



Bar Council response to the OPBAS sourcebook consultation

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the FCA's Guidance Consultation entitled "Office for Professional Body Anti-Money Laundering Supervision: a sourcebook for professional body supervisors".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.
4. 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 ("the BSB").

Overview

5. To give effect to the "risk-based approach" required by the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (the Regulations), it is first necessary to consider the risk to which the Bar is exposed. The modern scheme of anti-money laundering awareness and supervision of compliance with AML/CTF requirements is predicated upon a fact-sensitive assessment of how and where the risk of money laundering or terrorist financing might arise. It is therefore vital when considering what level of regulation is required to distinguish the exposure of the Bar to money laundering from that of the legal sector as a whole.

¹ Available here: <https://www.fca.org.uk/publications/guidance-consultations/gc17-7-sourcebook-professional-body-supervisors-anti-money-laundering>

6. The BSB's 2017 AML/CTF Risk Assessment noted that, whilst HM Treasury's 2015 National Risk Assessment ("NRA 2015") assessed the legal sector *as a whole* as "high-risk", none of the specific areas of risk highlighted related to the work of the Bar. Equally, none of the case studies cited in NRA 2015 referred to the involvement (knowing or otherwise) of barristers in money laundering, and the BSB had, at the time of their risk assessment, received no intelligence from the government or law enforcement agencies about the involvement or suspected involvement of any barristers in crimes within the remit of the regulated sector. It is further understood that the assessment of the level of risk² within the legal sector in HM Treasury's 2017 National Risk Assessment again identifies the areas of high-risk as being work that the Bar does not undertake, for example, conveyancing and the handling of client funds.

7. The risk profile of the Bar as a whole must therefore be considered to be very low indeed.

8. That is not surprising when one considers the nature of barristers' practice. The Bar Council has previously outlined this in its response to a number of recent consultations in this area³, including when setting out its view on the proposed Office of Professional Body AML Supervision (OPBAS)⁴, and most recently in its response to HM Treasury's consultation entitled "Anti-money laundering supervisory review consultation"⁵.

9. As to the structure of barristers' practice, despite reforms over the past 20 years or so, the Bar remains primarily a referral profession. Even where barristers are instructed directly by a lay client, itself under tightly regulated conditions, they remain prohibited from handling or controlling client money, operating or administering any client accounts, managing their client's affairs or conducting transactions.

² The legal sector, as a whole, is assessed as high-risk in relation to money laundering and low-risk in relation to terrorist financing.

³ See for example 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;

⁴ 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

⁵ Bar Council response to Anti-money laundering supervisory review (2017). Available here: http://www.barcouncil.org.uk/media/585120/bar_council_s_response_to_hmt_s_anti-money_laundering_supervisory_review..pdf

10. Further, the vast majority of barristers do not provide legal services which fall within the scope of the Regulations. Only a limited number of barristers provide services that fall within the scope of the Regulations. Those who do provide such services most commonly do so under instructions from solicitors who deal directly with the lay client, who are also subject to the Regulations and the supervision of the Solicitors Regulation Authority.

11. The BSB's 2017 AML/CTF Risk Assessment of the Bar (*supra.*) found that:

- the overall inherent risk profile of the Bar was judged to be low;
- the extent to which barristers engage in activity relevant to the Regulations is limited;
- there is little opportunity for criminals to use barristers directly to launder money (due to the aspects of barristers' practice noted at §9 and 10 above);
- the most likely areas in which the Regulations apply to the work of the Bar relate to *advisory* work relating to property / company formation / structures of the set-up of trusts;
- only eight chambers were identified as specialising in tax advisory work.
- there was no evidence of under-compliance with the Regulations, rather the BSB expressed its concern that there were some areas of over-compliance.

12. The Bar Council's view that the barristers' profession poses a very low ML/TF risk – and that in fact there is no risk at all arising out of the practices of the vast majority of barristers – is further 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.

13. The BSB already provides effective and proportionate AML/CTF regulation of barristers. We have not been alerted to any deficiency in the regulatory regime concerning the Bar that OPBAS is designed to remedy.

14. The imposition of OPBAS upon the supervision of a profession of such inherent low-risk, is such that the Bar Council, the Bar of Northern Ireland and the Faculty of Advocates have decided to issue a joint letter to express our strongly felt concerns.

