Bar Council response to the Anti-money Laundering/Counter-Terrorist Financing Action Plan - Annex A: Consultation on Legislative Proposals

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Home Office's consultation paper entitled Annex A: Consultation on legislative proposals.[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 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 is an independent legal profession, and as a result of the way in which it receives and undertakes much of its work (predominantly through instructions from other professionals), in conjunction with how it is regulated, the Bar has a low-risk AML/CTF profile. One purpose of this introduction to draw attention to particular features in this regard which lead to that conclusion, but which also help to explain the possible impact of the proposals on barristers. The other purpose of this introduction is to draw attention to a particular role and feature of the legal profession – the provision of confidential and independent legal advice, and the operation of legal professional privilege in relation to that advice – which must be borne in mind when considering the impact of the proposals on barristers.

[1] Home Office/HM Treasury (2016) Consultation on legislative proposals. Available here: https://www.gov.uk/government/consultations/anti-money-laundering-and-counter-terrorist-finance-legislative-proposals

Barristers in private practice

5. The majority of barristers are in private practice, either in a set of 'chambers' or as sole practitioners. The Bar Council draws attention to the following considerations in relation to such barristers:

(a) They may receive instructions in two main ways. The first is from another professional, for the benefit of a lay client: traditionally this would be a solicitor, but in recent years has increasingly included other professionals under the Bar's licensed access scheme. The second is direct from a lay client, under the Bar's public access scheme.

(b) In relation to the former, the instructing professional will ordinarily already be subject to the SARs regime, will be closer to the client, and is likely to have a much wider role in relation to the particular transaction or situation than the barrister. Moreover, in relation to instructions from a 'professional client' (as defined in the Bar Standards Board Handbook), barristers are bound by the 'cab rank rule', which means that they are not free to decline any lawful instructions, and cannot 'pick and choose' their clients or the instructions that they are willing to accept.

(c) In relation to *both* types of instructions, barristers are not instructed to carry out or execute transactions for clients:

i. Much work carried out by barristers in private practice is advocacy, advisory or drafting work related to disputes, rather than transactions. This is, thus, outside the regulated sector (pursuant to the decision of the Court of Appeal in *Bowman v Fels* [2005] 1 WLR 3083), and will rarely give rise to AML/CTF risks.

ii. In relation to work which is not dispute-related, the barrister will not be the one carrying out or executing the transaction on behalf of the end client. Where the context in which the barrister is asked to assist relates to a transaction, the barrister is usually only instructed to advise on particular issues, and occasionally to assist in drafting work. Other than in this limited sense, the barrister will not be involved in the transaction. The barrister is also likely to be given only limited information about any overall transaction or any wider context; only what is needed for the barrister to be able to give the advice requested. Moreover, only some of those transactions will be such as might bring the barrister within the 'regulated sector'.

(d) Barristers do not enter into a 'retainer' to carry out a transaction or multiple transactions, as other professionals might, and are not in a position to have the same sort of long-standing and close-knit relationship with end clients.

(e) In no situation is a barrister permitted to handle client money: the only money a barrister can receive from a client is payment of his or her fees.

(f) If a barrister acting on instructions directly from a lay client needs to be able to secure payment from a client (e.g. to discharge a cost payable to a third party, e.g. for photocopying, for a court fee, or for expert advice), then the Bar's Code of Conduct allows this to be done only through a third party escrow service. The Bar Council has put in place such a service through 'BARCO', which offers an escrow account facility which is regulated separately by the FCA and includes built-in anti-money laundering features such as background checks and software to upload identification documents.

6. For those reasons, not only is the Bar's AML/CTF risk profile low, but its structural exposure to the 'regulated sector' is limited. Only a limited proportion of the Bar's professional activity falls within the scope of regulated business for independent legal professionals as defined by regulation 3(9) of the *Money Laundering Regulations* 2007.

7. On the other hand, the nature of barristers' services means that when the AML/CTF regime is engaged, it will not ordinarily be in connection with a simple or straightforward transaction, such as a bank payment, and any restrictions on barristers' ability to provide their services will involve restrictions on their clients' access to legal advice or other legal services.

Legal professional privilege

8. A further important factor in this context is that most information obtained by a barrister in private practice from or about the end client will be the subject of legal professional privilege. Such information must be kept confidential, and cannot be disclosed by the barrister (so long as the barrister is not assisting in a criminal enterprise), including under the AML/CTF regime. This is clear from *Bowman v Fels*, and has been made explicit in the 4th Money Laundering Directive.

