

**Meeting:** Legal Services Board

**Date:** 20 October 2020

**Item:** Paper (20) 48

**Title:** Emerging themes in ongoing competence

**Author / Introduced by:** Margie McCrone

**Status:** Official

### **Introduction: Purpose of the paper / Issue**

1. This paper shares emerging themes from our analysis of information gathered during the recent call for evidence on ongoing competence. It also sets out the immediate next steps for our work in this area.

### **Recommendations**

2. The Board is asked to consider the emerging themes and provide feedback. This will inform a report on our findings that will be published in December 2020, forming the basis for further engagement with stakeholders.

### **Background**

3. The ongoing competence project aims to understand if legal regulators have appropriate frameworks in place to ensure that the professionals they regulate remain competent throughout their careers.
4. The scope of work was discussed by the Board in June 2019. Our focus since then has been on building a strong evidence base, which has included gathering information about current approaches to competence assurance in the legal services sector and other sectors. Our call for evidence was completed in the first six months of 2020, resulting in:
  - 50 targeted stakeholder meetings
  - 30+ formal responses to the call for evidence
  - 50+ additional datasets, research and other relevant information shared with us or sourced in desk research.
5. We have had positive engagement with many stakeholders so far, including:
  - the regulatory bodies and approved regulators
  - regulators in other sectors e.g. General Medical Council, Civil Aviation Authority

- government agencies e.g. HM Courts and Tribunals Service
  - consumer groups e.g. Citizens Advice, Law Centres Network
  - complaints bodies and tribunals e.g. Legal Ombudsman (LeO), Solicitors Disciplinary Tribunal (SDT)
  - representative bodies e.g. specialist bar associations
  - accreditation providers e.g. The Law Society (TLS), STEP.
6. We have discussed the emerging themes with the Legal Services Consumer Panel (LSCP) and shared information with our Board leads in advance of presenting this paper.

### Emerging themes

7. In this paper, we set out some of the points raised during our engagement across four themes:
- **Consumers' experience of legal services**
  - **Areas of increased risk for consumers**
  - **Existing competence assurance tools used in the sector**
  - **Potential new approaches to ongoing competence.**
8. Our call for evidence has gathered views from a wide range of sources within and outside of the legal services sector. In light of the responses, we consider that there is value in developing proposals to test with stakeholders via further engagement. There is nothing in our evidence base to suggest that we should not be considering if additional competence checks are required for legal professionals.
9. Stakeholders agreed that the ongoing competence of legal professionals was vital to ensure consumers' continued trust and confidence in the sector. This was cited as a key potential benefit of additional competence checks, as was avoiding harm to consumers from poor quality legal services.
10. There was a view that more checks and balances may be needed to prove that legal professionals have the necessary and up to date skills, knowledge and attributes to provide good quality legal services. As a result, there is some support for:
- **sector-wide additional competence checks** to provide more meaningful assurance that the sector is meeting the standards of minimum competence embedded in the regulators' existing rules
  - **targeted additional competence checks** because there is evidence of an increased risk of harm to consumers in some areas.
11. In many cases, stakeholders could point to assurance tools currently used within and outside of the legal services sector that might be relevant to our work. We are still developing our proposals, so it would be premature to set out any conclusions in this paper. However, the fact that many common points were raised in submissions, gives us confidence to take our work forward. This will include consideration of how to take a proportionate approach and balance the benefits, costs and risks of any intervention.

12. It is important to note that the paper is not representative of all views shared, nor does it weight the findings so far. More detail from the responses is set out in Annex A.
13. Further analysis will follow in the report on our findings, which will include a summary of submissions and indicate where we think there is scope for policy change, subject to further engagement and future consultation. We are also commissioning research into how ongoing competence is monitored and assessed in other jurisdictions to expand our knowledge in this area, which should be available in early 2021.

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

*Please refer to [Annex A](#) for more information*

- consumers find it difficult to assess the quality of legal services
  - guidance is not provided to consumers about what they should be able to expect in terms of quality
  - consumer feedback is important for ongoing competence but not routinely sought or considered.
14. Research from the LSCP (2010, 2020) has found that consumers assume legal professionals are and remain competent. The LSB Public Panel was recently asked about priorities for our resources and ongoing competence was an area where consumers thought we should target our work. One participant commented, 'I am still rather surprised that legal professionals do not undertake any formal checks...Without a competent legal professional, everything that follows will become an issue'.
  15. Responding to the call for evidence, stakeholders said that consumers need more information about the competence of their legal professional. This is relevant to our work on quality indicators and improving consumer engagement e.g. through Legal Choices and public legal education initiatives.
  16. The call for evidence identified some consumer-friendly explanations of competence standards. Some stakeholders suggested that there could be a shared framework of core competencies for all legal professionals that was accessible to consumers. We were also told that consumer feedback is important and should be used as a valuable tool to inform training and development.

