

BAR
STANDARDS
BOARD

REGULATING BARRISTERS

The development of a risk-based approach to supervision

Executive summary

The BSB is reviewing its approach to regulation in preparation for some significant changes to its regulatory framework. It is anticipated that by early 2014 a new BSB Handbook will be in force and the BSB will be regulating entities for the first time.

The BSB believes that within this new regulatory framework, an increased focus on supervision will be an effective means of encouraging and supporting those that it regulates to comply with their regulatory requirements. This will contribute to a regulatory approach that provides the best possible protection for customers and the public interest.

The prime responsibility for ensuring compliance with the new Handbook will rest on individual barristers and the chambers and entities in which they work. The professionalism of individuals, working within policies and procedures designed to reinforce that professionalism, provides the best protection for customers and for the public interest. Through supervision the BSB will encourage and support the maintenance of such professionalism and take proportionate measures where these standards are not met.

The proposed approach provides the BSB with the opportunity for earlier and more constructive engagement with those that it regulates. Whereas the BSB currently concentrates more on enforcement action after a breach of the Code of Conduct has taken place, supervision will focus on assisting chambers, entities and individuals to manage risk so as to prevent non-compliance from materialising or prevent recurrence where it has occurred.

The BSB believes that a risk-based approach to supervision - meaning that resources will be targeted at those chambers, entities and individuals who are seen as most likely not to comply with their regulatory requirements - will be the most effective and proportionate approach. Therefore chambers, entities and individuals who are operating at a low risk should not notice a significant increase in their interaction with the BSB.

Only those chambers, entities or individuals who are deemed to present an increased risk in relation to non-compliance might have more involvement with the BSB as a result of these proposals; and in these circumstances the intention will be for earlier and more constructive

engagement from the Supervision Department which should reduce the overall incidence of enforcement action.

Further detail is provided in a draft Supervision Strategy (annexed) which sets out the processes that the Supervision Department will undergo in order to implement supervision.

How to respond

This consultation will close on 31st May 2013.

A response form for this consultation is available alongside the consultation. Please email completed forms to sissop@barstandardsboard.org.uk. Alternatively, hard copies can be sent to:

Sarah Issop
Bar Standards Board
289-293 High Holborn
London
WC1V 7HZ

It will be assumed that all respondents are content to be identified in the consultation report and to have their response published. Please specify in your response if you would prefer not to be identified or not to have your response published.

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PART A – BACKGROUND

1. The Bar Standards Board (BSB) operates within the statutory framework of the Legal Services Act 2007. It is responsible for regulating all barristers in England and Wales and specifies the regulatory requirements that barristers must comply with.
2. The BSB currently focusses predominantly on enforcement as a means of ensuring compliance with regulatory requirements. Enforcement action is taken through the BSB's Professional Conduct Department and Professional Conduct Committee and is taken against an individual barrister for breaches of the Code of Conduct. Supervision is currently a relatively small component of the BSB's overall activity and includes the Chambers Monitoring programme as well as other discrete monitoring activities in relation to pupillage and complaints.
3. However, the BSB is currently reviewing its approach to regulation in the light of two key changes to its regulatory framework:
 - (i) The development of a new BSB Handbook, which will redefine the regulatory requirements that apply to barristers. The new Handbook is less prescriptive than the current Code of Conduct and includes a greater focus on core duties and outcomes.
 - (ii) The prospect of the BSB beginning to regulate entities as well as individual barristers.
4. The BSB intends for the new BSB Handbook and entity regulation to come into force in 2014. In preparation for these significant changes to the regulatory landscape, the BSB is developing a greater emphasis on risk and evidence-based regulation. This will involve an increased focus on supervision and earlier and more constructive engagement with those who are the most likely to encounter problems with compliance.
5. This consultation paper therefore sets out proposals for the development of a risk-based approach to supervision for the BSB.

Current supervision

6. The BSB currently undertakes supervision through a number of different committees including the Quality Assurance Committee, the Pupillage Sub-Committee and the Professional Conduct Committee.

Chambers Monitoring

7. In October 2010 the BSB undertook its first full round of Chambers Monitoring concentrating on all regulatory requirements that apply at a chambers level. Under this process all chambers were required to respond to a compliance questionnaire from which they were assigned a risk rating. Higher risk chambers, of which there were very few, were provided with a period of time in which to confirm that they had addressed all identified non-compliance.

8. The second round of Chambers Monitoring was conducted in the summer of 2012. It proceeded along the same lines as the 2010 round but focussed on compliance with the Money Laundering Regulations and complaints handling requirements.
9. Chambers Monitoring was run through the BSB's Quality Assurance Committee and managed by the Quality Team.

Pupillage

10. The Pupillage Sub-Committee undertakes both random visits to chambers to examine general pupillage arrangements as well as specific visits where concerns are reported by either pupils, pupillage applicants or other sets of chambers in relation to pupillage arrangements. Visits are undertaken by members of the Pupillage Sub-Committee.

Professional Conduct

11. The Professional Conduct Committee can launch an investigation where a third party or client complaint, or a BSB own motion complaint against an individual, raises concerns that a chambers is poorly administered and individuals or the Head of Chambers are potentially in breach of the code. The first step is to seek further evidence from the chambers but this could be followed up by an inspection if there is still cause for concern. Inspections are carried out by Committee members.
12. The intention of such inspections is to identify poor administration or breaches of the Code. In relation to poor administration, the Inspections Team will assist chambers to identify and resolve issues. Inspections teams are equipped with a list of areas to investigate, covering chambers administration and financial positions and systems.
13. This type of investigation is usually only used a few times each year.

Continuing Professional Development

14. Individual barristers are supervised in relation to their compliance with Continuing Professional Development requirements. This involves an annual submission by barristers of their record card detailing the relevant training that they have completed.
15. Where this supervision identifies non-compliance this will result in a referral to the Professional Conduct Department to consider enforcement action.

Towards risk-based supervision

16. The BSB intends to consolidate its existing supervision activity within a single Supervision Department and to build upon this through the development of a more comprehensive, consistent and proportionate approach to supervision.
17. Moreover, the BSB intends to develop a risk-based approach to supervision, with resources targeted at higher risk chambers, entities, individuals or areas.

