



LSB consultation on policy statement on ongoing competence

Response of the Bar Standards Board

Introduction

The Bar Standards Board (BSB) welcomes the focus that the LSB is giving to the on-going competence of legal professionals. It is a core responsibility of any regulator to set and maintain the standards of its regulated community. The BSB has an active programme of work to achieve this aim; taking a risk and evidence-based approach to introduce targeted and proportionate interventions. It is important that each front-line regulator is given the flexibility under any oversight by the LSB to develop its own approach to assuring ongoing competence. The proposed LSB outcomes should facilitate greater consistency of approach across legal regulators. They should not though be used to advance across sector regulation unless there is compelling evidence that it is necessary.

Consultation questions

Q1. Do you agree with the proposed outcomes?

In broad terms, yes. The BSB believes that the proposed outcomes cover the right areas that a regulator should be considering when ensuring the ongoing competence of its regulated community. We believe though that the LSB will need to take a flexible approach to assessing regulatory performance against these outcomes by each regulator. A one size fits all approach would be inconsistent with the differing nature of risks that arise with each profession within the legal sector. It must, within the scope of the LSB outcomes, be for the relevant regulator to reach its own conclusions, based on evidence and risk, on what regulatory interventions are necessary and proportionate. The LSB should assess how effective each regulator has been in meeting that objective but should not prescribe how to meet these 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?

Yes. But regulators should not be required to explain why a particular regulatory measure is not necessary, but instead why the regulatory interventions they have introduced respond to the evidence they have gathered and the risk analysis they have carried out. For example, if a regulator decides to introduce an enhanced approach to CPD, it should be expected to be able to justify why this is an appropriate and proportionate response and how it is expected to address a particular risk to professional standards. It should not be expected to say why all the other measures the LSB cites in its policy statement that might achieve a similar aim as enhanced CPD have not been adopted. This is likely to lead to considerable additional time and resource at the expense of focussing on implementing the regulator's preferred approach.

Equally, regulators should be free not to intervene where another organisation is effective in maintaining standards or where the market is acting to filter out poor practice. Regulatory intervention should be driven by evidence collected from a range of sources. Absence of evidence should not, of itself, be a justification for regulation.

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))?

Yes. The BSB has the Professional Statement for barristers which sets the minimum standards expected of barristers when they join the profession. This is complemented by specialist competency statements in areas of practice where there is evidence of a need for further regulatory intervention and additional clarity on our expectations of standards of practice. For example, we have published competency statements for barristers practising in the Youth Courts and in the Coroners Courts.

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

The BSB is not in favour of core competences for all authorised persons. Whilst there is some common ground in the competences required across the legal sector, the nature of the roles of legal professionals differs to such an extent that the wording of any shared competences would need to be drafted so broadly that they would have limited practical value. We therefore support the requirement that each regulator should develop its own core competences. That said, regulators should look for opportunities to collaborate with each other where the competency expectations across different professions are likely to be similar. For example, the BSB worked with CILEX and the SRA on preparing joint competences for barristers, solicitors and legal executives undertaking work in Coroners Courts.

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)?

Yes.

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?

Yes. Regulators need access to information from a range of sources on standards of practice both to evaluate the impact of any regulation introduced to address a deficiency in standards or to enable them to take informed decisions on where further regulation is needed.

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)?

Yes.

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

None at present

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)?

Yes. The BSB is already alert to risks that arise in areas of practice where the vulnerability of the consumer is likely to be greater. These are a factor in any risk assessment we might make when deciding what interventions, if any, we should make. It is important, when assessing vulnerability, that we engage with those who are vulnerable, to understand how that vulnerability manifests itself and to get a sense of what regulation would have the most positive impact. For example, when developing regulation to improve standards of practice in the Coroners Court, we spoke with bereaved families, to understand their experiences and to explore differing options for raising standards. The resulting competency framework and toolkit for practitioners were much improved by their involvement.

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

Yes, but with the qualification that any intervention must be proportionate and in response to evidence and risk analysis. Regulators should not introduce regulation merely because it operates in a different sector.

