The Council of the Inns of Court

Response to LSB Consultation document:

Draft Statement of Policy on ongoing competence – consultation paper

A: Introduction

1. This response by the Council of the Inns of Court (**COIC**) sets out the collective views of the four Inns of Court (Lincoln's Inn, Gray's Inn, Inner Temple and Middle Temple) on the proposals made in the LSB's draft statement of policy on ongoing competence (the **Draft Statement of Policy**) and on the consultation paper published by the LSB on 8 December 2021 (the **Consultation Paper**). It has been prepared by a working group consisting of representatives of the Inns, the circuits, and the Inns of Court College of Advocacy (the **ICCA**). Further details about the constitution of the working group are given in Annex A.

2. In summary:

   - COIC notes that it is not controversial that regulation aims to ensure competence. That reflects long-standing regulatory objectives and practices. Practice does not stand still; but there is no evidence that the existing approaches do not operate as they should.
   - COIC agrees that it is important to define standards to maintain competence throughout professional careers and across different specialisms.
   - COIC agrees that it is important for regulators to obtain reliable evidence about standards of competence in order to regulate effectively.
   - COIC agrees that it is important that the LSB's policy is flexible, so that it can be applied proportionately by individual regulators based on evidence.
   - COIC does not agree that the evidence justifies all the proposals made in the Draft Statement of Policy. The Draft Statement of Policy imposes presumptions about how individual regulators should act which are not justified by the evidence. COIC disagrees with the proposal in the Draft Statement of Policy that the burden should lie on individual regulators to explain why certain regulatory measures have not been adopted.
   - COIC is concerned that the Draft Statement of Policy and the implementation proposed do not adequately address the practical risks and costs of what is proposed.

3. This Response addresses each of the questions raised by the Consultation Paper, as follows:

   3.1 **Section B** ("General observations") responds to Questions 20 and 21, and to the general structure of the Draft Policy Statement and its context.

   3.2 **Section C** ("Regulatory outcomes and framework") responds to Questions 1–5, and 9.

   3.3 **Section D** ("Regulatory tools") responds to Questions 6–8.

   3.4 **Section E** ("Interventions") responds to Questions 10–12.

   3.5 **Section F** ("Remedial action") responds to Questions 13–16.

   3.6 **Section G** ("Implementation") responds to Questions 17–19.

   3.7 **Section H** ("Summary") contains a summary of COIC's responses.

B: General observations

4. 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". The LSB will be mindful of the statutory requirement that in preparing a statement of policy it must, under section 49(3) of that Act, "have regard to the principle that its principal role is the oversight of approved regulators".

5. There are profound limitations to the current evidence base. One reason why the Draft Policy Statement calls for regulators to "collect relevant information" (para 23) is, presumably, that such information is currently thin on the ground, as para 32 of the Consultation Paper acknowledges.

6. COIC is aware that it can be difficult to assemble reliable information. Nevertheless, evidence-based regulation must both assess the evidence that is available, and not run too far ahead of it. As COIC understands it:

   6.1 The LSB has been informed of some concerns about performance in certain specific areas: criminal advocacy (where COIC's own response[1] to the LSB's call for evidence identified relevant material), youth justice, immigration and asylum, conveyancing, and personal injury. (Many immigration and asylum practitioners are not regulated under the Legal Services Act 2007 but by the Office of the Immigration Services Commissioner under the Immigration and Asylum Act 1999. It is not clear how far the concerns apply to those practitioners who are regulated under the Legal Services Act 2007.)

   6.2 The LSB has not carried out, or identified, any in-depth research into 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 (occasional) poor performance in those areas point to a lack of

[1] COIC, Response to LSB Call for Evidence, paras 52–72. https://legalservicesboard.org.uk/wp-content/uploads/2020/10/COIC-C4E-submission-OC.pdf.

knowledge or skill on the part of practitioners, of the sort that could be addressed by training and assessment.

6.3 That assumption requires further analysis. 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. Aviation safety, for example, depends not just on the skill of individual pilots, but on the supportive skills of many other people (such as maintenance and 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. Similarly, it has been said of medical errors that[2]

> [E]ven apparently single events or errors are due most often to the convergence of multiple contributing factors. Blaming an individual does not change these factors and the same error is likely to recur. Preventing errors and improving safety for patients require a systems approach in order to modify the conditions that contribute to errors.

To proceed from observations of some poor performance or outcomes, even if they are valid, to an assumption that the competence of individual practitioners is at fault, risks making poor regulatory decisions. There needs to be root cause analysis.

7. In any event, outside some specific areas, the Consultation Paper does not refer to evidence that competence is a problem requiring any fundamental change in regulatory approach. Although regulators do not systematically collect data about competence, there are many routes by which poor competence will be identified. They include appeals, complaints to regulators or the ombudsman, and feedback from people such as judges who see lawyers' activities on a day-to-day basis. So far as COIC is aware, the data from those sources supports the view that barristers generally provide a highly competent standard of service.[3] It does not indicate that the existing approach to regulation by individual regulators is not achieving competence.

8. 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 Statement (such as competence re-assessment, spot checks, and reaccreditation) are likely to be intrusive, burdensome, and expensive. If existing regulatory practice already ensures that most barristers meet high standards of competence, then the additional benefit of such measures is likely to be small, and probably out of proportion to the costs, which will fall on the many competent and the few incompetent alike. Nor can regulators sensibly begin to consider

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[2] Cohn et al, eds, *To Err is Human: Building a Better Health System* (National Academy Press 2000) at 49.

[3] See COIC, Response to LSB Call for Evidence, paras 73–84: https://legalservicesboard.org.uk/wp-content/uploads/2020/10/COIC-C4E-submission-OC.pdf. In subsequent evidence, COIC pointed to information from the Legal Ombudsman for 2018–19. 300 complaints involving barristers were made. 154 were regarded as meriting review. Of those, 36 were upheld. The prevailing theme in those cases that were upheld concerned delay. Two cases appeared to concern competence issues of the sort under consideration in the Consultation Paper: Letter from Derek Wood CBE QC, 28 July 2020. The BSB's statistics suggest that very few new investigation cases concern competence issues as such: in 2020/21 there were three cases classified as "providing an incompetent standard of work/service" and one of "failing to properly advise client": https://www.barstandardsboard.org.uk/uploads/assets/1cd97722-46d6-4635-86a4f87b36031c87/2020-21-Regulatory-Decision-Making-Statistical-Report.pdf.

what types of checks or verification will be productive unless they understand where the greatest areas of risk are in practice.

9. The Consultation Paper places heavy weight on the evidence of consumers about their expectations. Consumer expectations are important sources of information. But as the Consultation Paper points out, one of the challenges of assessing competence is that consumers are not always well-placed to evaluate it, at least in all its dimensions. Many can 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—are rarely in a position to 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. Consumers are naturally heavily invested in whether a case has been won or lost, but that is not a reliable indicator of competence. 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, or more so). Such misconceptions are readily understandable; but they are misconceptions nonetheless.

