The Bar Council's Response to the LSB's draft statement of policy on Ongoing Competence

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the LSB draft statement of policy on ongoing competence.

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Introduction

4. The Bar Council welcomes the opportunity to respond to the draft statement of policy on ongoing competence, the consultation paper and the various information provided with the draft statement.

5. This document draws on the earlier response of 2020 to the call for evidence because the essential propositions contained within it remain, in our view, sound. While efforts have been made to update information gathered for that response, they have been affected by the abnormal nature of the last two years due to the Covid pandemic.

6. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisoryservices; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

7. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

8. The Bar Council, and in particular the Education and Training Committee, has worked very hard for many years to ensure high quality training and maintenance of standards at the Bar.

9. It is *because* the Bar Council and this committee has been intimately concerned with the maintenance of standards at the Bar (which we recognise as being of the central importance) that we are concerned at the LSB draft statement.

10. We are deeply concerned that the LSB proposals are (a) based on fundamentally wrong assumptions, (b) are in danger of leading to counterproductive measures being put in place that are costly, unnecessarily time consuming, and which will not further quality assurance of work at the Bar.

11. There has been a huge amount of thought given to assuring the quality of barristers' work, and a carefully calibrated system established for ensuring it.

12. We feel that the LSB's paper is based on the internally inconsistent, propositions that (a) there is not significant or widespread evidence of a lack of maintenance of competence but (b) there is no evidence of competence being maintained. The paucity of evidence of a problem maintaining competence at the Bar is itself clear evidence of standards being maintained.

13. As the evidence from multiple sources, set out in our response to the call for evidence on ongoing competence demonstrates, the Bar has a highly effective system of training and maintaining competence that is well suited both to the need to maintain competence, as well as to resources and structure of the Bar. The multiple avenues by which significant problems with ongoing competence could be demonstrated are not producing evidence of such problems.

14. Where regulatory measures are imposed which are, in reality, unnecessary, they carry unnecessary cost and burdens on both the regulator and the regulated,

the time and resources of both of which are already pressed and should be diverted only where there is a demonstrable need. It is the view of the Bar Council that such a need is neither evident nor demonstrated with regard to ongoing competence measures for the Bar.

15. As outlined in our response to the call for evidence in 2020, "We agree with the LSB that if and insofar as there was good evidence of a problem in terms of maintaining competence it would be appropriate to consider whether the right solution is some form of regulatory intervention. Regulatory action should be taken, but should only be taken, if (inter alia) it is proportionate and targeted only at cases in which action is needed."[1]

16. The Bar Council is doubtful of the need for a legal-sector-wide policy statement of this nature and at this time. Ongoing competence has been the focus of considerable work by the Bar Council and BSB and, by reference to the LSB's own commissioned research by Hook Tangaza, the English and Welsh Bar operate many areas of best international practice in relation to ongoing competence. The draft statement accepts that there is no evidence of a problem of a lack of, or decline in, competence in the legal services sector. The focus instead is on the absence of evidence of assurance of competence.

17. We disagree with the proposition that, where there is no good evidence of a problem of maintaining competence, that new structures should be put in place which will by their nature be invasive and expensive to assess continuing competence.

18. The Draft Statement of Policy rightly points out (para 16) that regulation by individual regulators should involve "evidence-based" decisions. That is no less true of the LSB's own regulation. It too should be evidence-based. The LSB has, under section 3(3) of the Legal Services Act 2007 a statutory obligation to "have regard to … the principles under which regulatory activities should be … proportionate, consistent and targeted only at cases in which action is needed".

19. That is an important starting point. In assessing the proportionality of any regulatory intervention, the LSB (and individual regulators) must consider the benefits and the costs of regulation. Some of the measures proposed by the Draft Policy are likely to be intrusive and expensive. If existing regulatory practice already secures the vast majority of barristers meet high standards of competence, then the additional benefit of such measures is likely to be small. Those additional benefits may well be out of proportion to the costs, which will fall on the very many

[1] The Bar Council's Response to the LSB's Call for evidence on Ongoing Competence (June 2020)

competent and the very few incompetent alike. Nor can regulators sensibly begin to consider what types of checks or verification will be productive unless they understand where the greatest areas of risk are in practice.

