
Office for Professional Body Anti-Money Laundering Supervision: a sourcebook for professional body supervisors

Consultation Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.
2. The Bar welcomes the opportunity to comment on the Financial Conduct Authority's consultation on the proposed text for a specialist sourcebook for professional body supervisors under the remit of the new Office for Professional Body Anti-Money Laundering Supervision (OPBAS). We have engaged extensively with HM Treasury around AML supervision by responding to a range of consultation exercises throughout 2016-17, including the transposition of the Fourth Money Laundering Directive in December 2016, the Money Laundering Regulations 2017 in April 2017, the call for further information on the AML supervisory regime in April 2017 and the draft Oversight of Professional Body AML Supervision Regulations in August 2017. Our response detailed below provides commentary on the sections of the sourcebook document of direct relevance to the legal profession in Northern Ireland and addresses the two questions contained in the paper.

Summary

3. The Bar notes the section at paragraph 1.10 entitled the "outcome we are seeking" with the FCA stating that OPBAS will take steps to ensure that professional body supervisors meet the standards expected of them when they pursue their AML supervision. This will be in addition to OPBAS's role in encouraging "collaboration and information sharing" between professional body supervisors, statutory supervisors, law enforcement agencies and others.
4. Whilst the Bar appreciates the intention behind OPBAS in seeking to ensure supervisor compliance with the obligations contained in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, we have repeatedly expressed concerns to HM Treasury that this approach represents a 'one size fits all' that does not translate across the diverse AML supervisory landscape. We believe that appropriate and proportionate risk-based

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supervision is being incorrectly categorised as inconsistent and therefore in need of another layer of regulation to instil common practice across all PBSs. Unfortunately this sourcebook consultation only reinforces that the OPBAS proposals fail to recognise the specific lower risks that apply to members of the Bar of Northern Ireland and appear to penalise a risk-based approach to supervision by instead imposing a generic and ill-fitting approach.

5. It is worth noting that regardless of the structural and regulatory environment in other parts of the UK, the Bar remains an independent referral Bar with no form of direct public access in Northern Ireland. The lay client relationship is established, maintained and controlled by the instructing solicitor who is supervised by the Law Society. Furthermore, barristers in Northern Ireland are not permitted to hold or handle client money. They are paid by the instructing solicitor and are not permitted to have any financial relationship with the lay client. Our barristers are prohibited from entering into a partnership with another barrister, professional client or any other entity or individual and must not provide legal services within Northern Ireland in any capacity or as part of any entity or arrangement other than in their capacity as a member of the Bar. A barrister also must not enter into a fee sharing arrangement with another barrister, professional client or any other entity or individual.
6. Consequently, the Bar of Northern Ireland operates at the lower end of the risk scale for AML. The current approach being adopted by HM Treasury and the FCA suggests a fundamental misunderstanding of the nature of the independent referral bar model which represents one of the cornerstones of the UK's legal system. We do not believe that the current role for OPBAS outlined in the sourcebook document adequately recognises the low-risk base of the barrister profession with HM Treasury and the FCA still failing to differentiate the independent referral bar from others involved in managing more high-risk activities elsewhere.
7. The section on "unintended consequences of our intervention" at paragraph 1.11 appears to acknowledge that there are a number of risks associated with the creation of OPBAS. The addition of significant burdens which are disproportionate to the level of risk represented by PBSs in this sector will see supervisors becoming diverted from their core functions as they attend to an increasing number of administrative procedures. This will ultimately result in less active supervision as supervisors are forced to deal with this layer of bureaucracy and may also mean that some will have to withdraw. However, this section of the document offers no solutions to address this potential issue. Therefore we are prepared to accept that there may be a role for OPBAS in encouraging collaboration and information sharing as outlined at paragraph 1.10 but we

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cannot concur with the observation at 1.13 that the oversight of OPBAS as presently designed will not be “unduly burdensome”.

8. Whilst the Bar has made the following point to HM Treasury numerous times, we restate that the most appropriate role for OPBAS to perform would be to work in partnership with supervisors to develop high standards of supervision with a focus on promoting best practice guidance across the sector. The Legal Sector Affinity Group has already developed wide ranging and detailed guidance to assist independent legal professionals in meeting their obligations under the AML/CTF regime which is currently under consideration for approval by HM Treasury. We believe that expert input into the future development of this piece of work as it evolves represents the most appropriate role for OPBAS in strengthening the supervisory regime for barristers.