18. This consultation paper sets out how the BSB proposes to develop and implement a risk-based approach to supervision. Included as an annex is a draft supervision strategy which details the proposed processes and framework within which risk-based supervision would operate at the BSB.
19. The consultation paper itself focusses on the impact that the proposed approach would have on three main groups:
 - (i) Chambers, sole practitioners and entities (Part B below)
 - (ii) Individual barristers (Part C below)
 - (iii) Consumers (Part E below)

Regulatory context

20. Risk-based supervision is a key component of the BSB's wider move towards a more risk-based approach to regulation.
21. At the heart of its new approach will be the development of a Risk Assessment Framework that will inform the BSB's regulation as well as the framework for developing risk-based policies and rule making.
22. Much of the detail in terms of the specific issues that the BSB will consider relevant to risk will be developed as the BSB develops its Risk Assessment Framework.

Benefits of a risk-based approach to supervision

23. Through developing a more comprehensive, risk-based approach to supervision the BSB intends to identify chambers, entities or individuals who would benefit from positive engagement from their regulator and assist them to manage risk and to prevent non-compliance from occurring. Supervision will also allow the BSB to provide those who have not complied with regulatory requirements with an opportunity to address the non-compliance so as to prevent recurrence. Therefore overall it is hoped that the proposed approach to supervision will reduce the incidence of non-compliance and the negative impacts that this can have on consumers and the regulatory objectives.
24. A risk-based approach to supervision will also allow for greater targeting of resources so that those who are operating at a low risk are able to continue to do so with minimum involvement from their regulator, whilst resources are concentrated on those who pose most risk to consumers or the public interest and who could benefit from involvement.
25. Supervision will also help to identify those chambers, entities or individuals who are consistently not complying with their regulatory requirements and are not attempting to address this. This should allow for more effective deployment of enforcement tools where it is necessary.

PART B – SUPERVISION FOR CHAMBERS, SOLE PRACTITIONERS AND ENTITIES

26. Most sets of chambers and sole practitioners will have been involved in the Chambers Monitoring rounds of 2010 and 2012. Whilst these programmes have proven to be a useful supervision tool, the main drawback for the BSB in terms of supervision is that they have been treated as discrete projects which have been closed after a period of time. This has meant that the focus has been retrospective and focussed on identifying and addressing previous non-compliance as opposed to assessing the likelihood of future non-compliance.
27. The proposed approach for risk-based supervision of chambers, sole practitioners and entities will be based upon the Chambers Monitoring programmes of 2010 and 2012. However, it has the following key differences:
- Supervision will be ongoing;
 - Evidence will be gathered from a wider variety of sources and not just from monitoring questionnaires;
 - All chambers, sole practitioners and entities will have a priority rating for supervision, which is based on the risk that they pose (in terms of the likelihood of non-compliance) and the potential impact of future non-compliance.
28. This section seeks to explain what the practical impact would be on chambers and entities under the proposed approach.

Sole practitioners

29. As with Chambers Monitoring 2010 and 2012, supervision of chambers and entities will also apply to sole practitioners. This will therefore include requirements such as complaints handling.
30. Any issues relating to the provision of legal services by a sole practitioner in their capacity as a self-employed barrister will be addressed separately as set out in Part C below.
31. For the remainder of this section references to chambers and entities are to be read to include sole practitioners.

Evidence gathering

32. Under risk-based supervision the BSB's Supervision Department will gather and collate a range of evidence that it deems relevant to the likelihood of a set of chambers or entity not complying with their regulatory requirements. This will include gathering evidence from the following sources:
- Evidence from the Legal Ombudsman (LeO) concerning complaints about members of chambers/entities;

- Evidence from BSB committees and their departments such as the Complaints Committee and the Professional Conduct Department or Pupillage Sub-committee; and
 - Evidence from BSB departments relating to compliance with issues such as Continuing Professional Development.
33. All of this evidence will be available to the Supervision Department and therefore chambers and entities will not need to be involved in providing this information for the purposes of supervision.
34. The Supervision Department will also generate its own evidence, which will include:
- A set of chambers or entities compliance with regulatory requirements;
 - Intelligence gathered through discrete research or supervision activity;
 - History of engagement with the Supervision Department; and
 - Specific intelligence received from consumers, barristers or other individuals.
35. Chambers and entities will be required to provide specific evidence to the Supervision Department. The type and frequency of information that they are required to provide will depend upon their supervision priority rating.
36. All chambers and entities will be required to undertake a general review of their compliance with all regulatory requirements every 3 years. This would be undertaken through a similar process to Chambers Monitoring 2010 and 2012, involving the completion and return of a questionnaire. The questionnaire would cover compliance with all of the regulatory requirements that apply to chambers and entities. There will be spot checks, meaning that some chambers or entities would also be required to provide evidence to corroborate their response. This is the only intended interaction that low priority chambers and entities will need to have with the Supervision Department unless their responses give rise to concerns.
37. Any chambers or entities that are deemed to be medium or high priority will be required to provide further evidence to the Supervision Department. This is set out in more detail below at paragraphs 52 and 53.
38. The priority that a set of chambers or entity is given for supervision will be assessed by reference both to the risk that they pose (in terms of the likelihood of non-compliance) and the potential impact of non-compliance.

Risk assessment

39. The Supervision Department will assess all evidence that it receives in order to determine the risk that a particular chambers or entity poses. The assessment of risk will involve considering the likelihood of the chambers or entity not complying with their regulatory requirements.

40. In assessing likelihood of non-compliance the Supervision Department will balance those factors that make non-compliance more likely against those are deemed to make it less likely. Chambers and entities will therefore be able to control their risk assessment by ensuring that the factors that are deemed to increase likelihood do not apply to them and the factors that are seen to decrease the likelihood of non-compliance do apply.

41. Each relevant factor will have a different weighting in order to reflect the relative importance that the BSB places on IT. It is proposed that the BSB would look for evidence under the following categories. An indicative weighting is included in brackets.

a) Factors that increase likelihood

- Identified current non-compliance (Medium - High)
- History of non-compliance (since corrected) (Low - Medium)
- Non-engagement with evidence gathering requests (High)
- Disciplinary findings against the Head of Chambers/entity or against members of chambers/entity (weighting dependent upon severity, size of chambers/entity and whether there are patterns that indicate systemic problems within chambers)
- Complaints against entity or members of chambers/entity which are deemed by the LeO to have merit (weighting dependent upon severity, size of chambers and whether there are patterns that indicate systemic problems within chambers/entity)
- Involvement in high risk business models and practices (Medium - High)

b) Factors that decrease likelihood

- Evidence of relevant voluntary accreditation such as the Bar Business Standard or other Quality Marks
- Evidence of regular consumer engagement/satisfaction surveys
- Evidence that appropriate action is taken as a result of consumer engagement/satisfaction surveys
- The appointment of a trained compliance or risk manager
- A good record of compliance
- A good history of engagement with the BSB

42. The balance of evidence will be used to suggest the overall risk that a set of chambers or entity poses.

43. The BSB will keep the factors under review so that they remain relevant as evidence is gathered through the operation of supervision.