10. 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.

11. 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. In wide areas of work, those who select barristers are highly informed and knowledgeable judges of competence and often themselves either legally qualified (employed barristers or solicitors) or independently advised by solicitors who are. In contrast, many of the areas identified as potentially problematic (criminal advocacy, youth justice, and immigration and asylum) are areas in which consumers cannot decide what to pay, and where market forces do not operate normally.

12. 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 important not to assume that one can simply read across and transplant something that works in one situation into another. For example:

12.1 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 legal profession is not organised that way. For instance, within the Bar, some employed barristers operate within a highly structured environment of that sort; but self-employed barristers do not.

12.2 Aircraft crew perform a robustly specifiable set of tasks where success and failure are clearly defined, where routine procedures are defined by standard operating procedures, and which can be precisely simulated.

Differences of that sort do not make comparisons pointless; but comparison must always take account of the difference in detail between professions. Many of the differences can matter a lot for the precise regulatory methods that are applied to assure competence.

13. COIC also has concerns about the robustness of the evidence available from a comparative review of regulation in other jurisdictions (some of which, as explained below, is not accurately summarised in the Consultation Paper). That evidence seems to be particularly thin when it comes to questions of assessment and reaccreditation.

14. Finally, COIC would like to point out one further and important gap in the evidence base. 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.

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

16. 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". COIC does not accept that the Consultation Paper has followed this principle.

Question 20: Costs and benefits

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

17. The main identified benefit of the Draft Policy Statement would be to bring regulation by individual regulators closer to what the LSB perceives members of the public expect of regulation in some areas. The Consultation Paper refers to no evidence which demonstrates either (a) that there is currently cause for concern about the competence of barristers or (b)

that the regulation currently taking place (and any developments that the individual regulators might make in pursuit of their own regulatory judgment, quite apart from any policy statement the LSB might make) is unable to address such concerns as there may be in specific areas. The cost of the proposed regulation will depend entirely on how it is implemented, which cannot be known. The benefits may similarly so depend.

18. What can be said with certainty, however, in relation to many of the "specific expectations" that the Draft Policy Statement requires regulators to treat as "default" positions, is that the Consultation Paper has not assembled evidence to assess either cost or benefit. Some of them would have at least some benefit and probably low cost (for example, further development of competence frameworks). Some would have no additional benefit and no additional cost, because they already reflect existing regulation by the BSB (such as the encouragement of reflective practice). Some (such as reaccreditation involving multiple sources of feedback, competence testing, and case file review) would come at high cost, for untested benefit.

Question 21

Q21: Do you have any further comments?

19. That competence should be regulated, and proportionate steps taken to secure ongoing competence, is not controversial in the least. The LSB review has served a useful function in assembling some evidence about competence and public attitudes towards it, highlighting the lack of systematic evidence about competence, producing a survey of approaches in other jurisdictions and professions, making some fair reflections on the problems with time-served CPD systems (which the Bar has already moved away from), canvassing a number of other approaches, and identifying the value of developing competency frameworks further than they have so far been developed. All of this is good, and useful.

20. The Draft Policy Statement, however, moves from these useful points—which helpfully expand the frame of the discussion—towards a premature attempt to entrench a particular set of interventions. Those interventions are mostly sketched rather than specified in detail. They have not been costed. But they are put forward as a set of interventions which are to be presumptively required. Given the state of the discussion, the time is not ripe to go that far. The Consultation Paper makes a powerful case for considering a number of novel approaches, but it makes no sufficient case for treating many of them as presumptively essential parts of individual regulation.

C: Regulatory outcomes and framework

Question 1: Proposed Outcomes

Q1: Do you agree with the proposed outcomes?

21. COIC has no objection to the proposed regulatory outcomes set out in paragraph 13 of the Draft Policy Statement, subject to the comments that it makes below concerning what "appropriate interventions" and "suitable remedial action" might consist of.

22. COIC's main concern about the regulatory framework lies not in the definition of the regulatory outcomes, but in the way that those outcomes are related to "specific expectations", set out in paragraphs 18–34 of the Draft Policy Statement, and in the imposition of a burden upon regulators to show why particular measures have *not* been adopted. Such an approach is inconsistent with outcomes-focused regulation within a statutory framework which embodies the principle that the LSB's "principal role is the oversight of individual regulators".

Question 2: Evidence-based decisions

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

23. COIC supports the principle that regulators should demonstrate that "evidence-based decisions have been taken about which measures are appropriate to implement for those they regulate".

24. Indeed, as set out in more detail below with respect to specific measures, COIC's main objection to the Draft Policy Statement is that it is inconsistent with the requirement for evidence-based decisions. Paragraph 17 of the Draft Policy Statement states (in terms which are, presumably for emphasis, repeated at paragraphs 20, 26, 29 and 34):

> Where a regulator has determined that any of the measures identified are not appropriate to implement, the LSB expects the regulator to clearly demonstrate why such measures are not appropriate for those they regulate. Regulators must set out what alternative measure(s) they have adopted to meet the outcomes.

25. That requirement is imposed even though, for most of the specific measures that are mentioned, the LSB has not itself produced reliable evidence to show either why those measures are presumptively necessary, or what their costs and benefits will be. Paragraph 17 mandates a set of default regulatory interventions, which is at odds with an expectation to demonstrate that "evidence-based" decisions have been taken, and with section 3(3) of the Legal Services Act 2007. The Consultation Paper fails to make the case that most of the specific actions it specifies are, in general terms, shown by the evidence to be necessary. It is not rationally justifiable to place the burden on regulators to explain why they have not adopted a particular measure in circumstances where the LSB has not been able to show why particular measures are necessary, what their costs and benefits would be, or (in many cases) how success of failure would be measured.

Questions 3 and 4: Competence frameworks

Q3: Do you agree with the LSB proposal that each regulator sets the standard of competence within its own competence framework (or equivalent document)?

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

26. COIC agrees that any rational approach to competence regulation will involve competence frameworks. They increase transparency for both the profession and consumers. The

development by the BSB of its Professional Statement, with the involvement and support of the profession, demonstrates a broad consensus that such frameworks are valuable.

27. Developing appropriately informative frameworks is, however, challenging. There are at least four sets of difficult questions. None is an objection to competence frameworks. But they show the range of issues which must be addressed to make frameworks useful. That supports the view that frameworks are best developed by individual regulators building on their existing work. Among the questions:

    27.1 **How specific should the framework be?** A framework that simply requires practitioners to have "appropriate knowledge of the law in the areas they practice in" can be applied across the board, but it leaves the question of what amounts to "appropriate" knowledge undefined. On the other hand, a framework which requires them to have "detailed knowledge of the civil procedure rules" would impose a pointless burden on those whose practice is entirely in the criminal courts, with no benefit for the public. Similarly, a useful competence framework needs to reflect the specific competences of the employed Bar and those in self-employed practice.

