

BAR
STANDARDS
BOARD

REGULATING BARRISTERS

RISK

.....
FRAMEWORK

A summary of how we
identify and manage
risks in the legal system

APRIL 2016

We are publishing three documents about our general approach to risk-based regulation:

- the **Risk Framework** describes our general approach to identifying and managing risks in the legal system;
- the **Risk Index** categorises those risks; and
- the **Risk Outlook** prioritises three risk themes which we think should be the current focus of our regulatory attention.

These documents also complement the approach set out in our **2016-19 Strategic Plan**.

You can find all of these documents at <https://www.barstandardsboard.org.uk/about-bar-standards-board/how-we-do-it/our-risk-based-approach/>

If you require this document in an alternative format, please contact us via email at contactus@barstandardsboard.org.uk or telephone us on 020 7611 1444.

The Regulatory Risk Framework

Who is this information for?

We have produced this information primarily for barristers and members of the public who want to understand more about our approach to regulation.

What is its purpose?

This document outlines our new way of regulating barristers, based on risk. Our Board has committed to adopting this approach, which we are implementing over a period of time.

This document sets out how we intend to identify and manage risks to a healthy legal system which arise within the section of the market that we regulate.

We want risk assessment to inform our regulatory activities. In this way, we can make sure that we focus our attention on the largest risks in the legal system.

There are also other types of risk that we consider in addition to regulatory risks. Risks to our corporate and strategic objectives (ie risks arising from the activities of the BSB and external factors impacting us as an organisation) are managed using many of the same principles, but are not covered by this document.

What does this mean for me?

For members of the public and consumers of legal services

You can be assured we are working to understand what you need from us as the regulator of barristers, what your concerns are and what you would expect us to be doing.

You will find out how we use a wide range of information to improve standards in the legal services market and prevent harm, and how we act when things do go wrong.

For those we regulate

You can be assured we are focusing our efforts where they are most needed and using our resources wisely.

We will help you to understand our priorities, telling you why we need reliable information about those we regulate and how we will use that information.

Good risk management is also important in your own practice. We will describe key principles that could help you when you take your own steps to manage risk.

For our employees

You have a clear process supporting all of your activities, making sure that regulatory risk is at the heart of everything we do.

Your work is targeted on areas that will make a meaningful difference. We have a structured approach to learning from and improving how we work.

Background

Whether the justice system is a very real part of everyday life for you, or something that largely works unseen, the concept at the very heart, the rule of law, is something vital to all of us in society.

The rule of law is what enables us to protect our rights as citizens and to hold one another to account. Enabling people to access justice and setting the standards of service they receive is central to our purpose as a regulator. But sometimes things can go wrong in the legal system.

Our role as a regulator

As a regulator, we oversee a marketplace where consumers with many different types of legal needs look for help from experts who can stand up in court on their behalf or provide advice.

It is our responsibility to safeguard consumers and protect the public in line with the objectives set out in the Legal Services Act 2007:

To do this, as a regulator we need to:

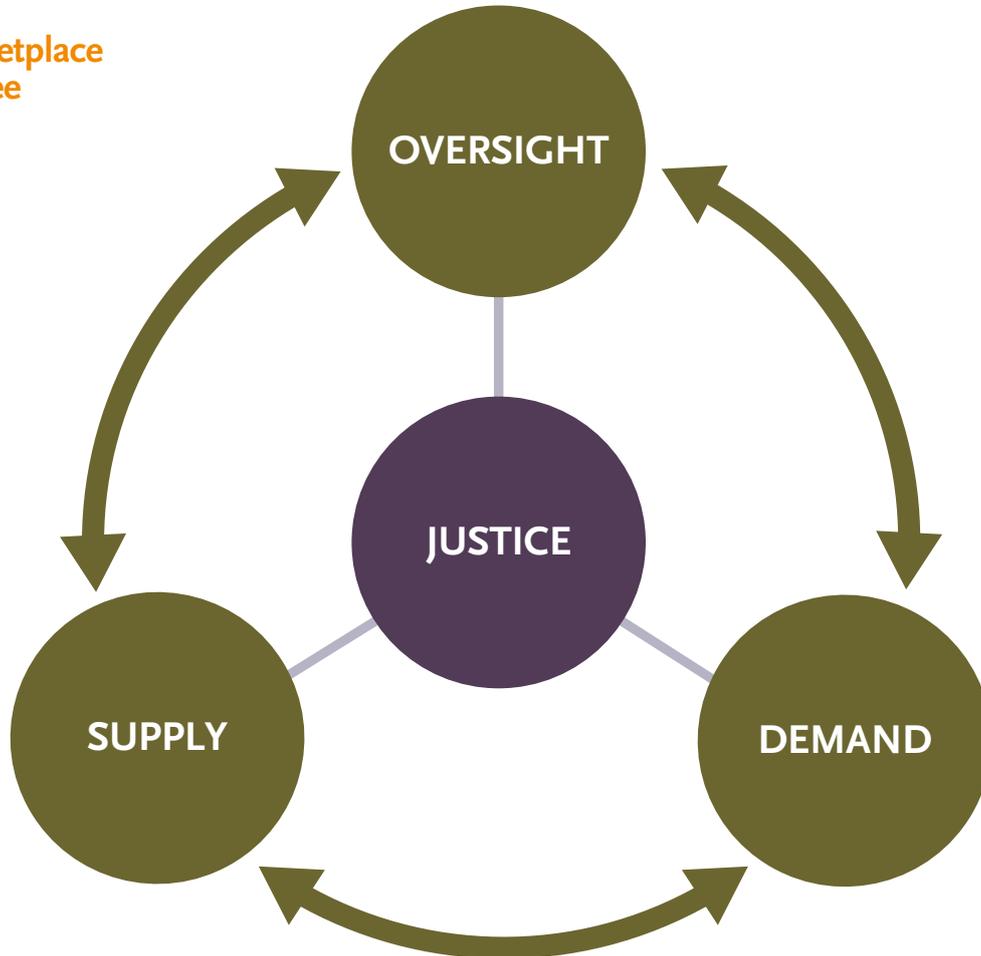
- have an in-depth understanding of how the legal services marketplace works, and how effectively it delivers for those who rely upon it; and
- be able to influence that marketplace so that it operates in line with our regulatory objectives.

The Legal Services Act Regulatory Objectives

- 1 Protecting and promoting the public interest
- 2 Supporting the constitutional principle of the rule of law
- 3 Improving access to justice
- 4 Protecting and promoting the interests of consumers
- 5 Promoting competition in the provision of services
- 6 Encouraging an independent, strong, diverse and effective legal profession
- 7 Increasing public understanding of the citizen's legal rights and duties
- 8 Promoting and maintaining adherence to the professional principles:
 - independence and integrity
 - proper standards of work
 - acting in a client's best interests
 - duty to the court: acting independently in the interests of justice
 - confidentiality of client affairs



The marketplace we oversee



Insight

We need a good understanding of the market for barristers' services so that we can make the right decisions.

That means we need to build a picture of the various groups and individuals involved – looking at the way that barristers work, the role played by others involved in the sector and the experiences of the public themselves.

For example, we might look at business models used by the profession, or at how clients choose their

barristers. When things go wrong, we look at the impact on clients and the wider public.

We are building up our market insight through activities such as:

- listening to our stakeholders;
- gathering information from those we regulate and from training providers;
- assessing complaints;
- gathering supervision monitoring information from chambers and entities;
- carrying out investigations; and
- research and analysis.

Influence

By "influence", we mean we aim to take regulatory actions that make a meaningful and positive impact within the legal services marketplace.

We have a variety of different "tools" that we can use as a regulator and we want to make sure we are using methods that are effective and targeted. Our regulatory "tools" include:

- setting education and training requirements for all barristers;
- setting standards for barristers entering the profession and setting requirements around their ongoing practice;
- authorising barristers and entities (businesses that provide legal services);
- supervising and monitoring barristers, their chambers and businesses we have authorised;
- investigating breaches of our regulatory requirements; and
- taking formal enforcement action; and
- providing information, advice and guidance.

The majority of these activities relate to the barristers we regulate and their businesses, but we also work with groups such as training providers, legal consumer organisations and others involved in the sector.

We need to be able to evaluate how well we are doing against the regulatory objectives so that the public can have confidence in barristers and legal services in general.

We do this through our corporate planning, performance reporting, governance and change management.

Our approach to regulation

Our regulation is based on the concept of risk. We call it "risk-based regulation". This means that before we act:

- we work to identify the things that could go wrong, or have gone wrong; and
- we carefully consider the right regulatory tool or power to apply to each situation.

