



Bar Council response to the Anti-Money Laundering Supervisory Regime: response and call for further information

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to HM Treasury's consultation paper entitled "Anti-Money Laundering Supervisory Regime: response and call for further information"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 (BSB).

Overview and Context

4. The Bar Council is the Supervisory Authority for its members under the Money Laundering Regulations 2007. Along with the regulatory functions described above, the supervision for anti-money laundering/counter-terrorist financing is discharged to the BSB, which acts independently from the Bar Council.
5. The Bar Council responds to the call for information from the perspective of the Bar.
6. As stated in the Bar Council's response² to the original 'Call for information on the AML supervisory regime'³, the recommendations of the Clementi Report have

¹ Available here: <https://www.gov.uk/government/consultations/anti-money-laundering-supervisory-regime-response-and-call-for-further-information>

already been given effect to in relation to the legal profession by virtue of the Legal Services Act 2007. As a result, the regulatory and supervisory functions of the Bar Council have been delegated to the Bar Standards Board (“the BSB”), which acts independently from the Bar Council. The BSB discharges this function according to its Enforcement Strategy which it applies in conjunction with a Supervision Strategy, both of which are underpinned by detailed provisions in Part 5 of the BSB Handbook. Therefore, the anti-money laundering/counter-terrorist financing (AML/CTF) supervision of the Bar, and the task of monitoring its compliance with its AML/CTF obligations, operates without the risk of the type of conflict of interest that could threaten the effectiveness of that AML/CTF supervision.

7. The majority of self-employed barristers do not undertake work that falls within the scope of regulated business for independent legal professionals as defined by regulation 3(9) of the Money Laundering Regulations 2007 – an important contextual factor when considering the operation, effectiveness and future of AML/CTF supervision for the legal sector.

8. The work of barristers generally consists of advising on and conducting contentious litigation which falls outside of the AML ‘regulated sector’. Unlike other legal professionals, self-employed barristers rarely become involved directly in any transactional work and they are not permitted to receive, control or handle client money. Barristers do not, and are not entitled to, administer client accounts. They are only entitled to be paid for their services.

9. Like self-employed barristers, the very small number of BSB regulated entities⁴ are not permitted to handle client money. A few barristers in some specialist fields are involved in non-litigation work that might fall within the ‘regulated sector’ (e.g. tax barristers and chancery barristers involved in advising on trust documentation), but they are generally instructed by other professionals (usually solicitors) who will deal with the lay client and who will therefore be better placed to deal with AML/CTF issues and should already have addressed them.

10. As the BSB’s approach to supervision is strictly risk based, where a greater risk is identified, the BSB has more stringent statutory powers under the Legal Services Act 2007 to manage it. In all fields, the BSB’s rules, and its supervision and

² Available here:

http://www.barcouncil.org.uk/media/471856/bar_council_response_to_the_hm_treasury_s_call_for_information_on_aml_supervisory_regime.pdf

³ Available here: <https://www.gov.uk/government/consultations/call-for-information-anti-money-laundering-supervisory-regime>

⁴ As of 20 May 2016 there are 49 BSB regulated entities. (BSB register of entities, available here: <https://www.barstandardsboard.org.uk/regulatory-requirements/for-prospective-entities/>).

enforcement strategies, are well able to address the money laundering/terrorist financing (ML/TF) risks involved in the practice of barristers in a proportionate and effective manner. Any consideration of the nature or degree of oversight of the BSB's AML/CTF supervisory role should bear this in mind.

Question 1: Are [the proposed] powers to monitor supervisors' activities and penalise poor practice sufficient? If more powers should be added, which powers might be?

11. The proposed powers are sufficient.

12. The Bar Council sees value in the Office for Professional Body AML Supervision (OPBAS) being an overarching observer that maintains a strategic view of the entire AML/CFT landscape and assesses the inherent ML/TF risks as they affect the professions. It should be ready and able to assist the supervisors in facilitating the professions to recognise and address those risks. OPBAS should also operate as a means to facilitate communications between professional body supervisors and assist them in having a conjoined strategic view of ML/TF risks.

13. The granting of more extensive powers to OPBAS than those set out could lead to a situation where a second line of supervision is created – unjustifiably increasing the regulatory burden upon the professions. Carefully circumscribed powers will help to ensure that oversight of the supervisors remains target of the Office's activity.

14. Powers to monitor, call for information, inspect and require an explanation for steps taken by a supervisor, if proportionately exercised, give OPBAS the powers required to undertake its role without being too intrusive. Coupled with the sanctions of censure and a recommendation of removal, those powers strike the right balance between OPBAS being an effective oversight body and not becoming a second AML/CTF supervisor.

Q2: Should the Office's powers to request information or attendance at interviews be extended to supervisors' members as well as supervisors themselves?

