Bar Council response to the Transposition of the Fourth Money Laundering Directive consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the HM Treasury's consultation paper entitled "Transposition of the Fourth Money Laundering Directive".[1]

2. The Bar Council represents over 15,000 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, and 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.

Overview

4. The Bar Council is the Supervisory Authority 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 Bar Standards Board (BSB), which acts independently from the Bar Council. In all fields, the BSB's rules, and its supervision and enforcement strategies, are well able to address the AML/CTF risks in a proportionate and effective manner. The BSB has responded separately to this consultation.

5. The Bar Council publishes guidance[2] for barristers to explain their obligations and illustrate best practice for AML/CTF compliance, and will be looking to add further practical assistance and examples into that guidance to give further help to barristers in applying it in

[1] HM Treasury (2016) Consultation on the Transposition of the Fourth Money Laundering Directive. Available at: https://www.gov.uk/government/consultations/transposition-of-the-fourth-money-laundering-directive

[2] See: Bar Council (2016) Money Laundering and Terrorist Financing. Available here: http://www.barcouncil.org.uk/practice-ethics/professional-practice-and-ethics/money-launderingand-terrorist-financing/

practice. However, the majority of self-employed barristers[3] 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.

6. The work of barristers generally consists of advising on and conducting contentious litigation which falls outside the AML 'regulated sector'. Unlike solicitors, 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. As the BSB's approach to supervision is strictly risk based, where a greater risk is identified, then the BSB has more stringent statutory powers under the Legal Services Act 2007 to manage it. Like self-employed barristers, the very small number of BSB regulated entities are not permitted to handle client money.

7. 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.

8. The Bar Council has responded to those questions in the consultation which are of relevance to the Bar. Answers have not been provided to Questions 1-2, 5-6, 8-11, 13-14, 16-18, 22-49, 51-59, 62, 64-66, 69-74, 77-78, 80-81, 83-84, 86-87.

Chapter 4 – customer due diligence (CDD) measures

Question 3: When do you think CDD measures should apply to existing customers while using a risk-based approach?

9. The Bar Council suggests that the new Regulations should require fresh CDD measures for existing customers only where there has been a change to the client's circumstances that is brought to the attention of the regulated person and is of material relevance to the business relationship's risk profile.

10. The nature of the requirement to be transposed into the new Regulations should remain "High Level". A more prescriptive measure would interfere with the required risk-based approach, and might well lead to a 'mechanical' approach to CDD: adding to the regulatory burden but not enhancing the fight against money laundering and the financing of terrorism.

Question 4: What changes to circumstances do you think should warrant obliged entities applying CDD measures to their existing customers? E.g. name, address, vocation, marital status etc.

11. The Bar Council suggests that only material changes of circumstances that are

[3] Independent barristers who are self-employed and practising in Chambers. Barristers who work in law firms are regulated personally by the BSB but the law firms in which they work are comprehensively regulated by the Solicitors Regulation Authority.

brought to the attention of the regulated person and that are relevant to the customer's risk profile should warrant obliged entities to re-apply CDD measures to their existing customers. Examples of such changes might include, for example:

11.1. The identity of the customer/principal point of contact;

11.2. The geographical location of the customer;

11.3. The nature of the transaction being undertaken;

11.4. The source of funds for payment; or

11.5. The delivery pipeline/the introduction of an intermediary.

12. However, the Bar Council wishes to stress that what is important is the nature of the change of the customer's circumstances and whether it is relevant to their AML/CTF risk, rather than a change *per se*. In this connection, we can given an example: a barrister is advising on a matter falling within the regulated sector, on instructions from solicitors in a substantial law firm, which is long established, well-known, and regulated by the SRA. During the course of the barrister's instructions the solicitors move address. Such a change, the Bar Council would suggest, should not require a re-application of CDD measures.

Chapter 4 – simplified due diligence (SDD) measures

Question 7: Do you agree that the government should remove the list of products subject to SDD as currently set out in Article 13 of the *Money Laundering Regulations* (2007)? If not, which products would you include in the list? Please provide credible, cogent and open-source evidence to support inclusion. What are the advantages and disadvantages of retaining this list?