Employed barristers

9. Our observations above and below 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. Many of the comments above would apply with equal force to employed barristers (e.g. those working for the CPS, the Government Legal Service, or litigation departments of solicitors' firms); but for others, such as those working in industry, the considerations may be different. Without more detail about the proposals, we are also unable to consider the potential benefits and disadvantages for barristers in those situations.

Section 2(a): Public-private partnership

Question 1 - The Government is seeking views on the change in focus of the SARs regime from one on transactions to one on the entities responsible for money laundering and terrorist financing.

- **What benefits are there for the reporting sector in moving the focus of the SARs regime from transactions to entities for tackling money laundering and the financing of terrorism?**

10. This is potentially a very important question, but it is not possible to give a firm answer to it, as the nature of the proposal is unclear, and as a result it is unclear what it will involve in practice.

11. Whether there will be benefits for the Bar, or even disadvantages, will depend on what the proposal really is, and how it might be implemented in practice.

12. In particular, it is not at all clear to the Bar Council how the proposal would operate in relation to barristers in private practice, who work in the way described in the introduction. Given both the way in which barristers practise and the likely relevance of a transaction to any SAR from a barrister, it is important to understand what is proposed in moving away from a transaction-focused regime. This can be illustrated in this way:

(a) A barrister is able to make a SAR where the barrister is asked to undertake work in the context of a transaction which is not itself the subject of legal professional privilege (e.g. where it is being negotiated between two parties, and is accordingly only confidential, and not privileged). In this context, it is likely that it will be the nature or circumstances of that transaction which gives rise to the relevant suspicion which leads to and is the subject of the SAR, and the substance of the transaction can be reported.

(b) By way of contrast, a barrister cannot make a SAR in relation to matters covered by legal professional privilege, even if those matters involve an entity that poses a high money laundering risk. If a suspicion arises from matters communicated to the barrister which are subject to legal professional privilege, then those matters cannot be reported.

13. If the proposal primarily involves removing the obligation to make a SAR in relation to transactions involving entities which do not pose the highest risk, then that could be beneficial by reducing the burden of the obligation to report in some situations, but that could bring with it significant disadvantages due to the absence of consent to act in such situations.

14. By way of contrast, if the proposal involves a reporting regime which is not transaction-related, then the lack of certainty about what that will involve makes it impossible to assess the impact on barristers.

15. Either way, the related proposals to remove the consent regime and to give power to law enforcement agencies to direct barristers how to act could cause very real and significant difficulties. These are addressed in answer to questions 2 and 3 below.

16. As a result, the Bar Council wishes to register its concern about the proposal, in the absence of a more detailed description of both the proposal and how it is intended that it will work in practice.

17. In answering this question, we do not understand that it is being suggested that legal professional privilege will in any way be affected by the proposal. If that were to be suggested, then that would be a very serious step indeed, and we would wish to have the opportunity to address such a proposal separately.

- **What would be the effect on costs to business in making that shift?**

18. The Bar Council does not hold records as to the cost of the current transaction-based SAR regime and accordingly is not in a position to provide a data-based response to this question.

19. In any event, without a clear understanding of how the proposal is intended to work, we are not in a position to consider its possible effect on the cost to barristers when compared with the current system.

Question 2 - To support that change, the Government is considering removing the current consent regime.

- **What are the risks in removing the consent regime, and how could these be overcome?**

20. The Bar Council has significant concerns as to the effect on barristers of the removal of the consent regime. The absence of detail within the current proposals exacerbates those concerns.

21. By section 335 of the *Proceeds of Crime Act* 2002, consent may be given by a nominated officer to do what would otherwise be a "*prohibited act*". Putting it broadly, a "*prohibited act*" includes participating in a transaction on behalf of a customer/client where there are reasonable grounds to suspect that the customer/client is engaged in money laundering. Without consent, it is an offence to carry out the transaction.

22. The Action Plan provides no insight into what arrangements would replace the consent regime for the regulated sector in relation to transactional business involving legal professionals where it is suspected that the customer/client is engaged in money laundering. This compounds the uncertainty as to how the proposed alternative regime would operate. It may be that it is intended that some form of moratorium period will be retained (Annex B, "How can the consent regime be improved? Consent regime: … The reporter would not commit an offence if the transaction proceeded during the review period"). How that would operate in practice, however, remains unclear, particularly if the facility to make SARs were

to be curtailed; and without the consent regime, a moratorium alone could present serious practical difficulties for lawyers.