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

*Please refer to [Annex A](#) for more information*

- stakeholders recognised that some consumers are at an increased risk of harm due to their vulnerability
- quality concerns in some practice areas were identified
- while little objective data on the quality of legal services is collected or published, a lack of 'hard' evidence should not deter intervention if there is harm or risk of harm to consumers.

17. Stakeholders made distinctions between sophisticated consumers on the one hand, and vulnerable consumers or consumers lacking legal confidence on the other, and their ability to make informed decisions about quality. This is important in the context of areas of increased risk such as immigration/asylum, which was by far the most frequently cited practice area of concern.
18. Concerns about some criminal advocacy were also frequently cited and the risks to consumers, including potential miscarriages of justice and further suffering for victims of crime are well established. Further, stakeholders recognised the inherent vulnerability of those in youth or coroner's courts.
19. Conveyancing is an area where there is significant evidence (consumer complaints, insurance claims and requisitions to HM Land Registry) of some harm to consumers. This is an example where consumers might not be vulnerable but they are at risk of experiencing poor quality legal services.

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

*Please refer to [Annex A](#) for more information*

- the sector, not unlike other sectors, tends to rely on self-assessed continuing professional development (CPD) for ongoing competence
  - other assurance methods have been adopted and often with positive outcomes
  - these additional competence checks have limited coverage, are often informal and/or are not necessarily targeted to risks.
20. All regulatory bodies currently have rules requiring legal professionals to take part in a CPD scheme, but limitations with CPD were recognised by many stakeholders.
  21. In some cases, additional competence checks have been adopted, including accreditation schemes, advocacy assessments, peer reviews, feedback, specialist training programmes and assurance visits (various submissions).
  22. Additional checks tend to be used in isolation or variably, leaving clear gaps in the framework. For example, regulators are not proactively or routinely gathering intelligence about the competence of individuals and firms, and when they do, there is limited recourse available. This is unusual compared with other sectors such as healthcare and aviation where remediation is possible without resorting to disciplinary action.

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

*Please refer to [Annex A](#) for more information*

- there was considerable support for a new approach(es) to assuring ongoing competence
- stakeholders focused on gathering feedback, remediation, mandatory training and improvements to existing CPD models.

23. Gathering feedback from multiple sources (consumers, peers, supervisors, employers and judges) was cited frequently as being valuable, particularly if it were linked with existing tools such as CPD outcomes. We note that there is a reluctance from some to provide formal feedback for fear of ‘ending careers’, which links to the current lack of effective remediation.
24. This could be addressed with stakeholders in further engagement and through learning from other sectors and jurisdictions where there is an established culture for providing feedback. We note that we have engaged with regulators in healthcare (doctors, nurses and midwives, dentistry and social care), aviation, financial services, education and engineering, which has provided valuable insights into how feedback and reflective practice can be used to support ongoing competence.
25. Stakeholders also commented on the need for mandatory training in certain subjects e.g. in ethics, or specialist training in practice areas that pose increased risk to vulnerable consumers such as youth and criminal advocacy. This is an area where opportunities to work together could be explored, as was the case with the cross-sector development of vulnerable witness training.

### Conclusion and next steps:

26. Following the Board’s consideration, we will finalise and publish the report analysing our emerging findings. These will then be tested with stakeholders in targeted engagement including workshops and roundtable discussions. We also plan to make use of the LSB Public Panel in early 2021. This engagement will inform the development of any potential policy options, which would be subject to formal consultation.

### Annexes

#### Annex A – More information on emerging themes

<b>Risks and mitigations</b>	
<b>Financial:</b>	N/A
<b>Legal:</b>	N/A
<b>Comms and engagement:</b>	The LSB will continue to engage with stakeholders to inform whether and what new approach to assuring ongoing competence is needed.
<b>Resource:</b>	N/A

<b>Freedom of Information Act 2000 (Fol)</b>		
<b>Para ref</b>	<b>Fol exemption and summary</b>	<b>Expires</b>

N/A	N/A	N/A
-----	-----	-----

## Annex A

<b>Consumers' experience of the quality of legal services</b>	
Guidance for consumers	<ul style="list-style-type: none"> <li>• Office of the Immigration Services Commissioner (OISC) and the Professional Standards Authority provide guidance on competence to consumers</li> <li>• The Council of the Inns of Court submitted a version of the BSB's Professional Statement for Barristers that it drafted for consumers.</li> </ul>
Shared competence framework	<p>Various stakeholders commented on what are core competencies for legal professionals:</p> <ul style="list-style-type: none"> <li>• competence is dynamic and what it means to be competent can change throughout an individual's career, or depending on their practice area</li> <li>• some competencies are not currently (explicitly) provided for in regulators' standards but may need to be e.g. emotional and technological competence.</li> </ul>
Consumer feedback	<p>Feedback from consumers is sometimes captured through:</p> <ul style="list-style-type: none"> <li>• Chambers</li> <li>• client testimonials or deal de-briefs</li> <li>• in 360-degree feedback used in some law firms.</li> </ul>

