

BAR STANDARDS BOARD

REGULATING BARRISTERS

Report: Risk-Based Supervision Consultation

Executive summary

The BSB's consultation on the development of a risk-based approach to supervision attracted 22 formal responses. Constructive feedback was also obtained through a number of briefing sessions for clerks, practice managers and heads of chambers.

Most respondents to the consultation were in favour of the development of a risk-based approach to supervision, with many suggestions made for how this could be best implemented. There was also a minority of negative responses, which focussed on the perceived increase in regulation and regulatory costs, as well as the lack of evidence to justify this; they also expressed concern at the concept of supervising at the chambers level.

The BSB has considered all responses and feedback received. Whilst the responses were largely positive, the BSB has agreed revisions to its approach to reflect some of the constructive suggestions for improvement. These revisions have also been informed by the development of the BSB's wider Risk Assessment Framework.

The main changes that have been agreed relate to the following:

- For chambers, impact assessments will now precede assessments of likelihood; those with the lowest impact will not be required to participate in further proactive supervision. This will mean that low impact sole practitioners and small chambers will not be treated the same as larger, higher impact chambers, thus avoiding a disproportionate impact on them and preventing the BSB from devoting a disproportionate amount of resources on supervising a small segment of the Bar. The assessment of impact will consider matters such as areas of practice, volume of cases and how much public access work a chambers undertakes, as well as whether pupils are taken and whether work is undertaken under the Money Laundering Regulations.
- Indicative risks against which likelihood will be assessed have been developed. This will allow for more meaningful assessment of the likelihood of these risks materialising, as opposed to attempting to assess the overall likelihood of any form of non-compliance occurring.

- Inspections will no longer be used for high risk chambers and entities. Instead, the Supervision Team will undertake evidence gathering visits which could include all chambers and entities. This is more compatible with the overall ethos of supervision, which will aim to develop constructive engagement between BSB staff and chambers and entities.

A number of more specific amendments have been made to particular aspects of the proposal. These are detailed in the BSB comment sections that follow the summary of responses to each question.

This report also includes evidence of the need for supervision, as requested by a number of respondents.

A revised Supervision Strategy and accompanying guidance, setting out the detail of the new approach, are included below at Annexes A and B. The strategy will become operational in early 2014 when the new Handbook comes into force.

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Introduction

1. The risk-based supervision consultation set out proposals for the development of a risk-based approach to the supervisions of chambers and entities, as well as proposals for evidence gathering targeting specific areas of risk (thematic reviews) and the supervision of individual barristers.
2. It was published on 25 February 2012 and was initially scheduled to close on 31 May 2013. The deadline for responses was later extended to 14 June 2013.
3. A total of 22 formal consultation responses were received. This included 12 from sets of chambers, 4 from individual barristers, 5 from professional bodies and a response from the Legal Ombudsman.
4. The following organisations responded:
 - 1 High Pavement
 - 7 Harrington Street
 - 8 New Square
 - 9 Kings Bench Walk
 - 9 Park Place
 - Bar Council
 - Bar Council's Equality and Diversity Committee
 - Blackstone Chambers
 - Chancery Bar Association
 - Falcon Chambers
 - Francis Taylor Buildings
 - Institute of Barristers' Clerks
 - Legal Ombudsman
 - New Square Chambers
 - South Eastern Circuit
 - St John's Chambers
 - Walnut House
 - Wilberforce Chambers
5. Responses were therefore almost exclusively from the perspective of those who would be supervised under the new proposals.
6. A number of briefing sessions were run during the consultation period to explain the proposed scheme and to provide attendees with an opportunity to ask questions. This included sessions for clerks, practice managers and heads of chambers. There were over 100 attendees across these sessions. Notes were taken of the comments made and the questions asked at these sessions and these have been factored into the summaries below.
7. During the consultation period the BSB has undertaken work on the development of its wider Risk Assessment Framework, which will inform its overall approach to regulation. It

has also continued to engage with other regulators and other relevant stakeholders on supervision matters.

8. This report summarises the responses received and sets out the BSB's comment on these and details the changes that it has agreed to its Supervision Strategy as a result.
9. A summary of the main changes can be found at paragraphs XX to XX and a revised supervision strategy and accompanying guidance are included at Annexes A and B. The strategy will become operational from January 2014, when the new BSB Handbook comes into force.
10. The BSB is undertaking a series of roadshows on the new Handbook and these will also cover the implications of the new approach to supervision. Details of these roadshows can be found on the BSB's website. In the meantime, any queries about risk-based supervision should be directed to:

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General summary of responses

11. Overall, respondents were broadly supportive of the concept of risk-based supervision. Some responses were wholesale endorsements whilst others also identified some specific aspects of the proposals that were not supported and made suggestions for improvement.
12. The Legal Ombudsman provided the only response from outside of the profession; it stated that the proposals have the capacity to be an effective means of encouraging and supporting the Bar to comply with their regulatory requirements.
13. The responses from the Bar Council, Chancery Bar Association, South Eastern Circuit and Blackstone Chambers were markedly more critical of the proposals than those from other individual sets of chambers and organisations. These responses all disputed the need for more proactive supervision of the Bar, pointing to a lack of evidence to support such an approach. They also criticised the concept of regulating at the chambers level rather than individuals and the potential cost of the proposed model of supervision.
14. There follows an analysis of the points raised in relation to the nine specific questions in the consultation paper.

