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# Recovering the costs of the Office for Professional Body Anti-Money Laundering Supervision: fees proposals

Consultation Response

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## Introduction

1. The Bar Council is the regulatory and 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 Council supervises barristers who are members of the Bar in Northern Ireland. The Bar Council derives its supervisory authority from the Code of Conduct that applies to all barristers within Northern Ireland and from the associated constitution, bye-laws and regulations of the General Council of the Bar of Northern Ireland and the Inn of Court of Northern Ireland. Hence the Bar Council is listed within Schedule 1 of The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 as being the supervisory authority in relation to the relevant persons that fall within its remit.
3. In terms of background, 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.
4. The 'Bain report' was officially titled 'Legal Services in Northern Ireland: Complaints, Regulation, Competition'. A number of factors contributed to the Bain Committee's view that regulatory 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*

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*appropriate. But we do believe that more effective oversight of the legal professions is required in Northern Ireland.”<sup>1</sup>*

5. In addition, there are a number of imminent regulatory changes taking place in Northern Ireland which have arisen from the Bain review and will provide for greater Government oversight, such as the appointment of a Legal Services Oversight Commissioner under the Legal Complaints and Regulation Act (Northern Ireland) 2016.
6. The Bar welcomes the opportunity to comment on the Financial Conduct Authority’s consultation on the fees proposals for recovering the costs of the 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. We also provided a submission to the FCA’s consultation on the proposed text for a specialist sourcebook for professional body supervisors under the remit of OPBAS in October 2017. Our response detailed below provides a summary of the Bar’s views on the impact of these fees proposals on the barrister profession specifically and the legal profession generally in Northern Ireland and addresses the questions contained in the paper.

## Summary

7. Whilst the Bar acknowledges some constructive attempts in the consultation to arrive at the most appropriate method of cost recovery, we remain concerned by several aspects of the consultation proposals. Fundamentally, the Bar is concerned that the proposals:
  - do not provide adequate transparency or detail on the costs that are to be incurred by OPBAS;
  - do not acknowledge that there will be an overall beneficial effect for the UK Government if OPBAS is effective in discharging its functions and yet there remains, without any adequate explanation or attention being

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<sup>1</sup> 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](https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/legal_services.pdf)

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given to this point, no acceptance that either the set-up or running costs should in any way be funded by Government;

- are still attempting to operate a “one size fits all” model across highly diverse sectors and entities within each sector. Consequently, the proposals do not, with sufficient clarity, align the method of fee recovery with the varying risk profiles that will exist across the community to which OPBAS relates.

8. Therefore the Bar is concerned about the lack of detail provided around the plan for OPBAS to recover periodic fees from professional body supervisors totalling £2.5 million in 2018/19 – 2019/20 and £2 million from 2020/21 onwards, as outlined in paragraph 2.16. We believe that the FCA must, following established good practice amongst other supervisors, provide greater levels of transparency around the operating model and budget for OPBAS. The information provided in the short section on periodic fees has failed to allay our concerns around whether the significant level of projected cost can be shown to be justifiable, controlled and value for money. The FCA must provide a full budget breakdown for OPBAS and ensure clarity around how cost efficiency and effective governance within the organisation will be assessed and proven.
9. We accept that once operational OPBAS may fulfil a useful role for the UK Government ahead of the Financial Action Task Force’s upcoming evaluation of the UK’s AML and CTF frameworks during 2018. However, questions remain in the fees proposals document around the savings or benefits to be gained from the work of OPBAS by the supervisors who will have to fund it. The Bar is concerned that the £600,000 - £700,000 incurred by the FCA in OPBAS operational costs between November 2017 and March 2018 as referenced at 2.15 have not been explained in detail. Based upon our engagement with OPBAS to date we observe that there is still a degree of exploratory work taking place aimed at benchmarking and defining the OPBAS model and integrating it into the UK’s wider AML regime. As supervisors we have no visibility of nor input into such expenditure. The additional £200,000 in project set-up costs up to November 2017 also appears to be a significant level of expenditure with no analysis provided to supervisors on what has been funded to date. Further clarity around this spend is essential as supervisors should not be asked to fund unknown or excess start-up costs for a system that the FCA presently anticipates will not be established until early 2018.
10. Furthermore, in considering the remit of OPBAS more broadly the Bar has repeatedly expressed concerns to HM Treasury that the approach being adopted in seeking to ensure compliance with the Money Laundering, Terrorist Financing

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and Transfer of Funds (Information on the Payer) Regulations 2017 represents a 'one size fits all' that does not translate across the diverse supervisory landscape. We remain concerned that appropriate and proportionate risk-based supervision is being incorrectly categorised as inconsistent and therefore in need of another layer of regulation to instil common practice across all the bodies listed in Schedule 1.