13. The Bar Council agrees that the list of products subject to SDD as currently set out at Article 13 of the Money Laundering Regulations 2007 should not be included in the new Regulations, for the following reasons:

13.1. The existence of a specified list does not reflect the objective of adopting a risk-based approach ('RBA');

13.2. Removal of the list is less prescriptive and therefore requires the *actual* risks to be addressed and considered by the obliged entity; and

13.3. Requiring the obliged entity to consider the risks presented by the business relationship would be consistent with the RBA within 4MLD.

Chapter 4 – simplified due diligence (SDD)

Question 12: Are there are any other factors and types of evidence of potentially lower risk situations, aside from those listed in Annex II of the directive, that you think should be considered when deciding to apply SDD? Please support your response with credible, cogent and open-source evidence where possible.

14. The Bar Council suggests that where the obliged entity's relationship with its customer is via a referring or instructing party and:

> 14.1. the referring or instructing party is also an obliged entity and is operating under the Regulations; and
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> 14.2. the obliged entity does not handle the customer's funds but only receives payment of fees in return for the services it provides,

then this should permit the obliged entity to regard these circumstances as evidence of potentially lower risk, such as to permit the application of SDD.

15. The SDD required in these circumstances should be no more than SDD on the referring/instructing client.

16. This is a matter of importance to the Bar Council, as it describes the standard situation for a barrister in private practice acting within the regulated sector where that barrister is instructed by a solicitor or an accountant to give legal advice. At present, a barrister instructed in those circumstances will be required to duplicate the CDD efforts of those who instruct him or her. Undertaking CDD in such circumstances presents particular problems because the barrister will ordinarily not have a direct relationship with the client/customer, and cannot therefore obtain access directly to the customer's information. If (as does happen – see our answer to question 20 below) the instructing solicitor or accountant refuses to allow the barrister to rely on their CDD in relation to the end client, the barrister may well be prohibited from acting (even though proper and sufficient CDD has been carried out by the instructing solicitor/accountant and there is no material risk of money laundering). This has a detrimental impact upon barristers' business affairs, is an unnecessary hindrance to barristers giving legal advice, and is (we suggest) an unintended, undesirable and excessively bureaucratic consequence of the current regulations.

Chapter 4 – enhanced due diligence

Question 15: What EDD measures do you currently apply to clients operating in high-risk third countries, including those on FATF's black, dark grey and grey lists?

17. The Bar Council's anti-money laundering and counter-terrorist financing guidance will shortly be amended to include the following guidance, which takes account of the circumstances in which the Regulations apply to barristers, and the risk profile which flows from this, as we explained at the outset of this response:

> **"Enhanced due diligence**
>
> 140. There may be circumstances in which it is appropriate to apply an increased or 'enhanced' level of customer due diligence than is ordinarily the case. The risk of money laundering or terrorist financing is variable in nature, and where there is an increased level of risk an enhanced level of customer due diligence should be applied to mitigate against that increased level of risk.

141. Save for those circumstances where enhanced due diligence is mandatory under regulation 14(1), the circumstances in which the relevant person will be required to apply enhanced due diligence will be a question of fact to be answered in the context of each individual case: a sliding scales of risk must be applied.

142. There are some circumstances where the application of enhanced due diligence is mandatory. For example, it is mandatory for a relevant person to apply, on a risk- sensitive basis, enhanced due diligence, and on-going monitoring, when the customer is a "Politically Exposed Person" ("PEP"). As a practising barrister you need to be alert to the risk posed by PEPs and to the possibility that a PEP may be a UBO or may appear somewhere in the control structure of a client.

