



Legal Education and Training Review Briefing paper 1/2011: Competence

Introduction

The aim of this briefing paper is to provide a guide to the notion of competence and the way it is used in competence-based systems of learning. Current legal education and training models in England and Wales rely in part on loose competence frameworks. Although any revised competence system or outcomes statements will not be a direct output of the LETR work, it is important to understand the basic strengths and weaknesses of competence-based models in evaluating possible ways forward for the regulation of legal education and training. The move to outcomes-focused regulation may be assumed to imply a greater reliance on competence-based frameworks in the future. However, the issues around the use of competence frameworks are complex and contentious. Their reliability and effectiveness will be explored further in the literature review conducted as part of this research. This paper therefore simply outlines the issues and cautions against taking that assumption as a given.

Competence v. 'competences'

'Competent' can mean a number of things;

- A meets a minimum standard of (historic) ability – this may simply mean that s/he has completed the formal requirements of a qualification system (see Eraut, 1994)
- A meets a continuing standard of performance, measured against an occupational or socially-expected norm – ie, the idea that “professionals should be able to do that which they profess they can do” (BRI Inquiry 2001, 25.3)
- A is on the mid-point on a scale between novice and expert (Dreyfus and Dreyfus, 1986)
- A's performance is not negligent or sufficiently incompetent to merit sanction or barring from practice (see Cooper, 1991).

Many systems of professional education and training tend to operate across the first two meanings, requiring both a minimum standard, signified by having once attained a set of relevant qualifications, and some evidence of continuing competence. Formal regulation of legal practice in England and Wales has tended to operate more within the first and last meanings (Cooper, 1991).

Competence in competence-based systems of education tends to be defined and measured functionally as the ability to perform an activity to the standard required using an appropriate mix of knowledge, skills and attitude.

Competences, competencies and 'competence' (or 'competency') frameworks

Some writers make a distinction between 'competences' at a macro level, as 'outputs' or minimum standards of performance and individual 'competencies' at a micro level or as 'inputs' (e.g. the behaviours or attributes required for the job). Others, however, use the terms interchangeably or suggest that the two concepts overlap.

The articulation of a competency¹ will typically involve:

- Naming it (e.g. provide legal advice to clients);
- Identifying the subsidiary elements involved (e.g. Explore and analyse the nature of the client's needs; research information relevant to client's situation; provide appropriate and accurate advice to meet the client's needs);
- Identifying the skills and knowledge required in performance (e.g. questioning; active listening; negotiating; summarising; checking understanding; decision making; planning; problem solving; presenting information; recording and storing information);
- Articulating performance criteria allowing demonstration of the competency to be assessed objectively. For example:
 1. Explain clearly the kind of service you can offer and check client's understanding
 2. Explore and agree with the client the nature of their advice needs and expectations
 3. Agree with the client where a situation requires immediate action and take steps to implement this
 4. Agree next steps with client
 5. Explain the organisation's systems and procedures for working with the client and check understanding including the limits of service provision and when service may be withdrawn
 6. Agree with the client the procedures, responsibilities and time limits for further actions
 7. Review and analyse available client information relevant to their case
 8. Comply with the relevant legislation, codes of practice, guidelines, and ethical requirements
 9. Record client details and agreed actions using organisational procedures for recording and storing client details
- Any additional guidelines felt appropriate (e.g. examples)

Competence standards may also provide a statement of the level or complexity of the context of performance by, for example, reference to the National Qualifications Framework² or otherwise. This is particularly significant if there is a graded series of such frameworks or where the aim of the

¹ The example is taken from unit LA11 of the National Occupational Standards for Legal Advice.

² See http://www.direct.gov.uk/en/EducationAndLearning/QualificationsExplained/DG_10039017

framework is to demonstrate consistent standards. Clearly, for example, the activity of offering legal advice can be and is performed at a number of different levels and one would not expect, for example, a trainee solicitor to be able to perform to the same level of competence as a QC.

Proponents and critics of competence approaches

Those who promote the value of competence frameworks generally do so by suggesting that they promote:

- public confidence in the profession;
- homogeneity and normalisation within the profession; and
- clarity and transparency of standards.

