



FACULTY OF ADVOCATES



Stephen Barclay MP
Economic Secretary to the Treasury
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

23 October 2017

Dear Stephen Barclay MP,

Office for Professional Body Anti-Money Laundering Supervision

We write to you jointly in our role as leaders of the professional bodies that together comprise over 17,000 specialist barristers and advocates across England and Wales, Scotland and Northern Ireland. We do so to call for HM Treasury to reconsider the approach being taken towards our professions in the creation of the new Office for Professional Body Anti-Money Laundering Supervision (OPBAS).

We feel obliged to take this step in order to ensure that HM Treasury is left in no doubt as to the problems arising from the current policy direction being pursued and the consequences that we believe will arise if our views continue to be ignored. Between our respective professions we have attempted in various ways, including through the Government's consultations on changes to the AML supervisory regimes, to raise with both HM Treasury and the Financial Conduct Authority (FCA) the fundamental issues that challenge the soundness and applicability of the OPBAS proposals. We have further outlined these in our individual responses to the current consultation on the OPBAS Sourcebook. However, we do not detect any recognition that our concerns are being appreciated and addressed.

Overview

We invite you to consider that there is a legal obligation under the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* (the "2017 Regulations") for AML/CTF supervision to be risk-based (Regulation 46). This reflects a broad consensus that effective and proportionate supervision is founded upon a risk-based approach. Despite this, we find that with regard to our professions the OPBAS proposals stand in defiance to those principles; they steadfastly refuse to recognise the uniquely low risks that apply to our members. Rather than reflect

these obligations, the proposed scheme arbitrarily penalises our bespoke, risk-based approach to supervision by imposing upon it a homogeneous, generic and ill-fitting blanket oversight body. Risk assessment is at the heart of the *2017 Regulations* and it is crucial that OPBAS's role is itself consistent with that approach.

Whilst we appreciate that the original intention behind OPBAS in relation to some professions or organisations may be a legitimate and potentially useful one, namely to ensure compliance with the obligations contained in the *2017 Regulations*, the current approach risks increasing rather than reducing the potential for inappropriate and therefore non-compliant supervision.

In addition to the above mentioned consultations, we have, between our respective professions, sought to engage positively through participation in the various existing HM Treasury supported forum and affinity groups. In each of these we have consistently highlighted our willingness as professional body supervisors within the legal sector to comply with and assist in enhancing the UK's AML supervisory regime. However, we remain very concerned about the requirements to be placed on supervisors to ensure compliance with OPBAS as outlined in the draft *Oversight of Professional Body Anti-Money Laundering Supervision Regulations 2017* (the "*OPBAS Regulations*"). These appear to be imposing a significant burden that brings little benefit to the UK's professional representative bodies for barristers/advocates in meeting their obligations as supervisors.

More importantly, we perceive no discernible benefit to the fight against crime. Alarmingly, the extended definitions in the draft *OPBAS Regulations* will mean that the supervisory requirements will extend beyond supervisors to actual members both past and present.

Independent Referral Bar

The independent referral Bar is one of the cornerstones of access to justice and the legal system across England and Wales, Scotland and Northern Ireland. The existence of a strong and independent Bar in each of these jurisdictions serves the public interest, facilitates the protection of the rights of the nation's citizens, the enforcement of their duties and is fundamental to the efficient and effective administration of justice. The current approach being adopted by HM Treasury with regards to OPBAS displays a fundamental misunderstanding of the role of barristers/advocates and the Bar.

Whilst the structural and regulatory environment for the professions differs across the UK, it remains the case that:

- a) All barristers/advocates are prohibited from handling client money and managing client affairs under their respective Codes of Conduct. Nor do they open or manage bank, savings or securities accounts. Consequently, barristers in England & Wales, Scotland and Northern Ireland all operate at the lowest end of the risk scale for AML supervision;
- b) The occasions on which a barrister/advocate engages directly with a lay client (direct access) are very rare and are atypical of the scenarios envisaged in the policy. Barristers in Northern Ireland and Scotland only permit direct access with professional bodies or recognised public bodies and not with lay clients. This facility is used very infrequently and this form of access is only granted in tightly controlled circumstances. Even where direct access is permitted in England and Wales, it constitutes a comparatively small element of the practice of the Bar and

the above prohibitions remain in force. Thus the primary form of practice for the vast majority of barristers/advocates in all jurisdictions is for instructions to be received on a wholly independent basis by a network of supervised instructing solicitors;

- c) Barristers/advocates occupy a unique position in being one step removed from the lay client. They are instructed and paid directly by the solicitor who, by contrast, has a contractual relationship with the client; they manage the relationship with the client, hold and transfer any client assets/funds and carry out any CDD long before a barrister/advocate is engaged given that they are separately subject to the application of the AML/CTF regulatory regimes;
- d) For the substantial majority of barristers/advocates the *2017 Regulations* simply do not apply to their practices.