<b>Areas of increased risk to consumers</b>	
Immigration/asylum	<ul style="list-style-type: none"> <li>• LeO said it has seen <i>'people lose their homes, lose their jobs and being told to leave the UK, often separated from their families, through no fault of their own'</i> as a result of poor-quality advice</li> <li>• Law Centres Network provided an example of individuals who come to law centres having spent large sums of money only to be told that their cases are without merit</li> <li>• Legal Aid Agency (LAA) peer review data shows that the number of contracted providers for immigration/asylum scoring below three across five quality thresholds was over 30% in 2017/18.</li> </ul>
Criminal	<ul style="list-style-type: none"> <li>• stakeholders referred to research reports (Smedley 2010, Jeffrey 2014, IPCR 2018) that highlighted concerns with the quality of some advocates taking on cases beyond their competence</li> <li>• the ICPR report 'Judicial perceptions of the quality of criminal advocacy' noted that, <i>'the main and most explicit demand that our interviewees made of the regulators was that they should be more robust in</i></li> </ul>

	<i>responding to poor advocacy when alerted to problems by judges or if a new appraisal system were to be instituted.'</i>
Conveyancing	<ul style="list-style-type: none"> <li>• LeO said residential conveyancing is the area that attracts the highest volume of complaints, accounting for 25% of its complaints work</li> <li>• conveyancing (all types) attracted the highest number of claims according to 2016 SRA data on personal indemnity insurance claims. While this was a one-off piece of work, the SRA said it is likely to remain relevant</li> <li>• data from HM Land Registry shows the prevalence of avoidable errors made by legal professionals making requisitions.</li> </ul>

<b>Existing competence assurance tools in the legal services sector</b>	
CPD	<p>Many stakeholders commented on the limitations of CPD:</p> <ul style="list-style-type: none"> <li>• the absence of third-party verification means that there is no assurance that completing CPD ensures an individual remains competent</li> <li>• there is no mandatory training for specialists or those working in practice areas with increased risks to consumers</li> <li>• auditing of CPD is often focused on compliance with rules rather than the quality or relevance of learning.</li> </ul>
Accreditation schemes	<p>There are a number of accreditation schemes for individuals and firms currently available in the sector. One example is the Association of Personal Injury Lawyers, which requires proof of competence in five core areas to be provided on an ongoing basis to maintain status as an accredited practitioner. Evidence to prove competence includes accredited CPD and relevant information from training logs, caseloads and files.</p>
Specialist training	<p>An example of existing training is the vulnerable witness training that was developed by the Bar Council, Inns of Court College of Advocacy, Circuits, Inns, CPS and TLS. This training is encouraged for criminal and family law advocates, addressing an identified area of concern that emerged some years ago around the treatment of vulnerable witnesses, particularly in rape trials.</p>
Advocacy assessments	<p>The CPS regularly checks the competence of its in-house advocates, comprising two annual advocacy assessments, one of which should relate to a contested case. Assessments are conducted either by a line manager or an external assessor and include file reviews and observation.</p>
Assurance visits	<p>Assurance visits are used by a number of regulators to identify and address competence issues through regular</p>

	<p>monitoring of premises and file reviews. Examples include the models used by:</p> <ul style="list-style-type: none"> <li>• LAA</li> <li>• OISC</li> <li>• Office of the Public Guardian (OPG): <ul style="list-style-type: none"> <li>○ OPG uses feedback from third parties to inform views on the quality of advice provided by deputies.</li> </ul> </li> </ul>
Peer review	<p>Peer review schemes have been adopted in some places. This includes:</p> <ul style="list-style-type: none"> <li>• LAA</li> <li>• Netherlands Bar: <ul style="list-style-type: none"> <li>○ advocates are required to take part in an annual quality assessment, requiring them to gather structured feedback. This could be through a peer review, which will include file reviews, discussion on case handling and result in a report on an individual's performance covering successes, challenges and opportunities for improvement.</li> </ul> </li> </ul>

<b>Potential new approaches to assuring ongoing competence</b>	
Feedback	Feedback is currently collected via Circuits, some judges or in-house appraisal models, but it is informal and not (necessarily) joined up with current competence assurance tools e.g. CPD outcomes.
Remediation	Remediation e.g. support for additional training or supervision is limited in the sector, which is unusual compared with other sectors. In healthcare, for example, the model of 'fitness to practise' is focused on keeping practitioners safe to practice for the protection of the public.
Training	The LSCP referred to the recent recommendation from the Equality and Human Rights Commission that training in disability awareness should be mandatory for criminal advocates and said this should extend to other areas too. Just for Kids Law and Transform Justice said specialist training is needed in youth and criminal advocacy.
CPD	<p>Possible changes to CPD models recommended by stakeholders include:</p> <ul style="list-style-type: none"> <li>• more targeted, risk-based auditing of CPD records</li> <li>• mandatory CPD modules</li> <li>• being clearer on the expectations of firms/employers</li> <li>• improving understanding of the benefits of reflective practice.</li> </ul>