Criticisms of such frameworks often centre around the following issues:

- That they may inhibit performance or creativity at a level above that stated in the framework (i.e. there is no incentive for (or even concept of) 'competence+')

They can lead us to focus on low-level procedures and attributes that are easy to define, at the expense of developing and assessing the higher skills of critical thinking, judgment and evaluation ...They encourage us to focus too much on the behavioural outcomes of learning, ...Both [outcomes and competence] approaches tend towards assessing understanding by looking at observable competences and outcomes competence approaches in particular can dehumanise learning ... (Webb, 1996)

- That they encourage a mechanistic approach:

Competence is often conceived as "the ability to perform tasks" and competence-based programmes may be characterized by the pejorative epithet of 'the 3 Rs' – Reductionist, Restrictive and Ritualistic. (O'Reilly *et al*, 1999)

- That competence models do not provide an adequate conceptual structure for understanding or for personal/professional self-development (Barnett, 1994; Maharg, 2007).
- That professional work is of a level of complexity and creativity that it is not possible to represent it adequately in a pre-determined framework. This is an extension of our first concern. Competence frameworks have often been criticised for ignoring or underplaying practitioners' roles in "creating and defining their own task" (Burgoyne 1989:57), and undertaking reflective practice – what some educationalists characterise as 'metacompetence'.

- That competence models may struggle to incorporate meaningful assessment of the values and attitudes that are part of 'professionalism' and an integral part of what we holistically understand by "legal competence" (Sherr, 1998).
- The measurement of competence at one moment in time has also proved problematic:

[C]ompetence, like maturity, is dynamic and developmental. It either grows or deteriorates. We do not achieve competence, package it and possess it for the rest of our lives [it is] a continuing process of growth. (Rouch, 2001, 46-7)

It has been argued that most of these problems can be successfully addressed provided that performance:

is conceptualised in terms of knowledge, abilities, skills and attitudes displayed in the context of a carefully chosen set of realistic professional tasks which are of an appropriately level of generality. ... The main attributes that are required for the competent performance of these key tasks or elements are then identified. Experience has shown that when both of these are integrated to produce competency standards, the results do capture the holistic richness of professional practice ... (Hager, Gonczi, and Athanasou, 1994)

This is the so-called 'integrated approach' that has been influential in Australia.

However, significant concerns remain, and there is some evidence of a move away from competence approaches in conceptualising professional capabilities or complex competencies such as 'leadership'. Thus, in medical education, for example, there has been a shift from measurement of competencies and academic achievement to a focus on professionalism and qualities associated with that (see, eg, Talbot, 2004). Coulehan and Williams (2001) have argued that there is a dichotomy in North American medical education between explicit commitment to "traditional values of doctoring – empathy, compassion and altruism" and a narrow, technician, ethic of competence characterised by "tacit commitment to behaviours grounded in an ethic of detachment, self-interest and objectivity". While some medical students and young physicians in their study responded to this dichotomy by embracing the explicit ethic of professionalism, others re-conceptualised themselves "primarily as technicians and narrow their professional identities to an ethic of competence, thus adopting the tacit values and discarding the explicit professionalism". A third group enacted "non-reflective professionalism" that was manifested by treating patients as "objects of technical services (medical care)".

Similarly, the Centre for Leadership Studies at Exeter University (Bolden *et al*, 2003) in a substantial review of leadership theory and competency frameworks came to the view that, whilst the competence approach has its strengths, it leads to a particularly individualistic conception of leadership and a relatively prescribed approach to leadership development. The authors queried whether the changing nature of work and society may demand new approaches that encourage a more collective and emergent view of leadership and leadership development. As they concluded:

In many ways a leadership competencies or standards framework is like a psychometric profile – useful for illuminating current practice in comparison to a norm but dangerous and potentially damaging if misused.

Continued doubts about the value of competence-based systems, particularly as regards their use outside of the workplace, go some way to explain the tendency in many fields, including legal education and training, to maintain a 'mixed economy' system, adopting a thicker descriptive approach involving a mix of input, process and outcome measures.

Competence frameworks in law

Competence frameworks in legal practice are comparatively recent in this jurisdiction. However, in a meta-survey of such frameworks for lawyers across several jurisdictions, Gasteen concludes that:

... although the research indicates very similar skills and knowledge are required of practising lawyers, the way in which these skills and knowledge are described and categorised are very different. Many of the differences in the definitions of competence are attributable to semantics or categorisation. While the majority of researchers seem to agree on a comprehensive or 'thick' description they differ on how this description is divided and categorised.
(Gasteen, 1995)

An indicative list of existing or proposed competence frameworks currently in use in England and Wales (and one example from Australasia), representing levels from the legal advice worker represented in the National Occupational Standards, through solicitors and legal executives to Queen's Counsel, appears below. A particularly current issue is the identification of appropriate competences or standards in the performance of advocacy, particularly in the criminal courts.