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

Impact

44. Once the Supervision Department has assessed the likelihood of a set of chambers or entity not complying with their regulatory requirements it will assess the potential impact if the chambers or entity did not comply with its regulatory requirements.
45. The following factors will be seen as potentially relevant to the impact that non-compliance could have:
- Size of chambers/entity or size of client base . non-compliance could have a greater impact if it were to occur at a larger set of chambers or entity that undertakes a large amount of work for a large number of clients.
 - Vulnerability of client base . large businesses and professional clients are more likely to know what level of service they can expect and what to do if this level of service is not achieved. However, lay clients or small businesses are likely to be more vulnerable as they will have less experience of instructing lawyers and are potentially less awareness of what remedies they might be able to seek. Therefore non-compliance is likely to have a bigger potential impact at chambers with vulnerable client bases than at those who work mainly for bigger, professional clients.
 - Services offered . services offered direct to the public are likely to have a higher impact than if the chambers is offering its services through a referral model where a solicitor or other intermediary might be able to assist a client to identify and address any issues with service.

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

46. If a set of chambers or entity is deemed to have a high impact it might result in their supervision priority rating being set at a higher level.
47. The relevance of impact will be assessed by reference to the evidence that was considered in assessing risk. Therefore even chambers with a potentially large impact will not be deemed to be higher priority if they are seen to be managing their likelihood of non-compliance so as to make it very unlikely that they do not comply. However, in practice such chambers would be more susceptible to increases in their supervision priority rating if their likelihood were to increase at any point.
48. As an example, a large set of chambers with a vulnerable client base that demonstrates some degree of likelihood of future non-compliance is likely to be assessed as high priority whereas a small set with a less vulnerable professional client base might demonstrate the same likelihood but be assessed as medium priority overall because the potential impact of their non-compliance is less significant.

49. The Supervision Department will request evidence during general compliance reviews that will enable it to undertake impact reviews of chambers and entities. Therefore chambers and entities will provide this alongside their response to monitoring rounds and will not need to provide any further evidence at this stage.

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?

Supervision according to priority rating

50. Once the BSB has assessed risk and undertaken an impact review it will assign a priority rating to the chambers or entity. This will place them in a band of either low, medium or high priority for supervisory attention. Chambers and entities will be informed of their priority rating, the reasons for this and what this means for them in terms of ongoing supervision.

51. As set out above, low priority chambers and entities will be required to undertake a general compliance review, similar to Chambers Monitoring 2010 and 2012, every 3 years. They may also need to participate in evidence gathering on specific areas of risk that the Supervision Department has identified (see Part D).

52. Medium and high priority chambers and entities will have greater involvement with the Supervision Department. This might involve being required to undertake more regular general compliance reviews, as well as taking part in targeted supervision covering any specific areas of concern. For example, an entity that has a poor history of compliance with complaints handling processes might be asked to provide specific evidence to demonstrate how it is handling complaints. Medium or high priority chambers or entities might also be asked to provide the Supervision Department with an action plan setting out how they intend to manage their risk in order to bring their priority rating down. The intention for the Supervision Department will be to help the chambers or entity to identify and address concerns so as to reduce the likelihood or impact of non-compliance and therefore reduce their priority rating.

53. For medium and high priority chambers and entities the Supervision Department will also be able to undertake an inspection in order to assess compliance. For the chambers and entities concerned, this will involve being available during an inspection to provide inspectors with the evidence they require in order to assess compliance. Inspectors would be instructed by the BSB and would normally be accompanied by BSB staff. For example, if a set of chambers is medium or high priority by virtue of a number of similar findings against its members which suggest a systemic problem in the administration of chambers, this might merit an inspection in order to ascertain what is going wrong and why.

Entering the supervision regime

54. The risk-based supervision regime that is outlined in this consultation paper will come into force in early 2014 when the new BSB Handbook is in force. Once they have

received their first priority rating, the supervision framework should apply similarly to chambers and entities. However, there will be a slightly different process for entering the supervision regime for chambers and entities.

Chambers

55. In 2014 the Supervision Department will contact all chambers and sole practitioners and request that they undertake a round of monitoring in order to assess their compliance against all areas. This will provide initial evidence that will allow for assessment and the assignment of a priority rating as set out above.

56. After 2014, any newly formed chambers will be required to undertake a round of monitoring in order to enter the regime.

Entities

57. Potential entities will need to apply to the BSB for authorisation. In assessing whether to grant authorisation, the Authorisation Team will request evidence that will allow them to undertake a risk assessment.

58. Low risk entities will enter the supervision regime and be supervised as set out above. However, it is proposed that all entities that are assessed at authorisation to be either medium or high risk will be subject to an inspection within 12-24 months of being authorised.

Addressing identified non-compliance

59. Although the intention of supervision is to encourage and assist chambers and entities to comply with their regulatory requirements, it is inevitable that some non-compliance will occur.

60. When non-compliance at the chambers or entity level is identified, the Supervision Department's priority will be to ensure that the chambers or entity addresses the non-compliance, including dealing appropriately with any adverse consequences for clients, and takes adequate measures to ensure that it does not occur again.

61. Therefore, where appropriate, the Supervision Department will inform the chambers or entity of the identified non-compliance and provide them with a period of time in which to address it.

62. It is important that resources are available to assist chambers or entities in this position. To this end the BSB is seeking to work with representative bodies to establish what resources they can make available to assist. In addition, the BSB will ensure that it has updated and user friendly guidance on its website for chambers and entities which will assist them in understanding how they can address non-compliance and prevent recurrence. The Bar Council also has Practice Management Guidelines which should be of assistance in this regard.

63. If the chambers or entity adequately addresses the non-compliance concerned, so as to significantly reduce the likelihood of recurrence, the Supervision Department will not escalate the matter to the Professional Conduct Department (PCD) to consider enforcement action.
64. Therefore the Supervision Department will only refer non-compliance matters to the PCD in the following circumstances:
- If the non-compliance is so serious as to merit immediate enforcement action;
 - If the chambers or entity concerned has repeatedly had similar issues;
 - If the chambers or entity does not adequately address the non-compliance.

