



Bar Council response to the Anti-money Laundering Supervisory Review

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to HM Treasury's consultation entitled "Anti-money laundering supervisory review: consultation".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

4. The Bar Council has previously outlined the nature of barristers' practice to HM Treasury². Key points, worth emphasising here, are that most barristers provide litigation advocacy services; most barristers do not provide legal services which are within the scope of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the Regulations); barristers are

¹ HM Treasury (2017) Anti-money Laundering Supervisory Review. Available here: <https://www.gov.uk/government/consultations/anti-money-laundering-supervisory-review/anti-money-laundering-supervisory-review-consultation>

² Bar Council response to HM Treasury's Call for Information on the AML Supervisory Regime (2016). 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

not permitted to handle or control client money nor operate or administer any client accounts; only a limited number of barristers provide services that fall within the 'regulated sector'. Those who do provide such services most commonly do so under instructions from solicitors who deal directly with the lay client and who are also subject to the Regulations and the supervision of the Solicitors Regulation Authority. The Bar Council's view that the barristers' profession poses a very low ML/TF risk is supported by the fact that there are no historic examples in the public domain of barristers engaging in money laundering or terrorist financing activities on behalf of their clients.

5. The Bar Council also provided its views on the proposed Office of Professional Body AML Supervision (OPBAS).³ The Bar Council remains supportive of any initiative that would provide greater governmental direction as to best practice and additional positive support to professional body of AML/CTF supervisors (PBSs)⁴ but is very strongly against any imposition of a *de facto* second-tier of AML/CTF regulation on barristers or indeed another significant additional layer of expense to barristers; this would be disproportionate considering the very low AML/CTF risks posed by the barristers' profession. The BSB already provides effective and proportionate AML/CTF regulation of barristers. The imposition of an AML/CTF super-regulator with invasive powers risks undermining the work of the BSB and imposing an inappropriate "one-size-fits-all" approach to regulation on all professionals in the regulated sector. Such an approach risks being confusing to the providers and users of legal services and counterproductive to the aim of good regulation.

6. The Bar Council is very concerned that the draft regulations contain nothing in relation to the purpose of OPBAS or its objectives. As drafted, the regulations would provide OPBAS with an unfettered remit in relation to AML/CTF regulation of PBSs. The powers provided by the regulations should be directed to the pursuit of a stated purpose of OPBAS.

7. The Bar Council is very concerned that the key regulation 7 in the draft regulations would place no limitations on the scope of any inquiry by OPBAS and could lead to protracted, prolix and disproportionate inquiries of PBSs.

8. The Bar Council is also very concerned that some features of the draft regulations under which OPBAS would operate would have far-reaching direct

³ Bar Council response to HM Treasury's Anti-Money Laundering Supervisory Regime: response and call for further information (2017). Available here:

http://www.barcouncil.org.uk/media/565535/bar_council_response_to_the_call_for_information_on_the_anti-money_laund....pdf

⁴ Called "self-regulatory organisations" in the draft regulations

application to barristers themselves as opposed to the BSB as the delegated ML/TF supervisor. The Bar Council is very strongly concerned that, as drafted, OPBAS would be able to direct its inquiries to any individual barrister. That is contrary to the feedback given by the Government and which is set out in the "Anti-money laundering supervisory review: consultation". Significantly, the Government's own position was that it would not 'legislate' to impose OPBAS inquiries on individual members of PBSs.

9. The Bar Council is very concerned that should the regulations be issued in their current form, PBSs will have to increase considerably their resources simply to deal with the additional layer of far-reaching regulation posed by an OPBAS with all its proposed powers. This would not only be expensive for the BSB (and therefore for the barristers who are supervised by the BSB) but is likely to have a diversionary effect. By this we mean that there is a significant risk that the BSB would be diverted from other very important work that it carries out in regulating barristers for the general good of consumers and the justice system as a whole.

10. Lastly, given the very significant issues raised in this response (and no doubt in others), the Bar Council considers that it would be appropriate for HM Treasury to issue a further consultation document and further draft regulations. It is also unfortunate that the current consultation period has been very short.

Question 1: Do the draft regulations deliver the government's intention that OPBAS help, and ensure, PBSs comply with their obligations in the MLRs? In particular, are further legislative amendments required to ensure legal PBSs can raise funding for the OPBAS fee?

11. The Bar Council answers Question 1 by reference to its general comments above and by its specific comments given below in relation to the draft regulations. In summary, the Bar Council does not consider that the draft regulations (in their current form) would help and ensure that PBSs comply with their obligations in the MLRs and, in the case of the BSB, the BSB would not be helped in its supervision of barristers.

12. The Bar Council has the following comments on the draft regulations:

13. As set out above, the draft regulations would place no limitations on the AML/CTF remit of OPBAS. They say nothing about the appropriate role and objectives of OPBAS, the intended relationship generally as between OPBAS and PBSs and the limits to the kinds of inquiries which can generally be raised by OPBAS.

14. One obvious and important limitation ought to be that the role and objectives of OPBAS must be directed at improving and ensuring effective supervisory

regulation by PBSs and not directed at individual members of PBSs or individual cases where AML or CTF shortcomings are suspected or known to OPBAS.

Reg 6

15. The General Council of the Bar of England and Wales is an unincorporated association. We would require clarification as to what “members of an unincorporated association” as “connected persons” is intended to capture and for that to be made explicit in the regulations.

16. Our concerns are set out in relation to regulation 7 below, which follows from the wide definition of “connected persons”. The General Council of the Bar is of the very strong view that “connected persons” should not include members of an unincorporated association but should include only any person who is an officer, manager, employee or agent of an unincorporated association. This can be achieved by deleting the word “member” from 6(c) in the draft regulations.

