LEGAL SERVICES BOARD

Meeting: Legal Services Board

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Title: Ongoing Competence

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Status: Official

Purpose of the paper

1. This paper provides an update on the regulators' progress in meeting the outcomes in the ongoing competence policy statement.

Recommendations

2. The Board is invited to **note** and **discuss** the analysis of regulators' progress.

Background

3. In July 2022, we issued a statement of policy on ongoing competence.

4. The Board previously identified ongoing competence as a priority policy objective, recognising that consumers should be able to trust that legal professionals have the necessary skills, knowledge and attributes to provide good quality legal services and that they are kept up to date and relevant over time.

5. Ensuring ongoing competence is an ambition in our strategy for the legal sector, where we identified one of the challenges that regulation can help to address was to ensure high-quality legal services and strong professional ethics. Our work here is designed to advance the regulatory objectives, including protecting and promoting the public interest, and the interests of consumers.

6. The policy statement followed a significant programme of work and collaborative policy development between 2019 and 2022. We first undertook a wide call for evidence about existing arrangements for assuring ongoing competence both in the legal services sector, and in other professions and other jurisdictions.

7. We commissioned academic and consumer research to inform our policy development. Our consumer research, which included both qualitative and quantitive activities with members of the public, found that there was a gap

between public expectations and what regulation currently requires to ensure legal professionals remain competent throughout their careers.

8. We carefully developed our policy proposals in regular discussion with stakeholders, including professional bodies and individual practitioners, consumer groups, academics, approved regulators and their regulatory bodies. Through ongoing engagement during the policy development phase, we built and maintained a wide network of interested stakeholders whose expertise we drew on to inform our work.

9. We consulted on a draft policy statement (December 2021 to March 2022) and received 43 responses (a high number compared with other LSB consultations). Some stakeholders queried what we expected the regulators to implement, and what they were expected to consider, and how to justify such decisions. When we published our response to the consultation and final policy statement, we clarified in our response the LSB's approach on these points, taking on board the consultation responses and stakeholder feedback.

10. The policy statement sets out a high-level framework that is designed to be flexible and permissive, so that regulators are able to put in place arrangements that are most suited to their regulated communities, while also meeting the four outcomes of the policy – that regulators should:

    - Have competence frameworks (or similar) that set the standards of competence that those they regulate should meet at the point of authoristion and throughout their careers.

    - Understand the overall level of competence across the profession(s) they regulate, drawing on insight and intelligence, and identify areas where competence may need to be improved.

    - Put in place upstream measures to ensure standards of competence are maintained across the profession(s) they regulate. This should be to directly address areas of harm or risk, and also to mitigate the erosion of competence (either over time or due to environmental changes e.g. consumer preferences).

    - Ensure that suitable remedial action is undertaken where appropriate, as part of a disciplinary process used when standards of competence are not met by individual authorised persons.

11. When we issued the statement, we said we expected regulators to have met the four outcomes by January 2024 (i.e. within 18 months of the statement being issued), with progress updates (and action plans) to be provided by January 2023. All regulators provided updates and actions plans as requested and we welcome that the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB) published these proactively, providing greater accountability to consumers and stakeholders. All the submissions from regulators will be published alongside this paper.

Analysis of regulators' progress

Overall progress

12. We are pleased with the assurance provided and consider the regulators are making good progress toward meeting all of the outcomes of the policy statement. Some have grasped the importance of ongoing competence as an issue that needs properly reflecting across their whole regulatory approach, e.g. throughout supervision and monitoring practices.

13. Some regulators have already taken steps and made clear and meaningful commitments to improved arrangements for ensuring ongoing competence. It is encouraging to see some take a logical approach of building up their evidence-base (in meeting outcome b), which will then inform the interventions undertaken (in meeting outcomes c and d).

14. The process of gathering specific updates from regulators during the implementation period has been effective at providing us a full and up-to-date picture of progress. We will seek feedback from the regulators on the process. We are conscious of the need to be proportionate and note that the information provided should mirror the assurance scrutinised by regulators' own Boards.

