PREFACE – STATEMENT OF AGREED PRINCIPLES ON BEHALF OF THE COMBINED UK INDEPENDENT REFERRAL BARS IN RELATION TO:

HM Treasury's Consultation on the Reform of the Anti-Money Laundering and Counter-Terrorism Financing Supervisory Regime

In addition to supplying our individual and detailed Consultation responses, the Bar Council of England & Wales, the Faculty of Advocates and the Bar Council of Northern Ireland all consider that the consultation engages important and repercussive principles on which we have a unified position. Therefore, by way of a preface to our own individual consultation responses, we would ask that the following universal themes and principles be noted and addressed.

1. The barrister/advocate profession is distinctly different from other providers of legal services, because barristers and advocates are members of an **independent referral profession**.

   The maintenance of an independent referral Bar represents one of the cornerstones of the legal system in all of our jurisdictions and must be recognised as being fundamentally distinct. The existence of a strong and independent Bar is paramount in promoting public confidence in rule of law, the guarantee of fundamental freedoms and the right to a fair trial through the availability of the expert representation provided by barristers and advocates.

   As independent professionals, barristers and advocates are free of any external pressures or intrinsic interests. They do not hold retainers and so do not maintain any relationship with a specific client once their instructions have come to an end. They are instructed by solicitors and not, barring a few, tightly-regulated exceptions, the lay clients.

   The large majority of self-employed barristers and advocates do not undertake work that falls within the scope of regulated business for independent legal professionals as defined by Regulation 12 of the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations* 2017. Their main skills are the provisions of courtroom advocacy and expert legal opinion.

   Accordingly, given this specific scope and the low risk associated with conducting independent referral work that centres around legal opinion and courtroom advocacy,

the AML/CTF risk associated with barristers and advocates has been consistently found, by the government's own assessment, to be "low", see the National Risk Assessments 2017 & 2020.

The entire purpose of the independent referral Bar is to selflessly serve, fearlessly and rigorously, their lay clients' interests and to achieve the best possible result, whilst fulfilling their duty to the court. The independence of our barristers and advocates is of paramount importance and a vital public virtue.

It is therefore in the public interest to maintain and develop the independent Bar. Only an independent group of specialist advocates can guarantee that anyone, no matter how unpopular they or their cause may be, receives the highest standard of expert and impartial representation.

Any supervisory or regulatory regime that fails to reflect the different responsibilities of barristers and advocates from other legal practitioners risks fettering their independence. This should be of grave concern to any government as limitations upon the rightful independence of our profession engages important principles about the extent to which the state is interfering with the proper application of the rule of law.

The rule of law is the principle that the law applies to all and that no-one, including government, is above the law. It is one of the fundamental foundations of any democratic society. A strong, independent, and vibrant legal profession has always been vital to ensuring that the rule of law is upheld. The independent Bar still maintains the constitutional principle of the rule of law in courtrooms across our nation's jurisdictions on a daily basis.

In that context we also record, accepting that it is somewhat outside the specific scope of this Consultation, a concern about the "scope creep" that has been associated with AML regulation and the expanded "risk transfer" that has seen government look to the professional supervisory bodies to enforce and, sometimes fund, government's response to economic crime and the current sanctions regime.

Whilst we can of course understand and align with the aims to address these risks, the responsibility for doing so rests with government. The assumption that these matters can, apparently without limitation, be transferred to professional body supervisors who are obligated to uphold principles of independence from government, raises specific concerns in the context of an independent referral profession.

2. The barrister/advocate profession is **already subject to extensive and evolving supervision and regulation** that includes, but extends far beyond, the scope of the AML regulations. For the reasons given above, the privilege of serving within an independent referral profession is accompanied by a series of exacting professional duties and obligations that help to enshrine the proper administration of justice and that reward the public confidence that is placed in the profession. These duties and responsibilities exist in each of the UK's legal jurisdictions in which barristers and advocates work and take the form of detailed, contextualised and specific written Codes of Conduct and principles of professional behaviour which, if breached, can have far-reaching and repercussive consequences.

