



**Please provide a brief overview of the session**

***“Good Lawyers Making Bad Decisions: Using Risk-focused Regulation to Support the Good and Prevent the Bad”***

*This session explores risk factors and indicators of poor and/or unethical client service, and what the regulator can do to proactively identify and address these factors with the goal of minimizing the risk of future harm, in the public interest.*

**Please provide a short bio of the speakers.**

*Max. 3 lines per speaker*

**Victoria Rees** - Director of Professional Responsibility, Nova Scotia Barristers' Society, Canada. A lawyer since 1988, and employed with the NSBS for 30 years in a variety of regulatory risk areas including trust assurance, audit, client compensation, complaints investigation and prosecution, and lawyer incapacity. Member of National Discipline Standards and National Model Code of Conduct Liaison Committees, past President of the IBA Professional Ethics Committee, and past VP (Canada) with the US National Client Protection Organization.

**Juliet Oliver** – holds the roles of General Counsel, Executive Director Case Direction, and case Adjudicator at the Solicitors Regulation Authority. She is a solicitor specialising in public and regulatory law having advised on regulatory and disciplinary policy in a number of sectors including health, social care and law. She is a member of committees of the Law Society of England and Wales, the Chartered Institute of Management Accountants and the General Optical Council.

**Hans Vogels** – a Netherlands lawyer, graduate in law in 1988 from the Maastricht University, and has contributed to several Bar activities in the Netherlands, i.e. president of the Young Bar Association, auditor, member of the Chamber of Deputies, member of the General Council of the Netherlands' Bar, and Head of the Netherlands' delegation to the CCBE. Presently he is President of the local bar of the Limburg region (i.a. Maastricht).

**Why is this session of particular interest and to whom?**

*With our collective mandate to regulate in the public interest, comes the essential requirement that we ensure to the extent possible that those whom we regulate conduct themselves ethically and competently. Regulators must therefore identify, understand and effectively respond to any risks to our ability to achieve this objective. Meaningful regulatory risk management requires a strategic, organization-wide approach that is nimble, well-informed, proactive and proportionate. Regulators without this strategic foundation and commitment are at risk of losing the rights and privileges of an independent regulator.*

**What particularly do you hope to explore in this session? Any specific questions you hope to answer?**

*We will explore the following:*

- 1. What are the indicia of poor, incompetent and/or unethical client service by those we regulate?*

2. *What are some of the different models for proactively identifying and preventing incompetent or unethical decision-making by those we regulate?*
3. *How do we know whether such models are/will be successful in supporting competent and ethical decision-making by those we regulate?*

**What is the setting of your session?**

*Our session will be in the format of presentations by three panellists interspersed with and followed by time for audience engagement and questions.*

**Any useful documents/background reading for context?**

*Please attach any links to content/pdf's that you think might be interesting related sources. We will upload these into the website's regulator community and research bank (if appropriate).*

*See materials attached as PDF*

**Anything you would like to ask the regulator community in advance of the session to inform the content/preparation?**

*E.g. We could issue a short poll, or ask for comments in the community groups.*

*N/A*

# International Conference of Legal Regulators October 4, 2018

“Good Lawyers Making Bad Decisions: Using Risk-focused  
Regulation to Support the Good and Prevent the Bad”