By working in this way we can take more proactive steps – acting before things go wrong and learning about which actions work best in any given situation.

In the past we based our regulation on very strict rules. We could not readily adapt our approach to different circumstances and often we could only take action after something had gone wrong.

Rules still play an important part in our new way of working. But now we are starting to work in a more flexible way whenever we decide on the best action to take.

This approach helps us to regulate in line with the regulatory principles set out in the Legal Services Act 2007, s28.



Regulatory principles

This “risk-based” approach helps us to regulate in line with the regulatory principles which can also be found in the Legal Services Act.



Transparent



Accountable



Proportionate



Consistent



Targeted at cases where action is needed

Source: Section 28 of the Legal Services Act 2007

So, where do we start?

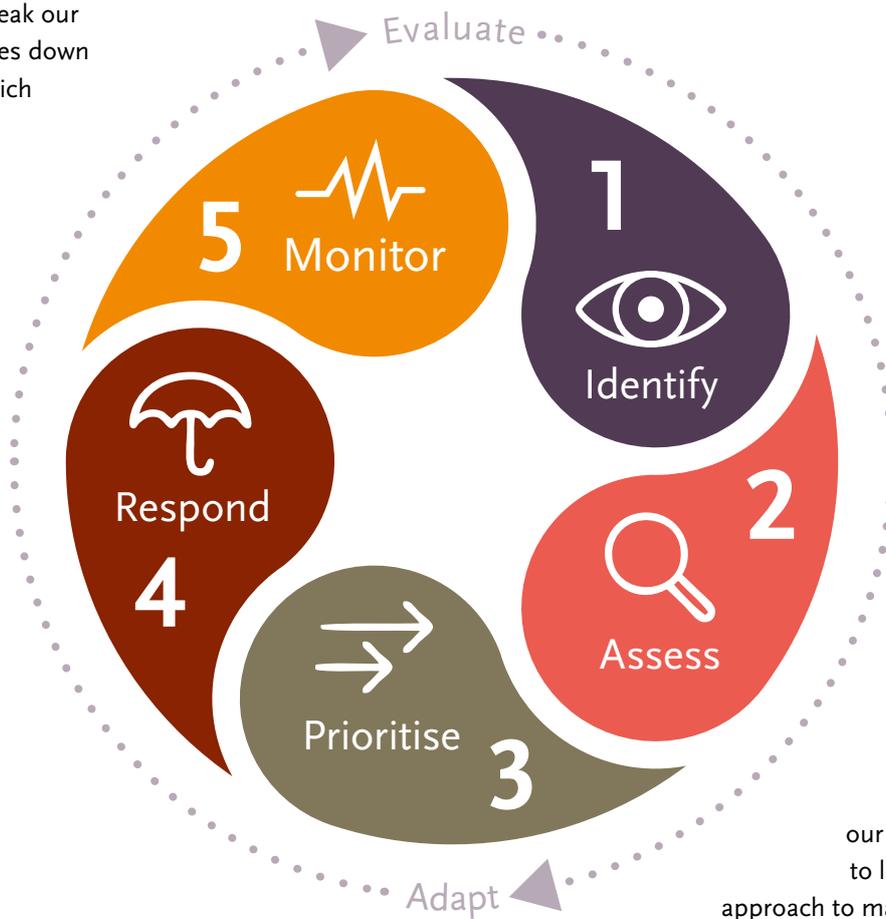
Our regulatory objectives set out in the box on page 5 underpin all of our regulatory activities. We use these objectives to identify what stands in our way – things that could go wrong and cause harm.

This provides us with a list of risks that could cause, or result in, these objectives not being met.

By identifying possible risks in this way, we can work to understand and treat the cause of the problem rather than just the symptom or individual event.

Our process for managing regulatory risk

In practice, we break our regulatory activities down into five steps which form a cycle:



We also evaluate our regulation in order to learn and adapt our approach to make improvements.

1 How we identify risks

As a regulator, we run on information. It is what we base our decisions and regulatory actions on. Whatever information comes in, we use it to identify the potential risk before we balance it against other priorities, or take any action.

To help us to categorise risks, we have a list of risks (see our *Regulatory Risk Index* [on our website](#)). We have arranged these risks into five groups:

- client service and delivery;
- ethical conduct;
- competence to practise;
- management and administration; and
- market risks.

