

BAR STANDARDS BOARD

REGULATING BARRISTERS

Response to HM Treasury Consultation Reform of the Anti-Money Laundering/Counter Terrorist Financing supervisory regime

Broadly, we are of the view that of the four options, OPBAS+ provides the best framework for advancing progress on the stated aims.

We fully support the aims of continuing to strengthen supervisory effectiveness and system coordination. We remain committed to working with a wide range of stakeholders to support these aims, both individually and collectively through the Anti-Money Laundering (AML) forums.

Before addressing the specific questions in the consultation, we would like to summarise the main points that we think HM Treasury should take into account when making the very important decision about how the AML supervisory regime is structured. In particular, we note that paragraph 1.29 of the consultation says that “different considerations will apply across the AML/CTF-regulated sectors, including the legal and accountancy sectors, and we encourage respondents to this consultation to indicate which sectors any evidence they provide is primarily relevant to.” We agree with this statement and urge consideration to be given to whether a single model best applies to equally to all supervisors. There are important differences between the professional bodies and their supervisors, and we would encourage HM Treasury to consider these carefully. We have set out below the most important factors about the Bar of England and Wales, and how we regulate the profession.

Representative/regulatory separation between the Bar Standards Board and the Bar Council

The lack of representative/regulatory separation seems to have been a key concern of third-party observers, but this is not the case for the Bar Standards Board (BSB) where there is robust separation. The Bar Council has established the BSB to exercise the regulatory functions. Regulatory independence is set out in the [Constitution](#) of the BSB. The Bar Council has in place arrangements which observe and respect the principle of regulatory independence, as defined in the Legal Services Board’s (LSB) [Internal Governance Rules](#).

Key points in the Constitution are:

- The BSB Board has a lay majority.
- The BSB is responsible for performing all regulatory functions (as defined in section 27(1) of the Legal Services Act 2007) of the Bar Council.
- The BSB is responsible for determining any question where a matter involves the exercise of a regulatory function.
- The BSB has no representative functions (as defined in section 27(2) of the Legal Services Act 2007).
- The BSB must at all times act in a way which is compatible with the principle of regulatory independence and which it considers is most appropriate for the purpose of meeting that principle.

This is underpinned by a [Protocol for ensuring Regulatory Independence](#). Key points in the Protocol are:

- The Chief Executive of the Bar Council and the Director General of the BSB shall report to the LSB any material failure to comply with this protocol.
- The Bar Council must not be involved in, or prejudice, the discharge of regulatory functions.
- No person exercising a representative function shall attend non-public sessions of the BSB Board or its committees, panels, decision-making panels or other bodies other than in exceptional circumstances. Any such attendance should be by specific invitation relating to a relevant piece of business that should be documented and made public.
- Where the BSB wishes to make a representation to the Bar Council, this should be set out in writing, making clear that this is being made in accordance with the protocol.

The regulatory framework for the Bar of England and Wales

There are much higher barriers to entry to the Bar than in some other professional bodies that are subject to the Money Laundering Regulations (MLRs), which are simply membership-by-choice organisations. These gatekeeping controls include:

- Education and training requirements that are set, regulated, supervised and enforced by the BSB, encompassing the need to successfully complete:
 - a post-graduate professional course (which is also internationally recognised as an entry route for some overseas jurisdictions) within an institution authorised by the BSB based on a framework of published standards; and
 - an intensive 12-month period of work-based training under the supervision of experienced barristers, to which entry is highly competitive.The curriculum and how it is assessed for both components (including a suite of professional-level exams) is set, regulated and supervised by the BSB.
- Fit and proper checks upon joining an Inn of Court as a student (required as part of the training pathway), and again at entry to the profession (Call to the Bar), including “Standard” criminal record checks.
- Annual application for authorisation by the BSB to obtain a practising certificate, including registration to conduct work under the MLRs.

Added to this, once qualified and authorised, barristers are subject to ten Core Duties and a rule book (the BSB Handbook) that set the framework for conduct and standards, which is

set, regulated, supervised and enforced by the BSB. Disciplinary action for the most serious cases of misconduct is determined by disciplinary tribunals that have a lay (non-barrister) majority.