Panel: Victoria Rees, Nova Scotia Barristers' Society, Canada

Hans Vogels, Limburg Bar, Netherlands

Juliet Oliver, Solicitors' Regulation Authority, UK

## Three main areas of different yet complimentary perspectives



**What are common indicia of poor, incompetent and/or unethical client service?**

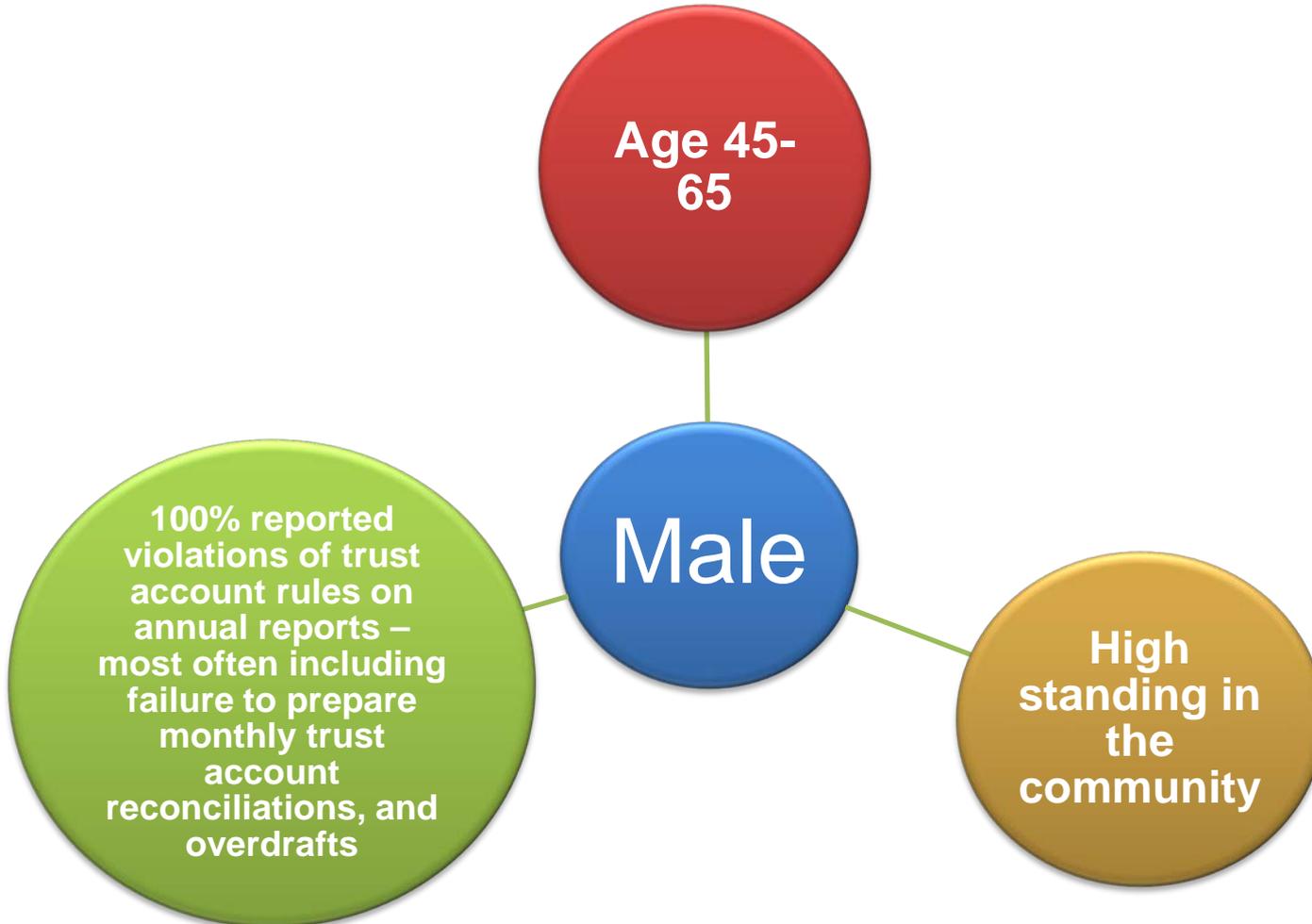


**What are some of the models or tools for proactively identifying and preventing incompetence & unethical conduct on the part of those we regulate?**

**How do we know whether these tools and models will be successful in supporting competent and ethical decision-making by those we regulate?**