Some of the risks in these categories focus on what has gone wrong. Others focus on what the cause could be.

An example

We receive a complaint from Mr Robertson, a window cleaner, that XYZ Barristers' Chambers has not paid its window-cleaning bill for over five months

Possibility

This suggests possible cash flow problems for the chambers in question – an example of a **viability risk** within the “Management and Administration category” on our Risk Index.

We are interested in viability risks because they can be a driver for other problems which could impact our regulatory objectives.

Consequences

Chambers management may be under significant pressure, which could impact standard of service.

If viability problems get worse, there is a risk of disorderly closure (where the barristers' practice fails to close down in an orderly manner) and clients' interests are not best served. There may even be an increased temptation towards financial impropriety to deal with the problem.

Causes

If we find the chambers is in financial difficulty, we will also try to understand the cause. This could include market and external factors such as a reduction in public funding or changes in tax liability and other risk areas such as management competence.

Understanding the cause behind issues may help us to take preventative action in other cases as well as deciding whether or how to act in this case.

Managing risk is about managing uncertainty: none of these consequences are guaranteed to happen. The presence of a risk is also not necessarily viewed as a bad thing – we are not seeking to remove all uncertainty from the market or to prevent new and innovative practices.

We need to consider our analysis of the situation – the unpaid bill may be as much an indicator of poor administration within chambers as it is an inability to pay. By consistently identifying risks using our index we can improve our market insight and better prioritise our regulatory activities.

It is important for us to correctly categorise incoming information, because it helps us to work out which risks are causing the most damage across the profession and where they are likely to occur.

Our Risk Index is not a static document – we review it regularly in light of new information and developments in the legal services marketplace.

If the incoming information does not relate directly to a regulatory risk we have already identified, we ask ourselves if it is relevant to our regulatory objectives at all. It may help us to improve our Risk Index, or it may be information that we do not need to act on at all.

Our starting point has been to identify which risks are of concern to us. We next need to better understand and gauge the relative size and shape of each risk.



2 How we assess risks

We receive a wide range of information that helps us to build a picture of our risks.

We might, for example, consider a complaint received by our Professional Conduct Department, or intelligence picked up by a member of our Supervision team. Or perhaps information from elsewhere, such as a query from a pupil who is struggling to get a supervisor to send the necessary paperwork.

Wherever the information comes from, we need to be able to form a consistent view of where action is really needed.

Whether we consider an individual barrister, a chambers or a barrister's business, or look at the profession as a whole – it is important that we develop an approach to assessing risks that we can apply across each level. This helps us to compare the relative importance of quite different issues.

Impact and likelihood

There are **two key elements** to measure when assessing risk:

1 Impact (what is the damage that could be done)

Because we are measuring risks to our regulatory objectives, "Impact" reflects the effect that the risk could have on those objectives.

We look at both the nature of the potential impact and the scale, using indicators such as number of consumers likely to be affected and the impact on wider public confidence in legal services.

2 Likelihood (what are the chances of that happening)

We also use the information we have available to measure how likely the impact is to occur.

In some cases we may deal with risks that have already occurred. Or in other cases we may still have time to take action to prevent things from going wrong.

We take into account both "impact" and "likelihood" to make sure we have a balanced view. Otherwise, we would be driven by extreme worst case scenarios that are unlikely to occur – or distracted by minor issues that have minimal impact on our regulatory objectives.

It is vital for us to consider timescales – how soon the impact is likely to occur. The further in the future that we believe the risk will occur, the greater opportunity we have to take proactive action to tackle the potential impact.

We also want to understand at this stage, how urgent it is for us to take action, so that we can prioritise.

If the risk has already occurred, we need to consider the evidence and assess the actual impact before taking action.

We will look at the way we assess different risks across the BSB to make sure we do this consistently.

As we record our assessments, we will build up a knowledge base of potential risks and issues. We can use this to take a broader view of which circumstances cause most problems.

Once we have made our assessment based on the information available, we can prioritise our response.

3 How we prioritise regulatory action

We want to make best use of our resources, so we prioritise our regulatory action based on risk. This may take place on several levels:

Level	Example
For individuals	We review intelligence, reports and complaints that we receive and decide where to take further action. We compare our risk assessment against regulatory priorities.
For organisations	We prioritise where we choose to target our supervision visits, and which topics we will cover with chambers and entities.
At a market level	We prioritise areas where we want to carry out a review to learn more, or where we think policy changes are needed.