Some competence frameworks proposed or in place for different kinds of legal work (outside the classroom):

Australasian Professional Legal Education Council Competency Standards for Entry Level Lawyers:
http://www.aplec.asn.au/Pdf/Competency_Standards_for_Entry_Level_Lawyers.pdf

CPS National Standards for Advocacy: <http://www.cps.gov.uk/Publications/prosecution/nsa.html>

ILEX work-based learning scheme draft handbook:
<http://www.ilex.org.uk/pdf/IPS%20con%20QE%20WBL%20handbook%20Aug%2010.pdf>

Institute of Paralegals competency standards: <http://www.theiop.org/national-competency-standards/contract-terms.html>

Joint Advocacy Group proposed standards for criminal advocates:

<http://www.sra.org.uk/sra/consultations/joint-advocacy-group-quality-assurance-scheme.page>. See also responses to consultation at <http://www.barstandardsboard.org.uk/assets/documents/consultation%20analysis%20JAG%20summary%20final%20version.doc>

LSC proposed competency framework for criminal advocacy:

http://www.legalservices.gov.uk/docs/cds_main/Annex_E_QAACompetencyFramework.pdf

National Occupational Standards for Legal Advice:

http://www.skillsforjustice.com/las/section_a/09_downloads.html

Queens' Counsel competency framework: <http://www.gcappointments.org/wp-content/uploads/2011/03/The-Competency-Framework-2011-12.doc>

SRA work-based learning outcomes: <http://www.sra.org.uk/students/work-based-learning.page>

References

- BARNETT, R. 1994, *The Limits of Competence. Knowledge, Higher Education and Society* (Buckingham: SRHE/Open University Press).
- BOLDEN, R., et al 2003, 'A Review of Leadership Theory and Competency Frameworks. Edited version of a report for Chase Consulting and the Management Standards Centre', 44pp. Available online at http://centres.exeter.ac.uk/cls/documents/mgmt_standards.pdf
- BRI INQUIRY, 2001, *Learning from Bristol: The Report of the Public Inquiry into Children's Heart Surgery at the Bristol Royal Infirmary, 1984-1995*. Cm. 5207(1) (London: TSO).
- BURGOYNE, J., 1989, 'Creating the Managerial Portfolio: Building on Competency Approaches to Management Development' *Management Education and Development*, 20(1), 56.
- COOPER, J., 1991, 'What is Legal Competence?' *Modern Law Review*, 54(1), 112.
- COULEHAN, J. & WILLIAMS, P., 2001, 'Vanquishing Virtue: The Impact of Medical Education', *Academic Medicine*, 76(6), 598.
- DREYFUS, H.L. and DREYFUS, S.E., 1986, *Mind over Machine*, (New York: The Free Press).
- ERAUT, M., 1994, *Developing Professional Knowledge and Competence*, (London: Falmer).
- GASTEEN, G., 1995, 'National Competency Standards: are they the answer for Legal Education and Training?', *Journal of Professional Legal Education*, 13(1), 1.
- HAGER, P., GONCZI, A. and ATHANASOV, J. A. 1994, 'General Issues about Assessment of Competence', *Assessment and Evaluation in Higher Education*, 19(1), 3.
- MAHARG, P. 2007, *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-first Century* (Aldershot: Ashgate).
- O'REILLY, D., CUNNINGHAM, L. and LESTER, S., (eds.) 1999, *Developing the Capable Practitioner. Professional capability through higher education*, (London: Kogan Page).

- ROUCH, M., 2001, *Competent Ministry: A Guide to Effective Continuing Education* (Nashville, TN: Abingdon Books)
- SHERR, A., 1998, 'Legal Education, Legal Competence and Little Bo Peep', *Law Teacher*, 32(1), 37. Also available at <http://ials.sas.ac.uk/research/woolf/inaugpub.htm>
- SHERR, A., et al 1994, *Lawyers – The Quality Agenda*, (London: HMSO) (See Chapter 2 "Understanding Competence").
- 2001, *Quality and Cost – Final Report on the Contracting of Civil Advice and Assistance*, (London: TSO).
- 2007, *Evaluation of the Public Defender Service in England and Wales*, (London: TSO).
- TALBOT, M., 2004, 'Monkey See, Monkey Do. A Critique of the Competency Model in Graduate Medical Education', *Medical Education*, 38(6), 587.
- WEBB, J., 1996, 'Why Theory Matters' in Webb, J. and Maughan, C., (eds) *Teaching Lawyers' Skills* (London: Butterworths).