## Common indicia of poor, incompetent and/or ethical client service



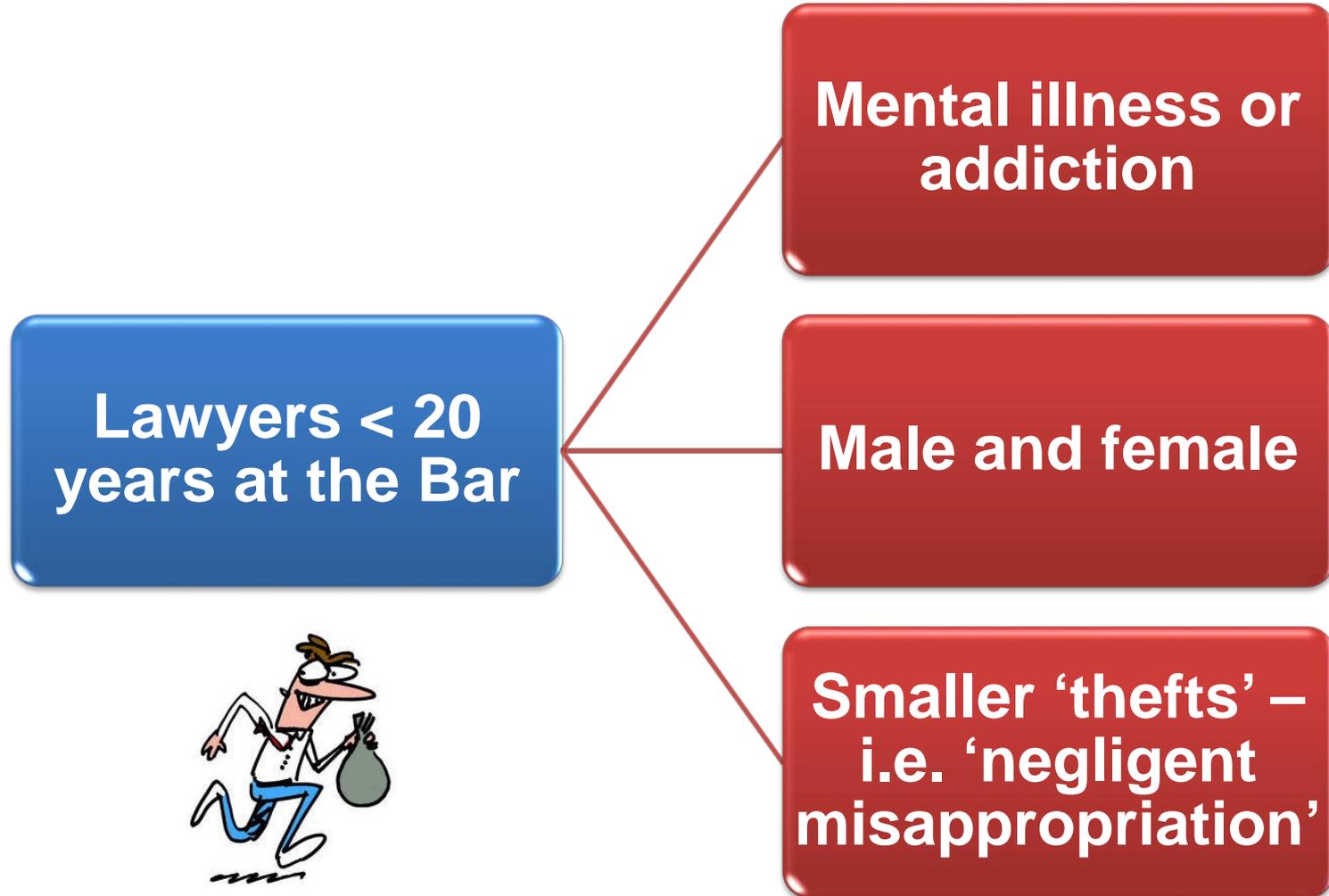
## Common indicia of poor, incompetent and/or ethical client service cont'd

**80% had complaints history re quality of service and competence (delay, failure to communicate, failure to meet undertakings)**