20. The draft statement places high weight on the evidence of consumers about their expectations. Consumer expectations can be important data points. But in this particular case they are they are relatively uninformative. One of the challenges of assessing competence (and one of the reasons why it should demand regulatory attention) is that consumers are not always well-placed to assess it, at least in all its dimensions. Many are able to assess some important aspects of competence (for instance how well the lawyer communicated with them, whether work was carried out quickly and efficiently, whether they understood the process). But consumers and users of legal services—especially some of the vulnerable people about whom the LSB is rightly concerned—can rarely assess the technical quality of the legal services they received, such as whether advice was right or wrong, or submissions or cross-examination competently or incompetently conducted. It is not clear, either, that consumer assumptions about what legal competence looks like are always accurate (for instance, consumers may assume that lawyers "know the law", whereas in many areas the ability to "find the law" is just as important). Such misconceptions are readily understandable; but they are misconceptions, nonetheless.

21. The LSB's research did not, anyway, produce reliable quantitative or qualitative data bearing on consumer's experience of lawyers' competence. It sought instead to ask different questions, mostly about what sorts of **regulation** consumers expect and prefer. Research about "how consumers think regulation should look" is not a substitute for a fully informed and evidence-based assessment by the LSB (and then by individual regulators) about what regulation is needed. "Protecting and promoting the interests of consumers" is one of eight regulatory objectives that the LSB must pursue. And the "**interests** of consumers" are not the same thing as their views about how lawyers should be regulated.

22. This focus has in some places led the Consultation Paper to make statements of questionable validity. For instance, in discussing the costs and benefits of regulation, para 112 says that in the "public panel research, consumers indicated a willingness to pay more if they had greater confidence in the competence of authorised persons". That may be true of sophisticated consumers who are paying themselves and can afford to pay more for legal services. But the evidence does not suggest that there is any competence issue in those areas, where effective competition already encourages high standards. The areas identified as potentially problematic (criminal advocacy, youth justice, asylum and immigration) are largely areas in which consumers cannot decide what to pay, and

where market forces have largely been displaced by a monopolistic state purchaser. When the current issues concerning levels of remuneration for legally aided or other state-funded work are considered, we would suggest that it is plain that in reality the costs of any such further regulation would be borne entirely by the individual barristers undertaking such work.

23. There are also limitations in considering the experience of those in other regulated professions. No-one would quarrel with the idea that one profession may learn from the experiences of another. But it is naïve to assume that one can simply read across, and transplant something that works in one situation into another. For example:

> 23.1. Medical professionals operate within a well-established framework which institutionalises training in sub-specialities, which the legal profession does not have; they also usually operate as employees in a team environment which has been developed to reflect those specialisms. The Medical profession has (as a reflection of the risk to health arising from its work) a huge amount of centrally state funded resources dedicated and available to the monitoring of competence established as where, on evidence, a need for the same has been established. Neither those resources, nor that proven need exist in relation to the Bar.
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> 23.2. Aircraft crew perform a robustly specifiable set of tasks where success and failure are clearly defined, where routine procedures can often be clearly defined, and which is capable of being simulated.
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> 23.3. Neither of those professions involve appearing in public in front of superiors, opponents and lay and professional clients.

24. Differences of these sorts do not make comparisons pointless; but comparison must always take account of the difference in detail between professions.

25. We also have concerns about the robustness of the evidence available from a comparative review of regulation in other jurisdictions. That evidence seems to be particularly thin when it comes to questions of assessment and re-accreditation. We do not feel that a system set up by a Faculty of Advocates that numbers less than 450 can be said to be one that could be readily adopted or practically employed by a profession of 17,000.

26. Finally, the Consultation Paper does not discuss or refer to any evidence on the availability and effectiveness of training. That is an important gap, and

particularly important when it comes to implementation.

27. The overall position is that, despite the efforts that have been made to supplement it, the evidence-base remains weak.