Q1. Do you have any comments on the proposed sourcebook for professional body supervisors? Would greater detail or a more prescriptive approach be helpful?

9. The Bar of Northern Ireland has reviewed the details contained in the draft sourcebook text. We welcome the attempt to provide some level of guidance focused on the expectations of OPBAS for professional body supervisors. However, we consider that the information produced by the FCA remains too general and is not specific to the legal sector in this jurisdiction. It is evident that both HM Treasury and the FCA lack any awareness of the operation of the profession in Northern Ireland and it therefore remains difficult to translate the various oversight requirements into this sector.

Section III

10. We note section III on governance which links to Regulation 49 of the Money Laundering Regulations 2017 and requires a professional body to make arrangements to ensure their supervisory functions are exercised independently of any of their other functions which do not relate to disciplinary matters. The Bar of Northern Ireland presently achieves effective separation and independence between its regulatory and representative functions. The regulatory activity of the Bar Council is overseen and discharged on behalf of the Bar Council by a Professional Conduct Committee which operates independently from the main Bar Council. The system in Northern Ireland has been the subject of extensive and independent review by Government and has been structured in accordance with the existing recommendations that emerged from this review.

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11. The 'Bain report' conducted by Sir George Bain for the Department of Finance and Personnel was officially titled '*Legal Services in Northern Ireland: Complaints, Regulation, Competition*'. A number of factors contributed to the Bain Committee's view that proposals in respect of England and Wales should not be adopted for Northern Ireland:

*"The absence of a regulatory maze in Northern Ireland that requires simplification, the small size of the legal professions, and their relatively good regulatory record compared with their counterparts in England and Wales led us to conclude that simply transferring Clementi's proposals and, in particular, a Legal Services Board, to this jurisdiction would not be appropriate. But we do believe that more effective oversight of the legal professions is required in Northern Ireland."*¹

12. The Bain Committee considered the question of the separation of professional regulation from representation, which Clementi considered should, within the internal structures of each organisation, be complete. The Bain report concluded that:

*"In respect of other aspects of regulation, however, the position is not as clear-cut. We are mindful that there is no history or current evidence of regulatory failure under the present arrangements, and no suggestion has been made to us that the professional bodies' general regulatory powers have been exercised against the public interest. But it has been suggested that within a small jurisdiction there is considerable opportunity for the representative and regulatory roles of the professional bodies to inform one another. And it has been further suggested that in practice the strict separation of regulatory and representative functions within relatively small professional bodies, in a small jurisdiction, would create difficulties."*²

13. It was therefore concluded that formal separation was not required for these other aspects of regulation; instead strong and effective oversight and increased lay participation held the key to improvement.
14. Consequently, the Bar takes the view that our representative and regulatory objectives are complementary, ensuring that the quality and standard of service offered to clients remains consistently high. Furthermore, there are a number of imminent regulatory changes taking place in Northern Ireland which have arisen from the Bain review and which will provide for greater Government oversight,

¹ Legal Services Review Group, 'Legal Services in Northern Ireland: Complaints, Regulation, Competition', (2006) at https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/legal_services.pdf (last accessed 20 October 2017)

² Ibid paragraph 3.35

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such as the appointment of a Legal Services Oversight Commissioner under the Legal Complaints and Regulation Act (Northern Ireland) 2016. Therefore we have no difficulty in concluding that our organisational structure will assist in promoting coordination and internal information sharing with senior management already actively engaged with the Bar of Northern Ireland's approach to AML supervision.

Section IV

15. The Bar notes the section IV on a risk based approach with the statement that this means "focusing efforts where the risks are highest" which highlights the requirement under Regulation 17(4) to develop risk profiles across the membership. As referenced elsewhere the independent referral Bar model operates at the lower end of the risk scale for AML, yet there is little recognition in the sourcebook that the obligations on supervisors and the resources required to support these efforts will differ in any way from those operating in high-risk sectors. We accept that it will be appropriate for some supervisors to allocate resources in a way that will allow them to shift their focus to areas with a higher risk as required but this approach has limited relevance to the Bar of Northern Ireland.
16. Furthermore, the Bar notes the observations around the features of a supervisory regime that supports industry adopting a risk-based approach on page 17. We welcome the statement that this should involve "a principles-based supervisory approach that encourages a professional body's membership to aim for achieving positive outcomes... rather than exclusively concentrating on compliance with prescriptive and detailed rules". We also note the acknowledgement that "principles can be more adaptable to different circumstances than detailed rules and are more likely to foster innovation and imaginative approaches in industry". However, we find it is difficult to accept that this overarching principles-based approach is recommended for the membership yet supervisors are being expected to provide £2 million to finance OPBAS which to date has failed to show any flexibility in dealing with the low-risk base presented by the barrister profession in Northern Ireland.
17. Despite these difficulties, we are keen to evidence the full compliance of our membership with the Money Laundering Regulations 2017. The Bar believes that a single risk profile at the level of a 'cluster' for our membership of 600 barristers would suffice to meet the requirements given the size of the profession in this jurisdiction and could be integrated into our wider approach to supervision. The Bar's supervisor is also responsible for admission to the profession and fitness to practise proceedings and therefore AML supervision fits within this broader approach.