Our rules also limit the scope of what barristers and authorised BSB entities are permitted to do. In particular, they are not permitted to:

- undertake the management, administration or general conduct of a client's affairs; nor to
- receive, control or handle client money apart from what the client pays a barrister for their services.

This generally limits the risk profile of the Bar in relation to the activities that fall within scope of the MLRs and which have been highlighted in the Government's National Risk Assessments as areas of highest risk (particularly conveyancing, client accounts and Trust and Company Services activities).

The BSB is also held to account as an effective regulator by the Legal Services Board (LSB), established under the Legal Services Act 2007 as our oversight regulator, according to its published performance framework. This will shortly explicitly encompass performance in relation to the new Economic Crime Regulatory Objective.

Leveraging wider regulatory knowledge and regulatory controls

We think that the biggest threat created by moving AML supervision of the Bar to another body would be the loss of synergy with this wider regulatory framework and consequent knowledge that we have about our regulated population through our wider role as a regulator of the Bar. The legal services regulatory framework that we act within has far greater breadth and depth than the MLRs. It means that our risk-based approach to regulation and our understanding of the profession is leveraged when we are supervising barristers in relation to the MLRs. Another body simply would not have that wider context of individual barristers and BSB entities, and the environment in which they practise. This knowledge forms an integral part of our AML risk assessments. We are able to achieve a depth of understanding of the Bar, and the persons and entities that we regulate, that is unlikely to be achieved by another single regulator acting solely for the purpose of supervision under the MLRs.

The consultation is predicated on the basis that system coordination needs to be improved and that this has been one of the most challenging areas in which to make progress. We think that creating an additional layer of supervision will create, rather than remove barriers.

Information sharing

It is acknowledged that there is a need to improve information sharing. We think that the main gap is between law enforcement the Professional Body Supervisors (PBSs)s, although the National Crime Agency has told us on a number of occasions that they consider the Bar to pose a low risk, which accounts for limited engagement compared to some other PBSs.

The PBSs have very good working relationships, meet often, and can and do contact each other easily when needed. A good example of this is the way that the Bar supervisors in Scotland, Northern Ireland and England and Wales collaborated to produce sector-specific

guidance. We have other examples where we have directly contacted other PBSs in both the accountancy and legal sectors about our approach to supervising persons of common interest.

On the face of it, it may seem attractive to limit the number of bodies that law enforcement has to engage with, but in practice they will need to go beyond any intermediary regulator and approach the BSB directly to obtain wider regulatory information that we hold. They already do so, and their information requests go beyond purely AML-related supervision outcomes.

We think that a better way to target this area for improvement would be to focus on strategies already in place in the [Economic Crime Plan 2023-26](#), such as to:

- “define a clear single version of the truth for our understanding of the threat and embedding a framework which enables the economic crime system to set priorities for collective public-private threat response”; and
- “enhance the exploitation of available data across the ecosystem to better prevent, detect, and pursue economic crime”.

These actions are critical in helping us to prioritise our response to the most significant risks and work collaboratively.

Another example is the new “Professional Enablers” working group, which we are a member of, which aims to ensure that PBSs are better able to target resources at suspected witting or unwitting “Professional Enablers”. This working group also has developed a series of actions to improve system-wide intelligence to support prioritisation of supervisory action. We think it would be a backward step to take the BSB out of this framework.

Information sharing gateways have the potential to deteriorate if supervision is consolidated and we were no longer a designated supervisor. Current obligations and powers would be lost, along with involvement in the AML forums where risk is discussed. All PBSs currently share information about emerging risk and good practice through the various AML forums (AML Supervisors Forum, Legal Sector Affinity Group, Legal Sector Supervisors, Legal Sector Information Sharing Expert Working Group and others). There is a wealth of experience and expertise in these forums that consolidation puts under threat. Alternatively, if the current PBSs continued to participate, cost inefficiencies would result from the duplication.