Summary of responses by question and BSB comment

Q1: Do you have any comments on the proposed factors that will increase or decrease the likelihood of non-compliance?

15. A number of respondents indicated that they were content with the proposed factors.
16. Of those respondents who had additional comments, the following key points were made in relation to the factors that would increase the likelihood of non-compliance:
- Some expressed concern that complaints about members of chambers could impact upon the risk profile of the chambers as a whole. Some respondents mentioned the importance of this being put in context whilst others disagreed that the actions of individual members of chambers should impact upon the risk profile of chambers at all.
 - By including high risk business models it is important that innovation is not discouraged or stifled, especially at a time when innovation could be vital to the independent Bar.
17. In relation to factors that would decrease the likelihood of non-compliance the following points emerged:
- The proposed Bar Business Standard or equivalent quality marks were emphasised as good indicators of sets of chambers who are effectively managing risk.
 - Whilst satisfaction surveys can be useful they can often result in poor response rates. There are other means of obtaining and acting upon consumer feedback which should be recognised. Moreover, some sets will undertake work which makes satisfaction surveys unfeasible.
 - There was some support for the notion of compliance officers. However, various responses noted that this, along with many of the other measures, could require resources that some chambers will not have.
18. Some recommendations were made for additional factors that could be considered to be relevant to likelihood, including the turnover of members and staff and also the spread of seniority both amongst staff and members.
19. Various respondents stressed the importance of chambers being able to reduce their risk profile over time by addressing issues.
20. One respondent also noted the potential inconsistency between assessing the likelihood of non-compliance in the general sense and then assessing impact in relation to specific risks.

BSB Comment

The consultation paper proposed that the BSB would assess the likelihood of each chambers not complying with their regulatory requirements. It therefore related to a single risk; non-compliance.

Through the development of its Risk Assessment Framework the BSB has now identified some more specific risks that it will supervise against. The Supervision Strategy guidance at Annex B includes these risks.

Assessing the likelihood of these risks materialising will allow for more specific and relevant factors to be taken into account in making the assessment, which will help to address the concerns raised by some respondents about the proposed indicators. For example, non-compliance by individual barristers at a chambers will only be considered relevant if the non-compliance has a clear relevance to the likelihood of one of the specific risks materialising; it will not in itself be seen to increase the overall risk profile of the chambers.

In relation to concerns about smaller chambers with less resources being penalised for not being able to devote resources to adopting good practice measures, the BSB has agreed to remove punitive supervision inspections. Therefore the concept of supervision inspections for high risk chambers and entities has been replaced by evidence gathering visits that will be available for all chambers. This reinforces the ethos of supervision; it will allow for the BSB to work more constructively with those that it regulates to encourage and ensure compliance and reduce the need to rely upon formal enforcement powers.

Q2: Do you have any comments on the proposed factors that the BSB would take into account when undertaking an impact review?

21. A large proportion of respondents had nothing to add in relation to this question.

22. Of those who did, the following comments were made:

- Whilst larger sets may have a larger client base they are also likely to have greater resources to put in place systems to ensure compliance.
- In relation to vulnerability of clients, some responses emphasised the support that is available for the more vulnerable clients which can go some way towards mitigating their vulnerability. In addition, for referral work vulnerable clients will have a solicitor who will be able to determine whether the service provided is acceptable.
- Many sets will have mixed client bases which would make it more complicated to assess the overall vulnerability of their client base. Moreover, those who work predominantly for vulnerable clients are likely to be the sets with less resources to devote to ensuring compliance and risk management.
- There was broad agreement that direct access work could be relevant to impact. Respondents also noted that it can be difficult to assess how much public access

work a set does and how much of this is actually for sophisticated consumers such as accountants and insolvency practitioners.

23. A few respondents stressed the importance of impact factors not being assessed in isolation of consideration of the likelihood of non-compliance. For example, it was noted that large sets or sets with vulnerable client bases should not be considered to be high impact if they are well run.

BSB Comment

Responses were supportive of the proposed factors and therefore the essence of these factors have been retained. However, in the light of responses the BSB has developed its thinking on how to implement these impact assessments. It is likely that the BSB will look at the following factors in order to assess impact:

- **Areas of work**
- **Number of new cases in last 12 months**
- **Volume of public access work**
- **Whether pupils are taken**
- **Whether work is undertaken within the Money Laundering Regulations**
- **Whether a chambers or entity uses Barco**

Q3: Do you have any comments on the proposal for impact reviews to be undertaken after the assessment of likelihood of non-compliance? Are there any additional factors that you believe should be considered as part of an impact review?

24. Many responses referred to their answer in relation to Q2 and did not comment on the specific issue of the timing of an impact review. The few responses that did address this issue emphasised the importance of impact alone not dictating the level of supervision. Another response commented that the 2012 consultation on entity regulation proposed that assessment of impact would precede assessment of likelihood. The proposition in the supervision consultation is for assessment of likelihood to precede assessment of impact but the change of approach is not sufficiently justified.
25. In terms of additional factors to consider, two responses proposed that the impact of non-compliance should involve a more detailed assessment that includes consideration of factors such as the effect of any non-compliance on the administration of justice, prejudice to extant proceedings, reputational damage to the Bar, financial impact on single large clients or the availability of compensatory or other remedies. Another response suggested that factors such as potential financial loss and the presence of robust complaints handling should be factored into impact assessments.