   Furthermore, each jurisdiction has already undergone detailed government-led reviews in to the regulation of the barrister/advocate profession in the context of the legal services market in their specific jurisdiction. These reviews have already considered the challenging and complex balance of how to apply regulatory/supervisory changes to the barrister/advocate profession whilst also respecting the required independence of the profession. In each jurisdiction, supervisory regimes and legislation have been proposed or enacted that have already attempted, with varying degrees of success, to give effect to the recommendations of previous government led reviews of the profession.

   Therefore, when considering specific AML proposals, it would be wholly contradictory and jarring for any such proposals to fail to take account of these existing, jurisdiction and profession specific, arrangements and simplistically assume that consolidation of jurisdictions or providers of legal services will deliver additional benefits. Doing so risks causing confusion to the existing attempts to regulate the independent referral profession. We should be avoiding rather than embedding further challenges to effective supervision. Instead, **any model must acknowledge and integrate with the pre-existing specific regulatory scope, structures and legislation that already exists for our profession in each of its distinct jurisdictions.**

3. **Difference does not equate to duplication**. For the reasons articulated above, we consider it vitally important to stress that the legal services sector is not a homogenous set of equivalent services or practitioners. There are stark and important differences between the scope and nature of the work performed by various different practitioners within the spectrum of legal services, even within the profession of barristers/advocates. There are also distinct jurisdictional differences, reflected in specific legislation and regulatory structures.

It is concerning to us that both within the published documents and also in the work that has preceded the publication of the Consultation there does not seem to be sufficient recognition of these valid and important differences. This lack of distinction could have significant repercussions for trust and confidence in the integrity of the justice system.

Until this point, we had, at least, been able to rely on the fact that international best practice, as articulated by FATF and others, saw the necessity for a risk-based approach and understood that inevitably that need to accommodate and recognise different responses depending upon the differing levels of risk:

> *"Countries should identify, assess, and understand the money laundering and terrorist financing risks for the country, and should take action, including designating an authority or mechanism to coordinate actions to assess risks, and apply resources, aimed at ensuring the risks are mitigated effectively. Based on that assessment, countries should apply a risk-based approach (RBA) to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified. This approach should be an essential foundation to efficient allocation of resources across the anti-money laundering and countering the financing of terrorism (AML/CFT) regime and the implementation of risk-based measures throughout the FATF Recommendations. Where countries identify higher risks, they should ensure that their AML/CFT regime adequately addresses such risks. Where countries identify lower risks, they may decide to allow simplified measures for some of the FATF Recommendations under certain conditions."*

Accordingly, when the OPBAS source book was last revised, we drew some comfort from its position in relation to risk-based supervision, noting its comments that:

> *"An effective risk-based approach underpins all aspects of anti-money laundering supervision. An effective risk-based supervisory framework enables a professional body to identify, assess and understand the money laundering risks within its sector and supervised population and mitigate them on an ongoing basis. …A professional body should ensure that the measures it takes to reduce money laundering are proportionate to the risks identified. …. This includes, for example, proactively engaging with stakeholders in its sector to continually* develop and build on its understanding of the risks present in its sector."

Although our individual responses will address the specific models proposed by the consultation, we wish to restate that a meaningful and faithful adherence to the principle of risk-based supervision is of paramount importance to the independent referral Bar sector. We note, with concern, that this was not made an explicit objective of the consultation exercise.

Any assumption that a model of consolidation can yield benefits despite the jurisdictional and professional distinctions that are essential features of the UK legal sector would be neither pragmatic nor desirable. Instead, such a reductive analysis will undermine the principle of risk-based supervision. Such an approach would not enhance the quality and effectiveness of supervision but rather detract from it.