Benefits of risk-based supervision for chambers and entities

65. The approach to supervision that has been outlined relies upon early and constructive engagement between the BSB and chambers and entities that could benefit from this approach. Those who are successfully managing their own risk will be subject to minimal involvement with the Supervision Department whilst the Supervision Department will seek to work with those who present a higher risk in order to avoid non-compliance from occurring or recurring. This will help chambers to avoid involvement with the BSB's enforcement arm.
66. There are other benefits for chambers and entities that develop effective risk management techniques, such as operating more efficiently.
67. The scheme will not operate so as to prescribe exactly how chambers or entities should manage risk. It will seek to encourage and support innovation and new means of improving service delivery.

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

PART C – SUPERVISION FOR INDIVIDUAL BARRISTERS

68. All individuals regulated by the Bar Standards Board are already supervised to a certain extent. The main area of individual supervision that is currently undertaken concerns compliance with requirements around Continuing Professional Development. The annual authorisation process also provides a degree of supervision.

69. It is proposed that the new risk-based approach to supervision will involve additional supervision in two circumstances:

- (a) As an alternative to the BSB pursuing enforcement action
- (b) Following enforcement action

70. In both circumstances the Supervision Department will have a similar range of tools available.

(a) Alternative to enforcement action

71. Currently, when information is received about potential non-compliance by an individual barrister, it is investigated by the Professional Conduct Department (PCD) and the Complaints Committee in order to determine whether to take enforcement action against the individual concerned.

72. It is proposed that in the future, when the BSB receives such information it should be able to decide whether it is a matter that is best investigated and pursued by PCD with a view to enforcement or whether it is more appropriate to address it through the Supervision Department.

73. The BSB believes that there are complaints that it currently deals with through enforcement which could be more effectively addressed through supervision, where the focus would be on addressing the issue concerned and preventing the recurrence of negative impacts, as opposed to focussing on punishment.

74. Examples might include those who have failed to follow the Public Access Rules or guidance. In these circumstances, if the impact has not been significant in the actual case, it might be more beneficial to ensure that the barrister concerned has learned from their mistake and will not repeat it rather than seeking to fine them.

75. The Supervision Department will have the following tools available in relation to individual barristers:

- The Supervision Department might feel that a complaint raises issues of significant concern to justify a degree of 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.
- 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.

- Chambers/entity inspections: Evidence obtained about individuals will also be factored into the supervision of the chambers or entities from which they practise (as set out above in Part B). Therefore if the Supervision Department receives evidence suggesting that a member, or number of members of the same chambers or entity, is not complying with regulatory requirements, or that there are underlying problems in the proper administration of chambers, it might suggest the need for a chambers inspection in order to ascertain the extent and potential causes of the problems.

76. It is hoped that in most cases individuals will engage with the Supervision Department in order to address any identified concerns and take appropriate measures to prevent recurrence. This would mean that enforcement action could be avoided.

77. The Supervision Department would only refer matters for enforcement if an individual does not sufficiently address the non-compliance or if, in the course of supervision, it identifies evidence of any additional non-compliance which requires fresh consideration of enforcement action.

(b) Supervision following enforcement action

78. If the PCD determines to pursue enforcement action against an individual barrister this will often be sufficient to address the issue. However, there may also be instances where it is felt that a barrister would benefit from some follow up supervision to ensure that they do not make the same mistakes again.

79. Therefore in all instances in which a disciplinary finding has been made against a barrister, the Supervision Department will consider whether follow up supervision would be effective in reducing the likelihood of future issues of non-compliance.

80. The Supervision Department would have the same tools available in these circumstances as when considering supervision as an alternative to enforcement.

Benefits for individual barristers

81. Those barristers who comply with their regulatory requirements will not be subject to any additional supervision. The BSB will only consider further supervision for barristers when evidence is received that gives rise to regulatory risk or concern.

82. As with chambers and entities, the intention of all interaction with the Supervision Department will be to ensure that non-compliance is addressed and does not recur. This will therefore provide a more positive and constructive context for individuals to discuss and address their non-compliance. Those who are willing to engage with supervision and attempt to address any regulatory concerns will be assisted to avoid future enforcement

action. The barrister and the Supervision Department should therefore be working towards the same objective.

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?

PART D – EVIDENCE GATHERING TARGETING SPECIFIC AREAS OF RISK

83. The Supervision Department will also undertake evidence gathering to cover specific high risk areas. This is a completely separate process to the supervision of chambers, entities and individuals. When new evidence is received regarding a particular risk and the BSB considers it necessary to gather more information, all relevant chambers and entities might be involved in the data gathering, regardless of supervision priority ratings. This might relate to particular regulatory requirements, areas of work or business practices.
84. The Supervision Department will decide which areas require specific evidence gathering through analysis of all of the evidence that is received through supervision as well as any relevant information from other BSB Departments. It will also take the BSB's Risk Assessment Framework into account in deciding which areas to focus on.
85. Evidence gathering on specific areas of risk 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.
86. This evidence gathering will therefore be based upon a risk identified with a particular regulatory requirement, area of work or business practice. It will not be based on the risk profile of the individual, chambers or entity that is being supervised. Therefore even low priority chambers or entities might be required to participate in this type of supervision. For this reason, this facet of supervision will be undertaken through separate projects outside of the normal operation of supervision. The Supervision Department will seek to minimise the frequency of these projects and to combine reviews of different areas where possible in order to reduce the burden on those involved.
87. Evidence gathered through this process may be fed into the supervision of chambers and entities as set out in Part B.

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

PART E – BENEFITS FOR CONSUMERS

88. The proposed risk-based approach to supervision should allow for resources to be deployed more intelligently and proportionately. Supervision will be targeted at higher risk chambers, entities, individuals and areas; resources can therefore be devoted to identifying opportunities for earlier and more constructive engagement that prevents risks from materialising in the form of negative impacts on consumers and the regulatory objectives.
89. Similarly, those that are managing risk and operating at a low risk will not need to expend unnecessary resources demonstrating that they are compliant and can focus instead on high quality service delivery, which should also benefit consumers.
90. Supervision should also identify those who do not comply with their regulatory requirements and who do not engage with supervision in order to address this. These are likely to be the most reckless chambers, firms or individuals and those who are more likely to have a significant negative impact on consumers. Evidence of their lack of appetite to accept and address regulatory concerns will allow for more serious enforcement action to prevent these negative impacts from enduring.