BSB Comment

Following consultation the BSB has agreed that for chambers, impact assessments will precede assessments of likelihood. Therefore all chambers will undergo an initial impact assessment in order to determine whether they require further proactive supervision (and therefore an assessment of likelihood).

This will mean that the lowest impact small to medium sized chambers and all but the highest impact sole practitioners will not be involved in an assessment of likelihood. Resources will therefore be targeted at higher impact chambers, as this is where the BSB's resources can have the greatest effect. However, low impact chambers will still be involved in supervision through thematic reviews; the Supervision Team will also gather and assess any evidence received from the Legal Ombudsman or other BSB Departments that suggests that there is an increased likelihood of one of the risks materialising. Evidence from either of these sources could result in low impact small chambers and sole practitioners being required to undertake a likelihood assessment.

This approach should also help to address concerns expressed in responses about the disproportionate burden of supervision on small chambers and sole practitioners, as only the highest impact of these sole practitioners and small chambers will be involved in proactive supervision and this will be clearly justified by reference to their potential impact.

Q4: Do you agree with the proposed approach to supervision of chambers and entities? Can you suggest any improvements?

26. The majority of respondents supported the overall approach set out in the consultation paper. The following themes emerged from these respondents:

- There should be an ability to review, appeal or at least discuss priority ratings with the BSB.
- Transparency and clarity in terms of what is required of the profession is crucial.

27. Four respondents were more critical of the proposals. Points raised by these responses included:

- The proposals will result in chambers needing to devote significant time and resources to responding to monitoring exercises and (for high risk chambers) being present at inspections. The consultation paper does not assess the costs to the Bar of participating in supervision or the detailed costs of the supervision proposals for the BSB.

- There is no evidence that the new approach would assist chambers to operate more efficiently and there are no other foreseeable benefits for sets of chambers.

28. However, no respondents disagreed with the basic premise of lighter touch supervision for low risk chambers and a preference for constructive dialogue over enforcement action.

BSB Comment

The BSB is heartened by the support that most respondents showed for the concept of risk-based supervision. It has agreed to proceed with the development of a risk-based approach to supervision with the refinements that are set out in this report. The new approach will become operational in early 2014.

In relation to the concerns expressed about the impact of involvement in supervision on chambers and entities, it is worth noting that the intention is for interaction with the BSB's Supervision Team to constitute a very small burden on chambers that are administered well and are managing risks effectively; this is central to the concept of risk-based supervision.

The BSB intends to pilot some chambers visits and provide some illustrations of the likely impact following this.

Q5: Do you agree with the proposals for supervision of individuals? Are there any additional instances in which you think supervision of individuals should be triggered? Are there any additional measures that you believe the Supervision Department should be able to undertake?

29. Nearly all respondents were supportive of the proposal to allow for some minor non-compliance to be addressed through supervision tools.
30. However, some responses noted the risks that will need to be guarded against with this approach.
31. A theme that was repeated in numerous responses was the need for clear guidelines as to how supervision would operate for individuals; this was seen as necessary for consistency and would also ensure that barristers know how alleged non-compliance will be dealt with and what to expect.
32. Three responses identified the potential for pressure to be applied on barristers to submit to supervisory sanctions rather than face proper investigation through disciplinary proceedings. This would mean that ill-founded complaints might not be dismissed and barristers could be pressured into accepting supervision without proof of wrongdoing. This is of concern because supervision would not carry the same safeguards and appeal rights as disciplinary proceedings.

33. A concern was also expressed that lengthy or onerous supervision could also end up being more of a penalty than formal enforcement action, which would appear to be against the intention of this approach. It was therefore suggested that supervision should be for a defined period of time.
34. One response was completely against the principle of supervision being used to address non-compliance by individual barristers, favouring maintenance of robust enforcement for well-founded complaints with no “half-way house”.

BSB Comment

The proposals around supervision of individuals were intended to provide the BSB with additional means of addressing non-compliance that would allow for more flexible responses. Whilst responses were largely supportive of this concept, they raised valid points about the need to ensure that supervisory responses do not become a means of punishing individuals without due process.

Therefore the Supervision Strategy guidance has been amended to clarify that supervision will not be imposed without due process. Any investigation and findings will be undertaken by the Professional Conduct Department under the established processes. Supervision of individuals will only be available following a formal finding or if a barrister is content to accept supervision.

Q6: Do you agree with the proposals for evidence gathering targeting specific areas of risk?

35. Responses to this question were mixed; whilst some responses were supportive a number of respondents emphasised the additional burden that this sort of evidence gathering would impose on sets of chambers.
36. A number of responses stated that it was difficult to comment given the lack of detail in the consultation paper on this issue.
37. It was noted in one response that if this form of evidence gathering is used extensively it could negate the benefits of low risk ratings. Another response expressed concern that as the priority ratings of chambers are reduced over time this form of supervision will increase to justify the supervision resources that are in place.
38. There were also suggestions that the BSB should consult with representative bodies on what areas it considers fit for such evidence gathering and allow them to make representation before doing so.