15. It is against that general background that the specific questions posed by the current consultation fall to be addressed.

Question 1: Do you have any comments on the proposed sourcebook for professional body supervisors? Would greater detail or a more prescriptive approach be helpful?

16. The very concept of a generic, one-size-fits-all super-supervisor, with the required one-size-fits-all sourcebook, is contrary to the risk-based approach that is necessary to inform proper ML/TF supervision and *required* to be conducted by the Regulations. One of the consequences of the proposed, flawed, approach is the production of a draft sourcebook that is, inevitably, so generalised in its text to be incapable of specific objection. However, its generality contributes no valuable insight to how it will operate in practice. It does not address such questions as what areas it will give particular focus upon or how will it assign its resources to particular professions or services. At present it is difficult to see how it would assist, for example, the BSB in assessing whether the guidance offered to the Bar by the Legal Sector Affinity Group or the Bar Council⁶, is sufficient or being complied with. It *is* possible to see how the imposition a broader, less fact-specific super-supervisor working from an equally generic sourcebook, and the concomitant resource commitment required from the BSB as supervisor could lead to a *weakening* of the BSB's strength as an effective supervisory body.

Question 2: Do you have any comments on the FCA's cost-benefit analysis?

17. As noted above, nowhere in the consultation does one find any considered reference to the deficiency in regulation that OPBAS is intended to fill in relation to the regulation of the Bar in particular. The justification for its creation appears to lie in the suggestion that "the effectiveness of supervision is inconsistent" (para 1.7). However, there does not anywhere appear to be any attempt to focus resources on the areas in which supervision is less effective. No doubt this is at least in part due to the absence of any identification of which the claimed areas of inconsistency are.

18. It is therefore difficult to identify a "benefit" sufficient to justify the imposition of any further cost upon the Bar, which already funds its Regulator, the BSB. The fee levels that are touched upon in the consultation are therefore by definition disproportionate.

⁶ Bar Council "Money Laundering and Terrorist Financing" (2017). Available here: <http://www.barcouncil.org.uk/practice-ethics/professional-practice-and-ethics/money-laundering-and-terrorist-financing/>

19. Further, those fees themselves do not appear to have been arrived at in any way that renders them susceptible to analysis. This makes it somewhat difficult to attempt a cost-benefit assessment in relation to their impact.

20. The consultation at paragraph 3.9 contains a concession that establishing a link between predicate crimes and the creation of OPBAS will be “challenging”. That, it seems to us, is something of an understatement, and it remains to be seen whether any attempt will ever be made to gauge the impact of OPBAS in “[making] the UK’s financial system a more hostile environment for illicit finance by ensuring professional bodies supervise to a consistently high standard and by enhancing collaboration between supervisors and law enforcement” (para 3.8). Given that that is the perceived benchmark, however, it is striking that nowhere in the consultation is there any suggestion that the effectiveness of supervision will be improved by a move from the required bespoke, risk-based approach to supervision that presently pertains, to a one-size-fits-all, bird’s-eye view that is not even sector, let alone profession specific.

21. If there is a case that certain sectors or, better still *professions*, would benefit from more, or better supervision, then that case should be made specifically and clearly. Those who do not fall within the ambit of that concern would not then need to have precious resources inefficiently dedicated toward it. Such a targeted approach would, perhaps, make a better case for a limited form of OPBAS. However, from the point of view of the Bar Council, we have been unable to identify the benefits, either to our members, or to the public as a whole, from the blanket scheme proposed in the consultation.

22. In relation to possible models for the apportionment of OPBAS’s (as yet not properly costed) running costs, it is understood that a number of options are under consideration. The Bar would favour a model that focused not only upon the level of engagement with the Regulations but also factored in the areas where risk was likely to be more acute, as these will inevitably be the areas upon which OPBAS would be required to direct a greater proportion of its resources.⁷ To this end, recognition of the extremely low-risk profile of the Bar as a whole, and the limited number of barristers who practice in the regulated sector (which is likely to number in the low hundreds rather than in the thousands) should be factored into any contribution required of the BSB.

Bar Council
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⁷ If it is said that this is impractical or cannot be accurately done then that is yet further evidence that the areas of concern have not been identified, the risks not assessed and OPBAS is being imposed upon professions such as the Bar regardless of whether the need for it exists.

⁸ Prepared for the Bar Council by the Money Laundering Working Group

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