143. Consideration should also be given to *geographical* risk factors. Does the location of the lay client, their source of wealth or the source of funding give rise to a suspicion of money laundering or terrorist financing? A good example of this would be where the lay client is based in a FATF high-risk or non-cooperative country. Whilst a risk-sensitive approach should be taken in relation to geographical risk, where a client is based in FATF high-risk or non-cooperative country the Bar Council takes the view that enhanced due diligence should be applied. This should be combined with an enhanced level on-going monitoring and commensurate record keeping.

144. The FATF list of high-risk or non-cooperative countries is available at www.fatf-gafi.org.

145. The nature of the enhanced due diligence undertaken should relate to the risk presented and should be proportionate to the level of that risk. You should be seeking to ensure that the amount of customer due diligence information and certainty that you obtain adequately addresses the risk that transaction in relation to which you are instructed is related to money laundering or the financing of terrorism. Examples of enhanced due diligence steps you may need to undertake include:

145.1 Obtaining more and/or more in-depth information as to the purpose of the transaction, the source of the lay client's funds or the ultimate destination of those funds;

145.2 Obtaining more in-depth verification of the identity of the lay client or, if appropriate, its beneficial owner;

145.3 Creating a regular 'file-review' that requires the customer due diligence measures to be monitored frequently."

Chapter 4 – reliance on third parties

Question 19: If you are a financial institution, are there any additional institutions or persons situated in a Member State or third country that you think could be relied upon in order to help reduce the regulatory burden on businesses e.g. the third party applies due diligence and record-keeping requirements and are appropriately supervised in

accordance with the directive?

18. Whilst members of the Bar are not financial institutions, the Bar Council understands that HM Treasury is interested in receiving wider submissions in relation to the issue of reliance on third parties. Article 17(1)(a) of the 2007 *Money Laundering Regulations* provides that the third party must consent before an obliged entity may rely upon their customer due diligence. This 'consent' provision was a feature of the domestic legislation only: it was not a requirement of the 2005 *Money Laundering Directive*. The Bar Council suggests that the 'consent' requirement within the reliance provisions should not be continued in the new Regulations. As a predominantly referral-based profession, this is a matter of particular importance to barristers (as is further explained below in relation to Question 20). The denial of consent has a direct impact upon the Bar's ability to properly undertake CDD. A denial of consent introduces duplication of effort, regulatory inefficiencies and a lack of co-operation within the regulated sector. It does not help the aim of the Directive to be achieved. In place of a 'consent-based' system, the obliged entity should be entitled to seek, and when received rely upon, a positive assertion by a third party operating within the regulated sector, that the required CDD obligations have been met.

19. The Bar Council suggests that if there are concerns as to liability in relation to reliance then such concerns should be addressed within the new regulations, for example by express provision allowing third parties to exclude liability from suit when reliance is placed on them. The Bar Council is aware that HM Treasury are actively considering the issue of reliance, and understands that different views exist in relation to how this part of the Directive should be implemented. The Bar Council also understands that HM Treasury is seeking to meet the stakeholders that are affected by issues of reliance and consider their views. The Bar Council would welcome the opportunity to be part of such a meeting and to engage further with HM Treasury in relation to this issue.

Question 20: Do you rely on third parties to meet some CDD requirements? How much does this cost your business? Please provide credible, cogent and open-source evidence to support your answer.

20. Barristers who are operating in the regulated sector and who are required to comply with CDD obligations regularly seek to rely upon third parties to meet their CDD obligations. Whilst this option is not available to barristers acting on a direct access basis (i.e. without instruction by a professional intermediary), those instructed by a solicitor or acting on a licensed access basis (i.e. instructed by another professional intermediary) will frequently, if not exclusively, seek to rely upon the CDD of those who instruct them (see our answer to question 12 above). This latter group of barristers – those instructed by a professional intermediary – is by far the larger of the two.

21. The ability to rely upon CDD carried out by, for example, a solicitor, is of considerable benefit to barristers. A refusal to permit reliance, an all-too-common occurrence, results in barristers having to repeat the CDD that has already been undertaken by the solicitor. Such work must be carried out by the barrister, a task made more difficult by not being in direct contact with the end client. The result is that the barrister must spend considerable time undertaking personally the required CDD checks upon his solicitor's client. The task of conducting these checks is time-consuming, may ultimately prove

impossible to complete, and is unpaid. It represents a substantial cost to the barrister. It is also likely to involve a repetition of the very same checks that the solicitors have already carried out.

