Consultation response

Draft LSB statement of policy on ongoing competence

7 March 2022

Introduction

The CLSB welcomes the opportunity provided by the consultation to reflect on ongoing competence issues. We are already implementing change in this area through initiatives such as our new CPD supervision programme that was introduced for the 2021 practising year and research being carried out as part of our Regulators' Pioneer Fund project, *How could Costs Lawyers reduce the cost of legal services?*

Q1. Do you agree with the proposed outcomes?

The measures listed in paragraph 13 of the consultation are activities, not outcomes. The key objective in setting outcomes is to allow variation in how that outcome is best achieved. By listing activities, instead of outcomes, the LSB is effectively prescribing what each regulator should do. This is only appropriate when what every regulator should do is the same. While we are fully committed to the overall aims of the LSB in seeking to improve levels of ongoing competence, if it were to state the requirements in terms of outcomes it would allow regulators such as the CLSB greater scope to tailor regulation appropriately to the sector. We highlight this by suggesting alternative wording below and the benefit this might bring.

LSB wording	**Alternative outcome based wording**	**Examples of advantages that outcome based wording could allow**
Set the standards of competence that those they regulate should meet at the point of authorisation and throughout their careers.	Levels of competence are maintained in a profession which are proportionate to the risks posed to consumers	Risks vary depending on the nature of the work a legal professional is engaged in – where a legal professional only serves other professionals, the risks are lower. Where risks are higher, for example (in our sector) client/solicitor cost challenges, CPD expectations can be higher. In some circumstances, regulators assuming the responsibility of setting standards of competence risk creating safe harbours – it may be more appropriate to set a framework for professionals to meet. This would allow, for example, obligations to be extended automatically for new areas of risk without waiting for regulations to catch up. The alternative wording allows scope to use incentive based approaches – for example,

		allowing legal professionals with higher levels of CPD to use particular quality marks. This could be particularly advantageous (in terms of consumer benefits) to encourage legal professionals to undertake CPD – for example to promote innovative products – but where it would be disproportionate to make this a regulatory requirement.
Regularly assess and understand the levels of competence within the profession(s) they regulate, and identify areas where competence may need to be improved.	Regulators understand the relationship between risk and competence levels in the profession they regulate. Risks of too low competence are appropriately mitigated.	The alternative wording directs regulators resources to where it is likely to delivery greatest benefit to end users. It allows a regulator to decide what mechanisms may be appropriate to assess risks – the regulator carrying out an assessment itself may be slow and expensive, there may be better ways to mitigate risk. For example, in our sector, the greatest benefit to corporate end users may not be traditional skills of Costs Lawyers (which lend themselves to a regulatory assessment of competence) but the opportunity for Costs Lawyers to distinguish themselves by having experience of certain types of commercial work – this is an emerging finding from our recent research, and if the LSB gave us the freedom to use our CPD efforts along these lines, we could end up delivering much greater benefit than using our scarce regulatory resources to carry out assessments of more traditional skill sets.
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.	Alternative wording is not necessary – the first two outcomes above capture the obligation for regulators to act (by identifying and then mitigating risk).	

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?

We agree that regulators should consider available evidence and indeed consider whether further evidence should be obtained before making decisions. Regulators should be alive to potential consumer harm in their regulated community and take appropriate measures. However any decision to impose additional burdens on authorised persons should be justified by clear evidence of the need to impose such a burden based on the regulatory objectives. There should be no reversal of the burden of proof – regulators should not be in the position of having to justify why any particular new measure or burden should not be imposed, simply because, for example, such a measure is imposed in another sphere. This would run contrary to the Better Regulation Principles, particularly that of proportionality recently reaffirmed by the UK Government. [1]

We do not consider that it is necessary for the LSB as an oversight regulator to be prescriptive about which measures are to be taken when the evidence justifies an intervention. However guidance and the sharing of experience on such issues is always welcome.

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 CLSB has recently developed and published a Competency Statement aimed at those joining the profession and is considering how best to extend this as a standard applying throughout the career of a Costs Lawyer.

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

We would query whether having bespoke competence frameworks is necessarily mutually exclusive of identifying shared core competencies. It might be appropriate for each of the regulators' competence frameworks – which will of course be tailored to the unique characteristics of each legal profession, the needs of its clients and the public interest in its work – to coalesce around a set of core competencies that are common to all legal advisers and which reflect public expectations of the profession as a whole.

In carrying out the research programme that underpins our own Competency Statement, we were mindful to ask ourselves what competencies a Costs Lawyer requires in particular, rather than what competencies a lawyer requires in general. We therefore do not have the data to meaningfully assess whether a set of shared sector-wide competencies is in fact identifiable. But we acknowledge that it might be beneficial to compare the competency frameworks of the legal regulators to identify commonalities, and consider whether there is value in articulating any common competencies in a consistent way. This would be an area where the LSB could usefully take a leadership role.