11. We believe that the OPBAS fees proposals document, as with the earlier HM Treasury and FCA consultation exercises, still fails to recognise the specific lower risks that apply to members of the independent referral bar which represents a cornerstone of the UK's legal system. Whilst the Bar of Northern Ireland may be required to pay the minimum fee of £5,000 as a small professional body with just over 600 members under the current proposals, there is still no attempt made to differentiate barristers from others involved who will, on a recurring basis, be involved in managing more high-risk activities elsewhere.
12. We note that this consultation now outlines the FCA's preferred measure for OPBAS fees of 'supervised persons (under the MLRs) who are individuals' with the reference at paragraph 2.25 to lawyers potentially being "over-represented" in these total population figures given the tendency of supervisors in this sector to report total active membership. We can confirm that it is accurate to conclude that lawyers have been over-represented in these numbers and comment on this in greater detail in response to the consultation questions. The Bar remains of the view that, in addition to any consideration of numbers, if supervisors are made to pay for OPBAS then those in the highest risk sectors should be responsible for the greatest share of the fees to ensure an appropriate distribution of cost recovery.
13. The Bar remains an independent referral Bar with no form of direct public access in Northern Ireland and barristers are not permitted to hold or handle client money meaning that this is a uniquely low-risk group of individuals. Consequently, we believe that the FCA should consider the development of a proportionate and risk-based definition on which to base the preferred measure for the OPBAS fees in order to reflect the very different activities being undertaken by the relevant persons across various sectors outlined in Regulation 8 of the MLRs.

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### **Q1. Do you have any comments on our proposed application fee of £5,000 for professional bodies that wish to be added to the list of self-regulatory organisations in Schedule 1 to the MLRs?**

14. The Bar has no difficulty in principle with the suggestion of a proposed application fee of £5,000 for professional bodies to apply to OPBAS if they wish to be listed as AML Supervisors under Schedule 1 of the MLRs. We note the comment at paragraph 2.12 that the FCA has not yet fully determined what will be involved in reviewing each application and that this fee may still be subject to change. Whilst this will not apply to the Bar of Northern Ireland as a supervisor already listed under Schedule 1, it would be useful for the FCA to provide a finalised figure as soon as possible.

### **Q2. Do you have any comments on the different measures we have considered for the tariff base for OPBAS fee-payers? Are you aware of any other measures we should consider?**

15. The Bar remains disappointed that the consultation fails to recognise our position to date that the Government should fund the OPBAS model. We have consistently highlighted that the costs for OPBAS should not be borne by the professional body supervisors given that the Government will be the main beneficiary from the UK's AML/CTF regime being brought into line with international standards. The document also fails to acknowledge that even under its current proposals the public will inevitably pay for this new model given that supervisors and their members will be forced to pass on the costs to clients.
16. However, we welcome the efforts made by the FCA to consider a range of different measures for the tariff base for OPBAS fee-payers. We agree with the comments in paragraph 2.18 that a flat fee does not give a fair distribution across the wide range of professional body supervisors because it "disproportionately affects smaller fee-payers with limited resources". Any approach under which the OPBAS fees are divided equally between all fee-payers would be entirely inappropriate given the significant burden that it would place on small organisations like the Bar of Northern Ireland. This is clearly evidenced by taking the FCA's lower estimate of the OPBAS annual running costs from 01 April 2018 of £1.7 million which when divided equally across the 22 supervisors would equate to a payment of over £77,000 each. This extra layer of cost would be wholly disproportionate to the level of risk presented by our members and it would be unsustainable for the organisation to plan and budget for such a high level of expenditure in the short to medium term.