Regulators should consider, in deciding what interventions are proportionate, what assurance is available from other sources. In the case of barristers, we can take assurance from a range of sources: from the competitive nature of the market for barristers' services in many specialisms; from the assurance mechanisms of bulk purchasers of barristers' services, like the CPS; from the internal performance management arrangements of employers of barristers. Regulators should not duplicate these sources of assurance but rather concentrate on promoting better assurance where it is currently lacking.

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)?

Yes, these are the types of measures that the BSB has considered, and will continue to consider, when there is evidence that further regulation is needed. We do not though think that the LSB should prescribe a list of measures that regulators should be considering. Which regulatory response is appropriate and proportionate is a matter for the front line regulators, and it is beyond the LSB's remit to seek to influence regulators by specifying measures they should take into account. That is not to say that the LSB shouldn't give examples of possible measures, when to do so is helpful. But regulators should not be held to account for why they have not implemented measures suggested by the LSB – but instead should explain why measures they have introduced are proportionate, evidence and risk based and will have the desired impact on standards of practice.

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

As above, it is not for the LSB to set the measures that regulators should be considering.

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

We think that there is merit in a non-disciplinary process for addressing competency concerns. Enforcement action is a blunt tool and is not designed to deal with any underlying concerns about standards of practice. The BSB is interested therefore in exploring the development of a process of remediation but would wish to do so in partnership with the profession and others. We do not at present have a settled view on what is the most effective approach to remediation. There could, for example, be a role for Chambers or employers in supporting barristers where there is a need for improvement, within a framework set by the BSB. That support could range from providing access to training, to mentoring, with regulatory intervention reserved for where the framework isn't being applied or a barrister is not responding to the support put in place by Chambers or their employer. Such an approach would be consistent with the emphasis the BSB's new strategy places on the role of Chambers in maintaining standards at the Bar.

Any process for remediation (whether operated through the profession or the regulator) needs to be agile and have access to expertise to make assessments in competence. The BSB is alive to models of remedial practice used in other sectors and is interested in understanding how these work in practice and how effective they are in dealing with concerns about competence.

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?

Yes, the regulators should have the flexibility to take their own decisions on what regulatory response is appropriate based on a range of factors including those the LSB outlines. It is not for the LSB to seek to define those factors nor the types of outcomes from any remediation. Examples of both are helpful but the LSB should avoid prescription in setting the outcomes for front line regulation.

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

There may be, but it will be for each regulator to reach its own conclusions on what factors to take into consideration when deciding on what regulatory response is necessary where there is evidence that someone falls below the standard expected of them.

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

Yes, although it may not necessarily be the regulators who seek directly to prevent competence issues from recurring – for example, the BSB could place an expectation on Chambers or an employer to put in place a plan of action to support a barrister following any (formal or informal) remediation. The important point is that regulators need to be given flexibility to deal with underperformance and to have available to them a range of tools, some of which may be directly managed by the regulator and others which are left to other agencies (within, where necessary, a framework prescribed by the regulator).

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

Generally, yes. The LSB needs to be mindful however that this is a sensitive area of regulation with any new initiatives requiring careful consideration and extensive engagement. New regulation should not be rushed. The BSB has a programme of work reviewing its approach to assuring standards of practice which is planned to run until 2024. This reflects the complexity and scale of the review and the competing priorities that need to be managed. We could not therefore commit, at this stage, to having everything in place to meet the LSB policy expectations within 18 months. To do so, could put at risk the quality of the output of our assuring competence programme and other programmes of work that could need to be re-prioritised.

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.

As above.

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?

No.

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

The LSB needs to take care in balancing its desire to see regulators progress in ensuring standards of practice and in placing overly prescriptive expectations that could act as an unhelpful distraction. The BSB urges the LSB to give each front-line regulators sufficient flexibility to meet the broad policy outcomes (with which the BSB generally agrees) and only to consider further prescription where there is evidence that a regulator is failing to meet those outcomes. As we have highlighted earlier, prescribing the measures that regulators should consider (and justifying why they have been ruled out) runs the risk of diverting resource away from focussing on its preferred approach

Q21. Do you have any further comments?

No

**Bar Standards Board
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