    27.2 **How should such a framework address specialism?** The Bar (and the bulk of the legal profession in general) has no comprehensive existing mechanisms or institutions for validating specialisms, and those that are defined in practice by the market are fluid. Should specialism be defined by subject-matter ("commercial" vs "land law"; and how specific should the definition be: is clinical negligence to be regarded as an aspect of personal injury law, or as a separate specialism)? Or should the focus be on the tribunals in which the professional practices ("criminal courts" vs "civil courts")? Or should it be on the type of activity ("direct access" vs "referral")? How does one deal with the fact that a single case may span across specialisms? At what point and by what mechanism does a barrister become a specialist? As things stand there are a few actual or incipient hallmarks of legal specialism, for instance the requirement for specific authorisation for direct access work, and appointment as Queen's Counsel as a mark of advocacy excellence. But the development of a comprehensive and comprehensible specialism framework would require considerable time and thought.

    27.3 **How should such a framework reflect expectations of career progression and development?** How does one explain how the standard of advocacy expected of (say) criminal barristers in the second year of their careers differs—as it should—from a QC of many years' experience? There is existing work in this respect in relation to criminal advocacy on which it may be possible to build. But it will be necessary to extend that work across all areas of practice.

    27.4 **How does one ensure that standards of competence do not vary arbitrarily by regulator?** Where a given activity is the same across different authorised professions (e.g., criminal advocacy) the public would obviously, and rightly, expect that standards will not arbitrarily vary.

28. These points show that developing workable frameworks will require care. In general, COIC thinks that they probably are best addressed, at present, by individual regulators which are sufficiently knowledgeable about the professions they regulate to be able to take well-informed decisions. To seek to produce a common framework across the entire legal

profession would lead to the formulation of principles at such a high level of generality that it would be unlikely to meet its objectives.

29. Nevertheless, COIC does consider that where there are core competencies which are common to more than one regulated group, those competencies should be defined to the equivalent standards, at least in the long run (an approach which was taken to criminal advocacy when the QASA scheme was being considered). That is consistent with consumer interest and with effective competition between different legal professionals.

30. Whether that can be achieved at once, or whether the appropriate course would be to start with each regulator's statement and work towards achieving consistency over time is not so clear. One possibility would be to require each regulator to consider other regulators' relevant statements when preparing their own, which already reflects existing practice so far as the BSB is concerned. Another would be for the LSB to work with regulators on developing core (or overlapping) competencies. However this is done, COIC is concerned that it should be done in a way that aims not at some bare minimum, but which reflects expectations of high standards in order to safeguard consumers and access to justice.

Question 5: A taxonomy of competence

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 particular circumstances)?

31. COIC agrees that this is a reasonable way to describe various dimensions of competence. We have already commented above on some of the challenges that recognition of specialist skills and that competence "varies according to circumstances" will present for expressing expectations of competence. It should be clear, however, that although regulators should consider these various dimensions of competence, a competency framework would not necessarily be organised around these categories. For instance, the CILEX professional competency framework takes all these dimensions into account but is organised around categories of "core principles", "core behaviours", and "core activities". The requirement to "consider" these areas must not be understood to dictate the form of any competency framework that an individual regulator produces.

Question 9: Regulation that is attentive to risk

Q9: Do you agree with the LSB proposal that regulators should be alert to particular risks (to users in vulnerable circumstances; when the consequence of competence issues would be severe; where the likelihood of harm to consumers is high)?

32. Although this question is asked in the context of proposals about intervention, COIC suggests that it properly applies to all aspects of the individual regulators' judgment.

33. The short answer to it is, "Yes". Regulation should be proportionate, and one aspect of proportionality is attentiveness to risk. This reflects existing regulatory practice.

34. That said, COIC would also suggest that regulators should not assume that appropriate attentiveness to risk means simply that higher-risk areas require more intrusive action. Some

of the areas which deal with the most vulnerable clients and the highest risk of severe consequences, such as asylum, youth justice, and criminal advocacy, are those in which practitioners are under intense pressure, financially and in terms of stress and working conditions. Some competent practitioners are giving up specialist practice because they find the pressures unmanageable. That is, of course, no reason to tolerate second-class competence. But there is every reason to think that most practitioners in these areas are dedicated and competent. It is no less important, in these areas, to maintain a carefully proportionate approach to regulation which is driven by genuine need; and it is especially important in these areas to bear in mind the burdens that intensified regulation may impose. Effective risk-based regulation should recognise a role for individual regulators in supporting practitioners to enable them to serve the needs of those they advise and represent.

D: Regulatory tools

Question 6: Collecting and understanding information

Q6: Do you agree with the LSB proposal that regulators adopt approaches to routinely collect information to inform their assessment and understanding of competence?

35. There is an important distinction—not clearly made in the Consultation Paper or Draft Policy Statement—between (a) collecting information about the profession as a whole in order to enable the regulator to form an assessment and understanding of *systemic* competence (how competence is displayed across a regulated profession, including any areas where there are perceived to be performance issues, and their root causes), and (b) collecting information about an individual in order to enable the regulator to assess the competence *of that individual.*

36. So far as systemic issues are concerned, COIC agrees that it is important for regulators to collect information to inform their assessment and understanding of competence.

37. It is also important that the information collected is comprehensive and aims to produce a balanced view of competence. It is important that it is not simply directed at identifying incompetence, because that may produce a misleading view (any more than that it should be directed at simply producing a reassuring picture). It is also important that the information collected enables the regulator to assess not only how often and where but also *why* competence failures occur.

38. To that end, COIC considers that it is important that regulators look at information as a whole and in context.

39. COIC is much more doubtful about the proposition that the regulator should, in general, seek information to enable it to assess *individual* competence. (There are of course areas where that must be done, for instance when an individual complaint leads to investigation. But that is a different proposition altogether from the idea that regulators should proactively seek to verify competence in individual cases where there is nothing calling it into question.)

40. As further explained below, reliable and fair assessment of an individual's competence will be extremely time-consuming and expensive. It is not merely resource-intensive, but it will in many cases demand specialist skills, commensurate to or coextensive with the skills of the person whose competence is being assessed. In this respect, at least, the experience of other professions is relevant: one would not expect (and the public would not expect) the skills of an airline pilot to be assessed by someone who could not competently fly a plane, or the skills of a medical specialist to be assessed without input from a medical specialist. Without massive extra resources, the existing regulators would not be competent themselves to assess the competence of a piece of advocacy in a heavy criminal case, or a skeleton argument to the Court of Appeal. Even if all they set out to do is to assemble and consider information from other people, it is extremely hard to make sense of and assess the weight to be given to that information without a high degree of specialist understanding.