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17. We note that relevant persons as defined in regulations 3 and 8 of the MLRs is not considered a viable measure given that this can include firms or individuals. Whilst this has the advantage of being defined in statute, we acknowledge that this could result in difficulties given the risk that a count of relevant persons would give the same weight to large corporations as to small partnerships or self-employed individuals. The use of this measure in the legal sector could see a small professional body supervisor overseeing a small sector with many small firms facing unfair cost burdens compared to larger professional body supervisors responsible for large firms. It could also create difficulties for professional body supervisors like ourselves who only supervise individuals. Meanwhile we have no difficulty with the other measures described, such as supervisory resources and income, being discounted for the purposes of this consultation exercise.
18. The section on ‘supervised persons who are individuals’ at 2.22 suggests that this provides a more accurate measure of the scale of supervisors’ responsibilities. It highlights that Regulation 51 and Schedule 4 of the MLRs require supervisors to collect data on ‘persons’, which includes individuals as well as firms, and to distinguish between them. We note the comment at paragraph 2.25 that the wording ‘supervised persons who are individuals’ in Schedule 4 has been interpreted inconsistently with the legal professional body supervisors tending to report total active membership. Meanwhile accountancy professional bodies supervisors have been reporting sole traders who are relevant persons and relevant employees.
19. The Bar acknowledges that to date we have indeed “over-reported” as we have provided details of our total active membership to HM Treasury, totalling around 650 members at present. However, the majority of the practice areas which our members work across will not be relevant at all to the scope of the MLRs. We anticipate that the number of our members involved in work linked to AML will at its peak be only a small percentage of this quoted 650 and a further exercise would need to be conducted by the organisation to validate those individuals falling within the remit of the MLRs.

### **Q3. Can you suggest any improvements to the definition of our preferred measure for OPBAS fees of ‘supervised persons (under the MLRs) who are individuals?’**

20. The Bar notes the inclusion of the draft definition of ‘supervised persons (under the MLRs) who are individuals’ in Appendix 1 which includes: (1) the number of “relevant persons” (as defined in Regulation 3 of the MLR) who are: (a) members of it, or regulated or supervised by it; and (b) are individuals; PLUS (2) the number

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of “relevant employees” (as defined in Regulation 21(2)(b) of the MLR) appointed by a relevant person. We would point to the difficulties in setting a uniform definition that applies across a range of diverse sectors given their varying structures, rules and risk profiles. We also suggest that it would be much more valuable in exploring any such definition to segment these individuals based on the level of risk associated with the activities which they are undertaking. This would tend therefore to place greater emphasis on the activities being performed rather than potentially seeking to try to further define the term “relevant persons”.

21. As outlined above, the Bar of Northern Ireland operates at the lower end of the risk scale for AML. There is no form of direct public access in Northern Ireland and barristers are not permitted to hold or handle client money. The lay client relationship is established, maintained and controlled by the instructing solicitor who is supervised, including for AML compliance, by the Law Society. 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.
22. Furthermore, HM Treasury’s National Risk Assessment for 2017 highlights high-risk areas for the exploitation of legal services as being financial transactions related to the set up of trusts and companies, property purchases and the transfer of funds through client accounts. Given the prohibition on our barristers handling client funds and managing their client’s affairs, these particular risk areas are not applicable to the work of the independent referral bar and therefore the definition in Appendix 1 as currently drafted is of greater relevance to other sectors with higher risk profiles.
23. Consequently, we take the view that the FCA should consider defining the activities that relevant persons undertake in order to assess their level of risk as the development of a definition of ‘supervised persons who are individuals’ around this would provide a more appropriate measure for the tariff base for OPBAS payers and would better reflect their exposure to AML risks.
24. We would point to Regulation 8(2)(d) of the MLRs which highlights that they apply to independent legal professionals acting in the course of business carried out in the UK. We believe that taken in conjunction with Regulation 12, which itself is also referenced in the Legal Sector Advisory Group’s draft guidance, it is apparent

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that the FCA's current definition lacks relevance for the work of barristers and also fails to include any element of proportionate risk based assessment across the various sectors. Section 1.4.5 of the guidance (referencing Regulation 12) states:

*"The Regulations only apply to a legal professional's activities where there is a risk of money laundering occurring. As such, they apply when a legal professional participates in financial or real property transactions concerning:*

- *buying and selling of real property or business entities*
- *managing of client money, securities or other assets*
- *opening or management of bank, savings or securities accounts*
- *organisation of contributions necessary for the creation, operation or management of companies*
- *creation, operation or management of trusts, companies, foundations or similar structures*