BSB Comment

Evidence gathering targeting areas of identified risk will be an important aspect of risk-based supervision as it will allow the BSB to focus on areas of risk which might otherwise be missed by focussing only on the profile of particular chambers or entities.

As stated in the consultation paper the BSB will seek to minimise the impact of this form of evidence gathering on the profession by using them sparingly and seeking to combine projects where possible.

All such evidence gathering will be justified on the basis of an identified risk, which will help to ensure that any impact on those involved is proportionate.

This type of supervision is referred to as “Thematic Reviews” in the new Supervision Strategy guidance.

Q7: Do you have any general comments on the Supervision Strategy or the consultation paper?

39. There was a wide range of general comments received covering a number of different areas. The most common themes which emerged included the following:

- Numerous responses emphasised the need for clarity on regulatory requirements and therefore the need for more detail on how the supervision regime would operate. There was support for clear, consolidated guidance on what sets of chambers need to do to comply with regulatory requirements.
- A number of respondents commented on the fact that the proposals were not costed, either in terms of the resources that the BSB would need to devote to implement the proposals or the burden that would be placed on sets of chambers. These responses emphasised the financial constraints that many sections of the Bar are currently enduring, the significant rises in the Practising Certificate Fees over recent years as well as the limited resources that many sets of chambers have. It was further noted that any burdens on chambers will impact disproportionately on smaller sets.
- A few responses noted the lack of evidence provided to justify the proposed approach and argued that regulation based on complaints was more appropriate than what is proposed. One of these responses referred to previous BSB literature which mentions the fact that the Bar is relatively low risk compared to other legal professions and the fact that few complaints are upheld against barristers.
- The importance of involving staff and clerking teams in supervision was emphasised, as often responsibility for compliance will be delegated to staff.

- Some concern was expressed that those who deceive the BSB could be considered low risk whereas those who honestly report any issues might be seen as a greater priority for supervision.
- The BSB needs to ensure that its use of “intelligence” does not allow for unsubstantiated allegations to be followed up on.
- A few respondents expressed concern that priority ratings for supervision would enter the public domain.

40. In addition, the following points were made by single respondents:

- The Legal Ombudsman expressed its support for the new proposals, which it believed to have the capacity to be an effective means of supporting the Bar to comply with regulatory requirements. Its response highlighted the work that LeO does to feedback information to the profession on complaints in order to assist in raising standards; the new supervision regime provides an opportunity for the BSB and LeO to work together to promote this.
- One response noted that the approach seems to have been developed to cater for entities and was not fit for sets of chambers, while another believed that it had been based on financial services regulation. Neither believed that the proposals were fit for the independent Bar.
- One respondent suggested that the BSB should offer compliance training, whilst another believed that the BSB should not seek to become an “educator” as well as a regulator.
- An argument was put forward by one set for higher priority sets to contribute more towards the costs of regulation.

BSB Comment

It was clear from responses and from feedback at the briefing sessions that a consolidated Regulatory Checklist and guidance for chambers would be welcomed by the profession. The new Handbook has a specific “Chambers” section which includes the main regulatory requirements that apply to chambers. In addition, the Supervision Strategy guidance at Annex B sets out the risks that will be routinely supervised against and the processes that will apply to chambers. This should help to make regulatory compliance and supervision more transparent for the profession.

Moreover, a key addition to the scheme that has resulted from responses to this question is that it has been agreed that all intelligence received will be assessed for its reliability and validity before it is taken into account for supervision. This will protect against concerns about unsubstantiated or malicious rumours being acted upon.

Q8: Do you have any comments on whether the potential adverse equality impacts identified in the draft Equality Analysis will be mitigated by the measures outlined?

and

Q9: Do you have any comments about any potential adverse impact on equality in relation to the proposals which form part of this consultation paper? Are there any other equality issues that you think that the BSB ought to consider?

41. Most respondents had nothing to add in relation to these questions. However, there were some consistent themes that emerged from other responses.
42. For example, a significant number of responses highlighted the fact that smaller chambers with less resources would be less able to adopt many of the good practice measures that could serve to reduce the priority rating for supervision. This would affect sole practitioners in particular. Sole practitioners and smaller chambers often have higher concentrations of BME practitioners and women.
43. Similar points were made in relation to sets practising in publically funded areas, that are likely to have less resources available. These sets are also likely to be deemed higher impact due to their vulnerable client bases. Publically funded work attracts a high proportion of BME practitioners.
44. Any financial burdens associated with complying with supervision will also have a disproportionate impact on sole practitioners, small sets and publically funded sets.
45. The Bar Council's Equality and Diversity Committee commented on the proposed mitigations for the risks identified in the Equality Impact Assessment. It made the following points in this regard:
 - Whilst guidance is a useful starting point it will be important that the guidance produced is accessible and useful and therefore ongoing consultation will be required to achieve this.
 - Guidance could usefully be supplemented by free briefing sessions on risk-based supervision, which could be a more accessible means of reaching some practitioners. It would also enable feedback to be obtained on the approach and any published guidance.
 - Providing access to a panel of experts for advice could be a useful way of mitigating any potential adverse impacts. This panel would need to be available at convenient times and should also receive equality and diversity training.
46. The Committee did not identify any other equality impacts that were not already identified in the Equality Analysis but stressed the importance of monitoring the situation once risk-based supervision becomes operational. It also expressed its support for meaningful monitoring of compliance with the new rules in the BSB Handbook.

