



# THE FACULTY OFFICE

## Master of the Faculties response to LSB Draft Statement of Policy on Ongoing Competence - Consultation

The Faculty Office (FO), on behalf of the Master of the Faculties (MoF), submits the following response to the Legal Services Board's draft statement of policy on ongoing competence consultation:

### **Introductory comments**

We note and welcome the Background information set out in the consultation paper which includes reference to a lot of research on expectations (including, of course, the legitimate expectation that a legal services provider is, and remains, competent) and the position in other, largely non-legal, professions. The issues of competency are, of course, rather more critical and/or life-threatening in many of the professions identified in the consultation as having more robust ongoing competency requirements<sup>1</sup> than *most* legal issues are ever likely to be and whilst a comparison is clearly useful, a detailed study of professions with more relevant risk profiles would, perhaps, have been more helpful.

There is, however, a significant difference between requiring action to increase public confidence or perceptions of competence in the legal professions and the need to address actual issues of the competence of legal practitioners. What the information appears to us to be lacking is any real evidence that there is in fact a significant problem with ongoing competency in the legal services sector generally, or in specific subsections of the sector, such that the proposed draft Statement of Policy would represent a proportionate or targeted response. Certainly, so far as notaries are concerned, the FO has not identified any significant concerns over ongoing competence through reviews of the available data arising from the very few First or Second Tier service complaints against notaries or from the infrequent disciplinary complaints, nor from evidence gathered through our inspections regime. The FO is, of course, committed to ensuring that those it regulates are, at the point of entry and remain, competent and it already has a number of policies and procedures in place to maintain its confidence in the competence of those it regulates.

Notaries Public are amongst the most qualified legal practitioners in England & Wales at the point of entry, given that most entrants have already qualified and practised in other

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<sup>1</sup> eg doctors, midwives, pilots

branches of the legal profession and studied and passed a further two-year post-graduate (examined at level 7 equivalent) academic course prior to qualification followed by the 2 or 3 year post-admission supervision and training requirements. Ongoing competence is ensured through a robust Continuing Professional Education requirement<sup>2</sup> compliance with which is checked annually for each and every notary on practising certificate renewal. In addition, we have a risk based, targeted inspection regime with provision, if deficiencies are identified, for the MoF to require remedial action which may include (but without limitation) ordering a further inspection or inspections of the notary's practice, a requirement to undertake further training or the supervision by a notary appointed by the Master of the notary's practice, or aspects of it, for such period as may be directed by the Master<sup>3</sup>.

As regard the notarial profession, we are concerned that the proposals outlined in the draft Statement of Policy are disproportionate to the likely issue or level of risk and, thereby, risk creating a disproportionately one-sized sledgehammer to target the cracking of a possibly non-existent nut. The answers to the questions below are, therefore, all to be read and caveated with our view that the Statement of Policy is, unless or until evidence to the contrary is identified, unnecessary.

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

Subject to our view that the case of the Statement of Policy has not been made, the four proposed 'outcomes' align with our current approach. However, we would question whether the outcomes set out in paragraph 13 are correctly identified as 'outcomes' at all; rather they appear to represent four prescriptive requirements which regulators are required to pursue. This is further supported by the very prescriptive set of "Specific Expectations" set out in paragraphs 15 to 34 which, in our view, go way beyond oversight and tend towards micro-management.

#### **Q2 – Do you agree with our proposed expectation that regulators will demonstrate evidence-based decisions have been taken about which measures are appropriate to implement for those they regulate?**

Yes. However, where Regulators are dealing with smaller numbers of authorised persons who generate very few complaints or disciplinary outcomes the 'evidence-base' is necessarily going to be small and drawing conclusions will be more challenging. Given the unique nature of Notarial Activities, opportunities for cross-regulator learning and utilising evidence gathered from others will be limited.