41. Mobilising a cadre of such specialists to assess individual professional competence will not be easy, and it will be expensive. Many barristers give generously of their time for pro bono activities related to training. But it could not be assumed that individual competence assessment could be performed by volunteers, nor that such a system could be relied on to meet regulatory objectives or command public confidence. It would require paying professional rates to highly skilled specialists, as well as the whole infrastructure that would be required to train them, deploy them, verify their assessments, and provide adequate quality assurance of the assessment system.

Questions 7 and 8: Sources of information

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)?

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

42. COIC's response to this question partly depends on the purpose for which the information is being considered—whether for the purpose of reaching systemic assessments or to assess individual competence.

43. For the purpose of making systemic assessments, the sources of information identified are, in general, potentially appropriate. But, as explained in the Consultation Paper, COIC understands that the proposal is that regulators should seek and use this information to attempt to make individual competence assessments. If the intention is that they should be used for that purpose, then COIC has serious reservations.

44. **Regulatory activities.** These present no difficulty, whether they are being used for systemic assessment or for individual assessment. But, for reasons that the Consultation Paper identifies, regulatory returns alone are unlikely to provide cogent evidence from which to assess competence in practice.

45. **Supervisory activities**. COIC considers that proposals for spot checks of competence are unlikely to be workable or effective. Competence in practice hardly ever depends on having instant recall of the sort of simple legal rules that can be tested in that way. It depends rather on a complex set of skills, knowledge, cognitive behaviours, and interpersonal

behaviours. A competent lawyer confronted with anything other than the simplest problem will expect to engage in a variety of activities (for example, and routinely: eliciting information from a client or witness, analysing documents, researching the law using a combination of existing knowledge and research materials, forming an assessment—often probabilistic—of the range of factual and legal conclusions that might be reached). Even in a well-defined specialist area, it would be extremely difficult to test competence reliably across such a broad range through a spot check. The difficulties would be more acute once specialism is taken into account, because the complex of skills, knowledge, and behaviour that is required to demonstrate competence in relation to, say, family law involving children will be radically different from the complex need for, say, commercial arbitration.

46. Effective supervision of this sort, therefore, would have to be carried out by highly-trained specialists; it would have to be fairly calibrated to the specialism of the particular individual being assessed; it would have to be realistic (which would mean that it would have to allow the person concerned access to the books and research resources that would normally be used). Anything less would be pointless and arbitrary.

47. The Consultation Paper also seems to envisage spot checks of case files (para 69). In COIC's view, unless the client consents and sometimes even with client consent, this risks being unlawful. A case file is bound to contain material which is subject to a client's legal professional privilege and/or subject to obligations owed to the court that it be used only for the purpose of particular litigation, if it includes disclosed documents or witness statements which have not been used in court (see CPR 31.22). In many cases it will contain sensitive personal data (medical records, or information about sexual matters, information about criminal convictions) in respect of which the barrister is the data controller. Without client consent (which could in most cases not be practically obtained for any "spot check"), and in some cases third party consent or a court order, or explicit statutory authority requiring or permitting a barrister to provide such information to a regulator in order to check competence, it could be unlawful to conduct such spot checks. Legislative change (and perhaps primary legislation) would be required. Regulatory rules would have to take into account the professional principle that "the affairs of clients should be kept confidential" (Legal Services Act 2007, s 1(3)(d)). It is not obvious that such a general rule could be justified, especially if detailed file review was being carried out merely for information-gathering purposes and not in response to definite concerns about competence.[4]

48. The suggestion is also, so far as much of the activity of barristers goes, impractical. Barristers are not "file handlers", but advisers and advocates. It is only in the very simplest cases that a "file" will consist of a small and well-defined set of documents, and the barrister's activity in "handling" that file is not capable in most cases of being described in terms of routine procedure. A civil case, for instance, will often involve thousands (sometimes tens of thousands) of documents, and the barrister's overall involvement in the case would consist of a wide variety of activities including advice (written and oral), drafting, preparing skeleton arguments, and delivering oral advocacy. Some of the key

[4] In *R (on the application of Lumsdon) v Legal Service Board* [2014] EWCA Civ 1276 at [25] the Court of Appeal left open the question whether advocates would be entitled to explain the "gist" of instructions to a regulator in the context of QASA assessment, though it was inclined to agree with the view of the Divisional Court that they would be. The point remains undecided. Detailed review of a file, however, would go beyond what the Divisional Court considered. Neither court considered the problems posed by CPR 31.22.

activities in relation to which competence is important (such as the actual oral advocacy) could only be examined by looking at a transcript, which would often not be available. To unpick and assess the barrister's contribution on anything other than a completely superficial level would require not merely hours, but probably hundreds of hours, of work. In anything other than a very simple case that work could only competently be performed by someone who had the specialist knowledge required to understand the case. This is simply not the sort of thing that spot checks—useful as they may be in checking compliance with well-defined criteria—would effectively address.

49. **Feedback from various sources.** COIC agrees that feedback may be useful in systemic reviews, and that there may be merit in regulators encouraging (but probably not mandating) the use of feedback as part of reflective activities carried on by practitioners themselves.

50. COIC is, however, sceptical about the value and practicality of using feedback to a third party as a way of assessing competence for individuals on a regular basis. This is done in specific cases (for example in the context of QC applications). In 2020, the QC Appointments Commission considered 281 applications. Its operating expenses for the financial year ending March 2021 were £1,127,000. The cost per-applicant was accordingly around £4,000. This gives some notion of the scale of the administrative costs of a system which depends on the analysis of feedback. It does not take into account any of the considerable costs of those who provide the feedback.

51. As to the main sources of feedback:

    51.1 Judges and tribunals before whom an advocate has appeared may be able to give useful feedback on advocacy performance. But, at best, that imposes an additional administrative burden on public servants who are already hard-pressed. That will be especially onerous if the feedback is to be useful (which means it needs to be more than a mere "box ticking" exercise). It would be essential to obtain feedback from more than one source in order to obtain a fair assessment of competence. Judges are not (because of legal professional privilege) always aware of the pressures that an advocate is under, which may dictate—perfectly properly—an approach which is unwelcome to the court. Nor, fairly, can competence be judged from a single performance. And there is some concern, which COIC thinks is legitimate, that an advocate who is concerned about the court's reaction may feel under pressure to act otherwise than in the client's interest. These are, as the LSB knows, some of the problems that the QASA proposals gave rise to, and would need to be carefully and fully considered by any regulator before adopting any scheme.