23. One possibility is that a barrister will not be permitted to 'participate' in a transaction at all in the event that there is a suspicion of money laundering. We question whether this is the intention. We also question whether it can be right. This approach would result in clients being denied access to legal advice based only on a suspicion, and without proof of wrongdoing or any action taken by a law enforcement agency, which would undermine that fundamental right and the rule of law. The only alternative would be for barristers to investigate their clients' affairs, which would be entirely wrong in principle, impossible in practice, thoroughly inappropriate, contrary to barristers' legal and professional obligations, and highly undesirable for law enforcement. The practical effect of this approach would also seem likely to cut across the aim of avoiding 'tipping off', as a refusal to act or insistence on further investigations would be likely to be understood by a client who is sufficiently aware of the law as having been triggered by a SAR.

24. Another possibility is that, provided that a SAR is made, a barrister will be allowed to continue with his/her instructions without the need to wait for consent. This would be a significant improvement on the current regime, in which the delays involved can cause real practical difficulty – for example, with commercial time pressures, demands by clients for activity to take place, and legal and professional duties to act in a client's best interests – as well as a risk of unavoidably 'tipping off' a client who is sufficiently aware of the law; but this would be an improvement **only if** a barrister is able to make a SAR in any situation involving a genuine suspicion of money laundering (i.e. not just in relation to entities of particular concern). The impact of such an approach on law enforcement may be relatively modest, given that the timescale for most transactions which might involve a lawyer (particularly a barrister) is far less swift than many financial transactions which may generate SARs.

25. It is not known if either of those possibilities, or an alternative solution, is being considered. The Bar Council is unable to offer further comment without a better understanding of the current proposals on this issue, other than to emphasise the importance of providing a system which enables a lawyer both to act responsibly and to continue to act for a client without risk of criminal sanctions.

26. The proposed changes to the SAR consent regime might be appropriate for the banking or finance sector, but its blanket removal would present very serious challenges for the Bar and for the rule of law that currently do not exist. This is a good example of how, when it comes to managing and addressing AML/CTF risks, one size does not fit all, and sector- and profession-specific responses to the risks are required: what is right for, say, a multi-national financial institution will not necessarily be right for a barrister in private practice.

- **If the current SARs consent regime is replaced, removing the statutory defence for SARs reporters, what legal protections should be available for reporters who unwittingly come into the possession of criminal property?**

27. The issue here is not limited to coming into possession of criminal property, but extends more widely so as to encompass all of the offences under POCA 2002 ss.327-329.

28. Due to the prohibition on handling client money (as explained in the introduction), barristers will not come into the possession of criminal property other than (if at all) through the payment of their fees, but there is a critical need for barristers to be able to know where they stand in acting for their clients in connection with transactions and other 'arrangements' (and, indeed, in accepting payment of their proper fees), without being at risk of criminal liability.

29. For those reasons, the Bar Council considers that a mechanism must be put in place to permit barristers to continue to be 'concerned' as legal advisors in transactions and other 'arrangements' in accordance with instructions from their clients even if they have suspicions that their clients are engaged in money laundering, provided those suspicions are reported. Even if, as we believe, the circumstances in which barristers will be 'concerned' in transactions and other arrangements within the meaning of the legislation are relatively limited, the boundary line is uncertain.

30. In short, there must be a route by which a barrister can avoid criminal liability for accepting instructions and continuing to act where the barrister believes that he/she will, or may, be committing an offence if he/she were to provide or continue to provide legal advice or other legal services. There should also be certainty as regards the receipt of payment of fees.

31. It is not a viable or satisfactory alternative for barristers to have to seek (and pay for) their own legal advice on every occasion in which they do not have consent to act, in order to identify as best they can whether it would be lawful to accept instructions or to continue to act.

32. Moreover, in view of the 'cab rank rule' (explained in the introduction), barristers are not free to decline instructions in cases of doubt. Rather, they may be obliged by their professional Code of Conduct to accept instructions and to continue to act unless to do so would actually be unlawful. This increases the risk and difficulty for a barrister where there is any doubt over whether or not it would be lawful for the barrister to accept instructions, or to continue to act, under the AML/CTF regime.