Continuity of progress

Much work has been done since the last FATF review by supervisors, both individually and collectively, to improve effectiveness. This work is ongoing. Any significant structural change will undoubtedly result in a significant period of disruption as new bodies take the necessary time to become established and effective. It is therefore essential that a priority consideration should be to not put at risk the good work that has already been done and continues to be progressed. The evidence for change therefore needs to be very strong. In the case of the BSB, OPBAS assessments do not provide evidence that supports the need for radical change. The last assessment was conducted in 2021, when no fundamental issues were raised with us, and we have kept OPBAS informed of progress since.

Costs

Creation of a new supervisory body will create additional costs that will need to be recovered, particularly under option 2 where OPBAS might remain alongside a new PBS Supervisor. Ultimately, these costs would have to be recovered from fees charged to consumers. We urge HM Treasury to think carefully about the cost-benefit and the wider implications for access to justice if practitioners withdraw from certain areas of practice.

We think that the hidden costs could be significant for the BSB, encompassing engaging with a new regulator to provide information to address the information gaps highlighted above.

Economic Crime Regulatory Objective

With the Economic Crime and Corporate Transparency Bill in its final stages, we anticipate that the Legal Services Act 2007 will shortly be amended to introduce a new Regulatory Objective to promote the prevention and detection of economic crime. In this broader context, we think that continuity of sector-specific AML supervision for the Bar of England and Wales makes most sense.

Other aspects of economic crime tend to be dealt with through the existing AML forums, by the same staff supervising under the MLRs. Again, either information sharing would be lost if we ceased to have a seat at the table of these forums, or costs in the system would be increased if we continued to attend these forums in addition to the new supervisor(s).

Chapter 2: Objectives

1. Do you agree that increased supervisory effectiveness, improved system coordination, and feasibility are the correct objectives for this project? Do you agree with their relative priority? Should we amend or add to them?

BSB response

We agree with the objectives and their relative priority.

We would also add that the direct and indirect costs of each option (to the regulators, the profession, consumers of legal services and the wider public) should be transparently measured as part of any decision-making process.

Chapter 3: OPBAS+

2. What would the impact be of OPBAS having the FCA's rule-making power? What rules might OPBAS create with a new rule-making power that would support its aim to improve PBS supervision?
3. Which, if any, of these powers should OPBAS be granted under this model? Are there any other powers that OPBAS could be granted under this model to aid OPBAS increasing the effectiveness and consistency of PBS supervision?

4. What new accountability mechanisms would be appropriate in order to ensure proportionate and effective use by OPBAS of any new powers?

BSB response

We note that OPBAS wishes to have a general rule-making power, subject to a consultation process. In our experience, OPBAS has sometimes strayed into being overly prescriptive rather than outcomes-focussed in its Sourcebook. Rules that are outcomes-focussed enable the PBSs to be risk- and evidence-based, and agile in their approach to supervision. We would encourage OPBAS to focus on outcomes if it is granted rule-making powers.

As OPBAS does not make public its assessment of individual supervisors, it is difficult to comment on the circumstances in which it envisages that such powers are currently needed. Any powers of sanction should be accompanied by an appropriate and transparent governance framework for decision-making and route of appeal.

5. Do you have evidence of any specific types of regulated activity which are at high risk of being illegally carried out without supervision?
6. Do you think a “default” legal sector supervisor is necessary? If so, do you think a PBS could be designated as default legal sector supervisor under the OPBAS+ option?

BSB response

Paragraph 3.11 the consultation asks about whether there is an issue with unsupervised legal firms, with specific mention of unsupervised barristers. The BSB Handbook defines a *practising barrister* as a barrister who is supplying legal services and holds a practising certificate. We supervise practising barristers who are “relevant persons” under the MLRs.

There are many barristers who do not have a practising certificate either by choice or because they do not qualify for a practising certificate because they have not completed pupillage (the work-based learning component of Bar training). Such barristers are called “*unregistered barristers*” because they are not on the public register of barristers who have practising certificates. Even though some rules apply only to practising barristers, all unregistered barristers remain members of the profession and are expected to conduct themselves in an appropriate manner; they remain subject to certain Core Duties and Conduct Rules at all times and can be subject to disciplinary action for breaches. If they provide legal services, they must comply with all the Core Duties and they have a responsibility not to mislead anyone about their status.