28. The weakness of the evidence does not mean that it would be wrong for the LSB to adopt a policy, particularly one which aims to strengthen the evidence base. But it is critically important when it comes to the form the Draft Policy Statement takes. Paragraphs 17, 20, 26, 29, and 34 of the Draft Policy Statement impose a burden on individual regulators to show why particular regulatory activities including competence assessment as reaccreditation are **not** appropriate, if they have not been adopted. That, in effect, shifts the burden from one of showing why, given the evidence, particular regulatory action is proportionate and necessary, and turns each of the measures identified into something that is assumed to be necessary and proportionate unless the contrary can be demonstrated. That is an unacceptable burden to impose upon regulators unless there is solid evidence that in general each of those measures is "targeted only at cases where action is needed". It does not appear to the Bar Council that the Consultation Paper has followed this principle.

29. In contrast, we believe that there is evidence that demonstrates there is general confidence in the Bar and objective evidence which shows the quality of service provided by the Bar remains high.

30. As part of the response to the LSB's call for evidence, the Bar Council gathered and considered extensive evidence. We summarise here the evidence we considered and the conclusions which we believe to be justified based on that evidence.[2]

30.1. There is good, objective evidence to suggest that standards at the Bar are generally high, including evidence from the Bar Mutual Indemnity Fund (**BMIF**).

30.2. There is no good, objective evidence of widespread lay client dissatisfaction with, or distrust of, barristers. As the Bar Council understands it:

(i) The LSB has been informed of some concerns about performance in certain specific areas: criminal advocacy (where COIC's own

[2] The Bar Council's Response to the LSB's Call for evidence on Ongoing Competence (June 2020)

response to the LSB’s call for evidence identified some material), youth justice, immigration and asylum, conveyancing, and personal injury.

(ii) The LSB appears not to have carried out any in-depth research of its own about those areas and has not carried out any research to identify the root causes of those competence concerns. That is important. The Consultation Paper takes it for granted that perceptions of (sometimes) poor performance in those areas points to a lack of knowledge or skill on the part of practitioners, of the sort that could be addressed by training and assessment.

(iii) That is almost certainly a simplistic assessment. Effective performance is rarely a matter simply of individual competence, but includes factors such as working environment, workload, experience, the skill of others who contribute to the overall task, and so forth. Air safety, for example, depends not just on the skill of individual pilots, but on the supportive skills of many other people (maintenance, air traffic control), the design and safety of the planes they fly, the sufficiency of the procedures they are expected to follow, and rules about how long they can fly for. To proceed from observations of some poor performance, even if they are valid, to an assumption that the competence of individual practitioners is the reason for the problems risks making poor regulatory decisions. There needs to be root cause analysis.

30.3. In any event, outside those specific areas, the Consultation Paper does not refer to evidence that competence is a widespread problem. Although it is right to point out that regulators do not systematically collect data about competence, there are many routes by which poor competence will be identified, including appeals, complaints to regulators or ombudsmen, and feedback from people such as judges who see lawyers’ activities on a day-to-day basis. The data from those sources supports the view that lawyers generally provide a highly competent standard of service. It does not provide evidence that the existing approach to regulation by individual regulators is not achieving competence.

30.4. Evidence from the Circuits and from the Specialist Bar Associations (SBAs) demonstrates that there are many opportunities available (in addition to those available through the Inns) for professional development.

30.5. The Criminal, and now also Family, Bar’s vulnerable witness training programme shows that the Bar can and does react to potential problems in

particular areas in an appropriate and effective way.

30.6. We support the BSB's emphasis on self-reflection and we believe that the profession as a whole should also focus on developing ways to provide feedback so that it is easier to spot and address weaknesses that fall short of incompetence.

31. We urged, in our response to the call for evidence, the LSB to consider the detail of all the responses we collated.[3]

32. We have not dealt in detail with the role of the Inns. The role of the Inns is important and central, but the Inns will make their own response.

