



Bar Council response to the 'New Information and Registration Requirements for the Bar' consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Bar Standards Board (BSB) consultation paper entitled 'New Information and Registration Requirements for the Bar'.¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Question 1: Do you agree with the proposal to collect areas of practice? Please give reasons for your answer.

Question 2: Do you agree with the proposal to collect information on the percentage of income attributable to practice area? Please give reasons for your answer.

Question 3: Do you agree with the proposal to collect information on income attributable to public access work? Please give reasons for your answer.

¹ Bar Standards Board (2017) [New Information and Registration Requirements for the Bar](#)

4. Overall, we do not object to the three key proposals set out in the consultation paper: to collect information from the Bar about areas of practice, the percentage of income attributable to each practice area and the income attributable to public access work. However, we think it would be helpful for the BSB to provide more detail for the profession on how this information will be used, to help persuade the profession that this is a necessary change. It would assist if a fuller explanation were given as to the need for the regulator to obtain the break down in income attributable to each area of practice. The profession would also benefit from reassurance that this information will not be used more widely than is set out in the consultation paper and that appropriate safeguards are in place to prevent this from happening. One possible safeguard is a pledge to consult the profession on any proposed new use for the data collected.

5. There are also some practical considerations that need to be further thought through, particularly with regard to how these proposals may impact upon the employed Bar. The current proposal to collect details on areas of practice based on Bar Mutual Indemnity Fund (BMIF) categories is arguably unsuited to the way in which the employed Bar operates. Employed barristers work for their employer and their practice can cover a wide range of areas depending on the role they undertake within an organisation. Whilst some employed barristers may be able to more narrowly delineate their practice areas (for example those in law firms), others in the more traditional General Counsel or Executive roles would find this much harder to do. This difficulty with defining employed practice areas against the BMIF categories is compounded by the fact that the employed Bar cannot obtain professional indemnity insurance from BMIF unless they are undertaking pro bono work in a personal capacity. As a result, they are not accustomed to categorising their work according to this list and we anticipate they would struggle to do so for the reasons already outlined. We suggest that it would be more effective to ask the employed Bar to indicate what their top three areas of practice are in this list or else to ask them to use a less granular list of categories, more appropriate to their mode of practice.

6. There are also similar problems with attributing percentage of income to practice area for the employed Bar. Employed barristers are typically paid a fixed annual salary by their employers, meaning their salary could be very difficult to divide into their different areas of practice. For this reason we would recommend that the employed Bar is not asked this question.

Registration for proceedings involving young people

Question 4: Do you foresee any practical challenges with introducing compulsory registration for Youth Court advocates? If you do, what are these?

7. We should state at the outset that we are unclear about the scope of the registration proposals. In the consultation paper the phrase “proceedings involving young people” is used, but the consultation paper does not define this term. Confusingly, the consultation also makes some references to Youth Court work. Youth Court work and “proceedings involving young people” are clearly two very different things. The latter could encompass most barristers practising at the criminal Bar since many criminal cases involve young people.

8. We believe that most reading the consultation will think that it relates to Youth Court work. The reasons include the fact that under the heading “Why are we proposing this” express reference is made to research which of course was focussed on the Youth Court. Similarly, if the consultation is intended to capture Crown Court work, it is puzzling that paragraph 3.12 refers to Magistrates and District Judges but not Crown Court Judges. It is difficult to see why that is so. It will have confirmed the view of those reading the paper that reference to ‘proceedings involving young people’ must have been intended to be a reference to such proceedings in the Youth Court.

9. We wrote to the BSB to clarify the scope of the proposals. We were told that registration would be required for Youth Court work as well as cases where a young person (under 18 years old) is the defendant in the adult Magistrates’ Court, Crown Court or other Higher Courts.

10. We think this is too broad. The research relied upon as an evidence base by the BSB focusses mainly on Youth Court work and in the absence of clear evidence of problems in the Crown Court, we suggest that the proportionate response is to focus on the Youth Court. A more targeted approach would also be a more effective use of limited resources and is consistent with the BSB’s risk-based approach to regulation.