It is a criminal offence for a barrister without a practising certificate to provide legal services which are *reserved legal activities* under the [Legal Services Act 2007](#). We have produced [guidance](#) on what legal services may be provided by a barrister without a practising certificate and on the rules which must be followed when doing so.

Unregistered barristers who conduct work that falls within the scope of the MLRs are not supervised by the BSB. In some cases, they are employed by firms that are regulated by the FCA or another PBS, such as the SRA. We have previously agreed with HMRC that any unregistered barristers acting as Trust and Company Service Providers (TCSPs), which is

not a reserved legal activity and therefore does not require a practising certificate, must register with HMRC. It would be helpful to be able to set out in the MLRs that HMRC is the default regulator for any unregistered barristers not working in a firm that is supervised by another regulator under the MLRs, so that we can refer to that in our guidance for unregistered barristers.

7. Overall, what impact do you think the OPBAS+ model would have on supervisory effectiveness? Please explain your reasoning.
8. Overall, what impact do you think the OPBAS+ model would have on system coordination? Please explain your reasoning.

BSB response

As an oversight regulator, OPBAS needs to be assured that we are meeting our obligations under the MLRs and supporting the UK's strategic approach to the areas of highest risk.

The standards expected of PBSs, and against which they are supervised by OPBAS, is set out in the OPBAS Sourcebook. Effectiveness is measured based on the extent to which PBSs are meeting those standards. Paragraph 1.14 of the consultation says that OPBAS reported in April 2023 that technical requirements of the MLRs has significantly improved since OPBAS was established in 2017 and we think that further improvements can best be made under this model.

However, we think there are limitations to the way that OPBAS currently works. OPBAS staff turnover is high and that makes it difficult for them to grow their knowledge and understanding and develop into their role. All in all, this leads to quite disjointed communication and the OPBAS staff tend to become quite prescriptive and directive, often pushing us in directions without being clear about how this will achieve the UK strategic aims and whether the diversion of resource is cost-effective. We are not convinced that the resourcing of OPBAS has been applied to achieve the best results. We would like to see a more sophisticated and collaborative relationship between OPBAS and the PBSs, which may need to be resourced differently.

9. Overall, how significant do you think feasibility constraints would be for the OPBAS+ model? Please explain your reasoning.

BSB response

As noted above, of the four options we favour this one. It provides the best scenario for continuity of the progress made so far because it is the most feasible to implement and it lacks the threats that are outlined in our opening paragraphs to this consultation response and under the options below.

Chapter 4: PBS Consolidation

10. Were we to proceed with the PBS consolidation model, what would the relative advantages be of (a) a UK-wide remit, (b) retaining separate PBSs in the Devolved Administrations? Which would best achieve the consultation objectives? Please answer with explicit reference to either the legal sector, the accountancy sector, or both.

BSB response

Whilst the Bar of England and Wales is not directly affected, it seems likely that the legislative arrangements for the legal sector in the Devolved Administrations would make it technically harder to consolidate the legal sector into a single PBS.

11. How could HM Treasury and/or OPBAS ensure effective oversight of consolidated PBSs under this model? Would it be appropriate to provide OPBAS with enhanced powers, such as those described in the OPBAS+ model description?

BSB response

HM Treasury was not able to resource the co-ordinating role that OPBAS now plays, therefore it seems likely that OPBAS will still be needed under this model. We are concerned about the cost implications of funding two regulators under this model. Ultimately, these costs would have to be recovered from fees charged to consumers. We therefore urge HM Treasury to think carefully about the cost-benefit of this model.

12. Under the PBS consolidation model, do you think that HMRC should retain supervision of ASPs and TCSPs, which are not currently supervised by PBSs? Why/why not?

BSB response

As described above, in relation to unregistered barristers, we think that the current model with HMRC as the default supervisor is the most efficient one because there is no register of unregistered barristers.

13. What would the impact be of consolidated PBSs having a more formal role in identifying firms carrying out unsupervised activity in scope of the MLRs? What powers would they need to do this?

BSB response

For practising barristers and BSB-authorized entities, this function is carried out by the BSB and it is likely that a consolidated PBS would have to rely on the BSB in the context of our wider regulatory remit and knowledge of the people and organisations that we regulate.