33. In our response to the call for evidence, we queried the reliance on the figures from a 2019 Ipsos Mori report on the reported levels of trust for various occupations. As we stated, we think that this evidence is highly unlikely to provide a sound basis for decision making, as "[w]hatever this survey shows (and it is probably no more than an accurate reflection of people's *prejudices* about various "types of people") it cannot seriously be considered to give any insight at all into the perceived competence of barristers, still less the actual competence of barristers."[4]

34. Insofar as the "consumer-group" data gathered in the current exercise, we make the following observations:

34.1. The numbers participating in both the focus group work (23 in total) and the survey were very limited.

34.2. The research was not directed to and did not show any widespread consumer lack of confidence in the competence of the legal professions. Instead, the research was directed to public perceptions of whether (i) members of legal professions are subject to formal ongoing checks of competence (ii) and whether members of the public thought that they should be. The conclusions of the research were (i) that there was an expectation that members of legal professions were subject to formal ongoing checks of competence and (ii) that they should be.

34.3. However, the research does not give evidence of any need for regular

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[3] The Bar Council's Response to the LSB's Call for evidence on Ongoing Competence (June 2020), pp. 3-20, 24-110.

[4] The Bar Council's Response to the LSB's Call for evidence on Ongoing Competence (June 2020), pp. 8-9.

formal checks. The research was not directed at the consumers of the Bar's services. As the LSB knows the Bar is almost entirely a referral profession. Its consumers are solicitors. The Bar owes duties to the Court as well as to professional and lay clients. If there is any validity in the argument of a need for assurance of competence and the need for regular formal checks it would be litigation Solicitors and Judiciary who ought to be principally consulted. Consultation with a generalised consumer focus group and a survey of the public are not largely relevant. Indeed, it is wholly unclear whether any of the 'consumer' participants in either focus group or survey had ever received the services of a Barrister commissioned on their behalf.

34.4. It is a real deficiency in the consumer research that the previous exposure and knowledge of the legal services sector of the participants was not a matter addressed, raising the question of how can it properly be relied upon as consumer research at all?

34.5. In relation to the stated expectation that members of legal professions should be subject to formal ongoing checks of competence, the Bar Council understands that the research was directed to the conclusion that the LSB sought to achieve. One can see this from the contents of the script for the quantitative survey questionnaire[5] and Video 4 given to the focus group.[6] In the case of the survey the practice of revalidation in other sectors is almost the first thing that the participant is told. It is self-serving and can be no surprise that, if members of the public are told by way of introduction to a survey or deliberation, that doctors, airline pilots and other professionals have regular formal checks to make sure they remain competent, that when subsequently responding as to whether lawyers ought also to have such regular checks, they will be in the affirmative.

34.6. We also reiterate that any data on the level of client satisfaction with the services performed by barristers – if it does exist – would need to be approached with caution.[7]

35. We again repeat our concern about the usefulness of drawing comparisons with other professions. As set out in the response to the call for evidence, "[t]he Bar is, we think, unique in combining two features which are vitally important when assessments are made of appropriate regulatory approaches: first, that it is essentially a referral profession, and second that its members have duties not only

[5] The Technical appendices to report on research into public attitudes (July 2021), p. 10.
[6] Ibid, p. 7.
[7] The Bar Council's Response to the LSB's Call for evidence on Ongoing Competence (June 2020), pp. 9-10.

to their client but also to the court."[8]

THE LSB'S SPECIFIC QUESTIONS

36. We turn finally to the LSB's specific questions.

Q1: Do you agree with the proposed outcomes.

37. It depends on what is meant by the outcome that "Regulators must regularly assess and understand the levels of competence within the professions(s) they regulate".

38. If that is intended to mean that the regulators need to make their *own* assessment of levels of competence, we strongly disagree with it, because it is both unnecessary and impractical. If it means that regulators must ensure they are in a position to know whether general levels of competence are satisfactory, for instance by keeping a close eye on BMIF data as to the level of claims and seeing the extent to which complaints are made to them or to the Legal Ombudsman about poor professional standards and the like, then we agree with it.

39. Nor do we agree with the proposal that certain specific expectations should be "default" regulatory requirements where a burden should be imposed upon individual regulators to justify any decision not to adopt them. The burden should always be on regulators to explain why particular action is necessary.