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Section V

18. The Bar notes the various supervisory tools for monitoring the adequacy of members' AML defences as outlined in section V of the sourcebook. We welcome the recognition that "many will be used only rarely" as a number are of limited relevance to our membership. The initial suggestion of professional body supervisors performing a gatekeeper role in considering whether a member meets the "ongoing requirements for continued participation in the profession" in relation to expectations around AML compliance is entirely appropriate under the Bar's supervisory model.
19. We also note the range of tools outlined which should be "tailored to the scale and nature of the member", including meetings with senior management, questionnaires, periodic information return and ad hoc information requests. Given that the independent referral Bar operates at the lower end of the risk scale for AML, we anticipate that a number of these methods will be of greater assistance to PBSs working across other higher risk sectors. However, it is worth noting that our members conduct their work from one common location, namely the Bar Library in Belfast, which affords an enhanced ability to engage with members to promote compliance, raise awareness and monitor performance in line with the requirements under Regulation 46.
20. We would also highlight that at present any failure by a member to comply with the obligations mandated by a supervisor will result in an immediate referral to the Bar's disciplinary process through the Professional Conduct Committee for professional misconduct under Section 8 of the Bar's Code of Conduct. This can result in the imposition of a range of penalties, including significant fines and suspension or disbarment from practise.
21. The Bar also notes the reference to thematic work with professional body supervisors having the option to involve a number of members in a project to consider a particular aspect of AML arrangements. We would have no difficulty with such a suggestion within the legal sector given that targeted thematic review findings on emerging trends could potentially be usefully shared through AML Supervisors Forum and Affinity Group discussions.
22. The section relating to guidance and communications highlights a range of steps that PBSs can take to make their expectations clear to the membership. As referenced above, the Legal Sector Affinity Group has already developed wide detailed guidance to assist independent legal professionals in meeting their AML obligations which is under consideration for approval by HM Treasury. The Bar would be content to identify an appropriate provider to deliver AML training to the membership in order to supplement the LSAG guidance. Any training in the

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NI context would most likely take the form of a face-to-face training seminar or the completion of an online training session. We would also anticipate providing the membership with email updates detailing relevant AML guidance as and when necessary in line with Regulation 47. In addition, the Bar would have no issue with addressing individual queries from the membership by way of correspondence or meetings.

Section VI

23. The Bar notes section VI addressing information sharing between supervisors and public authorities in relation to Regulation 50. We have no difficulty with the point that PBSs should take part in information sharing arrangements such as the AML Supervisors' Forum which the Bar of Northern Ireland is already engaged with. We would also point to chapter 9.4 of the LSAG draft guidance document which deals with the sharing of information within the regulated sector and joint disclosure reports. It is worth noting that a legal professional will only be able to share information if legal professional privilege does not apply.
24. However, we are aware that certain sections contained in Part 7 of the Proceeds of Crime Act 2002 contain provisions for disclosure of information to the National Crime Agency. Every barrister called to the Bar of Northern Ireland is subject to the Bar's [Code of Conduct](#) which sets out the standards of professional conduct and practise required of barristers in this jurisdiction. Section 16.7 of the Code highlights that: *"A barrister must not divulge, without the consent of the lay client, confidential information entrusted to him unless: b) the circumstances give rise to a public or statutory duty of disclosure"* which highlights that our members are expressly required to make a disclosure where required under relevant legislation, which includes the relevant clauses under the Proceeds of Crime Act 2002.
25. In terms of intelligence sharing, the Bar is cautious given the risks of prejudicing investigations or causing commercial harm particularly given the comment in section VI that "intelligence should be shared about active investigations, not just completed cases". In the Northern Ireland context, we take the view that information in respect of the outcome of any investigation should be shared with supervisors in the legal sector as early as possible. However, ultimately there would be a need for protocols to be developed between the Bar Council, Law Society and law enforcement to highlight detailed procedures around the sharing of sensitive information within this sector.
26. The Bar has no issue with appointing a Single Point of Contact in accordance with Regulation 49. The requirement under Regulation 46(5) to appoint a nominated officer to report knowledge or suspicions to the National Crime Agency would