    51.2 Clients, even if they are willing to do so, are not always well-placed to comment on all aspects of professional competence (though they will be able to comment on some of them). Some clients, especially vulnerable individuals, will be inappropriate assessors. In many fields it may not be possible for even a professional client, such as an instructing solicitor or employed lawyer, to give a fully informed view, because it is now common in criminal cases, for example, for advocates to appear in court with no professional client. If clients are to be asked to give their opinion, difficult questions can be raised about legal professional privilege, and (in particular) how far it should be open to the barrister to respond to adverse comments if doing so would reveal

confidential information. If client comments amount to a waiver of legal professional privilege, it is unlikely that it would be proper for a regulator to ask them to do so, at least unless the client had received independent legal advice (which would have to be paid for, and which would often be that it was not in the client's interest to waive privilege). If client comments do not waive legal professional privilege, it would often be grossly unfair to take them into account since the barrister would not be able to respond to them.

51.3 Professional colleagues may sometimes be able to comment, but their views will always be based on incomplete information, may be partisan, and they will also face potentially difficult issues in protecting the legal professional privilege of their own clients. They would not have been present during any meetings with the lay client, will not understand the dynamics between the barrister and the lay client, and are unlikely to have access to the lay client's specific instructions. Without Information of this sort, their ability to provide accurate feedback would be limited.

52. For these reasons, COIC considers that the Consultation Paper and the Draft Policy Statement go beyond the realm of the practical (or the lawful) in the proposals for soliciting feedback and conducting spot checks for the purposes of assessing individual competence, in the absence of any client complaint or formal disciplinary action.

E: Interventions

Question 10: Should regulators regulate?

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

53. In broad terms, and stated at this level of generality, the only possible response to this question is, "Yes". This question is framed in a way that implies that the idea is novel. It is not. Of the five interventions identified, (a), (b) and (c) are established parts of the BSB's regulation, and of other regulators too. No regulator leaves the profession entirely free to decide what, if anything, should be done to maintain ongoing competence.

54. That is not to say that COIC agrees that regulators should adopt (or be required to explain why they are not adopting) *all* the interventions listed in para 27 of the Draft Policy Statement. But, as COIC understands it, that is the question posed in Question 11. Question 10 simply asks, in effect, should regulators regulate ongoing competence? That seems a completely uncontroversial proposition.

Question 11: Which interventions?

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)?

55. If the question were merely whether these would be measures to be considered, COIC would not disagree. They are options on the regulatory menu, which could be adopted if the

evidence justified doing so. Since the implicit message of the Draft Policy Statement is, however, that they should be considered *as default options* and adopted *unless there are reasons not to do so*, their merits and problems become more urgent.

56. **Engagement with the profession.** COIC cannot imagine that this is controversial. It is obviously essential, and reflects existing practice. Such engagement needs to be a two-way process.

57. **Supporting reflective practice.** The BSB's CPD regime for established practitioners already supports reflective practice and embeds it in the CPD requirements. As the Consultation Paper points out, it will be valuable to encourage barristers to deepen their understanding of how reflection is effectively carried out. If reflective practice is to be useful, the regulator needs to be clear about what, done well, it looks like. That work, which is consistent with current regulation by the BSB, is supported by the Inns and the ICCA.

58. **Specifying training requirements, including mandatory training requirements.** COIC is not opposed in principle to specified training requirements, including mandatory training requirements if evidence shows them to be genuinely necessary in *particular* cases, such as areas of special risk. There are already such requirements for pupils and new practitioners. But we have great concern that any such requirements should be genuinely necessary, carefully targeted, and fully informed by a well-researched understanding of the practical challenges. The ICCA has deep experience in developing such training for advocacy and the vulnerable and youth justice, and the Inns and circuits of delivering training to pupils and new practitioners. That experience shows that such training takes time and specialist skill to develop and deliver if it is to be worthwhile (i.e., more than the proverbial "box ticking"), and that it is not low cost or low risk. There is no point in mandating specific training if it is not of high quality, and accessible and affordable to those who need it.

59. Valuable as training is, it is important that it is carefully planned. Developing training of that sort involves:

    59.1 Establishing a clear syllabus: What precisely is the training to cover? That may seem easy, but experience shows that it is not. For example, in relation to advocacy and the vulnerable there were areas where well-qualified experts disagreed about the appropriate training messages. The more advanced the topic, the more it is likely that there will be professional disagreements of that sort which need to be managed. Much more detail is required to specify a "teachable syllabus" than to produce a broad competence framework.

    59.2 Developing training materials. These are critically important. It is extremely rare to find that there are ready-made training materials to hand. Effective training will usually require a combination of written expository material (covering background knowledge, legal principles, and so forth), online material (such as demonstrations, lectures, explanatory material, and material for formative assessment), practical course material (such as "model" cases which can be used for training simulation), material to "train the trainers" (such as instructors' notes), and possibly material for summative assessment, which must be carefully validated. A high-quality course of any complexity will take many months of full-time work to develop, and always requires co-operation between subject-area specialists and specialists in training delivery.

59.3 Identifying and training trainers. Effective trainers need to combine (a) practical and personal experience with the subject-matter that is being trained, at a high level, (b) highly developed general training skills (not every competent practitioner is a skilful trainer), and (c) specific training equipping them to deliver this course effectively and to ensure that it is consistently delivered. Since in most cases trainers must be drawn from the profession, recruiting suitable candidates able to devote the time to this is not easy, and training them takes time too. There is a limited pool of well-qualified trainers and the demands on their time (including training pupils and new practitioners). Trainer burnout is a real issue. The experience of the Inns and Circuits is that it already requires great effort to maintain adequate numbers of excellent trainers to deliver the training that is required at present.

59.4 Delivering the training and assuring quality. This will often require amendment or updating of training materials in the light of experience or to keep them current. Assuring quality also requires systems to regularly review, and externally assess, training quality.

60. A poorly constructed course is worse than useless. If training is to be mandatory in any particular area it must be high quality. Indeed, that is the case *especially* where it is mandatory, because it will be delivered not only to the self-motivated and keen, but to those who are (however unreasonably) unwilling and recalcitrant. So, although COIC does not dissent from the proposition that mandatory training should be one option that remains open for consideration, it should not be thought to be an easy option, or a quick one, or a cheap one. On the contrary, COIC sees it as an option to be considered as a possible way of addressing specific, identified, and well-understood issues after careful analysis of costs, risks, and benefits.

61. **Competence assessments.** There are, in COIC's view, various issues with competence assessments which would need to be addressed.

61.1 Who carries them out? As the examples given in the Consultation Paper (pilots and teachers) show, competence assessment will need to be carried out by people who are themselves competent—who have the skills and knowledge to assess competence. It would be inappropriate to have credible competence assessments carried out exclusively by lay people (which is not to say that lay people might not have a role to play). In specialist areas, competence assessment, to be credible, would need to involve (and pay) specialists. That makes the position more difficult than for pilots or teachers, where the professions are large and the degree of specialism lower.