Instead, the system should firstly understand and embrace the diversity of the legal sector and then unambiguously commit to risk-based supervision across it.

Should there be a need to "cluster" or group certain views from across the legal supervisors then, as evidenced by this joint position, this can be achieved as required without permanently embedding ill-suited consolidation that comes at the expense of a core principle.

4. Therefore, in accordance with these principles, it is our considered and unified position that:

    - The consequences of the proposed reforms could have very serious implications for the legal and justice sector as a whole and therefore should only be advanced if there is a principled basis for doing so, supported by clear and compelling evidence that such reforms will yield demonstrable and sustainable benefits for the public and for the existing supervision all of the distinct legal services.

    - There is absolutely no evidence to say that barristers and advocates now require different supervision in relation to AML, or that the public would benefit from doing so. In the absence of any such evidence, the motives and repercussions of any enforced reform must be scrutinised and challenged given their potential adverse impact on important core principles.

    - There should be, in accordance with recognised best practice, an embedding of the principle of risk-based supervision. Government must accept that this entails a need to differentiate and discriminate between supervisory practices within an overall framework of commonly agreed standards and regulations. It must, to honour its wider public duties, resist succumbing to fatigue or

simplistic generalisations about the challenges in implementing a risk-based approach across what is a genuinely diverse range of practitioners. It needs to see diversity as a strength rather than a weakness.

- There has been no change in the risk-profile of barristers and advocates nor the fundamental scope of the work they are performing.

- In the case of barristers and advocates, AML is an integrated element of a much more complex and far-reaching regulatory and supervisory regime that is working effectively. The reason it works effectively is because the existing PBSs understand the nature of the work performed by barristers and advocates and where any AML/CTF risks are likely to arise. They are therefore able to carry out proportionate but effective risk-based supervision efficiently without placing an inappropriate burden on the profession or the supervised population.

- We consider that it would be an unjustifiable and retrograde step to adopt a single AML/CTF PBS for the whole of the legal sector, with or without a devolution exception, or a "*one size fits all*" AML/CTF supervisor/regulator (public or private). Any version of this approach presents significant disadvantages, including:
    - Supervision being carried out by generic regulators with little or no understanding of the distinct nature of the work of barristers and advocates and the circumstances in which AML/CTF risks might arise.
    - Such a regulator would be ill-equipped to conduct appropriate risk-based assessment.
    - Supervision being carried out by regulators who are not aware of other regulatory issues and concerns beyond AML/CTF. Such regulators would not be able to combine AML enforcement action with enforcement in other areas.
    - The imposition of inappropriate burdens on individuals practising in a profession that generally represents a very low risk in AML/CTF terms. This would include the very real risk of the imposition of overlapping supervisory and regulatory regimes – adding rather than reducing bureaucracy, red tape and cost. The creation of a series of inefficient and time-consuming interfaces and dependencies to accommodate this regulatory proliferation.
    - Increased cost to the advocates' professions due to them being required to engage with a supervisor who has had no previous experience of regulating any of the Combined Bars.

- Whilst it should be clearly acknowledged that the experience of the barristers and advocates' professions of OPBAS is one where the relationship has yet to become universally productive, if change is to be imposed, we take the view, that, in the absence of compelling evidence for change, the least disruptive option should be selected.

- Of the models presented, the OPBAS+ model is the least disruptive and therefore mitigates against some of the risks and adverse consequences associated with the other alternatives. It is nevertheless essential not to squander the opportunity that this would create for necessary reform within OPBAS. There would be collective benefit if an expanded OPBAS was also an enhanced OPBAS.

- There is a need for a new OPBAS to re-set the nature of its engagement with the professional supervisors. It can finally take action that would demonstrate improved respect for, and understanding of, the various professional supervisors. Reform could enable it to add improved value by being a more strategic, informed and accountable organisation which works in partnership rather than opposition. Structural change without this cultural change will regrettably fall short of the reform that is required.