PART F – GOVERNANCE AND OPERATIONAL STRUCTURE

91. The BSB is establishing a Supervision Department, drawing upon the existing Quality Team. This will not therefore represent a significant increase in the BSB's overall resources.
92. The normal operation of supervision will be managed by staff within the Supervision Department in line with the Supervision Strategy (annexed). However, staff will have access to a panel, comprising experts from across the BSB's committees, to assist it in dealing with more complex issues. This will mean that the Supervision Department will be able to seek expert advice on any specific areas of concern. For example, if the Supervision Department has uncovered evidence that it believes might raise equality and diversity issues, staff will be able to seek advice from the Equality and Diversity Committee member of the panel on the implications of the evidence.
93. The Supervision Department will report into the Bar Standards Board's Committee Structure.

PART G – CONCLUSION

94. The BSB intends to develop a risk-based approach to supervision that will encompass specific supervision activity in relation to chambers and entities and individual barristers.
95. This is part of wider moves at the BSB to develop a more risk and evidence based approach to regulation to complement the development of a new BSB Handbook and the prospect of the BSB beginning to regulate entities.
96. The approach set out in this consultation paper and summarised in the accompanying Supervision Strategy (annexed) should allow the BSB to supervise intelligently and to engage earlier and more constructively with chambers, entities or individuals who require greater regulatory attention. It should therefore result in greater protection for consumers and should also encourage those that the BSB regulates to improve compliance with regulatory requirements and avoid enforcement action.

Timetable and implementation

97. The intention is for the new approach to supervision and the Supervision Strategy to come into force in early 2014. This will allow for supervision to begin when the new BSB Handbook comes into force. The key milestones in order to achieve this will be:

Public consultation	March - May 2013
Consider responses and make necessary changes	June . August 2013
Publish response to consultation	September 2013
Finalise and test systems and processes	September . December 2013
Risk-based supervision begins	January 2014

98. The BSB may undertake some monitoring on specific areas of risk during 2013. It also intends to undertake some research into the administration of chambers in order to better understand the risks that are involved.

Q7 – Do you have any general comments on the supervision strategy or the consultation paper?

Equality and Diversity

99. The BSB has undertaken an Equality Analysis of the Supervision Strategy which analyses the impact of supervising chambers and entities. This analysis did not identify any significant negative impact that cannot be mitigated. However this document will

continue to evolve throughout the development of this policy and any new impacts identified will be mitigated as far as possible.

100. The Supervision Strategy will actively monitor and enforce the Equality and Diversity provisions in the BSB Handbook. These requirements address disadvantage and challenge existing patterns of discrimination in the provision of legal services.
101. Any chambers/entities found not to be compliant with the Equality and Diversity requirements will be given support and guidance in achieving the standards set out in the Code of Conduct and any chambers/entities who persistently disregard these requirements will be referred directly to the Professional Conduct Department for further disciplinary action.
102. The draft Equality Analysis is available on the BSB's website alongside this consultation. The BSB would welcome responses that identify any additional negative impacts that are not identified in the analysis.
103. An Equality Analysis for the supervision of individuals is being developed in conjunction with the development of the BSB's Enforcement Policy. This will be made available when it has been approved. No major obstacles to equality and diversity are foreseen.

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?

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?

ANNEX – DRAFT SUPERVISION STRATEGY



Supervision Strategy

To apply once the new BSB Handbook is in force

Summary of Approach

The purpose of this policy is to set out the strategic approach to the risk-based supervision of chambers, entities and individuals regulated by the BSB.

The approach will involve supervision resources being targeted at those chambers, entities and individuals who present the greatest risk of non-compliance and therefore the greatest likelihood of causing negative impacts for consumers and the regulatory objectives.

The intention of supervision will be to reduce the likelihood of these negative impacts occurring by encouraging chambers and entities to manage risk and through working with those who have engaged in non-compliance to ensure that it does not recur. It will involve earlier and more constructive engagement with those that the BSB regulates.

In order to achieve these goals the BSB's supervision activity will have three main facets:

- (i) Supervision of chambers (including sole practitioners) and BSB regulated entities;
- (ii) Supervision of individual barristers; and
- (iii) Evidence gathering targeting specific areas of risk

The approach that will be taken on each area will vary and therefore each is dealt with separately below.

Governance of strategy

This Strategy sets out the processes and the framework within which risk-based supervision will operate. Supervision will be managed by BSB staff in the Supervision Department. However a panel of experts, invited from across the BSB's committees, will be available to provide advice where necessary.

(i) **Supervision of chambers and BSB regulated entities**

Scope

This facet of supervision is concerned with the regulatory requirements that apply at a chambers and entity level, including those that apply to sole practitioners (references below to chambers therefore include sole practitioners). These requirements identify the key systems and procedures which competently managed chambers and entities need in order to provide a good service to clients and for the BSB to be confident that those working in them will meet their obligations with the BSB Handbook. The purpose of supervision is to encourage and support chambers and entities in meeting the requirements and to provide assurance that they are doing so.

Objectives

Supervision of chambers and entities has two main purposes:

- A) **Supervise chambers and entities:** Under risk-based regulation, supervision of chambers and entities will be proportionate, leading to a more efficient use of resources. This method of supervision will also incentivise chambers and entities to manage their own internal risk.

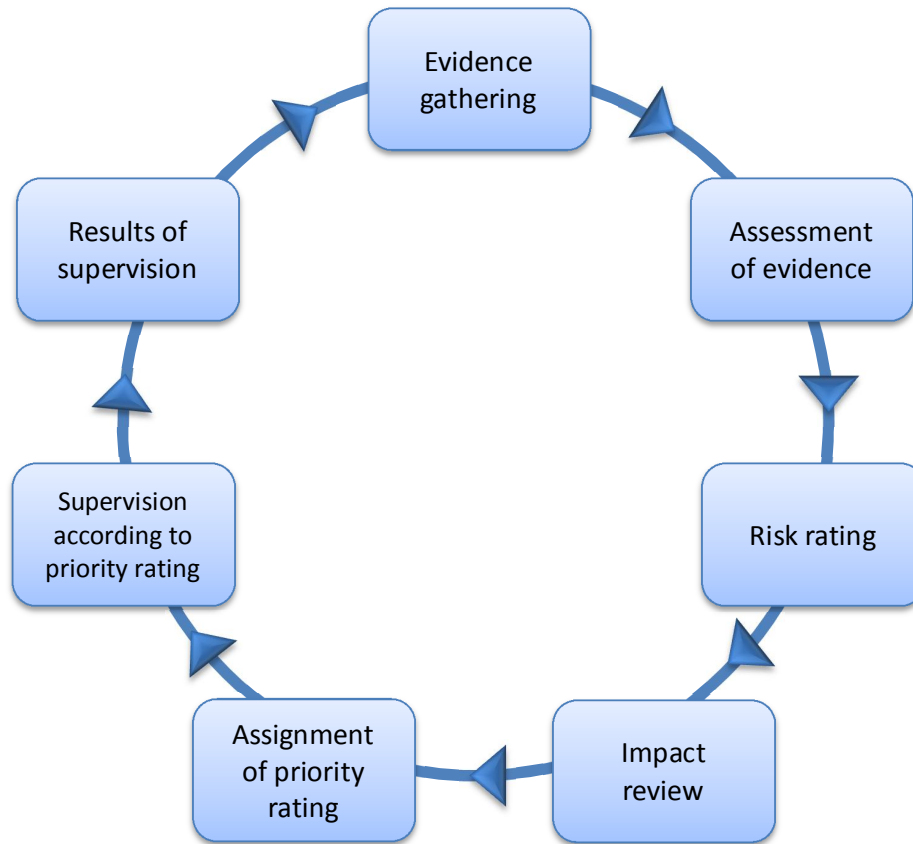
- B) **Identify and address non-compliance:** Supervision will also identify specific instances of non-compliance with the BSB Handbook. Where evidence of non-compliance is identified, the Supervision Department will assess the non-compliance and seek to provide the chambers or entity with an opportunity to address it so as to prevent recurrence.