40. We would agree with the second outcomes if it were expressed in this way:

Regulators must …

- Ensure that they are in a position to understand the levels of competence within the profession(s) they regulate and identify areas where competence may need to be improved.

  We agree with the first, third and fourth bullet points.

Q2: Do you agree with our proposed expectation that regulators will demonstrate that evidence-based decisions have been taken about which measures are

[8] The Bar Council's Response to the LSB's Call for evidence on Ongoing Competence (June 2020), pp. 9-10.

appropriate to implement for those they regulate?

41. Yes. And that it follows that a policy should not be adopted which places a burden on regulators to explain why they have not implemented specific expectations where the LSB does not have evidence which justifies making those actions the default position.

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))?

42. Yes.

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

43. No. Given the answer above is "Yes", it follows that we would answer this question in the negative. We believe that the development of a single set of shared competencies would be both unrealistic and unwarranted. The legal sector contains many and divergent professions and it would be misleading and unproductive to lever them into a single set of shared competencies. For example, the role of the Bar has almost nothing in common with that of, for example, Notaries. However, the Bar Council would not be opposed to cooperation between first tier regulators towards the alignment of competency frameworks in areas where the roles and, therefore, regulatory framework overlap, provided this does not result in an overall lowering of standards. Indeed, we believe this would simply require an extension of the cooperation already found between regulators on issues of training and there is no need for the LSB to be involved.

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)?

44. Yes, provided that description is not treated as dictating the form that a competency framework should take.

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?

45. In part. Yes, so far as the collection of information which informs **systemic** assessments of competence to understand risk and the overall picture in the profession as a whole. No, so far as the proposal suggests that regulators should routinely and proactively assess **individual** competence.

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)?

46. No. Some of the sources of information (such as information from regulatory activities) is justifiable. Some of them are acceptable in the context of carrying out systemic assessments of competence across the profession but would be unlikely to be workable or justifiable as a way of monitoring individual competence. Some of the proposals, for instance for spot-checks on knowledge or file reviews, are seriously flawed, reflect a misunderstanding of how the legal profession operates, and include proposals which would probably be unlawful if implemented. For example, a file review in a criminal case would be likely to lead to breaches of client confidentiality if it was a defence file and breaches of disclosure rules if it was a prosecution file. Furthermore, in a jurisdiction that involves digital working any case "file" would be spread across handwritten and electronic notes, the notes themselves often being placed into the digital case system itself, access to which would be restricted and subject to GDPR safeguards.

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

47. 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)?

48. Yes, and in such areas regulators should also take carefully informed decisions about the consequences of particular regulatory interventions for access to justice and take special care to understand the difficulties or perceived difficulties in the round. Further, regulators should also be particularly alive to safeguards that already exist in those areas.

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

49. Yes, provided those interventions are justified by the evidence and regulatory objectives and statutory requirements. In relation to the BSB and the Bar we do not believe that further interventions are presently justified by the evidence and regulatory objectives and statutory requirements.

Q11: Do you agree with the types of measures we have identified that regulators could consider (engagement with the profession; supporting reflective practices; mandatory training requirements; competence assessments; reaccreditation)?

50. As options that regulators "could consider", yes. But there are likely to be serious difficulties with some of them in practice, and we disagree with the proposal in the policy statement that the burden should lie on the regulator to justify and explain why any of them is not being used since the LSB has not produced evidence to show that they are needed, practical, or likely to be useful in general. For example, the efforts to implement QASA demonstrate the impracticality of introducing certain interventions, and we would resist any shifting of the burden to regulators to now explain why analogous intervention is unworkable.

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

51. Yes. Despite the legitimate criticisms of it, time-based CPD systems remain potentially valuable and should remain open for consideration.

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

52. The proposal is so vague that it is difficult to agree or disagree. We support the thinking behind such measures, but we consider that there is a great deal of work to be done to establish how they would relate to disciplinary processes.

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?