BSB Comment

A number of respondents were concerned that chambers with fewer resources (particularly small chambers or those working in publically funded areas) would experience a disproportionate impact from supervision. The following amendments have been agreed since consultation and should help to address these concerns:

- All chambers will undergo an impact assessment in order to determine whether they require proactive supervision. Only those sole practitioners or smaller chambers who have a high impact will be required to participate in likelihood assessments due to the potential impact that they have on the market.**
- The BSB has identified a number of risks that will allow for more accurate assessments of the likelihood of them materialising. This will provide greater scope to look beyond headline indicators such as quality marks and to also recognise other measures that chambers could adopt to reduce the likelihood of specific risks materialising. Therefore chambers with fewer resources should still be able to demonstrate that they are managing risks appropriately.**

The BSB recognises the importance of accessible guidance and support and will seek to work with the Bar Council to identify potential resources that could be made available in this regard. Free briefing sessions will be offered, as suggested by the Bar Council Equality and Diversity Committee.

Summary of amendments to supervision strategy

47. The BSB has reviewed and considered the responses received to the consultation and welcomes the fact that most respondents supported the development of a risk-based approach to supervision. It has therefore agreed to continue with the development of this approach, which will become operational in early 2014 when the new Handbook comes into force.
48. However, as detailed in the comment sections above, the BSB has agreed to a number of amendments to its approach. These amendments reflect points raised through consultation responses, the development of the BSB's wider Risk Assessment Framework and ongoing work with stakeholders. A revised supervision strategy setting out the detail of the new approach is included below at Annex A.
49. The revised supervision strategy incorporates the following core amendments in relation to the supervision of chambers and entities:

- The consultation proposed that impact should be assessed following an assessment of likelihood. The revised strategy provides that all chambers will undergo an initial impact assessment in order to determine whether they require further proactive supervision (and therefore an assessment of likelihood). The lowest impact medium and small sized chambers and all but the highest impact sole practitioners will not be involved in likelihood assessments. This will mean that resources can be targeted at higher impact chambers, as this is where the BSB's resources can have the greatest effect. This approach should also help to address concerns expressed in responses about the disproportionate burden of supervision on small chambers and sole practitioners. These chambers and sole practitioners will still be involved in thematic reviews and may also be involved in proactive supervision if evidence emerges to justify it.
- The consultation proposed that likelihood should be assessed in relation to the risk of chambers or entities not complying with one of their regulatory requirements. It therefore related to likelihood of a single risk materialising. The revised Supervision Strategy provides for assessment of likelihood of a wider range of risks materialising. This will allow for more specific factors to be taken into account and for a more accurate assessment of the likelihood of risks materialising. The increased accuracy and targeting of the assessment should help to identify risks that are not being managed effectively before they result in non-compliance; it should therefore facilitate a more proactive approach to identifying and mitigating risks and avoiding poor outcomes.
- The consultation proposed that inspections could be used as a response to high risk chambers or entities. Following consultation the BSB has decided not to pursue this form of punitive inspection. Instead, the Supervision Team will undertake evidence gathering visits which could include all chamber and entities. This is more compatible with the overall ethos of supervision, which will aim to develop constructive engagement between BSB staff and chambers and entities. Chambers and entities who are managing risks effectively should receive infrequent visits, whilst those who are not managing risks effectively will be visited more regularly.

50. In relation to the supervision of individuals, the strategy has been amended to clarify that supervision of individuals, as an alternative to enforcement action, would not be imposed without appropriate due process.

51. There are also a number of changes to the detail of the approach, which are included in the revised Supervision Strategy at Annex A.

Evidence of the need for supervision

52. Some responses pointed to a lack of evidence in the consultation paper of the need for the proposed approach to supervision.

53. The BSB undertook Chambers Monitoring programmes in 2010 and 2012, which sought to establish the levels of compliance by chambers with their regulatory requirements. These generated the following overall results:

- Chambers Monitoring 2010: 22% of chambers were not compliant with at least one regulatory requirement.
- Chambers Monitoring 2012: 17% of chambers were not compliant with at least one regulatory requirement.

54. It is clear therefore that levels of non-compliance are relatively high. It is also evident that relatively high levels were maintained between the two specific monitoring programmes. This is particularly concerning given that nearly all chambers had confirmed compliance, after BSB engagement, across all areas following the 2010 round of monitoring.

55. This therefore supports the need for ongoing supervision to prevent non-compliance by chambers. A risk-based approach will ensure that this supervision is targeted and proportionate, so that those who are managing risks effectively will have a minimum level of interaction with the BSB.