- **What would be the costs to your business of this change?**

33. The Bar Council does not hold records as to the cost of the current SAR consent-based regime and accordingly is not in a position to provide a data-based response to this question.

34. Even though the preparing and making a SAR for many barristers who do so may well involve several hours' work on each occasion (which will have to be done personally), the proposed change could lead to a substantial increase in the overall costs to barristers, in the light of our observations above.

Question 3 - Should a reformed SARs regime include powers for law enforcement agencies to direct reporters to take certain actions, including maintaining a customer relationship, and provide legal cover for the reporter to do so?

35. The Bar Council is opposed to any proposal that law enforcement agencies should be given the power to direct barristers to take certain actions in relation to their clients. We have commented above on the need for 'legal cover' in an AML/CTF context for continuing to act; but that must not depend on a 'direction' from a law enforcement agency.

Fundamental objections

36. In relation to lawyers, this proposal would be contrary to the rule of law, to the constitutional position of an independent legal profession, and to established law in relation to the protection of the right to independent legal advice and representation as provided under domestic and EU law, and guaranteed by the ECHR and fundamental human rights. It would also be contrary to the current EU Money Laundering Directives and the Money Laundering Regulations 2007, as explained in *Bowman v Fels* [2005] 1 WLR 3083, and would similarly be contrary to the 4th EU Money Laundering Directive.

37. The proposal would appear to contemplate two things. First, it contemplates law enforcement agencies dictating to barristers and other lawyers how and when they should act for and in relation to their clients in circumstances in which it has yet to be established that the clients have done, or are proposing to do, anything illegal. Second, it contemplates the possibility that barristers may be required to be involved in illegal acts on behalf of their clients, and to do so whilst also being obliged to continue to provide information to the law enforcement agency.

38. Both possibilities would cut across barristers' professional duties and responsibilities (including their duties to the court in the administration of justice) and their independence. They would also involve an abuse of the client's right to independent legal advice and of the client's concomitant right to the protection of legal professional privilege in relation to that advice, and would wholly undermine the client/lawyer relationship. Moreover, the former may cut across barristers' duties to act in the best interests of their clients (in respects other than those which involve illegality on the part of those clients), and the latter would impose unreasonable and impossible burdens on barristers.

39. Such intrusions would present fundamental problems for the rule of law and the operation of the legal profession, and would be unworkable. They would be contrary to the constitutional position of an independent legal profession, and to the rights guaranteed by the ECHR.

40. They would also be contrary the requirements of the 4th EU Money Laundering Directive and the current Money Laundering Regulations 2007, as explained in *Bowman v Fels*. Both the 3rd EU Money Laundering Directive (Directive 2005/60/EC – which gave rise to the Money Laundering Regulations 2007) and 4th EU Money Laundering Directive (Directive (EU) 2015/849) enshrine within them the protection of legal professional privilege.

Other objections

41. The Bar Council is concerned that no detail has been provided about how this potentially far-reaching proposal would operate. It may be that the intention is more limited, and would not cause the difficulties we have identified above, but the lack of detail makes it impossible to say.

42. In addition, whilst there may be a case to be made that directions may be appropriate in the case of a financial institution asked to act on a client's instruction to make or receive a particular payment, that is a very different situation from the relationship between barristers and their clients. Even without the fundamental objections set out above, this proposal appears to take no (or insufficient) account of the relationship between lawyers and clients.

43. Barristers are not instructed to carry out specific transactions, but to exercise their professional skill in providing legal services over a period of time dictated by the nature of their instructions. In addition, barristers are not the agents of their clients, but act independently from them. Under their Code of Conduct, barristers have an overriding core duty to the court in the administration of justice, as well as a core duty to maintain their independence. The Code also provides the basis on which barristers accept instructions, and specific circumstances in which barristers are required to accept and return their instructions.

44. Moreover, a barrister instructed by a solicitor or other licensed intermediary is dependent upon that party for his initial and continued instruction, not the lay client. Where the relationship between the solicitor/intermediary is brought to an end, the barrister's instructions are also concluded. A barrister instructed on a referral basis cannot continue to act for a client if the instructing professional has chosen, or been obliged to, withdraw.

45. The Bar Council is also concerned as to how it is envisaged that barristers would be able lawfully and practically to secure payment of their fees for work done following or pursuant to a 'direction' from a law enforcement agency. It would be quite wrong for barristers to be 'directed' to continue to provide legal services, or to cease to do so, in circumstances which may result in them being unable lawfully or in practice to recover fees for their work as a result of such a 'direction'.