#### **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))?**

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<sup>2</sup> of the Notaries (Continuing Professional Education) Regulations 2021

<sup>3</sup> Regulation 11 of the Notaries (Inspections) Regulations 2014

Yes. In this regard, we consider that the specific expectations, whilst acting as a helpful guide, are overly prescriptive

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

Not applicable. Whilst there are some commonalities of approach, the distinct nature of the discrete professions largely favour a more tailored approach without unnecessary prescription.

**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?)**

We agree with the areas you have set out and have no suggestions for anything additional.

**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?**

Insofar as regulators do not already do this as a matter of course, yes. In this regard, however, we consider that the specific expectations, whilst acting as a helpful guide, are overly prescriptive.

**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?**

You mention but pass over kite-mark schemes such as Lexcel and Solicitors for the Elderly. Where a lawyer wishes to improve public confidence that they have a special knowledge or their systems and practices have met a particular industry standard, such accreditations are available. Where a generalist wishes to specialise in an area where there is a market for those services, various industry accreditations do exist, and it would not be sensible to duplicate or compete with them. That is not to say that it is not for the regulator to ensure continuing competence, but that existing industry bodies can help ensure consistency by requiring their members to meet certain standards, and in promoting consumer confidence by such accreditations.

**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. It is also worth considering that lawyers may offer different degrees of service depending on their prices. A lawyer who devises a carefully caveated client engagement letter for a

conveyancing matter may exclude various categories of work (eg exclude advising on lease extensions) and be cheaper, while another lawyer may offer a “Rolls Royce” service which is not so caveated but which is more expensive. The consumer has, to a degree, the right to choose what work the lawyer, within their competencies, will cover, and so the sophistication of the work may vary depending on what the consumer wants. The effect of market pressures is sometimes to bifurcate the legal sector, with some lawyers in a race for the bottom in order to compete on price and other lawyers offering a premium service. Conveyancing is often used as an example of this phenomenon. The conveyancer concerned may be doing their job perfectly “competently” within the narrow confines of their engagement letter, without however addressing the complexity of elements outside of their brief. The main way this can be addressed is by the lawyer being as open as possible at the outset as to what their work will be covering and what it will not be covering.

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

Insofar as these are not already adopted, yes. In this regard, and as we have said before, we consider that the specific expectations, whilst acting as a helpful guide, are overly prescriptive

**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)?**

Where an issue is identified, the types of measures outlined appear to us to be sensible save for reaccreditation which we do not consider to be appropriate in this connection but should be reserved, perhaps, to persons returning to the profession after an extended period out of practise to ensure they are competent to return.

**Q12 – Are there other types of measures we should consider?**

No.

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

Insofar as regulators do not already have procedures in place, yes; and, again, subject to our view that the current proposals are too prescriptive.

**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?**

Regulators should take a holistic approach bearing in mind all the information which is in their possession from the full gamut of information gathering sources available to them.

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

Under the Notaries (Conduct & Discipline) Rules 2015 (as amended), a repeat of any competency issues, whether or not following on from remedial action would be likely to lead to disciplinary action as actions falling seriously below the standard of service reasonably to be expected of a notary or persistent failure to provide the standard of service reasonably to be expected by a notary, are included within the definition of Notarial Misconduct. The FO already has measures in place to deal with repeat behaviours. The measures set out in our Inspection Regulations referred to above are aimed at preventing recurrences if they were to be identified.

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

We do not believe the case has yet been made for requiring a Statement of Policy and certainly not in its current overly prescriptive format, so it follows that it should not be implemented in this form.

**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.**

See Q17

**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?**

We have no comment

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

For the reasons outlined above, we do not currently see the need for the draft Statement of Policy and do not believe that the case for it has been made. Whilst the costs of the work that would be required to evidence compliance would not be too significant given that we currently collect much of the data, and require compliance with rules designed to ensure ongoing competence, any additional reporting requirements under the auspices of the Regulatory Standards framework with the associated cost is disproportionate to the risk and/or mischief that it aims to remedy (if indeed, there is actually anything requiring a remedy).

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

None, other than those set out in our introduction.