15. No. What is important is that OPBAS oversees the supervisors, not the supervised.

16. From the perspective of practice at the Bar, the current system of supervision operates at an effective level of risk-appropriate scrutiny and insight. A further layer of AML/CTF regulation would be unjustifiable: it would be both unnecessary and unhelpful. The BSB is well-placed to understand the nature of the work performed by the Bar and where any ML/TF risks are likely to arise. It is therefore able to carry out risk-based supervision efficiently without placing an inappropriate burden on individual practitioners in a way that an overarching body like OPBAS could not. It

would be a regressive step to either replace, or add to BSB supervision with OPBAS supervision.

17. Even if there is a case for a greater level of intervention elsewhere, whether in the legal or other sectors, the nature of the Bar, the existing independent nature of its AML/CTF supervision and barristers' almost uniquely low ML/TF risk profile would point to a different conclusion for the Bar. As stated in HM Treasury's 2011-12 annual supervision report:

"The practical implementation of a risk-based approach to supervision varies depending on the nature and scale of the risks in each sector and this is reflected in the resources invested in supervision and by the specific measures taken to assess compliance. For example, in the legal sector, risks vary based on the work undertaken by different legal professionals. Most of the work undertaken by barristers may fall outside of the regulated sector. As a result, the level of resource applied to supervision of barristers (in terms of education, monitoring and investigation) is less than the resource allocated for the supervision of solicitors and licensed conveyancers who regularly hold and transfer client money and assist clients to enter into arrangements."⁵

18. An alteration, or duplication, of supervision in the legal sector that impacted upon the supervisory role of the BSB would be likely to result in:

18.1 Supervision being carried out by persons with limited understanding of the nature of the work of the Bar and the circumstances in which ML/TF risks arise. Such a regulator would be ill-equipped, without a substantial investment of time and resources, to conduct appropriate risk-based assessments.

18.2 Supervision being carried out by persons who are not aware, as the BSB are, of other regulatory issues and concerns beyond AML/CTF. Without this holistic view of the profession, such persons would not be able to carry out enforcement action effectively, by combining AML/CTF enforcement action with enforcement in other areas.

18.3 The imposition of inappropriate burdens on individuals practising in a profession that generally represents a very low risk in ML/TF terms (in particular in comparison to banks, accountants and solicitors and other involved in transactional work and handling client funds). This would include

⁵ HM Treasury (2013) Anti-Money Laundering and Counter Terrorist Finance Report 2011-12.

Available here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/200643/amlctf_supervision_report_201112.pdf

the very real risk of the imposition of overlapping supervisory and regulatory regimes – adding rather than reducing bureaucracy, red tape and cost.

19. Given the low ML/TF risk presented by the Bar, some of the more intrusive measures considered (such as an ability to enter premises – which for barristers could include private homes) for the purposes of AML/CTF compliance would be disproportionate to the risk and place an undue burden on individuals (as well as improper interferences with private and family life).

Q3: Should the Office report annually on other issues, in addition to its performance against its objectives in that year, priorities for the coming year and expectations around emerging risks? If so, which issues should the Office report on?

20. In order to limit the funding burden placed upon the supervisory bodies the level of reporting should be kept to a minimum. If the Office is to be given its own chapter in the FCA's annual report, reporting on the purpose for which it has been established: namely, the supervision of supervisory bodies, it is proposed that no further reporting should be required.

Q4: The government envisages the Office having representation at the Money Laundering Advisory Committee and the Anti-Money Laundering Supervisors Forum, and engaging with the Accountancy and Legal Affinity Groups. What role could the Office best fulfil in each forum, and are there other fora the Office should attend – if so, which?

21. A level of OPBAS engagement with the Affinity groups, as well as with the AMLSF, would be useful. The right balance, however, should be struck between maintaining this engagement with supervisory bodies, and resulting operational costs which will fall back on the supervisory bodies and from them to the professions.

22. It would be most appropriate if the Office could use the time in these meetings to understand the nature of the different professions within each sector, the methods of supervision used across the board, and the issues each of the sectors and professions face in interpreting the Regulations and carrying out their supervision. Discussions with individual supervisors/professions should also be held outside of these fora as needed.

Q5: How might the AML supervisory regime evolve over the next five to ten years, especially in the legal and accountancy services sectors? What are the advantages and disadvantages to the potential options – how might government help minimise the disadvantages?

23. The Bar Council hopes that the evolution of the AML supervisory regime will result in more accurate understanding across the board of the ML/TF risks in the legal and accountancy sectors, and accordingly that the oversight functions of OPBAS are carried out on a risk-based approach.

Q6: Are there other issues you would like government to take into account as it considers increasing the oversight of AML supervision in the accountancy and legal sectors?

Guidance

24. The Bar Council holds strong reservations as to the value of there being only one version of AML/CTF guidance for the entire legal-sector.

25. The reason for the Bar Council's reservation is that the nature of barristers' practice entails a different application of the AML/TF legislation from that of other legal professionals.

26. The majority of work carried out by barristers in private practice is advocacy, advisory or drafting based. It is related to disputes, rather than transactions. It is therefore outside the regulated sector and will rarely give rise to ML/TF risk.

27. A few barristers in some specialist fields are involved in non-contentious work that may involve a transaction (e.g. tax barristers and chancery barristers involved in advising on trust documentation), but they are generally instructed by other professionals (usually solicitors) who will deal with the lay client. That person will be better placed to deal with AML/CTF issues and should, by the time a barrister is instructed, have already addressed them.