Due to the structural mitigations and prohibitions above, the significantly reduced scope and vastly lower ML/TF risk of our respective professions is unique amongst designated non-financial businesses and professions.

However, HM Treasury's 'one size fits all' approach to the creation of OPBAS fails to translate across the diverse AML supervisory landscape. We are greatly concerned that appropriate and proportionate risk-based supervision is wrongly being categorised as uneven or inconsistent supervision "in need" of a "supervisor-of-supervisors" to instil common practice. All of our professional bodies already engage with some form of independent regulation of the profession at both devolved and central government level. We are all regulated by our professional Codes of Conduct. We have repeatedly queried the specific or additional value that OPBAS will bring to our organisations given the addition of significant administrative burdens that are disproportionate to the very low level of risk represented by our members.

HM Treasury's National Risk Assessment for 2017 will highlight 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 barristers/advocates handling client funds and managing their client's affairs, these particular risk areas are not applicable to the work of the UK's independent referral Bars and therefore we fear that the remit of OPBAS as presently designed is aimed at addressing a problem which does not currently exist within our professions.

We are extremely disappointed that HM Treasury has continued to disregard this concern. Through the draft *OPBAS Regulations* it is seeking to create a body with such wide-ranging powers that it can sanction a professional body supervisor by way of censure or recommend it be removed as a supervisor from Schedule 1 to the *2017 Regulations*. We do not believe that this approach adequately recognises the very low-risk base of the barrister/advocate professions with HM Treasury failing to differentiate the independent referral Bar from others involved in managing more high-risk activities elsewhere.

Instead our organisations have consistently advocated that the most appropriate role for OPBAS to perform would be to work in partnership with us 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. That guidance 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 along with guidance tailored to the specific professions represents the most appropriate role for OPBAS in strengthening the supervisory regime for barristers/advocates.

Cost Benefit Analysis

Furthermore, we are alarmed at the estimated running costs for OPBAS of £2 million per year which will be passed on to 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, our organisations are unable to accept, even in principle, this level of resource and method of recoupment. The significant level of projected cost and the impact of this on the membership across the profession in all three jurisdictions is unacceptable. Unfortunately, this is yet further evidence of a fixed (and not risk-based) approach to AML supervision that fails to take into account the particular circumstances of our professions and the independent referral Bar. Chapter 3 of the Financial Conduct Authority's Sourcebook consultation detailing a cost benefit analysis is cursory and simply does not provide any meaningful information. It also fails to display any recognition of the size of the profession in both Northern Ireland and Scotland, comprising approximately 600 and 450 members respectively.

The funding burden for OPBAS should rest with central government but still must be justified and subject to scrutiny from a cost benefit perspective by possessing a narrowly defined remit limited to providing a source of expert AML guidance to assist supervisors in their specialist sectors. It is accepted that OPBAS may be considered to be filling a vacuum in central government and will avoid duplication or overlap at HM Treasury/FCA level once formed. However, the compensating benefits and savings from such an approach have not been articulated. Instead, there is an unreasonable attempt to fund the body by means, in our case, of levying the very professional bodies who will derive the least value from the creation of this entity.

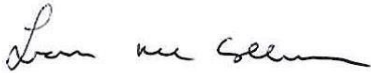
Finally, it may be said that the business case for the present model for OPBAS is that it will assist the Government in bringing the UK's AML/CTF regime into line with international standards ahead of the Financial Action Task Force's upcoming evaluation during 2018. However, this logic is flawed as it fails to take into consideration the needs of our organisations in operating viable supervisory models which ensure that any risks are managed and mitigated appropriately. Please note that we are determined to ensure by such means as we consider appropriate that FATF receives a clear and balanced assessment of the regime that applies in the legal sector and will continue to ensure that we are not bracketed in with ill-fitting descriptions that do not apply to barristers/advocates in our respective jurisdictions. Therefore if we find that we are not accurately described in the policy submissions being made we will reserve our position as to how to remedy this.

Summary

The Bar Council of England and Wales, Faculty of Advocates and Bar of Northern Ireland would welcome the opportunity to work jointly with HM Treasury to remedy the issues outlined above. We would urge you in your capacity as Economic Secretary to the Treasury to ensure that HM Treasury revisits its approach to date on this matter and commits to engaging with the profession across the

UK to ensure the development of a risk-based AML supervisory regime which operates effectively in ensuring high standards whilst also minimising the burden placed on those working in our sector.

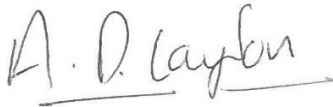
Yours sincerely,

A handwritten signature in black ink, appearing to read "Liam McCollum".

Liam McCollum QC
Chairman of the Bar Council of Northern Ireland

A handwritten signature in black ink, appearing to read "Gordon Jackson".

Gordon Jackson QC
Dean of the Faculty of Advocates

A handwritten signature in black ink, appearing to read "A. D. Langdon".

Andrew Langdon QC
Chair of the Bar Council of England and Wales