53. No. We consider that the language of this part of the Draft Policy Statement is unhelpful. There should be no reference to "aggravating" or "mitigating" factors in relation to powers which are not disciplinary. "Seriousness" is too open-textured a term. We consider that the policy should identify more specific factors to be considered.

Q15: Are there other factors that regulators should consider when deciding

whether remedial action is appropriate?

54. Yes. It seems to us that the regulators should consider the following matters:

54.1. How basic are the competence concerns? Do they relate to matters which are at the heart of the barrister's core or specialist competence? How far below competent standards of performance do they suggest the barrister fell?

54.2. Are the concerns based on a one-off error, or is there evidence of persistent or repeated concerns about competence?

54.3. How likely are the competence issues identified to result in harm?

54.4. How serious would the harm that the competence issues might cause be?

54.5. What were the root causes of the competence issues?

54.6. How far has the barrister showed insight into the competence issues?

54.7. What steps, if any, has the barrister taken already to address the competence concerns or to prevent them recurring?

54.8. How likely are remedial measures to be able to address those concerns effectively? What remedial measures are likely to be most effective?

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

55. Yes.

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

56. No. The timescale proposed for implementation is unrealistically tight given the scale of the activities required and the extent and nature of the evidence that will need to be assembled. The timetable is plainly unworkable if regulators are expected not only to adopt but to bring into force any implementing measures within the period specified.

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.

57. Yes.

58. As we understand it, the proposal being made is that the individual regulators should have complied with the Draft Statement of Policy within 18 months.

59. Even if that means that within 18 months the regulators should have taken decisions **in principle** about how to implement the Draft Statement of Policy, it is likely to be a tight deadline. By way of example:

> 59.1. The BSB first announced an intention to introduce a professional statement for barristers (in effect, a framework for threshold competence) in November 2014. The statement itself was adopted in September 2016 (nearly 2 years).
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> 59.2. The LSB first called for evidence in relation to this Consultation Paper in January 2020. The Draft Statement of Policy was not produced until December 2021, and consultation will not close until March 2022 (more than 2 years).
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> 59.3. The development (and, ultimately, abandonment) of QASA took over 5 years.

60. The Draft Policy Statement rightly insists that regulation in this field must be evidence-based, and there are gaps in the evidence base, which the LSB's research has not filled. We therefore doubt that it is realistic to suppose that individual regulators can (a) assemble evidence, (b) consult stakeholders, and (c) adopt detailed regulations within an 18-month period, across a wide range of different areas.

61. Nor do we think that this is necessary. The individual regulators already have established rules (in the Code of Conduct) and disciplinary procedures. They already have rules addressing competence on entry to the profession, during the early years of practice (including the New Practitioners' Programme requirements for CPD and advocacy training, and new regulations on ethical training), and for reflection and continuing professional development for established practitioners. Although a policy statement will require those rules to be reviewed—a process that will presumably be ongoing, as it should be—there is no reason to think that individual regulators need to complete that review, competently and on the basis of proper evidence and consultation, within 18 months. We would suggest that a more reasonable period would allow for (a) progressive implementation which (b) should be complete within 36 months.

62. If by “implementation” the LSB means that the regulatory rules in question should not only have been made but be in force and effective within 18 months, then that is impossible. To take three examples:

62.1. If there is to be reaccreditation, then practitioners will require at least 12 months’ advance notice of the reaccreditation requirements which they will be required to meet at the next reaccreditation. So, for example, if practitioners know about the BSB’s requirements for reaccreditation in April 2023, the earliest possible date on which those rules could be applied is March 2025.

62.2. If the BSB were to decide to impose mandatory training requirements there would need to be adequate time to develop appropriate courses and deliver them to those practising in the relevant field. The experience of the Inns of Court College of Advocacy is that for any substantial course, course development will take at least 12 months once the syllabus is settled. Delivery will, of course, depending on the numbers involved, take longer. In realistic terms, then, if the BSB were to decide in April 2023 that it required a mandatory course for asylum and immigration practitioners and even assuming then that it was able to specify the syllabus, the earliest date on which the course could begin to be delivered would be April 2024, and it would be unreasonable to require the course to have been completed by practitioners before May 2025 at the earliest. In practice, this makes aggressive assumptions, which are probably unrealistic.