61.2 How is confidentiality of clients and third parties respected? It is extremely hard to assess competence without having access to the full underlying case materials, including privileged material, material which may be confidential to third parties, and material that may be subject to court-sanctioned confidentiality regimes which preclude its use. Those problems might be resolved by using simulated case material. But it is hard to simulate a realistic court-room situation, and the difficulties of doing so increase when trying to simulate scenarios which will be seriously testing for experienced specialists.

61.3 How, in practice, does one identify performances to observe? Some barristers are frequently in court. Others are not. They may appear in closed tribunals (such as

arbitration tribunals, youth courts, some family hearings, hearings taking place in private, mediations) where third parties are not permitted. They may appear infrequently, or in long cases in which for many days they are not "on their feet". They may appear in cases which are adjourned at the last minute, or settled, or in which the defendant enters a guilty plea. They may be employed, and spend much of their time in private meetings. It might be extremely difficult to schedule a fixed time when the assessor would be likely to have an opportunity to observe the barrister in meaningful action. And, if that were achieved, how confident could one be that the assessed performance would really be typical of the individual practitioner's standards?

Some of those problems might be addressed by using simulated exercises. Such exercises have a proven track-record at some stages of training. But a comprehensive framework would require well-tested simulations covering the full range of specialisms, activities (including those of the employed Bar), and seniorities. This would require heavy use of resources such as actors and technology, and careful moderation if it was to be fair and credible.

61.4 How is fairness assured? If competence assessments are to be used to inform regulatory decisions (including remedial decisions) then it becomes extremely important to ensure that they are fair and consistent. There would need to be a procedure to monitor them. There might need to be mechanisms to challenge the assessment. (If competence assessments are being used only to provide guidance to the individual advocate, those problems would be less acute.)

62. At best, if these problems could be resolved, competence assessment would be an expensive and resource-intensive process, as is already the case where they are used as part of the summative assessment for new entrants (which does make use of simulated scenarios, carefully designed and moderated, multiply marked, and recorded).

63. It is against that background that COIC does not accept that the Consultation Paper makes the case for competence assessment to be a default intervention, so that the regulator would need to justify its omission.

64. In that respect, the Consultation Paper identifies only two examples of jurisdictions which have adopted anything resembling this model:

64.1 The Faculty of Advocates in Scotland uses a scheme which involves not in-court observation of advocates (as the Consultation Paper wrongly states) but assessed simulated advocacy exercises. Such exercises address some of the problems (with timetabling and legal professional privilege) identified above. The Faculty, however, is a small group, where assessment of 20 percent of its members requires only around 80 annual assessments. To assess the same percentage of the practising Bar in England would require around 2,680 assessments each year, just to cover members of the Bar in self-employed practice. If those assessments were carried out in accordance with good advocacy training practice (in groups of no more than six, and allowing for performances of at least 15 minutes and time for review), that would require around 500 sessions of at least three hours. That accounts only for self-employed barristers. It would also be necessary to accommodate around 600 employed barristers each year. The profession already delivers advocacy training to

pupils and new practitioners. Doing so already strains the resources available. It must, in COIC's view, be very doubtful whether such a resource-intensive scheme would be viable, let alone whether it would be proportionate when its overall result would be one fifteen-minute assessment every five years.

64.2 The approach used in the Netherlands is also mis-described in the Consultation Paper. As appears from the Hook Tangaza report it does not involve assessed observation of actual work. It involves *optionally* expert peer review of 5 files and discussion, but there are other options available which include engaging in moderated discussion. It does not appear that the peer review involves any assessment which might result in disciplinary action or revalidation. Since the scheme was only introduced in 2020, the Report does not assess its results.

65. The evidence on which this proposal is based, therefore, consists of just two schemes. Only one has been running for long enough to have any reliable data. Neither consists of competence assessments in the sense described in the Consultation Paper. Competence assessments as so described might be a measure that a regulator could *consider*. But it goes much further than the evidence warrants to suggest that it is a measure of such clear merits that the burden should be on the regulator to show why it has not been adopted.

66. **Reaccreditation.** The Consultation Paper sets out very little detail about what reaccreditation might consist of. Much depends on the detail:

66.1 It is not controversial that annual authorisation should consider (as it currently does) compliance with mandatory rules, such as CPD rules, required procedures for reflective practice, and any mandatory training courses. As COIC understands it, however, this is not what the Draft Policy Statement means by reaccreditation.

66.2 As COIC understands it, the LSB does not propose (at least as a general matter) that reaccreditation should involve formal assessment (e.g. examinations in substantive areas of law). That is wise. The position post qualification is different than for new entrants. New entrants must be equipped with a broad knowledge sufficient to enable them confidently to undertake further training, and to commence practice at a basic level. They also need to demonstrate that they have grasped the fundamental principles of legal reasoning and legal research. There would be no real point in re-testing those skills. It would be a monumental task to construct a sufficiently broad range of examinations to test lawyers across a full range of specialisms. The tasks of delineating those specialisms, and developing the syllabuses training materials and examination papers necessary for the purpose, would likely be out of all proportion to any benefit in mitigating risk to the public, and the LSB research has not identified any jurisdiction in which reaccreditation operates in that way.

66.3 If reaccreditation depended on an examination of "case files" or observation of performances, it would have all the serious problems, including those of client confidentiality, that have been identified above (para 47).

66.4 If reaccreditation depends only on feedback from clients, there are serious question-marks about how far clients will be able and willing to provide reliable feedback (especially in areas such as asylum and immigration, youth justice, and crime which are of concern) *and* about how far such feedback would contribute to any assessment

of competence. If it involved feedback from judges or third parties, it would face the difficulties identified above.

66.5 If, however, reaccreditation simply involves confirmation that the barrister has complied with the requirements for CPD, reflective learning, and any mandatory training courses, then it does no more than reflect existing (and obviously sensible) practice for barristers.

67. The danger, as COIC sees it, is that reaccreditation is being put forward in such general terms that it will not offer any real assurance to the informed consumer that competence is being maintained, above and beyond the assurance already provided by the requirements to engage in CPD (understood broadly as including reflective practice). If on the other hand, reaccreditation is taken seriously as imposing an obligation on professionals of all specialisms and at all stages of their career to prove themselves by searching examination to be capable of reaching the standards of performance expected at that stage of their career, then what is being proposed—and indeed required as the *de facto* standard which all regulators must follow unless they can prove it is not required—is a massive burden, untested in any jurisdiction, uncosted by the LSB, and for which there is no body of reliable evidence in support.

68. In saying this, COIC does not suggest that regulatory bodies cannot legitimately continue to keep forms of reaccreditation under review, and consider how they may test ongoing competence as part of authorisation. But a large amount of flexibility is required.

69. **Other measures.** Although COIC understands (and shares) the concern that time-based CPD requirements can become "box ticking" exercises, it considers that they remain a potentially useful measure that regulators might at least consider.