**50% had reported civil judgments and bankruptcy**

**Most often in general practice, and either sole practitioners or in terms of three or fewer lawyers**

## Profile changes



## Financial Risks



**Failure to maintain the required books, records and accounts in a timely and effective manner**

**Membership suspension for failure to pay fees or file trust account reports**

**Inability to meet expenses incurred in the course of the practice of law**

**Taxation decisions against the lawyer; i.e. a requirement to repay fees paid by clients**

## Financial Risks (cont'd)



Seeking  
loans  
from  
clients

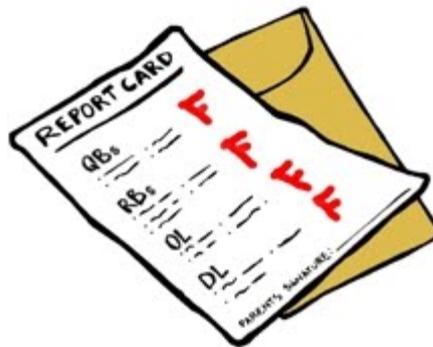
Over-billing  
or other  
'unique' fee  
arrangements

Over-  
working  
files to  
generate  
higher fees

Pre-taking  
unearned  
fees

## Quality of Service Risks

Failure to return  
calls from clients,  
lawyers and  
others



Double-booking court  
appearances or not  
appearing at all

Court decisions finding  
incompetent counsel as a  
valid defence,  
and/or ordering costs be  
paid by the lawyer  
personally

Failing to adhere to  
undertakings

Poor documentation of  
files

## Quality of Service Risks (cont'd)

Protracted litigation where the reasonably foreseeable results are outweighed by the effort to reach the end



Failure to supervise staff or non-lawyers/abdication of practice to non-lawyers

Failing to conduct adequate or effective conflicts checks, and/or failing to identify a reasonably foreseeable conflict

Providing legal advice 'on the fly' before conducting any research of the facts and relevant law

## Personal Risks



Evidence of mental health problems

Evidence of addictions

Becoming too emotionally involved in family law or child protective services matters

Criminal charges



## What are the potential sources for these kinds of risk information?

**Annual Lawyer Report**

**Annual or other Trust Account Reports**

**Trust audits and practice reviews**

**Ethics inquiries – ‘what do I do if...’**

**Complaints intake – calls from financial institutions and other professionals**

**Behaviour and results at the bar admission course and/or exams**

**Engagement with the accounting department; e.g. inability to pay fees on time, frequent changes of accounts**

**Information obtained through the reception desk or at the lawyers' library**

## **What are the potential sources for these kinds of risk information? (cont'd)**

**Reports from other lawyers from the community, committee volunteers**

**Newspapers and gossip sheets**

**Notice of judgements and bankruptcies**

**Law suits, taxation decisions, and professional indemnity insurance claims defences**

**Court decisions finding incompetent counsel or commenting on improper conduct of lawyers, whether in their personal or professional lives (including failure to make support payments)**

**Reports from judges through an appropriate protocol**

**Complaint responses/investigative interviews**

**Self-report**

## Tools for proactively identifying and preventing incompetent or unethical decision-making

Annual Lawyer Report

Annual or other Trust Account Reports

Trust audits and practice reviews

Process for responding quickly to inquiries about ethical and professional obligation, ethics, legal services/practice support

## Tools for proactively identifying and preventing incompetent or unethical decision-making (cont'd)

Early resolution of complaints – help find solutions rather than blame; use a restorative justice approach

Psychometrically defensible admissions criteria, assessments

Education and articles about ethics, professionalism – drawing from actual examples

Fraud prevention and risk education initiatives

## Tools for proactively identifying and preventing incompetent or unethical decision-making (cont'd)

Liaison with law schools about areas of weakness in substantive knowledge

Systems for third party reporting; e.g. financial institutions (ONP), judges

Fitness to Practice Programs; LAP, other diversionary and non-punitive alternatives

Triple P and risk-focused regulatory model

## Tools for proactively identifying and preventing incompetent or unethical decision-making (cont'd)

Creative approaches to ethical and other regulatory violations – seek to change behaviour rather than punish

Follow-up surveys of the public and lawyers after interactions with the regulator – was the information helpful? Did it make a difference? If so, how? What else could we have done?

Post-mortems in cases of disbarment, misappropriation, serious misconduct – what did we know? When did we know it? What could we have done better/sooner? What tools or authority do we need that we didn't have?