Impact of supervision on chambers and entities

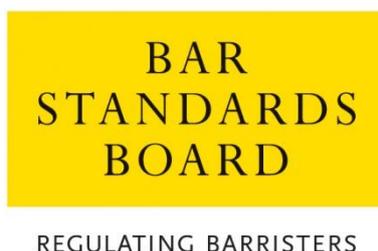
56. A number of respondents to the consultation were concerned about the fact that the consultation did not include estimates of the likely burden on chambers and entities. This is because it is difficult to provide an accurate estimation of the impact that supervision will place upon chambers at this stage.

57. However, the BSB's Supervision Team will be seeking to pilot aspects of supervision in the coming months, including some chambers visits with volunteer chambers. This will allow for the dissemination of some indicative timings for the supervision processes, based on the experience of chambers who assist with the piloting. Indicative timings will be placed upon the supervision pages of the BSB's website as soon as they are available.

58. At this stage it is worth noting that the intention is for interaction with the BSB's Supervision Team to constitute a very small burden on chambers that are administered well and are managing risks effectively; this is central to the concept of risk-based supervision.

59. Once supervision is operational the BSB will review the impact that supervision has on chambers and entities in order to ensure that it remains proportionate and commensurate with the benefits of supervision.

Annex A – Revised Supervision Strategy



Bar Standards Board Supervision Strategy

The BSB is committed to a risk-based approach to supervision. This means that resources will be targeted at chambers, entities, individuals or areas that present the greatest risk. A risk-based approach will mean proportionate regulation; the BSB's Supervision Team will have less interaction with those who are managing risk effectively than those who present a higher risk.

Risk-based supervision will:

- Allow the BSB proactively to identify risks and take appropriate action to prevent them from materialising;
- Encourage more effective risk management by chambers and entities and contribute to improvements in the level of compliance with regulatory requirements;
- Help to prevent negative outcomes for consumers and negative impacts on the regulatory objectives;
- Provide a means of ensuring that identified non-compliance does not recur;
- Allow the BSB to target its resources at those chambers, entities, individuals or areas that would benefit from supervisory attention; and
- Provide the basis for constructive engagement between the BSB and those that it regulates.

Supervising chambers and entities

All chambers and entities must ensure that they are compliant with the regulatory requirements set out in the BSB Handbook. This includes a requirement to have appropriate risk management procedures in place.

The BSB will supervise chambers and entities to ensure that they are managing risk effectively and are compliant with regulatory requirements.

Chambers and entities that manage risks effectively can expect a low level of supervision. Those who are unable to demonstrate that they are managing risks effectively will receive more supervisory attention.

Where issues are identified through supervision the BSB will seek, where possible, to address them with the chambers or entity concerned without resorting to enforcement action.

Supervising individual barristers

All individual barristers will be subject to a basic level of supervision through the annual authorisation process, supervision concerning specific areas of compliance (such as CPD requirements) and involvement in thematic reviews.

If the BSB receives evidence of non-compliance, it could consider enhanced supervision for that individual.

Through enhanced supervision the BSB will assist barristers to identify issues and take appropriate measures to prevent future non-compliance and future detriment to the regulatory objectives.

Annex B – Supervision Strategy guidance



Bar Standards Board Supervision Strategy Guidance

The BSB is increasing its focus on supervision to complement the new BSB Handbook. Supervision will be an effective means of encouraging and supporting those that the BSB regulates to effectively manage risk. This will contribute to a regulatory approach that provides the best possible protection for customers and the public interest.

The BSB has adopted a proportionate, 'risk-based' approach to supervision. This means that resources will be targeted at chambers, entities, individuals or areas that present the greatest risk. As a result, the BSB's Supervision Team will have less interaction with those that are managing risk effectively than those that are not.

This guidance accompanies the BSB's Supervision Strategy. It sets out how supervision will work in practice for chambers, entities and individuals, as well as the risks that the BSB will routinely consider through supervision.

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PART A: SUPERVISION OF CHAMBERS

1. Efficiently run chambers, operating at low risk, are in everyone's best interest; barristers' and chambers' operations should run smoothly, the BSB will need to take less enforcement action and consumers' interests will be protected and promoted. This is why all self-employed barristers, including sole practitioners, are under a duty to ensure that their chambers are administered competently and efficiently. A big part of this is having appropriate risk management procedures in place.
2. The BSB will supervise chambers to ensure that they are managing risk effectively as well as complying with their other regulatory requirements. It will do so through its Supervision Team.
3. Annex A sets out a number of risks that the BSB expects well-run chambers to be managing. Chambers should be able to demonstrate that they are operating in a way that means there is a low likelihood of any of the identified risks materialising.
4. However, the BSB will not limit itself to consideration of the risks set out in Annex A if evidence emerges of additional risks that it needs to respond to.
5. The Supervision Team will have five main functions (each is set out in more detail below):
 - (i) Assessing the potential impact that each chambers could have if risks were to materialise;
 - (ii) Assessing the likelihood of risks materialising for a particular chambers;
 - (iii) Working with chambers to reduce the likelihood of risks materialising;
 - (iv) Addressing non-compliance;
 - (v) Evidence gathering (to review impact and likelihood assessments).