22. The ability to rely on the CDD checks undertaken by a third party intermediary therefore represents a considerable cost saving and efficiency to the Bar. The experience of the Bar is that, despite it being provided for in the Regulations, consent to rely on those checks is frequently refused. Indeed it would appear to be the policy of some major solicitors to refuse reliance on all occasions. Clearly, such refusals serve to defeat the purpose of the Regulations. We do not understand such refusals to have anything to do with any failure on the part of the solicitors' involved: on the contrary, the solicitors may well assert specifically that they have complied with all of their obligations, but are simply not willing to allow the barrister to rely on that. The reasons for refusing may involve a worry to be that by giving consent they might undertake some sort of liability to the barrister, particularly if their own checks later prove to have been deficient in some way.

23. Such difficulties could be avoided if a barrister's CDD obligations existed only in relation to his or her immediate client, e.g. (in most cases) his instructing solicitor or accountant (see further the answer to question 12 above).

Chapter 4 – assessment of risks and controls

Question 21: Should the government set a threshold of the size and nature of the business for the appointment of a compliance officer and employee screening? If so, what should the government take into account?

24. No. Such a step would be overly prescriptive, could lead to inflexibility and would not reflect the Directive's aim of requiring obliged entities to take a RBA.

Chapter 9 – politically exposed persons (PEPs)

Question 50: How do you differentiate between risk management systems and risk-based procedures?

25. The Bar Council is not quite sure what HM Treasury understands the difference to be between a 'risk management system' and a 'risk-based procedure'. If there is a difference, the Bar Council would regard a 'risk management system' as one that identifies the relevant risk and a 'risk-based procedure' as one that sets out how the obliged entity should deal with the risk once identified.

Chapter 10 – beneficial ownership of legal entities

Question 60: The government welcomes any views on the issues highlighted in Chapter 10 and the PSC regime in itself.

26. The Bar Council suggests that there should be a sufficiently reliable register of beneficial ownership that obliged entities will be entitled to rely upon at the date of provision of the information. Whilst obliged entities would not, by virtue of Article 31.8 of the Directive, be entitled to rely exclusively upon the information obtained from that

register, the Bar Council is of the opinion that the new Regulations should permit a high degree of reliance upon the entries in that register. The obtaining of information from the register by the obliged entity should be *prima facie* proof of the obliged entity complying with its obligation to obtain information in relation to beneficial ownership.

27. The Bar Council further takes the view that the above register should be held online and should be suitable for web-based access, both by those making entries to the register and those accessing its information.

Chapter 10 – requirements for trustees

Question 61: How often should a trustee be required to update the beneficial ownership information that they hold?

28. With regard to the requirement to keep the information upon the register 'current' the Bar Council suggests that those persons obliged to file beneficial interest information should be required to update the register with any changes in beneficial ownership within a fairly short time period; say, 21 days.

Question 63: What other arrangements should the government <u>not</u> consider as having a structure that is similar to express trusts?

29. There is a risk that very many trusts of residential and other property could be caught by this proposal, quite possibly simply as a result of ticking a box on the standard Land Registry transfer form. Where land is transferred to more than one owner – which will be the case whenever a home is sold to more than one person (including those in marital, partnership or other relationships) – the standard Land Registry form TR1 provides a section in which a box can be ticked to say how the property will be owned beneficially: and if certain information is not provided, then the Land Registry assumes that the property is owned in equal shares. It is not clear whether any consideration has been given to the effect of this proposal on the ordinary ownership of land by more than one person, and the impact (and cost) of a potential requirement on individuals up and down the land to register the beneficial ownership of their own homes and farms. These could be significant if, for example, the need to register arises from the CGT exemption for a principal home, or from other reliefs and exemptions applying to agricultural land, due to either of those considerations being such that the trust "generates tax consequences" (a very wide, and ill-defined concept, which could potentially apply to the ownership of all land held by more than one owner). This would be an entirely disproportionate response to the requirements of the Directive, and could have unintended consequences for ordinary co-owners of land, none of which would appear to be intended. At the very least, the interaction between any new requirements (either as to the information to be held and/or as to registration) and the practicalities of ordinary residential and agricultural conveyancing and land ownership needs to be considered, and entirely ordinary types of land ownership trusts ought to be outside the scope of the proposal. This may be an issue which is peculiar to common law members of the EU, and so may not have been taken properly into account in any proposals made thus far.