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also be the same person as the Single Point of Contact. The need for whistleblowing arrangements under Regulation 46(2)(e) presents no particular difficulty given that this could be dealt with under the Bar of Northern Ireland's comprehensive whistleblowing policy which was implemented in 2015.

Section VII

27. Section VII on information and guidance for members relates to comments previously made above on guidance and communications in paragraph 19. The Bar has no difficulty in providing information to members about the money laundering risks the membership faces by way of email updates. We would also seek to consistently provide any practical assistance where possible by circulating information from LSAG and the various sources outlined in Regulation 47(3) relevant to the legal sector in Northern Ireland. However, given the low-risk associated with the independent referral bar we anticipate that this would take place only when new, up-to-date and relevant information is made available to avoid any confusion amongst the membership. It would also be necessary to liaise with the Legal Services Oversight Commissioner in Northern Ireland to ensure a coherent interpretation of guidance requirements in accordance with the LSOC's remit. We also note the comment that PBSs can gather members' views on money laundering risks and the Bar would have no difficulty in integrating this into our wider membership survey which runs on a bi-annual basis.

Section VIII

28. The Bar will take steps to ensure that any staff members dealing with AML controls will receive appropriate training in relation to section VIII. We would refer to the relevant sections of the LSAG guidance at chapter 3.7 which provides further clarity to the sector on this. However, given the low-risk presented by members of the Bar of Northern Ireland it is likely that the implications of Regulations 49(1)(c) and 46(2)(b) for the organisation's staff will be minimal. These regulations will undoubtedly be of greater significance to larger PSBs working in high-risk sectors.

Section IX

29. Section IX dealing with enforcement under Regulation 49(1)(d) highlights that PBSs should be able to take appropriate action against relevant persons where they have failed to meet their AML obligations. As referenced elsewhere, our members are subject to *"an over-riding duty to the court to ensure the proper administration of justice"* under section 4.1 of the Code of Conduct. Any member who fails to comply with any of their duties or the standards required may be referred to the Professional Conduct Committee for professional misconduct under Section 8 of the Code which can impose a range of penalties.

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30. The Bar of Northern Ireland is keen to incentivise compliant behaviour across the membership and accepts that it will be appropriate to use a range of tools to address non-compliance, including the use of directions to members to act on remedying any issues. We note the paragraph on page 29 which highlights that a PBS must satisfy OPBAS “that its powers are adequate and that they are used in appropriate cases to advance their functions as AML supervisors”. The Bar has no difficulty with maintaining records of enforcement action in line with this requirement.

Section X

31. However, it would be helpful to receive clarification around the administrative workload that this might entail given the reference to this documentation being used for the purpose of “quality assurance testing” by OPBAS. In addition, there is a suggestion in section X that supervisory work should be subject to “internal cross-checks by internal independent persons”. Whilst this extra layer of quality assurance work and engagement with OPBAS might be appropriate for a large PBS working in a high-risk sector, we are concerned that this level of work will place an onerous administrative burden on lower risk PBSs such as the Bar of Northern Ireland.

32. The Bar of Northern Ireland has no issue with contributing to the annual questionnaire submission as required under Regulation 51. We would welcome further information around the structure of OPBAS’s standard template as we consider that the current annual reporting mechanism with HM Treasury is sufficient for our reporting needs. We believe that it would be disproportionate to expand on the current template within the legal sector in Northern Ireland but accept that this may be of greater relevance to other sectors.

Q2. Do you have any comments on the FCA’s cost benefit analysis?

33. The proposals fail to provide any persuasive case that the benefits of OPBAS will outweigh the costs to those affected by it. For the reasons articulated above, the benefits have been overstated and the costs proposed are excessive, not only in terms of estimated direct costs, but also when factoring in the true impact of the indirect costs that will arise from the proposals.