To do this, we rank the risks according to their nature and scale, where they sit within our regulatory priorities and the urgency with which we need to act in order to be effective.

In some cases, we might not have sufficient information to make a final decision, but the potential for harm means that we decide we need to build a better picture and refine our assessment. There are many ways in which we can do this, for example:

- we may ask for further information during an application process;
- we may visit a chambers;
- we may refer a matter for formal investigation;
- we may commission some research into a particular topic.

We can then update our risk assessment and prioritise any response.

We may decide to tolerate some risks. There may be other risks that are a greater priority at that time or the risk may be too far in the distance for meaningful action to be taken. So we may accept the level of risk without the need for regulatory action at that time.

If we have decided that action is needed, we need to choose the most appropriate regulatory response.



4 How we respond to risks

Our regulatory controls

We have a variety of regulatory actions (also known as controls) that we can take when responding to a risk.

We select our control, or combination of controls, based on our understanding and experience of the risks identified, the urgency of response needed and the outcome that we are looking to achieve.

We aim to respond in a way that is targeted at the problem, in proportion to the level of potential harm, and in the most efficient and effective way possible.

This could relate to a single individual, to a chambers or a barrister's business, specific sectors of the market, or the profession as a whole.

Type of control	Purpose	Examples
Preventative	To limit the impact or likelihood of something harmful happening in individual cases	Our supervisors agree action plans with chambers focused on specific risk areas
Reactive	To deal with risks that have already occurred	We can enforce our regulatory requirements by placing sanctions on an individual barrister
Directive	To set clear expectations and guide future behaviour across the profession	<p>We publish our regulatory Handbook containing rules and standards.</p> <p>We issue guidance and advice to make sure our requirements are clear.</p>

5 How we monitor

It is important for us to monitor our performance as a regulator. We do not judge success ultimately in terms of risk at all. What matters is the real difference that we have made, and the outcomes for everyone who relies on the legal system – particularly for those who rely on barristers for advice, or to stand up for them in court.

It is important for us to be able to show that our regulatory intervention is making a difference, and to understand the real world impacts that result. It may be difficult, but starting to improve our understanding of regulatory outcomes is an important step.

We monitor the result of specific regulatory actions to make sure they are delivering the intended outcomes. Where things have gone wrong, we work to understand the impact on those affected.

For example, after a supervisory visit that has led to an action plan being undertaken by a chambers, we might schedule follow up visits to look for improvements to the service provided to clients.

In cases where our actions do not deliver the intended results, we will update our assessment of risk and take action accordingly – in effect, going back around the risk management cycle again. We will also look for lessons that we can apply more widely as we evaluate our overall approach.



How we evaluate, learn and adapt

Finally, we need to evaluate our overall regulatory performance to understand where we can improve in the future.

We focus on assessing:

- the impact of our regulatory activities on the regulatory objectives set out in the Legal Services Act 2007;
- the way in which our regulatory activities are carried out;
- input from our stakeholders.

Our risk-based approach is specifically designed to enable us to adapt our responses in the future. We can do this by learning from:

- regulatory performance, for example if we learn that controls have not worked as intended;
- changes to the levels of risk, for example an increasing trend in poor complaints handling;
- changes in regulatory strategy and priorities;
- new risks that arise as technology evolves and other changes impact the market;
- new regulatory powers or tools.

We have processes that oversee our performance and that may improve the regulatory approach at each stage of the risk management cycle. This will be supported by an assurance framework.

As a result, we may make changes to our processes and controls, for example:

- we may update our Risk Index with new or amended risks;
- we may adapt our risk assessment methodology;
- we may update our risk priorities and strategy;
- we may amend controls, for example, create new policies, aim to increase barristers' training and awareness;
- we may put in place additional monitoring.

We are also committed to sharing information concerning our regulatory risks, strategy and performance.

What to look at next

Take a look at our *Regulatory Risk Index* which sets out the risks that we manage using this approach.

If you want to know more about our risk priorities and context in which we regulate, read our *Regulatory Risk Outlook*.

Both these publications are available [on our website](#).



Contact us

If you have questions about our risk-based approach, or would like to provide us with information about any specific risk concerns that you have, please do get in touch with us.

Write to us:

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