11. Young people are by their very nature vulnerable, and we accept that representing them requires certain skills and carries with it additional responsibility. It is of course important for barristers who represent young people to understand their specific needs and adapt their conduct accordingly. Before considering the practical implications of the registration proposals, we suggest that the BSB needs to be mindful of the underlying problems affecting advocacy in the Youth Court before considering whether compulsory registration is the most effective means of addressing the issue.

12. Though the position varies from court to court, we understand that it is mainly solicitor advocates rather than barristers that undertake the majority of Youth Court cases. Of these barristers, the majority are junior - typically pupils - and those who have recently completed pupillage. We accept that this is a potential problem. We suggest that this is principally due to the low levels of remuneration. Our view is that the pay frequently does not reflect the seriousness of the work nor the skill and

experience required to do it well. Whilst the regulator can do little to influence that fact, there needs to be an appreciation of this reality when assessing the impact of regulatory intervention.

13. Youth Court work is paid at the same rate as adult magistrates court work, irrespective of the complexity of the work. In paragraph 92 of the Charlie Taylor Review of the Youth Justice System, Mr Taylor highlights that,

‘the youth court tries more serious cases than the adult magistrates’ court because it has greater sentencing powers, yet the appearance fees for lawyers in the youth court are similar to those in the adult magistrates’ court (which can only sentence to up to six months in custody).’

14. For example, remuneration for a serious sexual assault case in the youth court may be similar to a much more straightforward case in the adult magistrates’ court, despite requiring a greater level of skill and experience. The sex case may involve cross-examination of several prosecution witnesses who are vulnerable young people themselves. There is no graduated fee system for this work unlike in Crown Court cases where the level of pay rightly reflects the seriousness of the case and the skills required to do it. This means that more experienced barristers are unwilling to do youth court work and it is afforded a low status. This in turn leads to young barristers being encouraged to “cut their teeth” there before graduating to Crown Court, which means that the quality of advocacy in the youth court may suffer.

15. The BSB’s registration proposals, do little to combat these underlying problems. Compulsory registration does not address the underlying issues of low pay and status.

16. Furthermore, registering as competent to undertake youth work across the board does not recognise the wide-ranging nature of this type of work. Representing a streetwise 17-year-old for theft of a packet of crisps is wholly different to acting for a 15 year old boy with learning difficulties who is accused of sexually assaulting another young child. Regulatory change that does not recognise this is unhelpful.

17. Currently, all barristers are required by the BSB’s Handbook to consider whether they are competent to take on a case at the point that they receive instructions and are required to refuse to appear if it is beyond their skill and expertise². A barrister who registers to take on Youth Court work/work involving young persons may or may not in fact be competent to take on all such work. If that barrister is offered a more complex brief in the Youth Court than they are competent to do, the barrister is faced with the added pressure if ‘registered’ to do it. Such registration, if visible to solicitors

² See rC21.8 of the Bar Standards Board Handbook

and clerks (if the registration appears on the Bar Register) adds pressure to the already difficult situation of having to return a brief, possibly out of chambers.

18. The BSB cites concerns about the quality of advocacy as a reason behind the proposed registration requirements. We repeat that the research relied upon only refers to the Youth Court. Even if restricted to the Youth Court then it is difficult to see how registration can improve standards directly or through the Continuing Professional Development (CPD) programme. Pupils, who do much of the Youth Court work, are not required to undertake CPD.

19. A far more effective approach to improving the quality of advocacy with young persons is to support the work already being undertaken in terms of training³ the entire Criminal Bar in relation to Vulnerable Witnesses (defined to include children). It is surprising that the consultation paper does not mention this substantial work which we believe will make a real impact in all proceedings involving young persons, to their benefit and thereby of benefit of justice. We suggest that it would be useful for the BSB to assess the value of this work and to measure its impact. Indeed we invite consideration of a reassessment of the measures required to address the central issue once the retraining of the criminal Bar has occurred.