34. The Bar is very concerned at the detail surrounding the estimated running costs for OPBAS of £2 million per year detailed in chapter 3’s cost benefit analysis which will be passed on to the 22 professional body supervisors. Whilst we note that the structure of the charging regime will be consulted on by the Financial Conduct Authority at some point in Autumn 2017, the Bar of Northern Ireland cannot

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accept even in principle this level of resource and method of recoupment. The significant level of projected cost and the impact of this on our membership is unacceptable and provides yet further evidence of a fixed approach to AML supervision that fails to take into account the particular circumstances of the legal sector and the independent referral bar.

35. We fail to see why OPBAS cannot be established as a self-funded lean entity which demonstrates value for money by possessing a narrowly defined remit limited to providing a source of expert AML guidance to assist supervisors in their specialist sectors. It could be argued that OPBAS is filling a perceived vacuum in central government and will avoid duplication or overlap within government and FCA functions once formed but any savings or benefits to be gained from this approach have not been articulated to supervisors. Instead, this represents an unreasonable attempt to fund the body by means of levying the professional bodies who will derive the least value from the creation of this entity.
36. Furthermore, it remains unclear from the cost benefit analysis as to how the FCA will seek to approach the charging of professional body supervisors. It is worth noting that any suggestion under a future FCA fees consultation of OPBAS's running costs being apportioned equally across the 22 supervisors, rather than a per capita split allocated across each supervisor according to the number of professionals covered by OPBAS, would be regarded as completely unfair by organisations like the Bar of Northern Ireland with just over 600 members. This contrasts with other PBSs included under OPBAS's remit which have significantly more members, for example the Institute of Chartered Accountants in England and Wales with 147,000 members, the Institute of Chartered Accountants of Scotland with 20,000 members and the Chartered Institute of Taxation with over 17,000 members.
37. We have highlighted previously to HM Treasury that there appears to be no awareness that the OPBAS fee is yet another form of regulation on the legal profession and would represent the third iteration of expanding supervisory structures which we will have been required to finance in Northern Ireland, given the imminent introduction of a levy to fund the Office of the Legal Services Oversight Commissioner under the structures created by the Legal Complaints and Regulation Act (Northern Ireland) 2016 and the Department of Justice's statutory registration scheme. Therefore we continue to question how these additional OPBAS fees can be justified to our membership as proportionate to the level of risk represented by the Bar of Northern Ireland. The FCA's current consultation has failed to provide any further detail to persuade the Bar that a running cost of £2 million is necessary.

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38. Further to the £2 million running costs, we note the suggestion at paragraph 3.5 that the 22 supervisors will be likely to incur additional annual costs totalling £875,600 or £39,800 each. The table provided on page 9 highlights average estimates for some of the costs to be incurred, such as OPBAS site inspections and ongoing participation in information sharing arrangements equalling 120 man-days, which will represent a significant additional burden to the Bar of Northern Ireland. We consider this extra layer of cost is wholly disproportionate to the level of risk presented by our members and the expectation that this organisation will be prepared to plan and budget for such a high level of engagement in the short to medium term are completely misguided.
39. In addition, we note the section on benefits at paragraph 3.8 with the statement that OPBAS is being created to make the UK's financial system a more hostile environment for illicit finance as it "aims to make it harder and more costly for criminals to benefit from their crimes". The Bar has no difficulty with this aim but we believe it is worth pointing to the Money Laundering Advisory Committee's National Risk Assessment for 2017 which highlighted that high risk areas for the exploitation of legal services relate to the set-up of trusts and companies, property purchases and the transfer of funds through client accounts. These particular risk areas are not applicable to the work of the NI's independent referral bar and therefore the remit of OPBAS as presently designed is aimed at addressing a problem which does not currently exist within our sector.
40. In summary, the Bar takes the view that the cost benefit analysis detailing the projected running costs for OPBAS and additional resource implications for PBSs is entirely unacceptable. We fail to see how the excessive £2 million running cost per year can be shown to be justifiable, controlled and represent value for money. We are also unsatisfied at present as to the lack of detail on how costs will be controlled and how efficiency and value for money will be assessed and proven.
41. We accept that it is possible that the business case for the present model for OPBAS will assist the Government in bringing the UK's AML/CTF regime into line with international standards ahead of the Financial Action Task Force's upcoming evaluation during 2018. However, this assessment is flawed as it fails to take into consideration the needs of this organisation in operating a viable supervisory model which ensures that any risks are managed and mitigated appropriately. Consequently, we are unconvinced that the cost benefit analysis makes a compelling argument for the creation of OPBAS under a model which sees the costs being borne by the profession.