MSELP/AMS – SAT

## Impact (risks) of size, type and culture of practices on competent and ethical decision-making



## **NSBS Responses**

**MSELP and self-assessment**

**Legal Services Support team**

**Working groups focused on solo and small firm issues and supports, government lawyers and in house counsel**

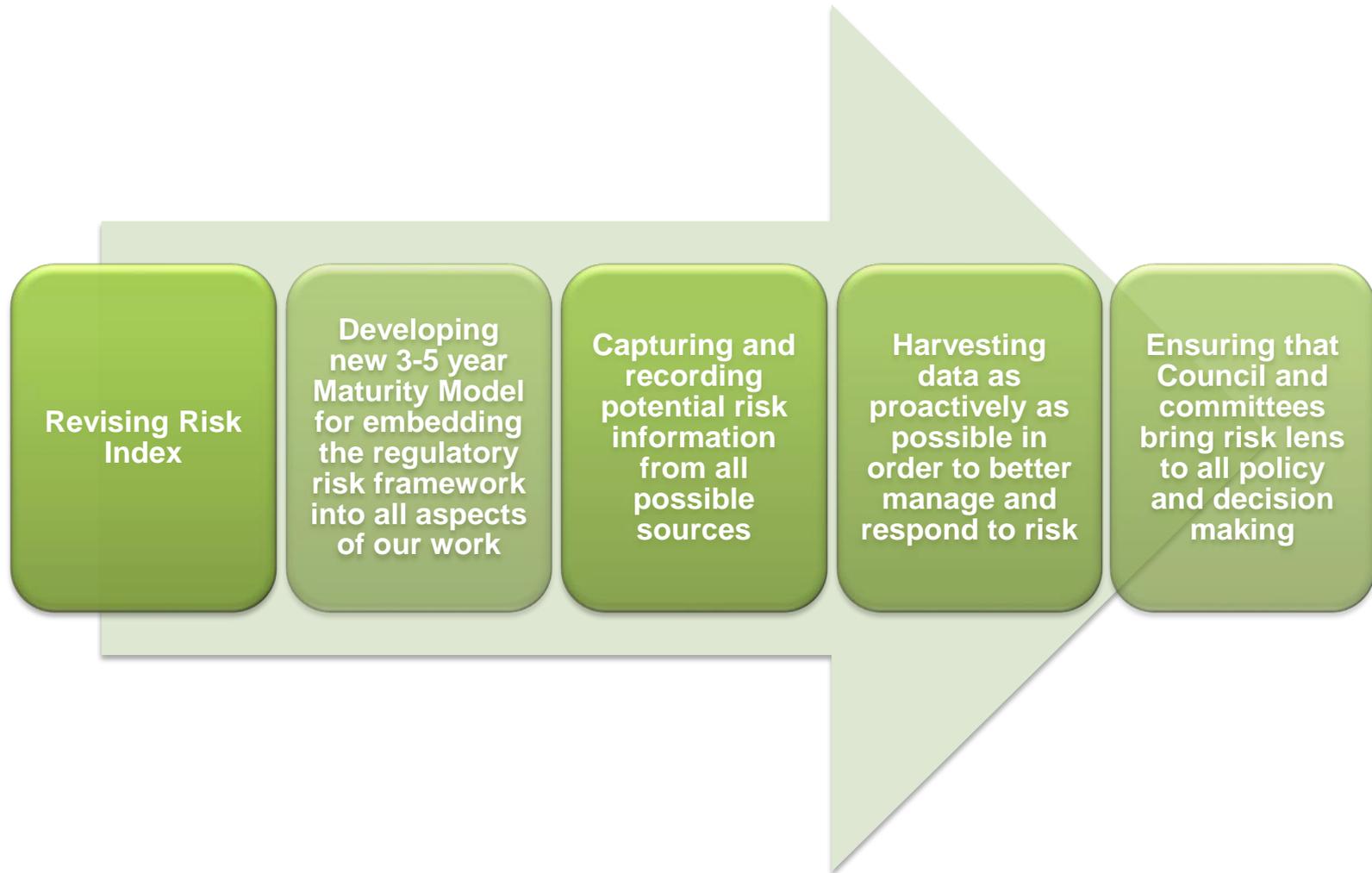
**New law firm registration process**

**Risk-focused questions on the Annual Lawyer Report and Annual Trust Account Report**

**Staff trained to provide practice and ethical guidance.**

**Changed the culture around our trust assurance program and audits**

## Regulatory Risk Management initiatives



# Conclusion

20% increase in  
complaint calls, but a  
20% decrease in  
written complaints

200+ calls to Legal  
Services Support  
team

Capturing and  
recording potential  
risk information from  
all possible sources

Law firms waived  
from submitting  
some reports for two  
years

Judges following  
protocol for  
reporting concerns

Fitness to Practice  
Program

MSELP pilot project

# Solicitors Regulation Authority: Who we are



Across England and Wales  
we regulate:

**185,000** solicitors

**10,500** firms

**ABS**

**750**

We protect the public by:



Ensuring solicitors meet high standards through education and training



Taking action when things go wrong with a solicitor or firm



Making legal services more accessible and affordable



Paying compensation to people who have lost money

# Risk based regulation

## Reports to the SRA



Poor practice/  
misconduct

REACTIVE →

← PROACTIVE