These two objectives will be achieved through separate processes, which are set out below.

A) Supervise chambers and entities

There are seven major stages in the supervision process. The stages are a cycle, with stage 7 feeding back into stage 1. This is depicted in the diagram below.

Diagram 1 – Chambers and entities supervision cycle



1. Evidence gathering

This stage involves gathering evidence from multiple sources.

Evidence sources may include:

- BSB departments (e.g. the Professional Conduct Department)
- The Legal Ombudsman
- Client complaints
- Complaints from other sources
- Chambers and entities past record
 - Record of compliance/non-compliance (e.g. as identified through the Chambers Monitoring scheme)

- Record of engagement/non-engagement with the BSB within the last 5 years (e.g. whether requests for information have been answered promptly)
- Supervisory activity
 - General reviews (e.g. questionnaire in the style of Chambers Monitoring 2010, covering a broad range of areas)
 - Targeted monitoring (e.g. requests for specific information from particular chambers)
 - Inspections (e.g. visits to chambers or entities to investigate matters in more detail)

2. Assessment of evidence

The evidence gathered in stage 1 is then assessed in order to determine the likelihood of the chambers/entity not complying with their regulatory requirements. This is done by weighting the evidence for and against this probability.

As part of the risk framework all relevant evidence will be listed and given a weighting dependent on the significance and seriousness of the evidence. For example, persistent non-engagement with the BSB would be considered very serious and therefore have a high weighting whereas a previous, minor non-compliance issue which has since been corrected, would receive a low weighting score.

The evidence used in this assessment can be positive or negative; for example, just as a record of non-compliance will be taken into account, so will a record of compliance

Steps can be taken to decrease the likelihood of not complying, including obtaining voluntary accreditation such as the Bar Business Standard as well as providing evidence of regular consumer engagement/satisfaction surveys. All of this would be included in the evidence for chambers being compliant

The balance of evidence for/against chambers or entities will be used to suggest the likelihood of non-compliance. It is the results of this assessment that will inform the risk rating.

3. Risk rating

The assessment of evidence will result in all chambers and entities obtaining a score which represents the likelihood of them not complying with their regulatory requirements. This is their risk rating.

4. Impact review

Each chambers/entity will have an impact analysis on their profile, which relates to the potential negative impact of non-compliance on consumers and the regulatory objectives.

The impact review will therefore consider any factors, inherent to the chambers/entity, which would increase the negative effect of non-compliance.

Examples of impact factors may include:

- Size of chambers or size of client base
- Vulnerability of client base
- Services offered

An impact factor could make a relatively minor non-compliance issue more serious.

Impact factors will be assessed by reference to specific, identified non-compliance risks. For example, the fact that a set of chambers has a particularly vulnerable client base may not be relevant where the risk assessment has identified a problem concerning (for example) employees' maternity leave, as here the negative impact would be felt primarily by members of chambers and staff.

If any of the impact factors are considered relevant this might increase the overall priority rating that a set of chambers or entity receives for the purposes of supervision.

5. Assignment of priority rating

Once the risk rating has undergone an impact review the final priority rating is assigned. Priority ratings will be banded as low, medium or high.

This priority rating will be used to determine the amount and nature of the supervision activities a set of chambers/entity will undergo.

By informing chambers/entities of their priority rating and any relevant reasons for this, the BSB hopes to incentivise them to actively manage their own risk through best practice and mitigating actions.

A set of chambers or entity's priority rating will remain the same until evidence is obtained suggesting that it needs to be revised either upwards or downwards.

6. Supervision of chambers/entities according to priority rating

As explained in stage 5, the level of supervision that each chambers or entity attracts will correspond to their supervision priority rating. The tools that will be available to supervise chambers and entities within each category are set out below.

Within each category the Supervision Department will have a degree of discretion as to which tools to employ.

Low priority may include:

- General reviews (e.g. questionnaires in the style of Chambers Monitoring 2010)

Medium priority may include:

- General reviews
- Targeted monitoring (requests for specific information from specific chambers or entities)
- Supervised action plans
- Chambers/entity inspections where appropriate

High priority may include:

- General reviews
- Targeted monitoring
- Supervised action plans
- Automatic chambers/entity inspections

7. Results of supervision

The results of supervision activity have three major uses. The first is to identify non-compliance. Where evidence of non-compliance is identified, the Supervision Department will normally assess and address it through the use of a range supervision tools. The aim is to not only address the non-compliance but to prevent its recurrence. The details of this process are set out below.

The second use is to identify areas of regulatory concern. The results may show, for example, that non-compliance is particularly frequent in relation to certain rules. This may suggest that there are problems about the interpretation of the rules or that improved education or communication is needed.

The third use is to be included in the evidence gathering stage (stage 1) of the supervision process. The results of supervision activity form a significant part of the evidence used to assess a set of chambers' likelihood of non-compliance. This feedback process completes the cycle of evidence, analysis and supervision.

B) Identify and address non-compliance

Supervision will not only inform risk assessment but also it will ultimately result in the identification of non-compliance.

As set out above, identified non-compliance will affect an entity/set of chambers' priority rating and the level of supervision that they are subject to. However, it will also begin a separate process concerned with addressing the non-compliance itself.