15. We provided an optional template, which helped identify the specific information and assurance we were seeking. Three regulators took up our offer of a meeting ahead of the January 2023 deadline, where we provided feedback on a draft progress update. This was a useful step, and we can see improvements in their finalised submissions.

Outcome A) Setting standards

16. Some regulators already have competence frameworks (or equivalent) in place that apply throughout authorised persons' practice, not just at the point of qualification. Some have committed to reviewing their frameworks: the Costs Lawyer Standards Board (CLSB) plans to ensure its framework applies throughout its authorised persons' careers, and the Council for Licensed Conveyancers (CLC) is developing a new Code of Conduct including ethical principles.

17. All regulators told us that they have robust arrangements in place to ensure competence at the point of qualification, including setting standards for entry into the profession. This is helpful context, but it is not sufficient to ensure competence *throughout* all stages of authorised persons' careers.

18. Relevant to our concern above about not just focusing on competence at the early career stage, we consider that regulators should be alert to the potential for competence to naturally degrade over time, given developments in the sector and wider society. Consequently, regulators should consider what upstream measures or safeguards might be needed to mitigate such risks.

Outcome B) Determining levels of competence

19. This is the area where we have seen the most developed proposals so far. Most regulators have set out intentions to adapt or improve their current data gathering, by gathering more information and/or through more sophisticated analysis of existing information. A more comprehensive picture should then inform what additional or different interventions are needed to ensure competence for their regulated community.

20. There are various types of information cited including information on performance gathered through annual declarations and practising certificate renewals, and from thematic and more in-depth reviews. Other specific data points include reports of incompetence, LeO complaints and case outcomes, first-tier complaints, PII claims, feedback reports, training records, and data gathered from other public agencies.

21. The SRA is intending to publish a first assessment of levels of competence among its regulated community, based on its data and information-gathering and analysis. Alongside the assessment, the SRA will set out areas of risk it has identified and the likely impact of those risks. It intends to then use this as a baseline, and publish annual updates so it can track changes in the sector and the impact of any new measures.

22. The BSB is developing a new data strategy to improve how it gathers and handles intelligence about its regulated community. This includes reviews of its enforcement and supervision procedures to ensure that relevant intelligence is captured and used to inform policy.

23. CILEx Regulation (CRL) has developed risk matrices, again based on a range of data and analysis, which determine a specific risk profile score for each regulated individual. This score is based on information such as the type of organisation the individual works in, their level of supervision, the area of law and type of client, and any prior conduct record.

24. Other regulators are adopting their own methods, but we consider these three approaches in particular are promising and could be achievable at scale for the smaller regulators. This might be an area of collaboration, which is something we expect to see more of across policy development on ongoing competence.

25. Where regulators are gathering new and useful information about competence in the legal services sector, we would encourage them to share this widely to inform understanding and policy. As we undertake increased market analysis in this new business plan year (2023/24), this is an example of where we could draw on regulators' insight and analysis, rather than duplicate information-gathering ourselves.

Outcome C) Making appropriate interventions

26. With the evident progress under outcome B, this indicates that regulators are pursuing risk-based and upstream regulation, which should identify issues as they arise, and allow regulators to intervene appropriately and proportionately.

27. For example, the Faculty Office (FO) said that it will consider a review of the post-qualification environment in areas historically identified as higher-risk (conveyancing, wills, probate and administration). The SRA has said it will look at how a sample of firms ensures its solicitors and other employees are competent. It will then use this to pilot a risk-based approach to identifying and following up with firms, where data shows they may not be meeting competence standards.

28. CRL already has a limited reaccreditation programme for its advocates. It now intends to review other sectors and consult with its regulated community this year on a wider reaccreditation model for all its authorised persons, on a rolling five-year cycle, targeted according to the risk profile information.

29. All regulators have some form of Continuing Professional Development (CPD) (or equivalent) requirement for their regulated community, with many using an outcomes-focused model. Some regulators have committed to reviewing their current CPD arrangements in light of the policy statement. The Institute of Chartered Accountants in England and Wales (ICAEW) and the Intellectual Property Regulation Board (IPReg) are currently implementing significant changes to their arrangements, which we approved through our statutory decisions process in recent months. These regulators took account of the statement while developing their proposals, and in approving them, we considered that the proposals aligned with the outcomes in the statement.