Question 4 - The Government is proposing to provide legislative cover to support better data sharing within the private sector.

- **What legislation and guidance needs to be in place to allow effective sharing of information between private sector firms in order to prevent and detect financial crime?**

46. Client confidentiality and legal professional privilege currently prohibit the sharing of client-related confidential and privileged information with any party.

47. The *Money Laundering Regulations* and reporting requirements in Part 7 of the *Proceeds of Crime Act* 2002 are statutory derogations from the principle of client confidentiality, but not from legal professional privilege.

48. Confidential, non-privileged information required to be disclosed is currently only "shared" with the NCA (or other law enforcement agency). Without legislation, sharing of confidential, non-privileged information with "private sector" reporters cannot lawfully take place, and the Bar Council would have serious concerns if such information from lawyers were to be shared directly with other private sector organisations.

49. Guidance from HM Treasury as to when and how client confidential, non-privileged information should be shared, and, indeed, when it should not be shared, would also be essential.

- **What benefits would you see from having the ability to develop SARs in partnership / report jointly with other private sector entities?**

50. There may be a benefit in permitting barristers carrying out work in the "Regulated Sector" to report suspicions jointly, where their instructions come from solicitors, insolvency practitioners or others in relation to "Regulated Sector" activities. At present, isolated reports by solicitors which do not include the barrister (or *vice-versa*) risk exposing barristers or raise the risk that solicitors and barristers make inconsistent SARs. Duplicate SARs in relation to the same matters would also seem likely to impose an undesirable burden on both reporters and those to whom such a report must be made.

51. However, in the circumstances referred to above in relation to the previous question, and in the absence of detail as to how information sharing would operate, the Bar Council is unable to give more than this very limited and highly qualified support to this proposal.

- **What can we learn from the U.S. experience of data sharing between private sector entities under the s314 of the USA PATRIOT Act?**

52. For the reasons set out in the response to the first question the Bar has a low-risk profile in relation to money laundering and terrorist financing. Accordingly, the Bar Council would not expect that the experience of data sharing between private sector entities under section 314 of the USA PATRIOT Act to inform future best practice for barristers. However, the Bar Council does not have a well-resourced fund of knowledge as to the operation of the PATRIOT Act.

Question 5 - Under the EU 4th Anti-Money Laundering Directive (4AMLD), Financial Intelligence Units are required to have a power to request further information in relation to a SAR. How should such information be gathered, and should it be regarded as part of the overall SAR?

53. The context of this question is unclear; but the Bar Council would be concerned if a request for further information led to delays in obtaining consent or the postponement of any moratorium period. Any request could also not be made for any information which is the subject of legal professional privilege.

Question 6 - The Government wants to support the financial sector in dealing with suspected proceeds of crime held in suspended bank accounts.

- **What new powers are required to allow the criminal funds held in UK bank accounts to be forfeited more easily?**

54. The Bar Council notes the existing powers for the freezing and seizure of criminal property by virtue of both the confiscation and civil forfeiture powers of the *Proceeds of Crime Act* 2002. There does not appear to the Bar Council to be a legislative gap that requires filling in this regard.

55. The consultation document proposes that property could be forfeited, and, it is suggested, forfeited *administratively* (see paragraphs 2.35 and 2.36 of the Action Plan, and the comments below), on the basis only of "*suspicion*". Given the existing statutory powers, the Bar Council would find it difficult to support such a step absent a compelling case being presented for its requirement. At the very least the power should be exercised judicially, in a manner directly comparable with if not equivalent, both in process and safeguards, to the current cash forfeiture provisions under Chapter 3 of Part 5 of the *Proceeds of Crime Act* 2002. In order for the forfeiture power to be proportionately exercised, the Bar Council also takes the view that a higher standard than mere "suspicion" that the funds are the proceeds of crime should be required.

- **What safeguards should be put in place around any new powers in order to protect innocent account holders?**

56. Please refer to the answer given above.

- **In uncontested cases, should administrative forfeiture be permitted, in the same way that POCA already enables the administrative forfeiture of cash?**

57. The Bar Council does not agree with the suggestion that an "*administrative*" forfeiture function should be introduced. The reality of such a phrase is expropriation of private property by investigative bodies on behalf of the state. Any such state forfeiture should be authorised only where the statutory conditions are established to a competent court's satisfaction. The requisite judicial scrutiny is required to ensure that any forfeiture of property is carried in accordance with a just and recognisable system of law. The permanent deprivation of a person's property on the say so of a police officer, of whatever rank, would mark a substantial and, in the Bar Council's view, unwarranted departure from the common law and the systems and safeguards contained in even the most draconian of statutes. The Bar Council is not aware of any gaps in the existing statutory scheme that compel the creation of such a novel and intrusive police power.