In these circumstances, the first stage will be to assess the impact of the non-compliance. The BSB's priority will be to ensure that the chambers/entity involved addresses the issue in order to prevent the non-compliance reoccurring and to remedy its consequences (where applicable). However, for non-compliance with the most serious and immediate impact on the regulatory objectives, the issue could be immediately escalated to the Professional Conduct Department (PCD) to consider enforcement action. Similarly, if the chambers or entity has a history of repeated non-compliance this might result in immediate referral to the PCD.

In all but the most serious and immediate of cases, the Supervision Department will discuss with the chambers/entity the issue identified and provide them with a period of time in which to prove that they have established procedures or undertaken other measures (such as organising appropriate training) necessary to address the non-compliance and prevent recurrence and, where appropriate, have taken reasonable steps to remedy any adverse effects on clients resulting from the non-compliance.

The Supervision Department will alert chambers/entities to any resources that are available to assist them to address their non-compliance.

Where appropriate, the Supervision Department may ask the chambers/entity to provide an action plan for how it proposes to address the non-compliance. Ultimately the Supervision Department might also feel that an inspection is required to confirm that non-compliance has been addressed and is unlikely to reoccur. Such inspections could also be used to assess compliance with other regulatory requirements.

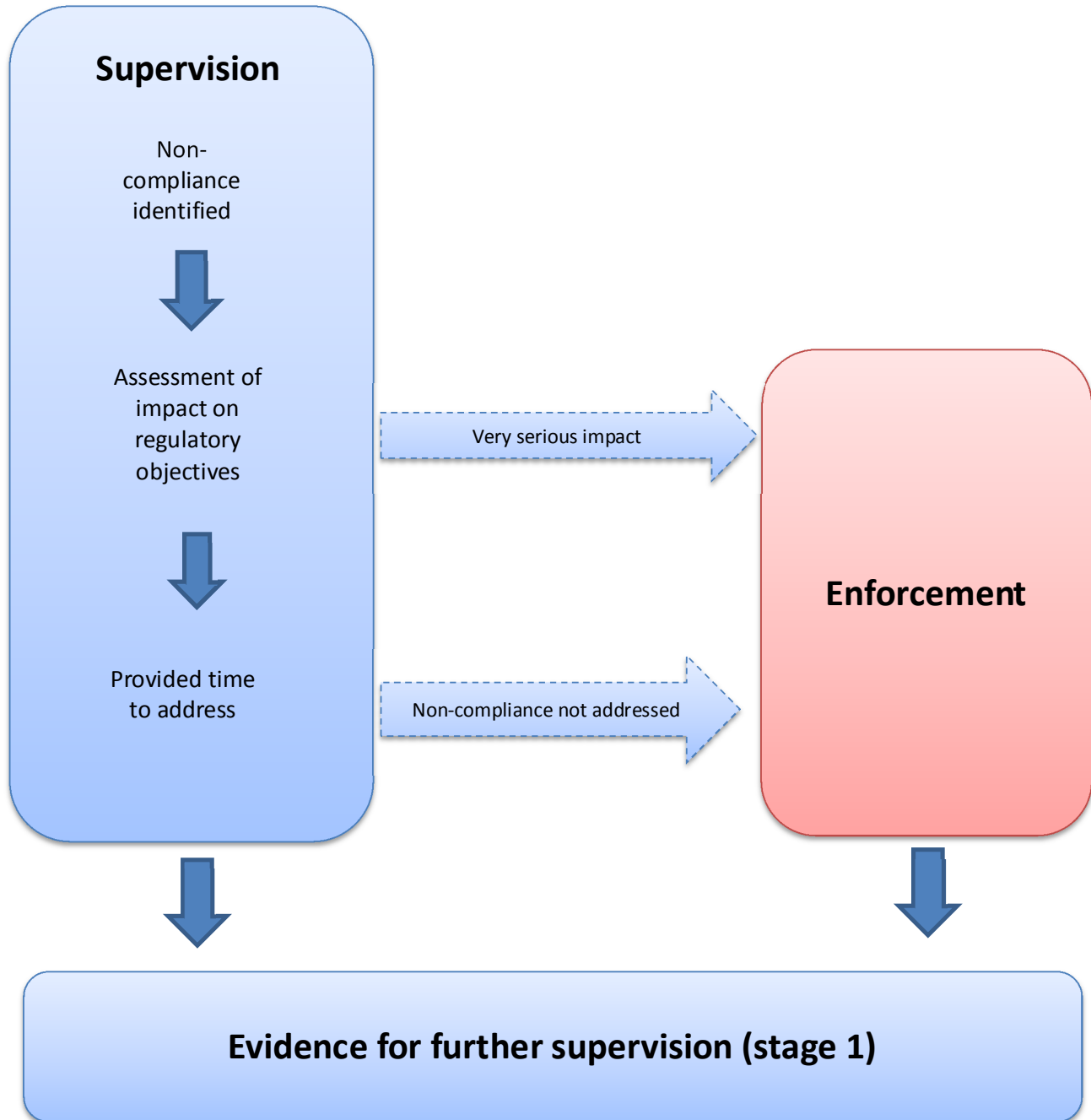
If the chambers or entity adequately addresses the non-compliance concerned, so as to significantly reduce the likelihood of recurrence, the Supervision Department will not escalate the matter to the PCD.

Results from this process will be factored into the evidence gathering stage of the supervision process and will therefore result in risk assessments being updated. The results of this process form a significant part of the evidence used to assess a set of chambers or an entity's likelihood of non-compliance. Therefore those chambers or entities that are able to prove that they have addressed non-compliance in a manner which should prevent similar future non-compliance may have their supervision priority rating reduced.

If the chambers or entity do not adequately address the non-compliance concerned, the Supervision Department will refer the matter to the PCD to pursue enforcement action.

The processes for addressing non-compliance are depicted in the diagram below.

Diagram 2 – Addressing identified non-compliance



(ii) Supervision of individuals

The BSB supervises individuals in relation to compliance with requirements around Continuing Professional Development. The annual authorisation process also provides a degree of supervision.

An individual could be subject to additional supervision in the following circumstances:

- (c) As an alternative to the BSB pursuing enforcement action
- (d) Following enforcement action

In both circumstances the Supervision Department will have a similar range of tools available.

(a) Alternative to enforcement action

When dealing with any complaints, whether from external or internal sources, the Professional Conduct Department (PCD) will assess this evidence in order to determine whether the application of one of the supervisory tools is more appropriate than immediately pursuing formal enforcement action. Such an assessment could take place either on initial receipt of the complaint or following a formal investigation.