69.1 Time-based requirements in addition to requirements for reflective self-directed CPD can provide useful signals to the profession about the scale and nature of activities that practitioners should have in mind. They may be a useful "safety net" in setting minimum standards. They may address some of the doubts about how effectively reflection and self-directed CPD work for some people.

69.2 Time-based requirements may stimulate the market to make suitable courses available to practitioners, including forms of activity (such as carefully constructed online learning) which may be more effective than the sorts of activity that practitioners left to their own devices may engage in.

69.3 Although regulators should be alert to some of the notorious deficiencies of time-based CPD regimes (such as the delivery of poorly conceived and minimally interactive recorded lectures, and so forth) regulators could consider ways to alleviate those concerns, such as course validation.

70. In short, although COIC agrees with the Consultation Paper that regulators should not assume (as the BSB does not) that a time-based CPD regime is sufficient to maintain standards of competence alone, it finds it curious that the Draft Statement of Policy does not include it even as one of the regulatory options that should be kept under consideration as part of a balanced system.

F: Remedial measures

Introduction

71. COIC comments below on the questions about remedial action. But there is a threshold question: it is not clear from the Consultation Paper what *triggers* remedial action, or how remedial action is related to the existing (and necessarily formal) procedure for handling complaints and breaches of ethics rules.

72. The Bar's Code of Conduct contains rules bearing on competence. These include Core Duty 7 ("You must provide a competent standard of work and service for each client") and Core Duty 10 ("You must take reasonable steps to manage your practice, or carry out your role within your practice, competently and in such a way as to achieve compliance with your legal and regulatory obligations"). Breaches of those rules can result in enforcement action, in relation to which there are, of course, detailed procedures.

73. In one sense these rules, taken together, already spell out a detailed set of provisions dealing with "remedial action" in response to lack of competence.

74. As COIC understands it, the concept of "remedial action" proposed in the Draft Statement of Policy is intended to be something different: to set out a range of measures which would be understood to be ways of improving competence in response to competence concerns, not disciplinary; they are described as measures "to improve or correct competence issues" and to "support authorised persons to improve their competence" (paras 30 and 31).

75. In principle, COIC agrees that those are worthy objectives. But:

    75.1 Some aspects of the Draft Statement of Policy are framed in terms which are redolent of disciplinary judgments (e.g. the reference to "aggravating and mitigating" factors in para 32(b)). If the intention is supportive, rather than disciplinary, that terminology is inappropriate.

    75.2 The Draft Policy Statement does not explain how remedial measures relate to disciplinary action. If remedial measures are triggered by information that demonstrates that a barrister has in fact failed to perform competently, it is hard to see why the case will not be, at least prospectively, disciplinary. That will inevitably affect the sorts of measures, including procedural safeguards to ensure fairness, that are involved.

76. To some extent those are points of detail which it can be expected the individual regulators would flesh out in due course. But it is going to be critically important to understand exactly how "remedial measures" relate to formal disciplinary processes, whether they operate in parallel to them, and if so how.

Question 13: Remedial measures in principle

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

77. COIC supports the idea that it should be possible to respond to competence concerns in ways which are aimed at supporting the individual practitioner and improving competence. COIC agrees that in cases where lack of competence has been demonstrably established an important aim of any action should be to address the competence issue that has been identified in order to improve competence for the future.

78. It is reasonably easy to see how this might be done in cases where incompetence has been established using the existing complaints procedures which lead to formal findings of lack of competence, or to administrative sanctions. That would involve adding remedial measures to the possible responses available to various decision-makers involved in the complaints process. COIC is, however, not convinced that any LSB Policy Statement is required. Individual regulators are already alive to the need to ensure that concerns, including concerns about competence, are addressed appropriately within an overall enforcement process which recognises the breadth of the possible responses to concern.

79. Where COIC is still more doubtful is in a proposal that the regulator might have power to impose remedial measures *entirely outside* any enforcement process (broadly understood). One obvious difficulty with that proposal is that, *ex hypothesi*, any conclusion that a barrister has failed to act competently implies a conclusion that the barrister in question has breached his or her professional obligations under the Code of Conduct. It is hard to see how the concerns that trigger remedial measures could ever not also trigger at least *consideration* of possible disciplinary action. But that concern is probably better addressed at the time the BSB comes forward with any regulatory proposals to implement the Draft Statement of Policy.

80. Depending on their form, remedial measures might have consequences which made them (in effect) disciplinary, however they were described. For example, a remedial measure which included any form of suspension, or a remedial measure which involved publication of a finding which amounted to a finding of lack of competence, could have those consequences. If they do, then it will be essential that they are subject to appropriate procedural protection for the individual barrister concerned.[5] A regulator could not lawfully remove essential procedural safeguards merely by branding what is in substance a disciplinary measure as a remedial one.

[5] See *R (on the Application of Lumsdon) v Legal Services Board* [2014] EWCA Civ 1276 at [71]–[77].

Questions 14 and 15: Factors to consider

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?

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

81. COIC does not agree that "seriousness" is a word that, in itself, adequately captures the full range of considerations, though it may serve as a useful shorthand. Regulators will need to confront a number of questions to calibrate their response to any competence concern:

    81.1 Does the evidence support the concern, and if so how strongly?

    81.2 Does the concern, if valid, suggest a breach of a relevant rule? Evidence of lack of competence will (if it is strong enough) always support a concern that there has been a breach of the Code of Conduct.

    81.3 Are the concerns reported to them such that they will or may call for disciplinary sanction, having regard to the regulatory objectives? That judgment, itself multi-faceted, must at least involve considering the nature of the concern and its consequences.

    81.4 If so, how would remedial measures be a suitable alternative to, or supplement to, other action?

82. COIC does not agree that, for remedial measures, seriousness is appropriately described in this context by reference to "aggravating" or "mitigating" factors. That is the language of discipline. The focus of remedial measures should be on whether action is required to improve the individual's performance, and if so what action is likely to be effective in doing that. Whether the competence was "aggravated" or "mitigated" is not relevant to that question (though it may be highly relevant to questions of sanction in a disciplinary sense). If the LSB intends (as COIC thinks it does, and should) that "remedial measures" are intended to be supportive and curative, rather than disciplinary, then they should not be described in the language of sentencing.

83. Although COIC agrees that "seriousness" in broad terms is a shorthand description of the critical factors, it would suggest that the Draft Policy Statement could, and should, attempt to explain the relevant dimensions of seriousness. COIC suggest that these include at least the following matters:

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

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

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

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

    83.5 What were the root causes of the competence issues?

    83.6 How far has the lawyer shown insight into the competence issues?

83.7 What steps, if any, has the lawyer taken already to address the competence concerns or to prevent them recurring?

83.8 How likely are remedial measures to address those concerns effectively? What remedial measures are likely to be most effective?