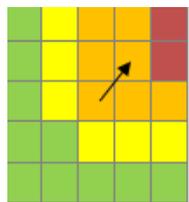
Complaints  
received

# A holistic approach

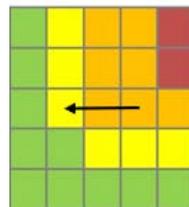


# Proactive regulation based on risk

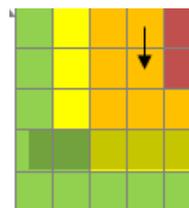
## Regulatory Environment Dashboard



Cybercrime



Holiday sickness claims

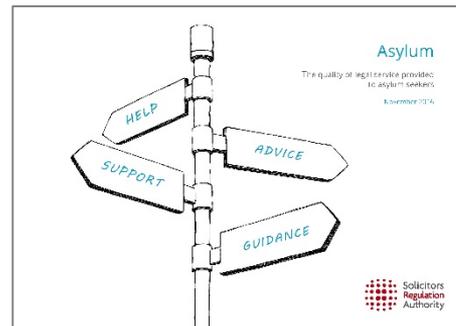


Money laundering

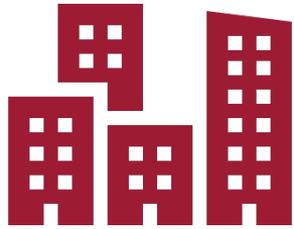
- quarterly report featuring the top risks and issues affecting the market
- identify issues, knowledge gaps and market developments
- logs actions taken across directorates
- helps the SRA to:
  - act only when it should, for no longer than is necessary
  - provide a consistent, transparent and disclosable account of our thinking.

# Thematic reviews

- In-depth audits - at risk firms & random samples
- Focus on improving standards and identifying serious breaches for investigation
  - Asylum and immigration
  - Criminal advocacy
  - Anti-money laundering

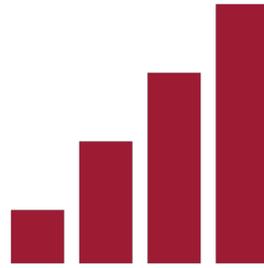


# Our thematic review approach



Firm  
visits

+



Detailed  
analysis

+



Research

# Using other organisations data

Actively sourcing information from:



The Government  
(MoJ, Land Registry)



Other regulators  
(claims management etc)



The LSB



Banks

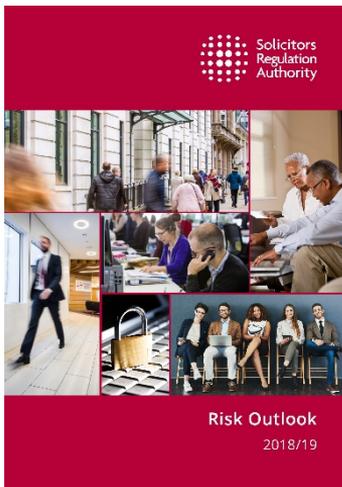


Insurers



Judiciary and  
the police

# Risk Outlook



- sets out our **position** on risk in the legal services market
- shows the **priorities** to which we will allocate our resources
- explains how we will **control** these risks and act in the public interest
- help solicitors and firms **manage** risk.
  