28. In relation to such non-contentious work, the barrister will not be the person carrying out or executing the transaction on behalf of the ultimate client. The barrister is usually only instructed to advise on particular issues, and occasionally to assist in drafting work.

29. There are professional reasons for this. Barristers practising in England and Wales are prohibited from:

29.2 Undertaking the management, administration or general conduct of a client's affairs (Rule S25, BSB Handbook); or

29.3 Receiving, holding or handling client money apart from what the client pays the barrister for his or her services (Rule C73, BSB Handbook).

30. In its current guidance for solicitors on money laundering, the Law Society identifies a number of key risks or danger areas. In summary those are:

- 30.2 Operating client accounts and handling or holding funds on behalf of clients;
- 30.3 Administration of estates;
- 30.4 Acting as a trustee;
- 30.5 Receiving money on behalf of a charity;
- 30.6 Acting as an attorney or deputy;
- 30.7 Conveyancing issues such as the receipt of funds from third parties or stamp duty avoidance; and
- 30.8 Forming a new company.

31. A barrister, whether acting for a professional client, a licensed access client or public access client, is prohibited by the rules of practice from doing any of these things. Such guidance would have no application to and thus no meaning for the Bar.

32. Barristers do not enter into a 'retainer' to carry out a transaction or multiple transactions, as other professionals might. They are not in a position to have the same sort of long term and close relationship with end clients as other legal professionals such as solicitors.

33. A barrister, acting on instructions directly from a lay client, may need to secure payment from a client to discharge a cost payable to a third party, for example for photocopying. The Bar's Code of Conduct permits this to be done through a third-party escrow service, and the Bar Council has put in place such a service through 'BARCO'. BARCO offers an escrow account facility, separately regulated by the FCA. It includes built-in anti-money laundering features such as background checks and software to upload identification documents.

34. Only a limited proportion of the Bar's professional activity falls within the scope of regulated business for independent legal professionals as defined by the Regulations. Of that which does the Bar's exposure to 'at risk' transactional work is limited in volume, scope and level of involvement. Accordingly its overall ML/TF risk-profile is very low.

35. The observations above relate primarily to barristers in private practice, and are made in that context. Barristers employed by organisations within or outside the 'regulated sector' may be in a different position, but that will depend on the nature of the organisation and the work they carry out for it. The majority of the comments above would apply with equal force to large numbers of employed barristers, for example those working for the CPS, the Government Legal Service, or litigation

departments of solicitors' firms. For others, such as those working in industry, the considerations may be different, but each situation would be fact specific.

36. The above demonstrates that the exposure of practising barristers to work that contains an element of ML/TF risks is limited: both as to the regularity of exposure and the level of risk. It is notably distinct from that of other persons practising in the legal sector. Profession-specific guidance is able to address that distinction. When prepared appropriately, it emphasises the practical impact of the AML/CTF legislation in a way which the particular supervisor knows, from its experience of regulating the profession, will have the greatest impact on working practices.

37. Unitary guidance would provide only generalised assistance. It could not properly provide risk-based guidance in relation to the risks presented to members of the Bar. Barristers could derive no assistance from guidance dealing with, for example, the risks of operating a client account, holding client funds or acting as a trustee. They are high-risk activities, but ones that a barrister is forbidden from undertaking for a client. Such guidance would not assist the profession in meeting its obligations or help to achieve the aims of the Regulations. It would be apt for confusion or omission.

38. The Bar Council therefore holds real concerns about the proposal that there should be universal legal-sector guidance, the practicalities of which would not and could not be targeted at the issues encountered in practice at the Bar. The public interest in proper AML/CTF measures being taken and proper supervision being carried out, requires there to be specific guidance that addresses the particular ML/TF risks faced by the Bar.

Cost

39. OPBAS will look to recover its operating costs from the supervisory bodies that it will oversee. Thus, the costs attributed to the BSB will in turn fall upon the members of the profession upon whom the extra layer of oversight has been imposed. In the case of the Bar this is particularly unfair given its limited engagement with the regulated sector and its almost uniquely low ML/TF risk profile. It is noted also that this will also be the case for supervisors/professions which are even smaller, such as the Faculty of Advocates in Scotland, and the Bar of Northern Ireland.

40. The FCA/OPBAS should be required to produce a costs recovery model that takes into account not just the scale of profession (whether by income or size) that is subject to supervision but also exposure and risk profile. It cannot be right that a relatively small profession such as the Bar, which presents a particularly circumscribed risk should bear a degree of costs that is not proportionate to that level of risk. Any deviance from this approach would fail to enshrine the essential risk-

based approach in the recovery model and would be at odds with the regulatory approach to obligations in the field.

41. The Bar Council is therefore in favour of a risk-based approach to the calculation and implementation of the fee to be obtained from each supervisor, and urges serious consideration of issue on the part of the FCA/OPBAS.

Bar Council⁶
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⁶ Prepared for the Bar Council by its Anti-Money Laundering Working Group.