*A legal professional is considered to be participating in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction".*

25. The guidance continues to highlight activities covered by the MLRs and those not covered by the Regulations:

### ***"Activities covered by the Regulations***

*In terms of the activities covered, you should note that:*

- *managing client money is more narrowly defined than handling it*
- *opening or managing a bank account is defined more widely than simply opening a client account. It is likely to cover a legal professional acting as a trustee, attorney or a receiver.*

### ***Activities not covered by the Regulations***

*HM Treasury has confirmed that the following would not generally be viewed as participation in a financial transaction:*

- *payment on account of costs to a legal professional or payment of a legal professional's bill*
- *provision of legal advice*
- *participation in litigation or a form of alternative dispute resolution*
- *will-writing, although you should consider whether any accompanying taxation advice is covered*
- *work funded by the Legal Services Commission".*

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26. This section on 'Activities not covered by the Regulations' will apply to the vast majority of the work being conducted by our members yet under the definition of 'supervised persons who are individuals' in Appendix 1 they will find themselves subject to Regulations which are completely irrelevant to their practice. Consequently, we believe that it is important for the FCA to consider the development of a proportionate and risk-based definition which reflects the very different activities being undertaken by the relevant persons across various sectors outlined in Regulation 8 of the MLRs. This would provide a more accurate measure for identifying the small number of individuals supervised by the Bar of Northern Ireland who are engaged in work relevant to the MLRs.

#### **Q4. Can you suggest ways of consistently identifying those individuals who are supervised by professional body supervisors as relevant employees of relevant persons? Are there risks of double-counting? If so, how can we avoid them?**

27. The Bar agrees that individuals supervised by professional body supervisors as relevant employees should fall within the scope of the MLRs. However, this question is likely to be of greater relevance to supervisors responsible for organisations with employees. This is not something that will be a particular matter for the Bar given that our primary role is to supervise individual barristers who are self-employed under the independent referral bar model. It is also worth noting that the references to the 'beneficial owner' throughout the MLRs have no relevance to us, and in fact would be unhelpful and confusing if intended to be used as a point of guidance or definition, given that the Bar is not structured in this way.

#### **Q5. Do you think we should set a minimum fee for the OPBAS levy? If so, is £5,000 a reasonable contribution from those professional body supervisors paying a minimum fee only?**

28. As previously and consistently stated, the Bar considers that the Government should be prepared to fund the creation of OPBAS in the first instance given that it will be the primary beneficiary of its work. Although this point has been raised previously there has been a somewhat dismissive response given by OPBAS who seem to ignore the arguments made (see paras 9 and 15 above) and mistakenly believe that their proposals will not impact on the taxpayer. We would ask OPBAS to properly engage on this point and want to record our regret that it has failed to do so to date. However, if OPBAS can adequately demonstrate that an approach involving any Government funding is not possible following proper engagement then the Government should consider allocating only appropriate

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and accountable OPBAS fees based on the development of a proportionate and risk-based definition of 'supervised persons (under the MLRs) who are individuals' which reflects the very different activities being undertaken across the various sectors outlined in Regulation 8 of the MLRs.

29. We recognise that this may be difficult to achieve and therefore would be reluctantly prepared to accept the application of a minimum fee. However, we consider that £5,000 is an extremely high levy given our level of exposure which is likely to number at most in the tens of members. It is worth noting that small supervisors will be disproportionately impacted by this fee alongside all of the indirect costs of OPBAS that they will be required to absorb. Therefore we believe that £5,000 would have to be a maximum fee rather than a minimum fee given that any increase to this would have a detrimental effect on the Bar.

### **Q6. Do you believe we should spread recovery of the set-up costs and accumulated costs of OPBAS over two years?**

30. The Bar believes that the periodic fees detailed in section 2.15 of £2.5 million in 2018/19 – 2019/20 and £2 million from 2020/21 onwards appear excessive. We would welcome a detailed breakdown of the cost projections and evidence of these figures being benchmarked extensively. However, if the Government is not prepared to fund OPBAS then we agree that the recovery of set-up costs and accumulated costs should be spread over a minimum period of two years. The Bar would also accept the spreading of such costs over a longer period of time to further reduce the impact upon supervisors.