58. Where cases are uncontested, the judicial oversight provided by the magistrates' court is an important check to ensure that the procedural requirements (the provision of notice etc) have been complied with and the grounds for forfeiture are been made out. Such oversight is essential to ensure that forfeiture powers are properly and proportionately exercised and not abused. It is precisely where the exercise of the state's power is unopposed that judicial oversight is essential: it ensures the protection of rights and liberties that are otherwise unguarded and thus at risk of abuse. This is particularly the case where public funding is either unavailable, or restricted in its availability, to those who wish to oppose the making of such an order.

59. There is no evidence of which the Bar Council is aware that suggests such oversight is ineffective, inefficient, unjustifiably expensive or in need of reform. The relatively minor administrative burden on magistrates' courts of listing uncontested forfeiture hearings is a price to society that is worth paying to ensure proper scrutiny of the state's desire to wish seize somebody's private property.

Section 2(b): Enhanced law enforcement response

Question 7 - What do you see as the benefits of introducing a power to require individuals to explain the sources of their wealth?

60. The Bar Council opposes the introduction of such a power, for the following reasons. For the same reasons, it does not see any benefits to this power which are not outweighed by contrary considerations.

61. Article 1 of the First Protocol to the European Convention on Human Rights provides that "*(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law*."

62. The presumption of innocence ordinarily operates to prohibit proceedings in which a person is obliged to provide an explanation on pain of punishment or forfeiture. The privilege against self-incrimination is an important common law protection, now enshrined in statute by the *Human Rights Act* 1998. In general terms, a person is only required to provide information to a State agency if statute expressly requires it. All these important legal principles militate against introducing a power to require individuals to explain the sources of their wealth unless effective safeguards exist to prevent abuse.

63. Orders made pursuant to such proceedings would also conflict with existing case law in relation to the current money laundering offences. In a money laundering prosecution there are two ways in which it can be proved that property derived from crime. One is by showing that it derived from conduct of a specific kind and that conduct of that kind was unlawful. The other is by adducing evidence that the circumstances in which the property was handled were such as to give rise to the irresistible inference that the property could only be derived from crime. A failure by a person to give an explanation about his 'wealth' is not sufficient to prove that it derives from criminal conduct. We see no good reason to depart from these well-established principles.

64. If the intention is to introduce a power limited only to obliging a person to "*provide critical information upon which law enforcement agencies can build their case*", as per paragraph 2.33 of the Action Plan, different considerations would apply as such powers are already known to the law and have, subject to safeguards, been found to be ECHR compliant (e.g. *Saunders v UK*).

Question 8 - Would you see a benefit in a linked forfeiture power where the explanation is not satisfactory or no explanation is provided?

65. The Bar Council repeats its response to question 7 above.

Question 9 - What benefit would you see in an illicit enrichment offence, targeting those who use their public position to enrich themselves? What are the potential impacts on business?

66. The unlawful use of a public position for illicit personal enrichment corrodes public trust in those officials, encourages corruption and depletes public resources.

67. The existing offence of fraud by abuse of position, contrary to section 4 of the *Fraud Act* 2006, could be used to cover many instances of the proposed offence of illicit enrichment. It is also worth noting that the Law Commission is presently consulting on reform to the common law offence of misconduct in public office, which has the potential to overlap with the proposed illicit enrichment offence to the extent that it is not covered by the *Fraud Act*.

68. If there is a need to create a more specific or targeted offence, then the circumstances in which such an offence is needed should be identified. If those circumstances exist, then a properly targeted offence may be appropriate, but further details would be needed before the Bar Council could comment further.

Question 10 - The Government is considering the introduction of a power to enable the Government to designate entities of primary money laundering concern.

- **What benefit would such a power provide?**

69. A power to designate entities of 'primary money laundering concern' could potentially assist in forestalling money launderers and those who fund terrorism from accessing the UK financial sector and, to a limited extent, act to reduce the reporting burden on the "Regulated Sector". The threat of designation could have a powerful effect and its use might drive up standards both generally and in particular at those firms who perceive themselves most at risk of becoming designated.

