file reviews are concerned, we query what this would achieve in the context of a Chancery barrister. Chancery barristers are generally not dealing with

individual cases on a day-to-day basis, so there is no "*file*" to review in the way which might be applicable to a solicitor. Merely reading the papers on a barrister's desk (or more likely in an email inbox) would say very little about whether that barrister was competent (and might raise issues of client confidentiality and GDPR compliance). There might be an Opinion or other written work-product, but it might require a detailed knowledge of the papers before its competence could be assessed. Moreover, the technical nature of the subject matter might make it very difficult for a reviewer who had no experience in the particular field to make a reliable assessment as to competence.

20. In the context of Chancery litigation, feedback is an unreliable indicator of competence. Chancery barristers are (normally) self-employed and so have no line-manager or subordinates who can provide an assessment (and we suggest this is one of many reasons why comparisons with other professions are of limited value). So far as clients are concerned, it is the nature of the job that they are frequently pleased with the service they have received when they win, and disappointed with it when they lose, yet almost every case is bound to have at least one loser. Even solicitors, as opposed to lay clients, can find it genuinely difficult to disentangle the performance of an advocate from the merits of the case and the approach of the judge. Opponents or judges can also find it genuinely difficult to distinguish the performance of the advocate from the demands of the case. Clients sometimes insist on points being taken contrary to advice, but an opponent or judge will not know that. For these reasons, we believe regulators should exercise considerable caution before relying on feedback as an indicator of incompetence.

21. We agree that information from agencies such as disciplinary tribunals and Legal Ombudsmen is important. By its nature, however, such information will only cover cases in which misconduct (not necessarily including incompetence) has already occurred.

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

22. No.

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)?

23. Yes. It is obviously right that regulators should focus on areas where there are clear risks of the kind described.

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

24. As mentioned above, in our view the word "*interventions*" sets the wrong tone in a Statement of Policy. It carries a suggestion that a professional has already done something wrong and implies interference with the professional's business affairs.

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)?

25. We agree that communication and engagement with the profession is important.

26. We agree with the promotion of "*reflective practice*" and consider that the current CPD system put in place by the Bar Standards Board already achieves this in relation to Chancery barristers. We have significant reservations about feedback, which we have outlined above.

27. Provided the amount of time required is not excessive, we agree with training, learning and development requirements and, as discussed above, the ChBA already provides a comprehensive programme to assist practitioners with this.

28. We do not understand how competence assessments would work in relation to Chancery practice. There are relatively few hearings in the Chancery field which could be described as routine, and only a small number of practitioners attend such hearings, often in the early years of practice. So, the observation of one barrister's performance in Court would necessarily involve very different circumstances from observation of another barrister's performance in a different case. It is hard to see how competence could be assessed with

any kind of consistency between different barristers. Likewise, it would be impossible to set examinations in numerous different areas of specialism: the time and expertise needed to devise the questions and mark the answers would be prohibitive for most regulators, to say nothing of the time barristers would then need to devote to preparation.

29. The problem with reaccreditation is that either it would involve feedback, observation and examination, with all the problems outlined above, or else it would largely be a tick-box exercise, which would achieve little.

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

30. No. For the reasons already given, we do not believe there is any evidence to support a change from the existing regime as far as Chancery barristers are concerned.

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

31. We consider that the BSB already has a reliable approach to remedial action. Nothing needs to be developed.

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?

32. Yes, obviously.

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

33. No.

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

34. Yes, obviously.

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

35. As already discussed, we do not consider there is a need for the BSB to take any action, at least in relation to Chancery barristers.

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.

36. No, because in our view nothing needs to be done.

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?

37. No.

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

38. No.

Q21. Do you have any further comments?

39. No.

Andrew Twigger QC
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