(i) Assessing impact

6. The first step for the Supervision Team will be to assess the potential impact that each chambers would have; this relates to the potential extent of the negative consequences if any risks were to materialise.
7. The impact assessment will require each chambers (including sole practitioners) to provide information, including:
 - Areas of work undertaken;
 - Number of new cases started in the last 12 months;

- Whether work is undertaken under the public access scheme;
 - Whether pupils are taken;
 - Whether chambers undertakes work within the Money Laundering Regulations; and
 - Whether chambers uses Barco (the Bar Council's escrow account service).
8. The Supervision Team will also consider the effect of each chambers on wider market risks. In particular, this will include consideration of:
- The effect of the chambers' business model, structure or membership on competition and consumer choice;
 - The effect of business models and structures on the professional principles;
 - Risks posed by particular client bases;
 - Risks to the maintenance of a diverse and representative legal profession.
9. Using this information, the Supervision Team will calculate an impact score (which will be communicated with the chambers but not published) and use this to determine whether the chambers will need to complete a likelihood assessment.

(ii) Assessing likelihood

10. The next step after the impact assessments is for the Supervision Team to assess how well risks are being managed in chambers. This is called the likelihood assessment. Here, the word likelihood is referring to how likely it is for the risks identified in Annex A, or other identified risks, to materialise at each chambers.
11. Most multi-tenant chambers will be required to have a likelihood assessment. However, chambers with low impact scores, which will most likely be the majority of sole practitioners and some medium (2-30) sized chambers, will not be involved in a likelihood assessment.
12. The likelihood assessment will comprise a questionnaire type document with questions on processes and systems that chambers has in place to protect against certain risks materialising.
13. In order to assess likelihood, the Supervision Team will look for both negative indicators (which suggest that a risk is more likely to materialise) and positive indicators (measures which demonstrate that a set of chambers is actively managing the risk so as to reduce the likelihood of it materialising).

14. The completed questionnaire is returned to the Supervision Team where it is analysed and a likelihood score is calculated for each separate risk, which then informs an overall score. It is this overall score that will determine a chambers' priority rating; i.e. how much supervisory engagement the BSB believes is necessary to help prevent risks in chambers materialising. For example, a low risk score indicates that chambers is managing their risks effectively which means they should be low priority for supervisory engagement, whereas a high risk score indicates that a chambers is not managing risks effectively and would benefit from some more attention and support (high priority for supervision).
15. Chambers will be informed of their risk score and any risks that have been assessed at an increased likelihood, as well as any recommended steps chambers should take to lower their score.

Low impact chambers

16. Those low impact chambers and sole practitioners who do not require a likelihood assessment will still be involved in supervision through thematic reviews (see Part D). The Supervision Team will also gather and assess any evidence received from the Legal Ombudsman or other BSB Departments that suggests that there is an increased likelihood of any risks materialising (see paragraph 25). Evidence from either of these sources could result in low impact chambers and sole practitioners being required to undertake a likelihood assessment.

(iii) Working with chambers to reduce the likelihood of risks materialising

17. All chambers will be informed of the results of their likelihood assessments as well as the reasons for this. The results will not be publicly available.
18. Feedback to chambers on their assessment will alert them to factors that have increased the likelihood of risks materialising as well as good practice measures that they could adopt to attempt to reduce the likelihood.
19. The Supervision Team will encourage chambers to engage with these issues and to keep the BSB informed of any improvements that have been made which might serve to reduce their assessment scores. It will also be able to signpost available guidance and support.
20. The less effectively a chambers is managing risk the more involvement the Supervision Team will have with that chambers. In certain circumstances the Supervision Team may also request that a chambers provide an action plan setting out how it intends to manage a particular risk or risks.

(iv) Addressing non-compliance

21. The Supervision process will undoubtedly identify instances of non-compliance with the BSB Handbook. Where evidence of non-compliance is uncovered, the Supervision Team's goal will be to ensure that the issue is addressed and that it is addressed in a manner which should prevent recurrence.
22. The Supervision Team will seek to provide chambers with a period of time in which to prove that the issue will be addressed. A member of the Supervision Team might also request specific information in relation to the issue to establish the extent of the non-compliance or to assess the measures that have been introduced to address it.
23. The Supervision Team will only refer a matter to the Professional Conduct Department to pursue enforcement action in the following circumstances:
 - If a chambers has not satisfactorily addressed the non-compliance within a reasonable period of time;
 - If the chambers concerned has a poor history of compliance and engagement with the Supervision Team such that it is unlikely that it would take the opportunity to address the issue;
 - If the non-compliance concerned is very serious.

(v) Evidence gathering (to review impact and likelihood assessments)

Impact assessments

24. Impact assessments will be reviewed for all chambers at appropriate intervals to ensure that they remain up to date.

Likelihood assessments

25. Likelihood assessment will be continually updated as new relevant evidence is received. This will include the following circumstances:
 - Where relevant evidence is received from the Legal Ombudsman, another BSB Department or from another source;
 - Where relevant evidence is generated through Thematic Reviews (see Part D); and
 - When a chambers provides new evidence that is relevant to its assessment (for example if it has adopted a new good practice measure).
26. The Supervision Team will also undertake its own evidence gathering in order to ensure that the evidence upon which it is assessing likelihood remains current and relevant. This will not apply to low impact chambers that have not had a likelihood assessment.