30. We appreciate that CPD can be an important tool that supports meaningful developments of professionals' skills and abilities. In isolation, it is not a guarantee or determination of competence however, and for it to be most effective, we consider CPD requirements need to be supported by and closely linked to a competence framework and any other necessary interventions. This means that individuals and firms can identify their own learning and development needs according to that framework. Likewise when remedial activity is necessary, this can be more easily targeted according to those learning and development needs.

<u>Outcome D) Remediation</u>

31. Most regulators have told us they already have the necessary measures in place to allow them to take remedial action, i.e. they can impose measures that will support the individual profession to improve and maintain their competence, where it has been found lacking. Some regulators (SRA, CLSB) have committed to reviewing their guidance about when remedial action should be used.

32. Few specific examples or themes have been cited though for when remediation has been used. Similarly, when we undertook our call for evidence and policy development, we found few cases where this approach had been taken on a consistent basis. We have seen little evidence of when remedial action has been typically used, for what purpose and whether it was effective, e.g. in ensuring that professionals gained insight about what had gone wrong and how to prevent this again. We expect to see more evidence of this in future, if regulators consider that their current arrangements here are sufficient.

33. Several regulators told us that they are considering an increased focus on entities, firms and employers, arguing that as they are closer to individual practitioners, they can therefore more easily identify issues, areas of risk and necessary steps to assure competence. For example, the BSB is developing a clearer regulatory framework for chambers and employers, which will include an expectation that they should track the competence of members/employees and take steps to address issues when they arise.

Implementation

34. As expected, given their existing frameworks and arrangements, the regulators are at different stages of meeting the four outcomes. Most regulators have told us they expect to meet the outcomes in the statement by our expected deadline of 31 January 2024. The BSB and IPReg have said they will do so later in 2024. The FO is has said that it already meets all the outcomes.

35. Based on the assurance submitted, and the scale of the measures planned, we consider that full implementation by the BSB and IPReg later in 2024 is acceptable – provided that we continue to see progress throughout in the interim.

36. We will continue to monitor progress and provide feedback to each regulator on where we want further assurance of their chosen approach in future. In particular, we intend to focus our efforts on the FO and the CLC, as the assurance provided from these regulators was more limited.

37. From all regulators, we want to see more detail about how they will monitor and evaluate any changes they implement to take account of the policy statement. We want to have assurance that any new measures can be assessed for their effectiveness.

38. Our primary tool for monitoring and assessing regulators' delivery against the policy statement is the revised regulatory performance framework. Characteristic 16 under Standard 3 in the revised framework reflects the outcomes of the policy statement, and regulators will need to provide assurance against this characteristic in future performance assessments.

39. This exercise has provided much useful insight into the regulators' work beyond ongoing competence, including on their supervisory and enforcement functions. To avoid duplication and make best use of our existing evidence, we will ensure our analysis feeds into other ongoing work, including on professional ethics, the enforcement review, and the reviews of rules and guidance on first-tier complaints and education and training.

Next steps

40. We will provide specific feedback to each of the regulators via relationship managers and other engagement.

41. We will request a further update on progress when we request information for the regulatory performance assessments this summer. For those regulators where we require additional assurance, we will be more targeted in these requests.

42. Subject to feedback from stakeholders on the process, we intend to adopt this approach with monitoring progress against other policy statements, including the consumer empowerment statement issued in April 2022.

Risks and mitigations	
Financial:	N/A
Legal:	Legal advice will be sought as needed by policy team.
Communications and engagement:	We will continue to work closely with regulators on implementation and engage with our wide network of stakeholders with an interest in ongoing competence.
Equality and diversity:	Where regulators make applications for new arrangements relating to ongoing competence, our rules expect these will include assessments of the impact of proposals on persons with protected characteristics, and assessments of the impact of proposals on regulated persons, consumers and the public interest.
Resource:	N/A
Environmental:	N/A

Freedom of Information Act 2000 (FoI)		
Para ref	**FoI exemption and summary**	**Expires**
N/A	N/A	N/A