14. Under the PBS consolidation model, what would the advantages and disadvantages be of a consolidated accountancy or legal sector body supervising a range of different specialism/professions for AML/CTF purposes?

15. What steps, if any, could HM Treasury take under this model to address any inconsistencies in the enforcement powers available to supervisors?

16. What option, to the extent they are different, would be preferable for providing for supervision of non-members under the PBS consolidation model? Are there alternatives we should consider?
17. What powers, if any, might be required to minimise disruption to ongoing enforcement action and to support cooperation between the PBSs retaining their AML/CTF supervisory role and the PBSs which are not?
18. Overall, what impact do you think the PBS consolidation model would have on supervisory effectiveness? Please explain your reasoning.
19. Overall, what impact do you think the PBS consolidation model would have on system coordination? Please explain your reasoning.
20. What additional powers or tools, if any, could enable OPBAS to ensure the transition to a new model is smooth and supervision standards do not fall in the interim?

BSB response

As we have set out in the opening paragraphs of our consultation response, whilst consolidation appears to be attractive, we think that the disadvantages outweigh the apparent advantages, specifically in relation to:

- leveraging wider regulatory knowledge and regulatory controls;
- information sharing;
- continuity of progress;
- cost; and
- threat to our ability to meet our obligations in relation to the new Economic Crime Regulatory Objective.

21. How do you believe fees should be collected under the PBS consolidation model?

BSB response

The Bar is currently subject to two fees, those levied by OPBAS and the economic crime levy. These are collected in different ways, with the OPBAS fee being levied on supervisors and the economic crime levy being collected directly by HMRC. Given that under this model the BSB would be removed from its supervisory role, it would create additional costs for the BSB to identify barristers and BSB entities in scope of the regulations, since only a small proportion of practising barristers conduct work that is in scope. In practice, however, it seems likely that the consolidated PBS would have to rely on the BSB to collect this information and the associated fees.

22. Overall, how significant do you think feasibility constraints would be for the PBS consolidation model? Please explain your reasoning.

BSB response

We do not think this option is feasible or necessary for the reasons set out in the opening paragraphs of our consultation response.

Chapter 5: Single Professional Services Supervisor

23. Do you agree these would be the key structural design features to consider if creating a new public body (whether it was an SPSS or an SAS) Should anything be added or amended?

BSB response

We agree and in particular support the statement in paragraph 5.5 that the new body would be expected to be operationally independent of any ministerial department. The legal sector's independence could be brought into question under models 3 and 4 which might make the UK a less attractive place internationally for the supply of legal services. The proposal of a public body looking at barristers' files as part of AML supervision could put at risk the principle of legal professional privilege. Barristers may be instructed in cases against the government and the scenario of a public body supervising that barrister could give rise to conflicts of interest.

24. If an SPSS were to be created, which sectors do you think it should supervise?
25. Were an SPSS to be created, what powers should it have?
26. How should enforcement responsibility be transferred should an SPSS be created?
27. What powers should HM Treasury have to oversee an SPSS?
28. Overall, what impact do you think the SPSS model would have on supervisory effectiveness? Please explain your reasoning.
29. How significant would the impact be on firms of splitting AML/CTF supervision from wider regulatory supervision in the sectors to be supervised by the SPSS?
30. Overall, what impact do you think the SPSS model would have on supervisory effectiveness? Please explain your reasoning.
31. Overall, how significant do you think feasibility constraints would be for the SPSS? Please explain your reasoning.

BSB response

As we have set out in the opening paragraphs of our consultation response, whilst consolidation appears to be attractive, we think that the disadvantages outweigh the apparent advantages, specifically in relation to:

- leveraging wider regulatory knowledge and regulatory controls;
- information sharing;
- continuity of progress;
- cost; and
- threat to our ability to meet our obligations in relation to the new Economic Crime Regulatory Objective.

Chapter 6: Single Anti-Money Laundering Supervisor

32. Do you foresee any major challenges for effective gatekeeping, under either the SPSS or SAS model? If so, please explain what they are, and how you propose we could mitigate them?
33. Overall, what impact do you think the SAS model would have on supervisory effectiveness? Please explain your reasoning.
34. Does the separation of AML/CTF supervision from general regulatory activity present a major issue for those firms currently supervised by the statutory supervisors? Please explain your reasoning.
35. Overall, what impact do you think the SAS model would have on system coordination? Please explain your reasoning.
36. Overall, how significant do you think feasibility constraints would be for the SAS? Please explain your reasoning.