27. The frequency and form of this evidence gathering will depend upon how effectively a chambers is managing risk; those who are managing risk effectively and are low priority will be required to provide evidence less frequently than those for whom risks are more likely to materialise (high priority for supervision).
28. The Supervision Team will be able to gather evidence through remote requests for information (desk-based evidence gathering) as well as through visiting chambers in person.

Desk-based evidence gathering

29. Desk-based evidence gathering will have two main forms:

- (i) Supervision returns (such as the Chambers Monitoring programmes of 2010 or 2012), in which a number of chambers will be required to respond to certain enquiries or provide evidence for assessment by the Supervision Team.
- (ii) Specific requests for evidence from a particular chambers. Such a request would be required if the Supervision Team has a query that applies to that chambers.

Chambers visits

30. Visits to chambers will allow the Supervision Team to make a more accurate assessment of how well risks are being managed. Staff will be able to discuss matters with members of chambers and staff and also review policies, files, systems and processes. Visits should also assist chambers to understand any areas of concern so that they can seek to address them.

PART B: SUPERVISION OF ENTITIES

To follow when the BSB has been approved as an entity regulator.

PART C: SUPERVISION OF INDIVIDUALS

Basic supervision

31. All individual barristers will be involved in a basic level of supervision. This includes the following:

- Annual authorisation;
- Monitoring of compliance with CPD requirements; and
- Involvement, as required, in thematic reviews (see Part D).

Enhanced supervision

32. Individual barristers who do not comply with their regulatory requirements may also be involved in enhanced supervision.

33. Enhanced supervision could involve one of the following:

- Monitoring of the individual's overall compliance with their regulatory requirements. This would help the barrister concerned and the BSB to understand the extent of their non-compliance and any reasons for this. This form of supervision would be for a limited period of time.
- Explaining concerns to the individual and providing them with a period of time in which to confirm that they have taken appropriate measures to prevent future non-compliance. The Supervision Department will make the barrister aware of any relevant guidance or other resources that are available to assist them to address the concerns.

34. Barristers who do not comply with enhanced supervision may be referred to the Professional Conduct Department to consider whether enforcement action should be pursued.

PART D: THEMATIC REVIEWS

35. The Supervision Team will also undertake Thematic Reviews to cover specific high risk areas. Thematic Reviews will allow for assessment of compliance and risk management in relation to a particular regulatory requirement, area of work or business practice.
36. The specific areas that will require thematic reviews will be primarily informed by the BSB's Risk Assessment Framework. Evidence gathered from the supervision of chambers, entities and individuals will also help to inform what areas might be considered to be high risk and therefore requiring a Thematic Review.
37. Thematic Reviews might cover all chambers and entities (for example if it relates to a particular regulatory requirement with universal application) or to all chambers, entities or individual barristers undertaking work within a certain category. It might also involve a sample of chambers, entities or individuals within a certain category.
38. The Supervision Team will seek to minimise the frequency of Thematic Reviews and to combine reviews of different areas where possible in order to reduce the burden on those involved.
39. Evidence gathered through this facet of supervision may be fed into the supervision of chambers and entities as set out above in Parts A and B.

ANNEX A: RISKS

BAR STANDARDS BOARD

REGULATING BARRISTERS

Chambers risks

All self-employed barristers, including sole practitioners, are under a duty to ensure that their chambers are administered competently and efficiently. This includes a requirement to ensure that chambers have appropriate risk management procedures in place.

The BSB has identified some key risks by reference to which it will supervise chambers and entities. As a minimum, chambers and entities should be aware of these risks and should be managing them so as to reduce the likelihood of them materialising.

The risks will be reviewed regularly and updated as evidence of new risks emerges through the operation of supervision.

The BSB will not limit itself to consideration of these risks if evidence emerges of additional risks that it needs to respond to.

1. Governance

Risk: Ineffective or dishonest governance

Examples

This could include:

- a) Adopting business plans and models that unfairly disadvantage clients*
- b) Failure to have effective risk management systems in place*
- c) Lack of awareness of relevant regulatory requirements*
- d) Failure to adequately address compliance issues when they are identified*
- e) Misleading the BSB*
- f) Performing outside the scope of authorisation or BSB regulation*

2. Client care

Risk: Provision of a poor service to clients

Examples

This could include:

- a) *Failure to provide relevant, or provide misleading, information to clients about the services provided and the terms on which they are being provided*
- b) *Ineffectual casework management leading to delays, conflicts or late returns*
- c) *Breaching the confidentiality of clients*
- d) *Acting where conflicts of interest arise*
- e) *Failure to manage complaints effectively*

3. Equality and Diversity

Risk: Insufficient consideration of equality and diversity in administration or service delivery

Examples

This could include failure implement and comply with equality and diversity requirements in the BSB Handbook.

4. Pupillage and training

Risk: Inadequate or unfair pupillage or training

Examples

This could include failure to comply with pupillage requirements in the BSB Handbook.

5. Financial management

Risk: Incompetent or dishonest financial management

Examples

This could include:

- a) Failure to keep proper financial/accounting records (including those that support calculation of fees)*
- b) Accepting referral fees*
- c) Handling client money*
- d) Facilitating money laundering or other criminal offences*
- e) Closing down without protecting existing clients' interests*