Chapter 11 – data protection

Question 67: The government would welcome your views on retaining documents necessary for the prevention of ML/TF for the additional 5 years. What do you think the advantages and disadvantages are of doing so?

30. The Bar Council considers that an initial retention period of 5 years is acceptable. However, the Government might consider extending the initial retention period to 6 years, as the Bar Council believes that this would tie in with common business practice of retaining documentation until the expiry of the limitation period on contractual liability.

31. The Bar Council further considers that an additional retention period of 5 years would only be justified in cases where one of the following factors existed:

31.1. There is a proven link to money laundering or terrorist financing;

31.2. A high level of Enhanced Due Diligence was required when the business relationship was entered into;

31.3. A Suspicious Activity Report has been made to the National Crime Agency.

32. The Bar Council thinks that the additional 5 year period should be the maximum period for which documents should be subject to a requirement that they be retained.

33. As a further point, the Bar Council would like to emphasise the importance of any data retention obligation or allowance complying not only with the Data Protection Act 1998 (DPA), but also with the EU's General Data Protection Regulation (GDPR)[4], which from 25 May 2018 will apply in the UK (until such application ceases). Article 41(1) of the Directive provides that any processing of personal data must be subject to Directive 95/46/EC (which for the UK's purposes is implemented in the DPA). The GDPR, however, repeals Directive 95/46/EC. The Information Commissioner's Office (ICO) are in the process of determining the impact of a Brexit on the GDPR's relevance in the UK.

34. The Bar Council would therefore emphasise to HM Treasury the importance of keeping an open line of communication with the ICO, in determining which information they either will require or allow obliged entities to retain. This will be particularly important in relation to a data subject's 'right to be forgotten'[5]. We would suggest that this be made clear in the new Regulations and any associated guidance.

Chapter 12 – supervision of regulated sectors

Question 68: Do you think that where registration is a requirement, the supervisor should be given an express power to refuse to register or to cancel an existing registration?

35. What is important for professions such as the Bar is that the relevant Supervisor (and, as previously stated, for the purposes of the Money Laundering Regulations barristers

[4] See: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN

[5] See Articles 17, 19 and Recitals 65 and 66

are supervised by the Bar Council, acting through its independent regulatory arm, the BSB) has sufficient power to sanction the regulated person/entity and, if necessary, revoke its membership for AML/CTF breaches. In that respect, the Bar Council invites HM Treasury to note that the legal professions are able permanently to close the door on any AML/CTF risk created by a supervised person, by means of the ability of the regulator/Supervisor to remove such a person from the profession. This power already exists and does not require the creation of an express provision or a change in the registration requirements.

36. The Bar Council also rejects any suggestion that registration should be extended from its current application to HMRC and the FCA only.

37. All practising barristers are already registered with the BSB. All practising solicitors are registered with the Solicitors Regulatory Authority; and other legal professionals are registered with other legal regulators. The current registers will therefore catch all supervised persons carrying out work within the regulated sector. Imposing an additional or separate registration requirement would not enhance this position, but would simply require additional regulatory action by the supervisor and those they supervise, at an additional cost, without adding to the fight against money laundering and the financing of terrorism.