62.3. If the BSB were to decide to require compulsory competence assessment in advocacy exercises (along the lines of the Faculty of Advocates), it would be necessary to develop multiple courses (to cover different areas of specialism: at the very least three courses would be required to cover criminal law, family law, and civil law), and then recruit and train trainers to deliver them. In practical terms, if the BSB were to decide to impose such a requirement in April 2023, the earliest date upon which the assessment could begin to be delivered would be May 2024, so that the first cohort could not be expected to complete the course as part of their CPD requirement for accreditation before March 2025.

63. In our view, therefore, the Draft Policy Statement should make it clear that whatever date is provided as the date for “implementation” of the Policy is the date on which individual regulators will be expected to have complied with the Policy Statement in their own policies and rules. It should be clear that those policies and rules can be expected to include whatever period is necessary to implement whatever measures they adopt effectively.

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?

64. The equality impact of the measures adopted by any individual regulator can only be assessed when concrete proposals are available. It is clear that some measures might have equality impacts, which would need to be properly assessed. The LSB's policy must permit such assessment to be rigorously conducted. We suggest that it is already apparent that reasoning like '… consumers indicated [a] willingness to pay more …' is less likely to apply to those undertaking lower paid, publicly funded work, with consequent issues for equality (the same point can of course be made about the increase of burdens more generally).

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

65. The costs and benefits of the Draft Policy Statement cannot be assessed because (a) the evidence base is inadequate and (b) the costs have not been established, and (c) cost and benefit would depend on how the Draft Policy Statement is implemented by individual regulators. We suggest that there has been a tendency to adopt an optimistic view of anticipated benefits, in the absence of any concrete consideration of costs likely to be borne by practitioners.

Q21: Do you have any further comments?

66. In general, we are concerned that the Draft Statement of Policy appears to set out a blueprint for regulatory action by way of specific expectations which are not well supported by the evidence available. We consider that flexibility is essential.

67. As stated in the response to the call for evidence, we think that competence (and much more) is achieved by a mixture of market forces, professional culture, and appropriate regulation. There is therefore no need for barristers to continue to demonstrate competence to the regulator, nor a need for the regulator to test competence. That is because a combination of the high standards required on entry to the profession, combined thereafter with such factors as market forces and peer pressure are in practice effective to maintain competence.

68. Barristers are also subject to rigorous application processes to undertake certain (often more sensitive) types of work. Public bodies such as the CPS are responsible for maintaining lists of 'panel' advocates and retaining public confidence, with those advocates therefore subject to additional oversight.

69. As we stated in our response to the call for evidence,

> *"There are formidable problems in assessing the skills of barristers, as was demonstrated during the consideration of QASA scheme. The difficulties of introducing a cost-effective post qualification testing regime to cover every area of practice at the bar are even greater. In the absence of any evidence of systemic incompetence, or any other good evidence of a need for ongoing formal regulator assurance, we see no grounds for embarking on such a difficult and expensive task, the costs of which would ultimately be borne by consumers.*
>
> *We accept that there may be occasions when developments in law or practice may call for ongoing training. So far, the Bar in collaboration with its regulator the BSB has responded to identifiable needs of this type with minimal formal regulatory intervention, the best examples being the vulnerable witness training programme and youth court advocacy. If similar issues were to arise in other areas of practice the appropriate regulatory response ought, similarly, to be targeted at the specific problem or potential problem that had been identified.*
>
> *Consumers of legal services are entitled to expect practitioners to be competent. If consumers go to the Bar, they will almost invariably experience at the very least a competent service."* [9]

Bar Council
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For further information please contact

Rose Malleson, Policy Analyst, Education, D&I, and CSR

The General Council of the Bar of England and Wales

289-293 High Holborn, London WC1V 7HZ

0207 242 0082

RMalleson@BarCouncil.org.uk

[9] The Bar Council's Response to the LSB's Call for evidence on Ongoing Competence (June 2020), p. 22.