Question 16: Follow-up

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

84. The answer is obviously, "Yes". Effective remedial action will need to be followed up.

G: Implementation

Questions 17 and 18: Implementation timetable

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

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.

85. As COIC understands it, the proposal being made is that the individual regulators should have complied with the Draft Statement of Policy within 18 months.

86. Even if that means only that within 18 months the regulators should have taken decisions *in principle* about how to implement the Draft Statement of Policy, it is unrealistic. By way of example:

86.1 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).

86.2 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).

86.3 The development (and, ultimately, abandonment) of QASA (which addressed one aspect of one specialism) took more than 5 years.

86.4 The development of the GMC's revalidation scheme took at least 12 years.

87. 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. COIC therefore doubts 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.

88. Nor does COIC 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 ethics assessment), 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. COIC would suggest that a more reasonable period would allow for (a) progressive implementation which (b) should be complete within 36 months.

89. 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:

    89.1 If there is to be reaccreditation, 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.

    89.2 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 (past experience suggests a lead-time of 18–24 months). 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.

    89.3 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 assessments (to cover different areas of specialism: at the very least four assessments would be required to cover criminal law, family law, civil law, and the employed bar), and then recruit and train those who would 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.

90. In COIC's 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.

Question 19: Equality impact

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?

91 COIC does consider that concrete proposals are likely to have equality impacts that need to be addressed. There is evidence that:

91.1 Practitioners from some ethnic heritages are under-represented in some areas of practice and over-represented in others. For instance, Black British male barristers constitute 1 percent of those practising in commercial and financial regulatory work, but 6.5 percent of those practising in immigration law: see Bar Council, *Race at the Bar* (2021),[6] table 3. If the LSB's policy leads an individual regulator to impose additional requirements for competence assessment or mandatory training on some areas of practice in particular, those requirements may affect barristers from some ethnic groups differently from those of other ethnic groups.

91.2 There is evidence (see *Race at the Bar* pp 29 ff) that barristers from some ethnic heritages face obstacles to retention and career progression (for instance establishing practice, and through appointment as Queen's Counsel). Further research is needed to establish how competence assessment might compound those obstacles.

91.3 Any system which depends on feedback or a record of recent practice will be affected by circumstances which require a lawyer to take a break from active practice (for instance because of parental leave or caring responsibilities). Women are more likely to have reason to take such breaks, and there is a risk that competency assessments or reaccreditation could impose barriers for them which other barristers would not face. Care would be needed to make sure that a system of competence assessment or reaccreditation did not compound the disadvantages that women already face in that respect.

92. COIC agrees that it will necessarily lie with individual regulators to assess and mitigate these risks. That, however, militates against any policy which requires action to be taken without adequate time to consider its full implications, or which entrenches certain approaches as "default" approaches when the equality impacts of them have not been comprehensively assessed by the LSB.

H: Summary

Q1: Do you agree with the proposed outcomes.

93. No. Although COIC agrees with the proposed outcomes in general terms, it disagrees 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

[6] https://www.barcouncil.org.uk/uploads/assets/d821c952-ec38-41b2-a41ebeea362b28e5/Race-at-the-Bar-Report-2021.pdf.

adopt them. The burden should always be on regulators to explain why particular action is necessary.

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?

94. 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))?

95. Yes. With the caveat that in areas of core competence where regulatory responsibilities overlap, the objective should be (either immediately, or over time) to produce consistent competence frameworks between regulators without compromising standards.

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

96. A single set of shared competencies is probably unrealistic. But the regulatory direction of travel should be towards the alignment of competency frameworks in areas where they overlap, provided this does not compromise standards.

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)?

97. Yes, provided that description is not treated as dictating the form that a competency framework should take. Individual regulators should remain free to structure competency frameworks in whatever way is likely to provide the most useful guidance to the public and the profession.

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?

98. No, not in the form that it is proposed. COIC agrees in general terms, 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. COIC disagrees, 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)?

99. No. Some of the sources of information (such as information from regulatory activities) are 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 properly operates, and include proposals which might well be unlawful if implemented.

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

100. No, provided the sources identified are broadly understood. COIC would, however, emphasise the importance of placing information about individual performance and competence in context.

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)?

101. Yes, consistently with current practice; 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.

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

102. Yes, but only where those interventions are 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)?

103. Not as the policy is formulated. As options that regulators "could consider", they should remain open. But there are likely to be serious difficulties with some of them in practice, and COIC disagrees 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.

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

104. Yes. Despite the legitimate reservations about 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.

105. The proposal is not spelled out in sufficient detail to enable COIC to express a view. COIC supports 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?

106. 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?

107. Yes. See paragraph 83.

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

108. Yes.

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

109. 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.

110. Yes. See above and paragraphs 86–90.

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?

111. The equality impact of the measures adopted by any individual regulator can only be assessed when concrete proposals are available. Some measures are likely to have equality impacts, which will need to be properly assessed. The LSB’s policy must permit such assessment to be rigorously conducted.

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

112. 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.

Q21: Do you have any further comments?

113. See Section B above. In general, COIC is concerned that the Draft Statement of Policy sets out a presumptive blueprint for regulatory action by way of specific expectations which are not well supported by the evidence available. We consider that flexibility is essential.

Annex A: The COIC Working Group

COIC is a registered charity established and funded by the four Inns of Court to represent and promote the Inns' policies and activities on matters which are of common concern to them. COIC's purposes (in summary) are (1) the advancement of education in the law and related disciplines; (2) the promotion of the sound administration of the law by promoting high standards of advocacy; and (3) overseeing and enforcing professional standards of conduct in relation to the provision of advocacy and related legal services.

This response was drafted by a working group. Its members consulted widely within their Inns and Circuits and the entire response has been approved by COIC's Board.

The members of the working group have a broad range of experience in a range of specialisms and include members with particular expertise in education and training. They were:

- Faye Appleton (Director of Membership and Education, Lincoln's Inn)
- Desmond Browne CBE QC (Chairman of COIC's Board)
- Tony Charles (Director of Education, Gray's Inn)
- Guy Fetherstonhaugh QC (Inner Temple)
- Lynda Gibbs QC (Hon) (Dean of the ICCA)
- Alistair MacDonald QC (North Eastern Circuit)
- Duncan Matthews QC (Gray's Inn)
- Simon Myerson QC (Middle Temple)
- Christa Richmond (Director of Education, Middle Temple)
- Paul Stanley QC (Chairman of the Board of the ICCA)
- Professor Cheryl Thomas, Professor of Judicial Studies at UCL (Inner Temple)
- Will Waldron QC (Northern Circuit)
- James Wakefield (COIC Director and BTAS Registrar)
- HHJ Sarah Whitehouse QC (Lincoln's Inn)