38. In the context of the Bar, with its low AML/TF risk profile, and in the absence of evidence justifying this additional registration, imposing such an additional layer of supervision would be disproportionate, unjustified and contrary to the spirit and intention of the Government's Red Tape Challenge and its drive to "get rid of unnecessary bureaucracy"[6].

39. The Bar Council does not understand there to be any call for the creation of an additional register from the Supervisors of the legal professions. Given that Supervisors of obliged entities generally cover very different areas of economic activity, any temptation to transfer the views of a Supervisor in one sector (who might be in favour of such a step) to a different sector should be resisted. What might be right for say, casinos or money service businesses would not immediately present itself as being appropriate to the legal professions.

40. The Bar Council refers HM Treasury to the opinion expressed on behalf of the Bar Council of England and Wales[7] in response to the Supervisory Regime Call for Information in June 2016, which was as follows:

> **"Q27: Should the government require all supervisors to maintain registers of supervised businesses? If so, should these registers cover all registered businesses or just certain sectors? Should such registers be public? What are the likely costs and benefits of doing so?**
>
> "48. No. The Bar Council does not consider it appropriate to require the BSB to

[6] https://cutting-red-tape.cabinetoffice.gov.uk/

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

maintain a register of all supervised entities (which in effect would mean a register of all barristers) for AML/CTF purposes. The BSB already keeps a register of all barristers whom it regulates. Given the low-risk nature of the work of the Bar the creation of a specific register for AML/CTF purposes would be disproportionate and wasteful; publication of such a register would be unnecessary, costly and unlikely to serve any useful purpose."

The Law Society of England and Wales responded in similar terms[8]:

> "85.The Society would urge caution in any proposal to implement yet another register which would be costly for business and have very little impact in improving regulatory outcomes and provide no added benefit in the fight against money laundering."

41. The Directive does not require a system of additional registration and the legal professions and their regulators have not sought it. In such circumstances it is hard to see how imposing such a requirement serves a proper purpose.

Chapter 12 - criminality test

Question 75: What are your views on the meaning of "criminals convicted in relevant areas"?

42. The Bar Council understands this question to be inviting comment as to where the boundary is to be set in relation to the meaning of "*criminals convicted in relevant areas*" within Article 47(3). The Bar Council agrees with HM Treasury's view that this should be understood to refer to convictions for offences that are relevant to the risk of money laundering or terrorist financing.

43. The Bar Council does not think that the definition should be extended to include HM Treasury's further category, i.e. "such other convictions for offences that have a bearing on whether a person is suitable to hold a management function" where those offences do not of themselves relate to offences relevant to the risk of money laundering or terrorist financing. Such a definition could be apt to capture conduct that has no relevance to the level of money laundering or terrorist financing risk a person presents. For example a person with a conviction for an offence of causing death by dangerous driving may not be appropriate to hold a management post but the conduct that led to the conviction is not indicative of a higher level of AML/CTF risk.

44. The Bar Council does not believe that the 'criminality test' should be extended to those who are the subject of a criminal investigation, or have been charged with such an offence. A criminal conviction is the benchmark test for distinction of treatment in wider society in general and the application of restrictive measures upon a lesser standard is difficult to justify given the markedly lower thresholds that are required to commence an investigation or bring a criminal charge.

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[8] http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/hm-treasury-consultation-call-for-information-aml-and-cft-supervisory-regime/

45. Regulation of misconduct that falls below the criminal standard is rightly, and should remain, the business of regulators.

46. The Bar Council would also urge HM Treasury to promulgate regulations that do not interfere with regulators' powers to regulate their professions and deal with the misconduct of their members generally, both within and outside the AML/CTF sphere.

Question 76: What are your views on the meaning of "associates"?