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)?

Yes, in general terms these are relevant issues. We do feel that care should be taken so that the factors listed in paragraph 19 of the draft Statement of Policy do not result in competence requirements that are overly complex or over specific. There is a lot to be said for a general standard within a particular regulated community. For example a requirement that authorised persons do not

[1] The Benefits of Brexit: How the UK is taking advantage of leaving the EU (publishing.service.gov.uk) page 27

take on cases for which they are not competent may be more useful than a list of what those circumstances would be for different types of case, particularly as those circumstances are likely to change. If emphasis is given to risks, ethics and behaviours, this will drive the correct decisions in our view.

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, provided that the principle of proportionality is followed. Regulators must be able to target the collection of information towards outcomes which benefit consumers. They must be alive to the dangers of overburdening authorised persons by routinely collecting large volumes of information when more targeted methods are available. This is particularly true for regulators (like the CLSB) that do not have the regulatory powers needed to collect information at a firm level or require firms to collate and then pass on information as part of routine compliance processes (which are often managed, for example, by risk and compliance or L&D functions that are already doing this kind of work).

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)

These are all sensible sources of information. However any framework should be flexible to reflect the different size and nature of the regulated communities. The CLSB currently regulates 682 Costs Lawyers. Given the size of this regulated community, the data from the measures listed is inevitably limited and is unlikely to have statistical significance. For example, since 2019 the Legal Ombudsman has received four second tier complaints related to Costs Lawyers, three of which it rejected for not being within the rules and only one of which led to a decision. In 2021, we received three disclosures of disclosable events under the CLSB Practising Rules. These numbers are not surprising given the size of the regulated community and the professional nature of most of their clientele. As a result the CLSB has needed to develop a different approach – see below.

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

The CLSB is in the particular situation most of its regulated community are either employed in or bodies authorised by the SRA or do work predominately for those bodies – the number of Costs Lawyers acting as sole practitioners is much smaller than it once was. Therefore the SRA is in a unique position to be able to supply information relevant to competence issues of Costs Lawyers. Information is exchangeable under the Memorandum of Understanding between the regulators[2] but the CLSB is raising the issue with the SRA of further information potentially being available.

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.

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 we suggest that the LSB should not mandate particular measures or provide that the regulators must provide evidence to rebut a presumption that such measures should be taken. The Statement of Policy should be broad enough to reflect the situation of regulators such as the CLSB, whose regulated communities primarily provide services to professional clients as a "sub set" of

[2] Framework Memorandum of Understanding (sra.org.uk)

those professional clients' own services. This might be better thought of as a professional collaboration than a one-way service provision.

We would therefore like to see the Statement of Policy contain some reflection of the different knowledge and power relations between authorised persons and professional clients. The research carried out by the LSB and referred to in the consultation makes no reference to Costs Lawyers or their clients. This is perhaps inevitable in broad based research across the sector, but shows the danger of adopting a one size fits all approach.

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)?

These are all good examples, but for the reasons stated above should remain as examples rather than measures that the regulators have to justify not taking.

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

Scope should be left in the Statement for the regulators to adopt other measures as appropriate.

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

Regulators will usually already have this approach, however we agree that they should be kept under review and that there is no room for complacency but each regulator's efforts should be proportionate to the apparent risks. For example the CLSB has this year brought into effect a new CPD audit under this CPD supervision framework.

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.

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

The risk posed to the public and any wider public interest would appear to be key factors. The CLSB has a more detailed list of factors contained in its disciplinary rules and procedures particularly at 5.1.5 but these arguably would be included within the broad categories of seriousness and aggravating and mitigating factors.

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

Yes.

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

No – see response to Q18.

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.

Any timetable needs to reflect the realities of regulators' business planning cycles and resources. For example the CLSB has an 18 month business planning cycle beginning in June of each year, which is dictated by the timeline for approval of the annual practising fee by the LSB. The CLSB will need time to reflect on the outcome of this consultation once announced, and consider at board level what changes are required and how they should be prioritised. If measures miss a business planning cycle due to the timing of the policy statement being published, they will need to wait until the

subsequent year before work is begun. Of course, any very significant change such as reaccreditation would take far longer than 18 months for any regulator to implement, as the LSB is no doubt aware from its experience with the Quality Assurance Scheme for Advocates.

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?

See below.

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 has not provided an impact assessment of these proposals, stating that regulators will be in a better position to assess the impact of any specific measures. However since the LSB is basing its proposals to a significant degree on measures that have been taken in other professions, we would have hoped that the LSB would be in a position to describe the impacts of those measures and attempt to show in broad terms what the impact would be on this market.

Q21. Do you have any further comments

No.