20. We are concerned that the Ministry of Justice is likely to increase the number of cases heard at the Youth Court. If cases that were to be tried in the Crown Court are moved to the youth court where fees remain low, and there is the additional burden of registering with the BSB, we think that fewer barristers may be inclined to take on such cases and a greater number of cases will be impacted.

21. The Bar Council conducted a survey in 2016 that focussed on, 'Remuneration of junior counsel in the magistrates' courts', and received a total of 292 responses. 71% of the young barristers who responded stated that only 1-25% of their workload were cases that appeared before a Youth Court. These results demonstrate that only a small proportion of young barristers (defined as barristers up to seven years in practice) are undertaking this work and substantiates the assertion that Youth Court advocacy is mainly undertaken by solicitor advocates. However solicitors have chosen not to engage with the review referenced at paragraph 3.5 of the BSB's consultation paper⁴. This means there is an information gap in the data and that any remedies proposed by the BSB will only partially address the issues regarding advocacy standards in the youth court.

22. Whilst "My Bar" will provide a prompt when the barrister is undertaking their routine annual registration for their practising certificate, careful consideration needs

³ See the ICCA website [here](#)

⁴ Bar Standards Board (2017) [New Information and Registration Requirements for the Bar](#) p.9

to be given to the possibility that the barrister doesn't register (because for example they do not anticipate they will do this work) but then does engage in "proceedings involving young people". What support will be available to ensure that barristers are aware of this new requirement to register after such an appearance given the risk to them of being inadvertently in breach of the Handbook rules? Also, how soon after the work is completed is the barrister expected to register? It would aid compliance for barristers to know what "promptly after the event" means.

23. Question 5: Do you agree with the proposal to require barristers undertaking work in proceedings involving young people to register?

24. We are not supportive of the proposal for compulsory registration for the following reasons:

- a) As drafted, the scope of the proposal we are being asked to agree with is not clear, as outlined above.
- b) We are concerned that the registration requirement will diminish an already small pool of barristers undertaking youth court work. The proposed changes do little to address our concern that this work is often unpopular amongst more senior practitioners because of the low levels of remuneration and the low status afforded to it. We consider that compulsory registration will act as a further deterrent to barristers undertaking work in the youth courts. This is because it is an additional administrative process to be undertaken and may carry with it additional scrutiny and regulation of the barrister by the BSB. Whilst most chambers will encourage their pupils to register for youth court work, once a pupil is a tenant, they may choose not to register to undertake youth court work in order to avoid being briefed. In this event, an already very small number of barristers prepared to do this work would decrease further.
- c) Compulsory registration for Youth Court work in general does not take into account the breadth of work undertaken there as outlined above.

25. There are other options that merit exploration before any conclusions as to the most effective approach is reached. For example the BSB could consider the existing Inns of Court Advocacy training materials for barristers undertaking Youth Court work.

26. Another option worth exploring is the idea of panels involving all advocates (i.e. solicitor advocates as well as barristers) to ensure all advocates doing Youth Court work are suitably qualified. This would require cooperation from the Government but

would incentivise advocates' participation in training, thereby raising standards, and could be rolled out to other courts that deal with young defendants if successful.

Question 6: Do you agree that the registration should appear on the BSB register?

27. No, we do not agree that registration of competence should be publicly available on the BSB Register. This is quite different from the information being held by the BSB and used for risk assessment and CPD monitoring purposes. By contrast, the register is in the public domain and is intended to inform potential and current clients of a barrister's regulatory status. The inclusion of this type of information on the register may be misunderstood especially in light of the wide ambit intended to be covered, i.e. barristers representing young defendants. Clients may assume that registration confers an additional qualification upon barristers, which is not the case. If there is a need to register competence prior to being instructed, there is a risk that barristers who may be better qualified without having registered prior may lose out on work. Even if a lengthy explanation of registration were included on the register, we do not think that this would be sufficient to dispel any confusion. For this reason we do not think inclusion of this information on the register information serves any useful purpose and would recommend its omission.

Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017

Question 7: Do you foresee any practical challenges around declaring whether the work you do, or intend to carry out, falls within the scope of paragraph 11 (4) and 12(1) (a) to (e) and 12 (2) (a) to (d) of the Regulations? If you do, what are these?

28. The BSB has proposed a rule change that would require barristers, during the Authorisation to Practise (AtP) process, to:

- a. disclose whether they are undertaking, or intending in the next 12 months to undertake, work which falls within the scope of paragraphs 11 (4), 12 (1)(a) to (e) and (2) (a) to (d) of the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* ("the Regulations"); and
- b. if they do fall within the scope of the Regulations, to declare:
 - i. whether, with reference to paragraphs 26 (8) and (11) of the Regulations, they have been convicted of a "relevant offence" as listed in Schedule 3 of the Regulations; and
 - ii. that they will obtain a basic disclosure check and provide the result to the BSB.

29. This part of the response of the Bar Council addresses the following issues:
- a. Whether the AtP process should seek disclosure of whether the barrister is *intending in the next 12 months to undertake* work which falls within the scope of the Regulations;
 - b. The requirement for the barrister to obtain a basic disclosure check, and
 - c. The approach to the requested funding of the Office for Professional Body Supervisors ('OPBAS').

Undertaking, or intending to undertake work that falls within the scope of the Regulations

30. Barristers are most likely to undertake work that is subject to the Regulations in two circumstances:

- a. As tax advisers, i.e. a barrister who by way of business provides advice about the tax affairs of other persons, when providing such services (§11(4)), and
- b. As Independent Legal Professionals, i.e. a barrister who by way of business provides legal services to other persons, when participating in financial or real property transactions concerning:
 - (a) The buying and selling of real property or business entities;
 - (b) The managing of client money, securities or other assets;
 - (c) The opening or management of bank, savings or securities accounts;
 - (d) The organisation of contributions necessary for the creation, operation or management of companies; or
 - (e) The creation, operation or management of trusts, companies, foundations or similar structures,

And does so by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction (§12(1)).

31. Given the restrictions on the nature of self-employed barristers' practices it is unlikely that they will engage with the Regulations by way of carrying out "the managing of client money, securities or other assets" (12(1)(b)), "the opening or management of bank, savings or securities accounts" (12(1)(c)) or "the organisation of contributions necessary for the creation, operation or management of companies" (12(1)(d)). For the same reason, whilst a self-employed barrister might engage with the Regulations by way of acting as a "trust or company service provider" (§12(2)), the incidence of this is likely to be limited. There may be some employed barristers who

maintain practising certificates and who carry on work within those areas, but we would not expect the numbers to be large.

32. Given that self-employed barristers do not *conduct* transactions on behalf of their solicitors' clients, where they do undertake work that is covered by the ambit of the Regulations it is likely that they will be engaged in relation to the "planning or execution of the transaction" rather than acting "for or on behalf of a client *in* the transaction".

33. In relation to these matters, the BSB propose to ask barristers whether they are undertaking, *or intending in the next 12 months to undertake*, work which falls within the scope of the Regulations, with a view to obtaining an "annual snapshot" of those who undertake work in the 'regulated sector'. This in turn, it is said, will help the BSB better understand the money laundering and terrorist financing risk profile of Bar.⁵

34. The Bar Council understands the BSB's desire to undertake this exercise and to seek a more detailed understanding of barristers' engagement with the Regulations. However, the Bar Council takes the view that the objectives of the BSB would be better met if the question that the BSB proposes to ask within the AtP process were subject to some alteration.

35. The nature of practice at the self-employed Bar is that for most barristers it is generally not possible, beyond in the most general terms, to say what work it is a barrister intends to undertake, e.g. crime, judicial review, chancery, commercial disputes. The exception may be if a practitioner is engaged in a large piece of litigation that may take up all of their time for the foreseeable future. However, such work does not engage the Regulations. For that reason, and with regard to barristers who engage with the Regulations as independent legal advisors, (rather than as tax advisers), a request for a forward-looking estimate is unlikely to provide the BSB with the quantity and quality of information that it seeks – a risk that the BSB itself concedes in the consultation (§4.12).