47. The aim of Article 47(3) is to prevent criminals and their associates from holding a management function in or being the beneficial owners of the relevant regulated entities, where the criminal convictions are relevant to an AML/CTF risk. The Bar Council takes the view that the reference to criminals, relevant criminal convictions and an AML/CTF risk all indicate that in referring to "*associates*" the Directive is referring to criminal associates, i.e. those with whom the criminal is or was associated in the act of carrying out criminal activity. The Bar Council draws support for this view from the purposive definition given in the second Recital to the Directive: "*The soundness, integrity and stability of credit institutions and financial institutions, and confidence in the financial system as a whole could be seriously jeopardised by the efforts of criminals and their associates to disguise the origin of criminal proceeds or to channel lawful or illicit money for terrorist purposes.*" The "*associates*" contemplated by 4MLD are those engaged with criminals in their efforts to "*disguise the origin of criminal proceeds or to channel lawful or illicit money for terrorist purposes*".

48. The Bar Council takes the view that it would be wrong to implement the new Regulations in a way that gave "associates" any wider meaning, for example a definition that included a person engaged in a commercial or business relationship with the criminal, or a family member. Such a definition would risk excluding entirely innocent persons from participating in the regulated sector. HM Treasury is aware of the issue of penalising persons who are not in a position to achieve distance between themselves and the criminal, and gives the example of a parent. However, the same problem can apply beyond familial relationships. Professional people working in a partnership could fall under the ambit of "associate" where the definition included commercial or business relationship. Such a situation would be highly undesirable, potentially unworkable and beyond the requirement of the Regulation. For this reason a "close associate" type definition of the sort contained at Article 3(11) of the Directive (in relation to PEPs) would <u>not</u> be appropriate.

Question 79: Are there any specific offences you consider relevant in relation to the risk of money laundering and terrorist financing?

49. The Bar Council suggests that the following offences should automatically be considered relevant to the risk of money laundering and terrorist financing:

49.1. Crimes of dishonesty and financial impropriety;

49.2. Bribery and Corruption;

49.3. Terrorism;

49.4. Drug Trafficking;

49.5. Murder;

49.6. Serious sexual offences;

49.7. Offences in breach of the Money Laundering and Terrorist Financing legislation;

49.8. Offences against the justice system; and

49.9. Conspiracies and inchoate offences in relation to the above.

Question 82: Do you think a transitional period of two years affords sufficient time to complete the criminality test on the appropriate existing persons who are already on the supervisors' registers?

50. Depending on what the application of the referred to 'criminality test' will require in practice, the proposed transitional period of two years may well be inadequate to permit an orderly and financially viable introduction of such a test in relation to existing members of the Bar. If the test is to be applied to all existing members of the profession, as well as new entrants, the task will be a considerable, if not almost impossible, one for the profession's Supervisor and its members to complete within 2 years. For example, if the 'test' were to require DBS checks to be carried out for all members of the Bar who practise in the regulated sector (which will include those who may do so only very occasionally), then this would be a significant and costly burden. The same would apply to all other affected professionals and their regulators. At the very least, a longer period would be required so that (1) the system introduced to deal with the requirements of the new Regulation is properly designed and implemented and (2) the costs are budgeted for (bearing in mind that most bodies operate on an annual funding cycle).

51. In addition, the Bar Council has real doubts as to whether the Disclosure and Barring Service has the resources, staff and systems to respond to new DBS checks on behalf of the potentially "tens of thousands of individuals", and in particular professionals (lawyers, accountants and others), that the Consultation itself[9] acknowledges may be affected.

52. In order to address these issues the Bar Council suggests that Supervisors be permitted to approach the implementation of the 'criminality test' on a risk-sensitive basis. This would greatly reduce the regulatory burden of introducing such a measure by, for example, avoiding the disproportionate requirement to carry out DBS checks on each member of an affected profession. Even in that event, the period of two years might not prove to be sufficient, but there would be a much greater prospect that it would. A more risk-based approach would also reduce the financial and administrative burdens on professionals, supervisors and the DBS that we have just identified.

Chapter 13 – administrative sanctions

Question 85: Should the government consider whether additional sanctions and measures should be made available to those set out in 13.4 and 13.5?

[9] At paragraph 12.26.

53. No.

Bar Council[10]
November 2016

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[10] Prepared for the Bar Council by its Money Laundering Working Group.