



# Legal Services Institute

May 2011

## CPD: compliance, competence or development?<sup>1</sup>

**Professor Stephen Mayson**

Director of the Institute

I attended the Bar Standards Board's Clementi Debate on 26 May. The subject was whether the education and training of lawyers in England & Wales is fit for purpose. The content and debate, however, were more narrowly focussed on the fitness for purpose of continuing professional development (CPD) for barristers. It seems to me, though, that the issues are of broader application and importance.

I do not need to rehearse here the content of the presentations. Thankfully, not all speakers started from an assumption that the present approach *was* fit for purpose. What disturbed me was my own growing sense of unease through the evening – for reasons I couldn't initially pinpoint.

All present seemed to agree that CPD was 'a good thing', with its implicit consequence that lawyers who undertook sufficient and relevant CPD would be (and were) better practitioners. I would not dissent from that proposition – even if we might (and the panellists did) differ on the meanings of 'sufficient', 'relevant' and 'better'.

What the Debate did not address, despite some suggestions that it should, was the public interest in regulatory intervention in CPD. It is a regulator's function to determine whether or not a practitioner is competent to practise. It might even be their function to require CPD to be undertaken. But how prescriptive should that requirement be? And in whose interests is the intervention made?

The current approach is to require a certain number of hours to be undertaken (the proposal for the Bar is that from January 2013 this should rise to 24 hours a year). My sense of the meeting was that all agreed that a 'one size fits all' approach was not sensible, because the nature of practice changes over time, as do personal development needs. I must be missing the point, though, because it seems to me that a universal requirement for 24 hours a year *is* a one-size-fits-all requirement. So

---

<sup>1</sup> This paper was originally published as a blog post at [www.stephenmayson.com](http://www.stephenmayson.com) and represents the personal views of the author.

the 'sufficiency' proposition appears to be on shaky foundations if framed in terms of an input (hours) rather than an outcome (competence). But at least a minimum number of hours makes compliance easy to assess (for the regulator and the regulated) ... even if it actually fails to assure continuing competence. That might explain part of my unease.

There is clear evidence from CPD providers – and it has changed little during this country's 25-year experience of professional CPD – that, as the CPD year-end approaches, lawyers will attend (in body, though rarely in mind or spirit) any CPD event that will get them over the hours threshold. The content can be entirely irrelevant (to competence); and the behaviour (in making the choice and in not being truly 'present') is not what one might expect from a professional.

Some maintain, against this background, that CPD is fit for purpose. That begs a fundamental question about what the purpose is. The reality in the circumstances I am describing is that the CPD obligation has achieved *compliance*, but not competence or development. Compliance without competence or development strikes me as a rather sterile objective. (It might be true that education is never wasted – if, in the circumstances I assume here, there has been any; but that is still not necessarily the same as competence or development.) The relevance requirement therefore also lies on some shaky foundations. My unease mounts.

I confess to admiration for the New Zealand approach (thanks to panellist and BSB board member Matthew Nicklin for this): a requirement in the code of practice that a practitioner "must undertake the continuing education and professional development necessary to ensure an adequate level of knowledge and competence in his or her fields of practice". What a refreshing approach: treating practitioners as responsible professionals, able to make their own judgement about sufficiency and relevance – and being willing to be judged and held accountable after the event (on the basis of competence demonstrated, or not) rather than being told before it to satisfy some arbitrary input proxy (hours spent).

So, does this sometimes insufficient and irrelevant process nevertheless produce 'better' lawyers? Of course it might. But I am not sure that this should be the objective for a regulator (as opposed to a representative body). Surely, regulators, through regulation, should confine themselves to securing minimum levels of competence (which might nevertheless be set at high levels) rather than pursuing aspirations based on relative competence beyond that minimum level? After all, regulation is an intervention in otherwise private activity, and such intervention should in my view be justified in the public interest. What, then, is the public interest here? My conclusion would have to be that it is to protect clients from incompetent practitioners, and to achieve a broader confidence of the public in the competence of those authorised to provide legal services through maintaining standards for authorisation and removing those practitioners who fall below them.