70. However, there is a risk that the consequences for designated entities could be disproportionate, depending on how the system operates and on the legal and practical consequences of being designated. In addition, money launderers may simply avoid making use of a designated business, so the result may be that the problem is just shifted elsewhere. The current regime in which regulators would appear to maintain an active, if unpublished, watch-list as well as targeted enforcement actions enables failing firms to be targeted for improvement and encourages SARs from such firms without helping launderers to avoid detection. It is unclear whether designation will be as effective.

71. However, whilst such a power may have a disruptive effect against the entity in question, it would only operate against the "riskiest customers", who should, in any event, fall foul of a properly-operated risk-based approach to the risk of facilitating money laundering and terrorist financing. The Bar Council is therefore concerned that such a power may not yield as substantial a benefit as expected in comparison to the resources that would be required to establish and maintain such a system, including the cost of dealing with contested designations, and that the resources may be better targeted elsewhere.

- **What would be the impact of such a power on firms in the regulated sector?**

72. This would depend on the detail of the proposed system, how it would operate in practice, and the legal and practical consequences of designation, none of which are clear from the proposal.

73. One possible effect might to be impose or increase the burden of AML/CTF obligations in some situations where the risk of money laundering or terrorist financing is low, but the degree to which this is likely to happen and the degree of additional burden imposed are impossible to identify without a more detailed proposal.

- **What legal recourse should be available for designated entities who wish to challenge their designation?**

74. A statutory review body should exist to oversee such designation. Absent such a process, immediate recourse to judicial review would be sought by those entities so designated, resulting in otherwise avoidable potentially complex and expensive litigation: see, for example, the case of *Bank Mellat v. HM Treasury*.

75. Designation could possibly be a power that is exercised by a suitably informed and properly resourced existing body, such as the FCA, which has the benefit of an established review and appeals process in relation to its enforcement proceedings.

- **What can the UK learn from the U.S. experience of using section 311 of the USA PATRIOT Act?**

76. This is not a matter within the expertise of the Bar Council.

- **What would be the costs to your business?**

77. The Bar Council is not in a position to provide a data-based response to this question. The absence of sufficient detail also makes this difficult to assess.

Question 11 - What benefit would you see in the provision of a power, similar to the provisions for cash seizure, to allow seizure and forfeiture of other forms of readily moveable property such as high value jewellery or precious metals?

78. Powers already exist (but have never been brought into force) in relation to the seizure of items pursuant to a restraint order pursuant to the *Proceeds of Crime Act* 2002. Cash, being fungible, has a special status justifying the cash forfeiture powers contained in Chapter 3 of Part 5 of the *Proceeds of Crime Act* 2002. The proposal presupposes that there is a need for further powers, but Chapter 2 of Part 5 of the *Proceeds of Crime Act* 2002 ('civil recovery') already contains powers that could be deployed in respect of readily moveable property such as high value jewellery or precious metals.

79. In those circumstances, the Bar Council is currently not persuaded that the proposed power is necessary.

Question 12 - What benefit would you see in enabling the administrative forfeiture of the proceeds of crime in uncontested cases, following an initial hearing at a magistrates' court?

Should a limit be set on the value of property that could be administratively forfeited, and what should that limit be?

80. For the reasons set out above, the Bar Council opposes any form of "*administrative*" forfeiture.

Question 13 - If we amend the investigative powers within POCA so they can be sought earlier in the investigative process, and make applications and administration more flexible, what would be the impact on your business?

81. Given the low-AML/CTF-risk profile of the Bar, the Bar Council would not expect this proposal to have a significant direct impact on the operation of barristers in private practice.

82. The Bar Council would however make the following observations.

83. Investigative powers under POCA are already extensive and can be sought under Chapter 2 of Part 8 (in the Crown Court) as soon as an investigation is underway, i.e. at the earliest possible stage. As such, the proposed powers already exist and are frequently deployed by law enforcement agencies. In such circumstances, the Bar Council would need to understand the concerns the proposal is intended to remedy before being able to express an opinion upon any benefits that may accrue from them.

Question 14 - In addition to the proposals in this Action Plan, are there additional powers that UK law enforcement agencies should have to tackle money laundering?

84. No.

Bar Council[2]
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[2] Prepared for the Bar Council by the Anti-Money Laundering Working Group