36. Whilst many self-employed barristers specialise in specific areas of the law, this does not determine the factual matrix of the matters on which they will be instructed. Whether a barrister *intends* to practise in a certain area of law will not determine whether they will or not, and even less will it determine whether the work that they are asked to do will fall within the Regulations. For example, a barrister may intend to practice in the field of commercial property transactions for the year ahead but may never actually be instructed in relation to a matter that engages the provisions of the Regulations. For that matter s/he may never be engaged in the field of commercial property transactions at all. Trying to understand the how the Bar engages with the

⁵ Currently judged by the BSB to be low.

Regulations by asking them what they *intend* to do will not assist the BSB or provide them with the information that they seek.

37. Moreover, the proposed question is one that risks giving rise to false answers. For example, a barrister might legitimately answer the question ‘yes’ in the hope that s/he will undertake work that is in a field that might fall within the scope of the Regulations. However, the same barrister could legitimately answer the question ‘no’ as even if s/he did intend to undertake work that might fall within the scope of the Regulations s/he might equally hope that upon full consideration it does not (the burdens of the Regulations being ones that most practitioners would hope to avoid). Neither barrister would in fact know the correct position until such time as any instructions were received and the details considered (at the earliest). As both answers would be valid, neither answer provides the BSB with any certainty.

38. Equally, some barristers, whose field of practice may entail engaging with the Regulations, may simply answer ‘no’ as they have no *intention* to practise in a given type of work beyond that which is sent to them and which they are free, competent and sufficiently senior to carry out.

39. The problem with the ‘prospective’ nature of the question is that the answer depends upon the personal view of the barrister as to what they think some hypothetical future instructions might involve. This is not a sound basis upon which to seek to build a statistical base.

40. The Bar Council takes the view that the only safe basis on which a self-employed barrister can determine what work s/he will undertake in the future is to consider what work s/he is currently undertaking and whether it will continue for any immediate period of time. In other words, the barrister would need to be asked are you undertaking any work that engages the Regulations “now”.

41. In combination with that question, the BSB should consider asking what work the self-employed barrister has undertaken in the previous year. This would present a definite answer. A barrister would know if s/he had undertaken work that engaged the Regulations – if for no other reason than they would have had to undertake CDD in relation to their ‘customer’. This may have the disadvantage of providing information that is historic but has the distinct advantage of being based in fact. Moreover, whilst the data might be historic, it would still be relatively recent, and obtained over no greater period than that in relation to which the BSB is seeking other practice information.

42. A ‘retrospective’ survey will also address the question that a barrister is likely to ask him/herself if asked to consider the BSB’s proposed question, i.e. “what work have I done to date?” The best guide to what a barrister might do in the future is the

work that s/he has done in the past. If, as we think, that will be the basis on which the proposed question is addressed the better approach is to ask that question instead: 'what have you done to date?'

43. There is also a further reason why this would make it easier for barristers to know the right answer to the question. The applicability of the Regulations is not always straightforward. Asking barristers about their actual experience will help them to deal with this difficulty, as they will have to have considered the application of the Regulations to the circumstances of a real set of instructions or work task. Looking forward, the question is inevitably a hypothetical one, which may make it much harder to answer.

44. Moreover the data set will increase and improve with each year. Under the current proposal each year's information will have no direct relationship to the previous year's information: each set of responses being based on perceptions and expectations rather than actual experience.

45. Given the above matters the Bar Council suggests that any rule change to require barristers to make a disclose during the AtP process of the type proposed should set the question to be asked in the following terms, as least so far as self-employed barristers and paragraph 12(1)(a) are concerned:

"Are you currently undertaking, or have you in the past 12 months undertaken, work which falls within the scope of paragraphs [11 (4), 12 (1)(a) to (e) and (2) (a) to (d)] of the Regulations..."