17. The BSB, as the independent regulator of the Bar, carries out the AML supervision of barristers. The BSB is independent of the Bar Council; a separation prescribed by the Legal Services Act 2002. It is not clear to us whether under arrangements such as this (and similar to that of many legal sector supervisors), the BSB would be considered an “agent” of the Bar Council. Whilst this might be the consequence of the current wording, it would be a quite inappropriate result.

Reg 7

18. We note that because of the inclusion of “member” in the definition of connected persons in an unincorporated association, this regulation appears to authorise OPBAS to gather information directly from barristers rather than from the Bar Council and/or the BSB. The Bar Council has very strong concerns about any such proposed compulsion on its members. The explicit purpose of this regulation is to improve the supervisory regimes imposed by PBSs, not to audit compliance by or compel information from individual members of those PBSs. Direct information-gathering from members of PBSs would be both unnecessary and undesirable, and would undermine the status and supervisory efforts of the PBSs. It would also go beyond the power available to OPBAS in its regulation of other AML supervisors; it would therefore be unfair to the members of unincorporated associations who would face heavier obligations than the members of supervisors which are incorporated as companies. It would also allow OPBAS to compel barristers to provide information even where those barristers are outside the scope of AML/CTF regulation.

19. Were OPBAS or any other law enforcement agency to have specific concerns about a specific member of a PBS, these should either be addressed through the PBS

or by independent law enforcement action (e.g. the Police). If there is no such concern, it is difficult to envisage in what circumstances such information-gathering from a PBS's members about the conduct of the PBS would be either appropriate or useful.

20. Draft regulation 7 is apparently unlimited in its scope. It would empower OPBAS to compel an unlimited number of answers and documents and compel persons to attend interviews without limitation. As set out above, the role of OPBAS should be given a legislative definition as to its objectives and its limitations and this should be clearly and distinctly set out in the regulations. And in turn draft regulation 7 should contain commensurate limitations to ensure that OPBAS's inquiries are limited to those which are appropriate to its delineated functions and objectives.

Reg 8

21. We note with concern the wide retention power this regulation gives in relation to original copies of "seized material". As drafted, it is a power that is beyond that allowed in criminal investigations under the Police and Criminal Evidence Act 1984, where law enforcement agencies are required to return original documents and materials if retention of photocopies or photographs would suffice instead.

22. It is proposed that an owner of material can go to the Crown Court (in England and Wales) to claim ownership of material. The Crown Courts do have the power to determine ownership in some limited cases under the Proceeds of Crime Act 2002 but, as has been recognised by the senior appellate courts, they are not well equipped to deal with property law or property ownership disputes, and have always been barred by Court of Appeal jurisprudence (regarding restitution orders) from dealing with such disputes. The High Court is the appropriate forum for such disputes to be resolved. It is noteworthy that the OPBAS Regulations propose (at Reg 22(3)) the High Court for jurisdiction in relation to contempt issues.

Reg 9

23. This regulation appears to be directed at lawyers who provide services to clients. For the reasons we set out above in relation to draft regulations 6 and 7, this is not appropriate, as OPBAS should not have the power to compel lawyer-members of a PBS to provide information under regulation 7.

24. If the regulations were to allow OPBAS to compel a lawyer to reveal information about a client (and our position - as set out above - is that OPBAS should not have this power) then the proposal that a lawyer could be compelled to provide details of his/her client's name and address goes beyond existing common

law in relation to legal professional privilege (LPP) given that there are certain circumstances in which the address of a client may be privileged information (such as where the address is provided by the client for the purposes of seeking advice relating to the location of the address). We would therefore recommend that the regulations clearly state that LPP material cannot be compelled, rather than stipulating that a name and address can be compelled even where LLP applies.

Reg 13

25. The Bar Council has strong objections to a regulation which allows the FCA to compel the PBS to appoint a "skilled person" to prepare a report on any "matter concerned". This would appear to enable delegation of the FCA's information-gathering and analysis responsibilities under the OPBAS Regulations, without any justification or limitation at all. We would also note that this would be at the cost of the PBS concerned, even providing that the FCA would have the power to set the terms of the instruction, which must include the commercial terms.

26. Instead, the Bar Council calls for:

- a) a limitation on the situations in which it is appropriate for a "skilled person" to be appointed rather than for OPBAS to conduct the relevant inquiries and analysis, and
- b) a limitation to the levels of fees which can be charged by the skilled person.

Reg 17

27. We note that there is no mechanism for escalating concerns against a PBS nor any requirement that an SRO be given an opportunity to improve or rectify its supervision. Instead, OPBAS will have the power to recommend that a PBS can be de-listed by HM Treasury, simply after the giving of notice to the PBS (Reg 18).

28. Except in very extreme circumstances, including gross misconduct and/or chronic inability to cope with its supervisory responsibilities, the Bar Council recommends that PBSs ought to be given the opportunity to rectify their defects and conduct before the FCA can recommend that it be de-listed.

Questions 2-5 (for regulated businesses only) not applicable

Questions 6-8 (referring to PBS supervision and related costs)

29. These questions are not directly applicable to the Bar Council as opposed to the BSB.

30. However, the Bar Council comments that the increased costs to the BSB (which are then passed on to barristers) are likely to be significant and unjustified given the very low ML/TF risks posed by the barristers' profession.

Bar Council⁵
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⁵ Prepared for the Bar Council by its Money Laundering Working Group