In circumstances where the PCD refers a matter for supervision, the Supervision Department will have the following tools available:

- The Supervision Department might feel that a complaint raises issues of significant concern to justify a degree of 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.
- 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.
- Chambers/entity inspections: Evidence obtained about individuals will also be factored into the supervision of the chambers or entities from which they practise (as set out above in Part (i)). Therefore if the Supervision Department receives evidence suggesting that a member, or number of members of the same chambers or entity, is not complying with regulatory requirements, it might suggest the need for a chambers/entity inspection in order to ascertain the extent and potential causes of the problems.

It is hoped that in most cases individuals will engage with the Supervision Department in order to address any identified concerns and take appropriate measures to prevent recurrence. This would mean that enforcement action could be avoided.

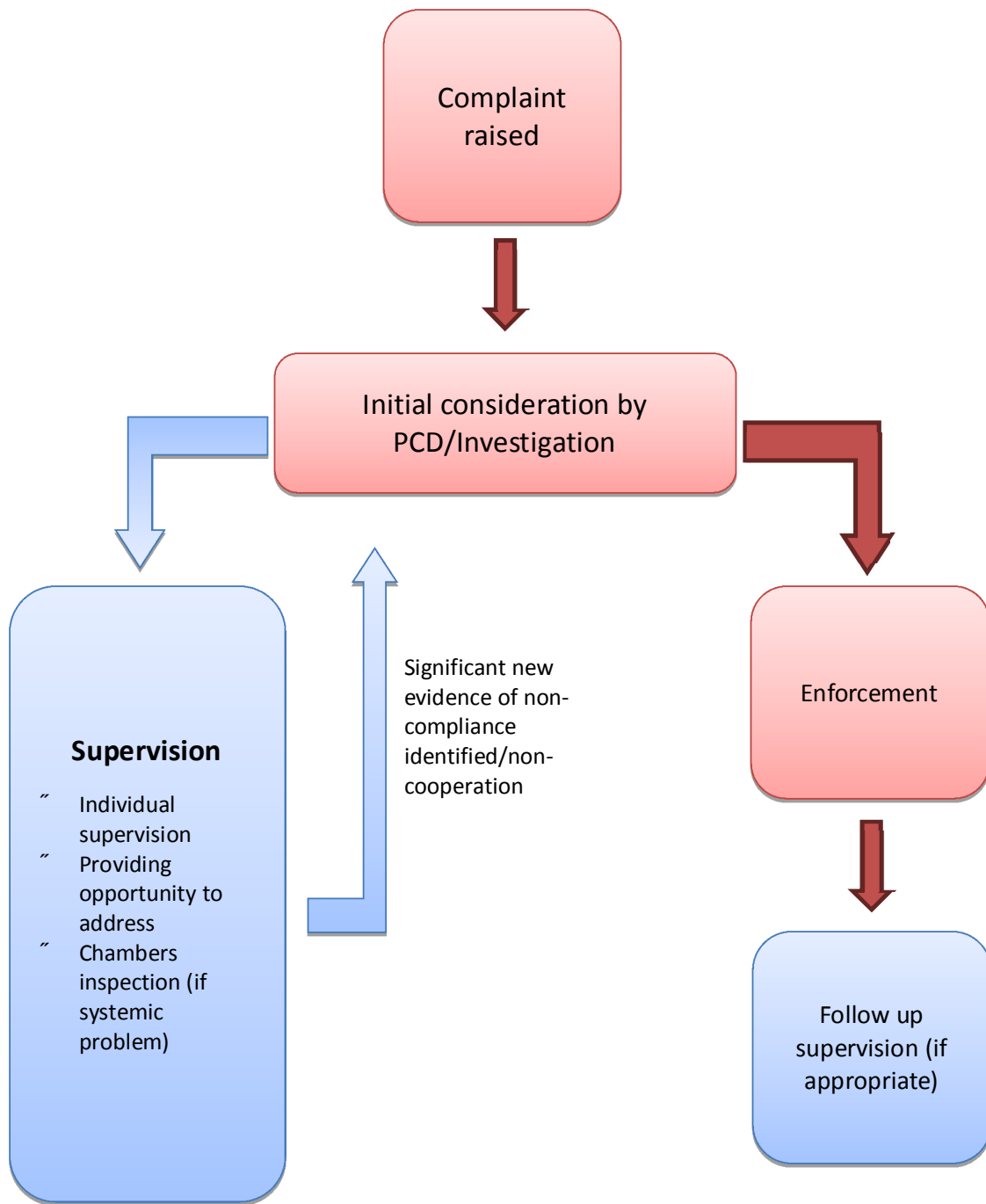
The Supervision Department would only refer matters for enforcement if an individual does not sufficiently address the non-compliance or if in the course of supervision it identifies evidence of any additional non-compliance which requires fresh consideration of enforcement action.

(b) Supervision following enforcement action

In all instances in which a disciplinary finding has been made against a barrister, the Supervision Department will consider whether follow up supervision would be effective in reducing the likelihood of future issues of non-compliance.

Follow up supervision could incorporate the same measures that are available when pursuing supervision as an alternative to enforcement action.

Diagram 3 – Supervision of individuals



(iii) Evidence gathering targeting specific areas of risk

The Supervision Department will also undertake evidence gathering to cover specific high risk areas. This is a completely separate process to the supervision of chambers, entities and individuals. When new evidence is received regarding a particular risk and the BSB considers it necessary to gather more information, all relevant chambers and entities will be involved in the data gathering, regardless of priority ratings. This might relate to particular regulatory requirements, areas of work or business practices.

The specific areas that will require evidence gathering will be primarily informed by the BSB's Risk Assessment Framework, although it may also arise from a single one off piece of evidence. Evidence gathered from the supervision of chambers, entities and individuals will help to inform what areas might be considered to be high risk.

Evidence gathering on specific areas of risk 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.

This facet of supervision will therefore be based upon a risk identified with a particular regulatory requirement, area of work or business practice. It will not be based on the risk profile of the individual, chambers or entity that is being supervised. Therefore even low priority chambers or entities might be required to participate in this type of supervision. For this reason, this facet of supervision will be undertaken through separate projects outside of the normal operation of supervision that is set out in section (i) and (ii) above. The Supervision Department will seek to minimise the frequency of these projects and to combine reviews of different areas where possible in order to reduce the burden on those involved.

Evidence gathered through this facet of supervision may be fed into the supervision of chambers and entities as set out above in section (i).