Basic Disclosure Check

46. With regard to the obtaining of a basic disclosure check the Bar Council questions whether this is truly necessary in order to comply with the Regulations. It ought not to be required, and would be disproportionate to require this, unless truly necessary.

47. If it really is necessary then the Bar Council proposes that barristers should be asked to declare that they will obtain a basic disclosure check (if they have not already obtained one previously) and provide the result to the BSB *upon being instructed or engaged in a matter that engages the Regulations*. This will avoid barristers – particularly self-employed barristers and others whose work may only occasionally engage the Regulations – being obliged to undertake this task unless and until a piece of work actually engages the Regulations. The rules ought also to enable barristers to accept instructions on an urgent basis which require work to be carried out before a basic disclosure check can be obtained and the result provided to the BSB, in order to avoid potential prejudice to client interests in the interim.

48. The AtP process (and the related rules) should also make clear that this is a one-off process that does not need to be repeated upon the receipt of further instructions that fall within the scope of the Regulations. Accordingly, there will also need to be a mechanism for barristers to be able to answer “yes” to this question in subsequent AtP processes, without being asked to provide a basic disclosure check where they have previously provided one.

OPBAS Costs

49. Paragraph 4.11 of the consultation document states:

“The Government also intends to create a new oversight regulator for Money Laundering/Terrorist Financing for the accounting and legal sector supervisors, called the Office for Professional Body Supervisors (“OPBAS”). The Government has indicated that the costs of OPBAS will be passed on and will be consulting over the summer about how they will be apportioned. Collecting data about how many barristers are engaged in relevant work will enable us to ensure that OPBAS costs are allocated to the Bar proportionately.”

50. It is not immediately clear to the Bar Council what the BSB means by the phrase “ensure that OPBAS costs are allocated to the Bar proportionately”. The Bar Council believes that this means that the BSB will use the data it collects to enable it to seek to persuade OPBAS to keep to a minimum the charges that it intends to pass on to the Bar Council. However, it might also mean that the BSB considers that the costs of OPBAS ought to be allocated only to barristers who had declared they carried out work falling under the Regulations. The Bar Council would regard such a step as not in the interests of the Bar as a whole, and as being unreasonably and unnecessarily burdensome from an administrative perspective, and accordingly invites the BSB to confirm that this is not what it means and that it has no such plans.

Question 8: Do you agree with the proposed form of words for the rule changes to rS59 and rC64? Please give reasons for your answer.

51. Whilst we support the need for the BSB to back up regulatory requirements with the threat of sanctions, such sanctions should be proportionate. We suggest that it is disproportionate to threaten the withholding of a practising certificate and therefore the ability to earn a living. We do not think that barristers should have their practising certificates withheld or revoked on the basis that they have not provided the BSB with a unique email address, for example. This may be unduly heavy-handed and could have an unnecessary and damaging impact on barristers and their ability to earn a livelihood.

52. Allowances should be made for (the admittedly small numbers) of barristers that do not have a personal email address either because of a disability or because they are not IT literate. The BSB should consider alternative means of engaging with “My Bar” and completing the AtP process.

53. The employed Bar should be exempt from the requirement to declare the percentage of income attributable to each area of practice if the BSB adopts our recommendation that they are exempted from it. It is not clear that this declaration is required at rS59.5 but if it is, we think it should reflect any exceptions made for the employed Bar.

54. We have already outlined our policy concerns on the registration proposals for proceedings involving young people earlier in this response. If the BSB decides to proceed with registration, we think that “promptly register” ought to be clearly defined at rC64.

Question 9: Do you agree with our equality impact analysis? Please give reasons for your answer.

55. The percentage of BAME and female barristers is proportionally higher at the employed Bar, than at the self-employed Bar. As suggested at in paragraph 5 and 6 above, some adjustments will need to be considered for employed barristers in order for them to be able to comply with the proposed rule changes.

Bar Council

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