- Annual report: July
- Spring and Autumn updates

## Topic papers



- Focus on specific risks identified within the market
- Provides guidance to firms on how to manage these risks



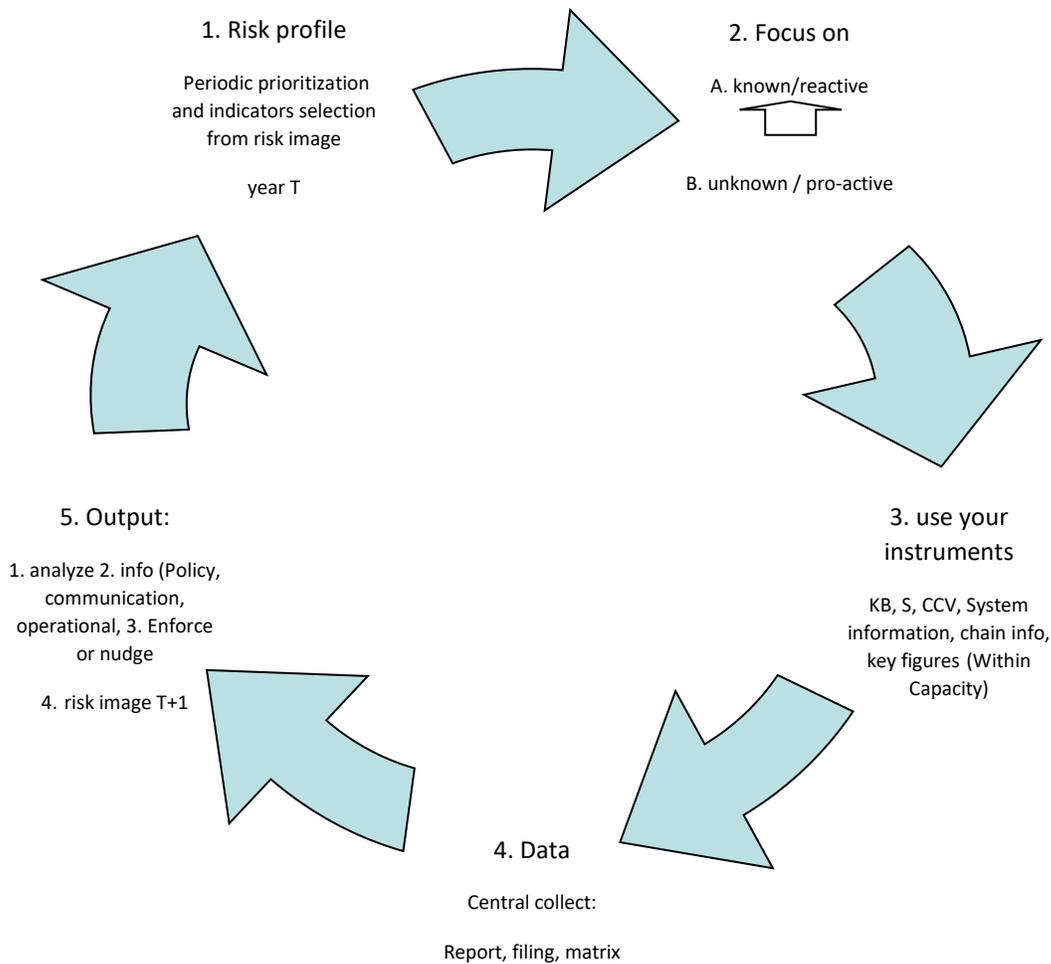
## Risk based approach for supervision on lawyers in The Netherlands

The local bar president is the supervisor (or regulator) under the law (Advocatenwet), on the lawyers in their judicial district. There are 11 judicial districts in The Netherlands, thus 11 bar presidents. The bar presidents work on standardizing their supervisory approach.

