



## Legal Services Board

# CONSULTATION ON PROPOSED POLICY ON ONGOING COMPETENCE

A response by  
CILEx Regulation

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**Professional Standards For Specialist Lawyers**

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## **EXECUTIVE SUMMARY**

1. CRL welcomes the LSB consultation and supports proposals to improve ongoing competence of those we regulate. CRL is well placed to do this since we already have a competence framework.
2. We also welcome the LSB's recognition of the need for flexibility given the wide diversity of lawyers in scope.
3. As the LSB develop its proposals we would encourage the LSB to consider the following points:
  - a) The proposed timeframe for implementation is too ambitious, we would favour 3 years;
  - b) The LSB should, in line with good regulatory practice, publish a fuller analysis of the costs and benefits of its proposals, including an analysis of the risks that overly onerous requirements on regulated lawyers could lead to work transferring to the unregulated sector, and less protection for consumers;
  - c) The LSB should publish a fuller analysis of the equality implications of its proposals, and implications for instance of the impact on those who work part-time (who are more likely to be women). It is particularly disappointing that no attempt has been made to consider the socio-economic impact of these proposals; and
  - d) The LSB should consider further the pros and cons of introducing competency frameworks by specialism and/or profession.

## **RESPONSE**

### ***Q1. Do you agree with the proposed outcomes?***

4. To achieve the introduction of robust and effective assessment of the ongoing competence of legal professionals, the outcomes outlined in the consultations appear to be the right 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?***

5. The proposals as outlined in the consultation will provide evidence-based decision making as to whether the individuals that they regulate are competence throughout their legal careers.

### ***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))?***

6. If the proposal outlined in the consultation document is to provide consumers with an understanding of the knowledge, skills, behaviours and attributes which

they can expect from a legal professional, then it would be better to have common competency frameworks by area of specialisation. Individual frameworks by profession may lead to consumer confusion. If however, the primary purpose of the framework is to enable the regulator to assess the competence of their own profession and assure the consumer that this is a requirement of continued authorisation, then a framework (or frameworks) by profession should suffice.

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

7. As set out above, this is dependent on the primary purpose of the competency framework(s). If it is to be used by the consumer then the frameworks should be common, by area of practice. If its primary purpose is for the legal professional and the regulator, then competency frameworks by profession would be effective.

**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)?**

8. CRL agrees that these are the correct areas on which to focus. However, the timeline for implementation of such a far-reaching framework, particularly a common framework, will be extremely challenging. There will also need to be some form of oversight of the project if there is to be a common framework, which would be most effective to achieve consumer understanding. The QASA, which aimed to introduce a framework for one area of practise only was challenging and time-consuming and ultimately failed in its objective.

**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?**

9. CRL agrees with this proposal in principle. However, there will be a number of challenges to overcome in order to be able to access some of the information outlined in the consultation. For example, CRL regulated individuals work in SRA regulated firms and in-house in private businesses. In order to enable collection of the data outlined, CRL would be required to negotiate access, which may pose some challenges. This may apply equally to regulated individuals from other professions who work in either the unregulated sector or in firms regulated by other regulators.

**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)?**

10. CRL agrees that a wide range of data sources can provide an holistic picture in relation to the competence of regulated individuals. This would mitigate the risk that consumer feedback may present a picture in relation to competence based on the outcome of their matter rather than representing a reflection of the competence of the individual being assessed.

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

11. The options for information types is comprehensive, CRL has not identified any other additional sources.

**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)?**

12. CRL agrees with this assessment. For some time, CRL has been improving its ability to assess its regulated individuals based on risk, including the status of the consumer and the risks posed by the area of specialism.

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

13. CRL agrees with this proposal in order to maintain standards and protect the public and the consumer.

**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)?**

14. CRL agrees with the proposed types of measure.

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

15. None identified.

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

16. CRL agrees that remedial action should be taken where competence issues have been identified in order to protect the public and the consumer.

**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?**

17. CRL agrees that aggravating and mitigating factors should be considered, provided that the public/consumer is not put at risk.

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

18. None identified.

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

19. Yes, we agree.

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

20. CRL considers the timeframe to be challenging. It is recognised that the proposal is to create a competence framework by profession in the first instance and to be fully researched, tested, consulted upon and implemented within 18 months will be possible (as CRL already has competency frameworks from which to build), as will the use of assessment. Other proposed elements may be more challenging to agree, for example access to in-house files to enable the regulator to assess the competence of the regulated in-house lawyer. Access to enough individuals who are qualified to conduct such assessments may also be challenging within 18 months.

21. However, if, as would seem more sensible, the proposal is to have a common framework, this is unlikely to be achievable within the proposed timeframe.

**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.**

22. As set out above, CRL believes that it should be possible to meet the requirements, however some elements may be challenging.

**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?**

23. CRL believes that there may be EDI implications for this significant policy change. The areas of practice identified for higher levels of supervision are those specialisms that attract lower client fees, this will disproportionately increase the cost of regulation to those working in these areas, at a time when these are the areas of practice most in need of additional resource. This, in turn, could also have a detrimental impact on consumers, with protected characteristics and otherwise.

24. In addition, some of these areas of practice have higher numbers of BAME legal professionals (e.g., immigration) and the potential for significantly increased costs may have a disproportionate impact on them. Increased costs will also disproportionately impact those who work part-time (who are more likely to be female). It is unlikely to be possible to mitigate the costs through a reduction of requirements for part-time workers, as they will have the requirement to be assessed to the same level of competence as full-time workers.

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

25. Yes. CRL would like to raise the following additional points:

- a. The implementation of the new regime will require significant resources for all regulators, and this will have cost implications for the deliverers of legal services. Reference has been made in other policy areas at the LSB to the costs of legal services being too high and limiting access to

justice. There are risks to the introduction of these additional requirements in relation to additional costs to the consumer and equally driving those currently regulated out of regulation, which will have consumer detriment in other ways.

- b. The consumer research indicated that it was understood that these changes would increase costs and that those participating in the research were willing to pay increased costs for competent lawyers. However, there is a difference between agreement to costs increases in principle during a research project and payment of increased fees in practice. There is a risk that consumers, may not want to pay increased costs and may instead choose the services of unregulated legal services providers who will not be subject to these additional regulatory costs.

**Q21. Do you have any further comments?**

26. CRL has one further observation. The proposal is founded on the principle that introducing ongoing competence for legal professionals will improve public trust in lawyers. However, evidence provided by the LSB indicates that consumers and the public were unaware that lawyers were not already subject to such checks. CRL raised this with the LSB at the start of the project in January 2020, however, there has been no exploration of the underlying reasons for the lack of public trust in lawyers. Therefore, whilst the introduction of the changes may improve the competence of lawyers, it is unlikely to improve public trust as there is no evidence that lack of competence is the source of the lack of public trust.

27. CRL fully supports ensuring lawyers are competent throughout their legal careers but would also support more investigation into the reasons why there is a lack of public trust in legal professionals.