My contention, therefore, is that the regulator should assure competence. This is in part an issue of the qualification and entry requirements sufficient for *becoming* an authorised person under the Legal Services Act. CPD has nothing to do with this. The regulators must then over time be satisfied that a practitioner is suitable to *remain* an authorised person. Is CPD relevant to this? Yes of course; but only, I think, in a sense more limited than current CPD requirements assume.

If a practitioner is the subject of a serious complaint about competence or service, or is found to have been professionally negligent, there must be questions to be asked about their competence and the public interest in them remaining able to practise. I would regard it as an entirely relevant question then to ask whether or not they had undertaken any CPD to maintain the currency and relevance of their competence, and to explore in detail exactly what CPD they had done and when. That should legitimately inform a regulator's judgement about the extent of culpability in relation to the professional lapses complained of and the assessment of continuing fitness to practise. But that judgement will be exercised in the specific circumstances of a particular complaint, at a certain point

in time, and in the context of the practitioner's performance at that time and in the period leading up to it.

I am led to the conclusion that the true value and utility of CPD as a regulatory obligation can only be judged in retrospect, and that to seek to prescribe in advance (especially by something so crude as an input measure of time spent) misses the point. The public interest requires an assurance of competence at the point of authorisation, and action to remove from practice those who subsequently fall short. It is not well served by universal and broad-brush requirements that ensure compliance rather than competence.

In the end, therefore, I am drawn to the New Zealand approach. Every lawyer should be under a regulatory obligation to maintain their competence and fitness to practise. The New Zealand approach requires that. Of course, CPD should be encouraged: development beyond the minimum required to practise should be a lifelong quest for any self-respecting professional. Personal aspiration and motivation will drive this, supported by the professional representative bodies. I question, however, whether the regulator should be focusing on professional development beyond the minimum competence required for practice.

The regulator should certainly remove from practice those who have been demonstrated not to be up to the required standard of competence. That is a specific judgement required after the event in light of a range of circumstances, including whether 'sufficient' and 'relevant' CPD had taken place. Disciplinary proceedings against those who have not undertaken enough CPD hours (failure to comply) does not actually assure their continuing knowledge and ability (failure of competence) – and probably costs the professions something in practising certificate fees to no great avail.

My unease therefore relates to:

- the confusion of compliance with competence and development; and
- regulators' focus on achieving some abstract and relative notion of 'better' when their attention should be directed to removing the incompetent and unethical from practice.

Consequently, CPD should relate to competence; it is not secured by compliance with an hours threshold, and development beyond the required minimum level of competence is a personal and relative matter. Whether someone has fallen below that minimum level cannot be assured by CPD, and can only be judged confidently in retrospect.

My conclusion is that the scope for prescription of CPD requirements is therefore more limited than current approaches appear to acknowledge, with the result that regulatory intervention relating to CPD goes further than the public interest requires.

## Legal Services Institute

The Legal Services Institute (originally the Legal Services Policy Institute) was established by the College of Law in November 2006 as part of its charitable activities. Its principal objectives are to:

- (a) seek a more efficient and competitive marketplace for legal services, which properly balances the interests of clients, providers, and the public;
- (b) contribute to the process of policy formation, and to influence the important policy issues, in the legal services sector and, in doing so, to serve the market and public interest rather than any particular party or sectional interest;
- (c) alert government, regulators, professional bodies, practitioners and other providers, and the wider public, to the implications of these issues; and
- (d) encourage and enable better-informed planning in legal services by law firms and other providers, government, regulators and representative bodies.

The Institute seeks to form and convey independent views that it believes reflect, support and promote the public interest rather than the preferences or views of other interested parties. Where the College might have views as a provider of education, these are expressed separately.

### Legal Services Institute

The College of Law  
Gavrelle House  
2 Bunhill Row  
London EC1Y 8HQ

Tel: 01483 216393

E-mail: [lsi@lawcol.co.uk](mailto:lsi@lawcol.co.uk)

Web: [www.legalservicesinstitute.org.uk](http://www.legalservicesinstitute.org.uk)