Research driven by risk indicators, means applying the supervisory capacity to prioritize according to risk profiles. In summary: Risk based approach. The purpose of that approach is that action can be taken where most needed.

Risk monitoring is a permanent process, and is therefore cyclical.

The local bar presidents have identified five steps in this process: 1. Risk profile (year T); 2. Define reactive/pro-active; 3. Apply surveillance instruments; 4. Collect your data; 5. Output: Analysis, enforcement, information, risk profile year (T + 1). The latter means that on the basis of the output of year T, the risk profile for year (T + 1) can be defined or adjusted. Risk based approach is therefore cyclical and dynamic. This process is visualized in a theoretical model:



### **Short explanation of the model Risk-based approach.**

1. A risk profile is the composition of single or multiple risk indicators <sup>1</sup>. The bar presidents have taken as a starting point a list of risk indicators that can create incentives for the use of the available monitoring tools.

Risk indicators can – grossly – be divided into four categories, i.e. finance, ethics, quality and law practice (*See annex 1: Example Schematic map with indicators*). The risk indicators map requires permanent input. The bar presidents and their staff get that input permanently from within and from without the sector. The risk indicators are thus constantly renewed and enable new risk profiles. The composition of a risk profile takes place annually. This provides space for prioritization and reprioritization.

2. The distinction between reactive and proactive means essentially that the intervention is thus divided that both known and not yet known lawyers are reached. Thereby the insight of the bar presidents in their whole sector rises (other than in focusing at already well-known groups). This prevents supervision from becoming rigid.

3. Applying the available supervisory instruments requires a thoughtful choice and is limited by the available capacity. This is the question: do we want to know everything from everyone, or just something specific from a few? A management plan (*Annex 2*) shows the quadrants of that question mapped out as a tool to make choices in terms of capacity at the management level. That scheme is a layer that can be laid on the theoretical model.

4. The use of the supervisory instruments obviously shows data, which are reported annually to a central point. That report shows the actual risk image found.

5. The data found (4) is analyzed. At the same time, enforcement is deployed where necessary – and fast. The data analysis also provides information from which the bar presidents can raise policy questions, information on the - quantitative and qualitative - capacity, the need for communication or information, and other information. Nudging and other ‘soft’ skills are part of the intervention tools. It is important that data analysis provides a (risk) image allowing the bar presidents to reprioritize the risk profile.

This is the cycle completed.

<sup>1</sup> Risk = The probability that an act or omission of a lawyer or law firm in the course of his practice is contrary to a norm in the scope of art. 46 of the Act on Advocates. Indicators may indicate an increased risk.

Example risk indicators map: dynamic < permanent input

FINANCE:

Factoring/credit; delayed payment contributions etc; negative solvability; delayed accounts; debts; structure; profit-based approach.

ETHICS:

Complaints; disciplinary sanctions; accountability third parties; trade register (remarks); addictions, other types of misconduct .

QUALITY:

Small or monolithic portfolio; size of the firm; client satisfaction (matrix); disciplinary sanctions; insufficient permanent education.

LAW PRACTICE / FIRM:

Size of the firm; poor website; poor or no innovation; accounts; complaints; non-compliance to supervision

Selection tool : formula CHANCE (big/small) x IMPACT (big/small)

Get smarter: the ultimate worldwide goal is to find the sole indicator.

The central focus is on quality and ethics: help keeping your sector in a good condition.

*Tool: formula chance X impact*



start: risk indicators. What do we want?

Every info of everyone	Specific info of everyone
Every info of some	Specific info of some



Who to select for what?

Select all on all issues	Select all on a single issue
Select some on all issues	Select some on a single issue



instruments

CCV	Key figures
KB	s



data

bulk	bulk
Focus on information an advise	Focus on enforcement



output: our capacity? Regulation required? Redefine risks; enforce