BSB response

Please see our response to the previous group of questions in chapter 5 above.

Chapter 7: Sanctions Supervision

37. Given the change in the sanctions context in the UK since Russia's invasion of Ukraine, have supervisors changed their approach to oversight of sanctions systems and controls amongst regulated populations? If so, what activity has this entailed?
38. Do supervisors need additional powers to monitor sanctions systems and controls effectively, or can this be done under existing powers? What would any new powers need to consist of?
39. Aside from legislative powers, do you foresee any other barriers to supervisors effectively monitoring sanctions systems and controls?
40. Should any new potential supervisory powers relating to sanctions broadly cover all types of UK sanctions?

BSB response

The government has sought to engage with regulators about sanctions compliance through the AML forums. However, the danger with this approach is that all barristers must comply with the sanctions regime but only a small proportion conduct work that is in scope of the

MLRs. Therefore when considering the appropriate supervisory regime for sanctions, the two subjects should not be conflated.

We had already introduced testing compliance with the sanctions regime in 2019 as part of our standard AML supervision work programmes, so this was in place prior to the imposition of the raft of new sanctions that were imposed following the invasion of Ukraine.

Following the invasion of Ukraine and the imposition of the new sanctions, the BSB:

- documented a separate risk assessment covering the Bar as a whole rather than the minority subject to the Money Laundering Regulations, with advice from our independent expert on matters relating to Money Laundering and Sanctions;
- implemented a communications strategy to ensure that all barristers were aware of their obligations, including creating a new dedicated page on our website with information for barristers (which we have regularly updated as further information has become available and in response to questions from barristers) and providing information in a number of our monthly regulatory updates to the profession; and
- conducted a risk-based thematic review that captured areas of the Bar that do not engage in work under the Money Laundering Regulations and published a [report on our findings](#) in June 2023.

We have shared our findings with the Bar Council, which has set up a working group to develop guidance for the Bar. Our initial rating of the Bar being used as enablers of sanction breaches was medium risk and although we are assured through this thematic review that there is a good awareness of the sanctions regime amongst the commercial Bar, we will continue to maintain this rating whilst actions set out in the report are ongoing.

We would welcome additional powers to monitor sanctions systems and controls effectively. It would be helpful if the government sets out in legislation that sanctions supervision is a regulatory function and barristers are obligated to cooperate with us in this regard. Although we have not yet been challenged on sanction supervision, there is a risk of challenge if we request information that is not clearly within our regulatory function. In addition, as a risk and evidence-based regulator, it is often effective for us to establish an information gateway with the relevant body, OFSI in the case of sanctions licences and breaches. This will enable us to focus our resources on supervision activities based on the evidence of risk.

Options Comparison

41. How would you expect losing AML/CTF supervision to affect PBS' financial models, and the fees charged to supervised populations?

BSB response

Barristers pay a practising certificate fee, which is subject to consultation and approval by the Legal Services Board. Our costs of supervising the profession under the MLRs is recovered through the practising certificate fee. The BSB does not charge a separate fee for AML/CTF supervision.

We anticipate there would be ongoing costs for the BSB associated with the need to engage with a new supervisor under options 2 to 4, for the reasons set out in our consultation

responses, ie since information and intelligence sharing gateways would have to remain open.

42. Based on your experience and the considerations set out in this document, what is your analysis of the relative extent to which each of the four reform options would lead to (a) improved supervisory effectiveness and (b) improved system coordination.

BSB response

Broadly, we are of the view that of the four options, OPBAS+ provides the best framework for advancing progress on the stated aims, based on the reasoning we have set out in our response.

Public Sector Equality Duty

43. Are you able to provide evidence as to how the options set out in this document would help or harm individuals or households with protected characteristics?

BSB response

We do not have any evidence on how any of the four models will impact those with protected characteristics.

**Bar Standards Board
28 September 2023**