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# Anti-money laundering supervisory regime: response and call for further information

## Consultation Response

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### 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 HM Treasury's consultation seeking further views on the mandate and powers for the proposed new Office for the Professional Body Anti-Money Laundering Supervision. We previously responded to the consultations on transposition of the Fourth Money Laundering Directive in December 2016 and the Money Laundering Regulations 2017 in April 2017. Our response detailed below provides commentary on the sections of the consultation document of direct relevance to the legal profession and also addresses the questions posed in Chapter Three on Supervisors' Effectiveness.

### Chapter One: Introduction

3. The Bar agrees with the assessment outlined at paragraph 1.3 that the effectiveness of the UK's anti-money laundering supervisory regime is inconsistent and that there is room for improvement, particularly in understanding and applying a risk-based approach to supervision. There is a willingness on the part of the professional body supervisors within the legal sector to comply with the AML supervisory regime. However, the associated obligations on supervisors within this sector in order to ensure compliance are yet to be fully clarified.
4. We would highlight that regardless of structural and regulatory changes in other jurisdictions, in Northern Ireland, the Bar remains an independent referral Bar with no form of direct public access. 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

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than in his or her capacity as a member of the Bar of Northern Ireland. A barrister must also not enter into a fee sharing arrangement with another barrister, professional client or any other entity or individual. The areas of practice in which our barristers engage are diverse and a large proportion of the Bar would work on areas of law which would not involve any recognised risk of AML/CFT occurring. They also 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.

5. The Bar therefore operates at the lower end of the risk scale for AML in comparison to the higher risks posed by financial institutions which have been the primary focus for HM Treasury to date. Consequently, it is difficult to appreciate the level of compliance which will be required from our barristers to satisfy the requirements of the AML supervisory regime within this sector. It is vitally important that the obligations on both supervisors and professionals operating in this sector is proportionate. We require assistance from HM Treasury on this matter in order to determine what is required with clarity.
6. The Bar notes the recognition of support for supervisors developing and implementing a single supervisory risk assessment in each sector at paragraph 1.9. To date there has been a reliance on the relatively low risk that the Bar of Northern Ireland represents given the independent referral model in operation. We would welcome guidance and assistance in relation to the adequacy of the risk assessment for the legal sector in Northern Ireland. The Bar is keen to evidence the full compliance within our membership. The Bar would also be content to implement the measures outlined in paragraph 1.9 as an outcome of this exercise, including the suggestion that supervisors should introduce single points of contact and publish enforcement activity. We would also be able to facilitate the proposed training for staff and members on existing and emerging AML/CFT risks.
7. In addition, we recognise the comment at paragraph 1.10 that the FCA's approach to AML supervision has focused too heavily on the largest firms with less scrutiny of the smaller firms. We would add that it is very difficult at present to interpret the recommendations from the larger settings into applicable and proportionate actions in a smaller and lower risk sector.
8. The Bar has no difficulty with greater oversight of the regime as outlined in paragraph 1.11 in order to strengthen coordination across supervisors operating in the same sector. We would welcome an enhanced level of engagement with HM Treasury to assist supervisors in the legal sector in Northern Ireland to meet their obligations.

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9. Meanwhile we note the comments at paragraph 1.11 that greater oversight could “address the perceived risk that professional bodies’ representative functions undermine their regulatory objectives”. The Bar 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 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.
10. Furthermore, there are a number of imminent regulatory changes taking place in Northern Ireland which 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. We would be concerned that this emphasis on greater oversight to monitor supervisors’ compliance with the regime which is aimed at addressing this “perceived risk” could result in duplicated work and processes. The Bar do not therefore feel that this risk is applicable in our circumstance and would be opposed to any moves in response to a perceived, but not real, risk as they would be unnecessary and disproportionate.
11. The Bar welcomes the recognition at paragraph 1.12 of the issues associated with the AML guidance available. The Bar considers that not enough guidance has been made available to date with the information produced by HM Treasury being too general and not specific to the legal sector in this jurisdiction. It is evident that a lack of awareness exists of the operation of the profession in Northern Ireland and it is therefore difficult to translate the oversight requirements into this sector.
12. The Bar welcomes the Government’s intention outlined at paragraph 1.14 to clarify the obligations on all supervisors through the new regulations. However, we believe it is imperative that the list of requirements included in this section is adequately tailored to meet the needs of the supervisors for the legal sector in this jurisdiction.
13. The provision of assistance to ensure compliance with the new regulations would be beneficial. However, we are concerned by the proposal to introduce a new Office for the Professional Body AML Supervision and the associated fee to be levied on the professional body supervisors. The Government needs to be cognisant that this 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

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imminent introduction of a levy to fund the Office of the Legal Services Oversight Commissioner and the Department of Justice's statutory registration scheme. We would query whether this fee on the professional body supervisors will be proportionate to the level of risk represented by the Bar of Northern Ireland.

14. The Bar has no difficulty with the mandate and powers for the new Office for Professional Body AML Supervision outlined at paragraph 1.14. However, we believe that this cannot operate on a generalist level and the Office must have sectoral experts, including specialist knowledge of the legal sector in Northern Ireland. The Bar expects that the Office will be able to provide the definitive direction on AML guidance specifically for our sector. We note that the Government intends to consult on the draft regulations that will underpin the Office during summer 2017 and we look forward to the opportunity to comment in further detail in due course.

### **Chapter Two: Supervisors' Obligations**

15. The Bar is content to support greater Government oversight to ensure consistency in monitoring and managing AML risks. We welcome the recognition at paragraph 2.1 that this should be proportionate and could be integrated into the existing Annual Supervisors Return Process.
16. In terms of managing and identifying AML risks described at paragraph 2.2, the Bar subscribes to the model under which any failure to cooperate by members results in an immediate referral to the supervisor's disciplinary process. The Bar agrees that thematic reviews should be used more widely as detailed in paragraph 2.3. The legal sector would be particularly well placed to allow for any targeted thematic review findings on emerging trends to be usefully shared through AML Supervisors Forum/Affinity Group discussions.
17. We also recognise that a single supervisory risk assessment across the regime will necessitate a very high level approach and will be less useful for supervisors in the day to day monitoring of populations. We take the view that the sector specific risk assessments mentioned at paragraph 2.4 would be very helpful in ensuring consistency across supervisors in the legal sector. The Bar also welcomes the observation that AML risk assessments should be integrated into the supervisors' 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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18. We note the section on penalties and enforcement at paragraph 2.5 with supervisors being required to levy a scalable fine to penalise malpractice. At present any failure 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. However, these are presently entirely discretionary.
19. The Bar cannot presently indicate at this stage whether it would be feasible to introduce a scalable fine. We believe that there is a need for a full risk assessment and the provision of relevant HM Treasury guidance and training before it would be possible to consider the potential for scalable fines in further detail. We take the view that there is not a sufficient level of maturity around the management of AML risks relating to the legal sector in this jurisdiction. The Bar would reiterate the need for further detail around exactly how members operating under our supervisory regime within Northern Ireland's legal sector can fulfil their obligations in relation to AML.
20. Paragraph 2.6 highlights that all supervisors should abide by a common framework for the use of penalties to help ensure consistency across the regime. The Bar has no difficulty with any penalties being informed by a common framework.
21. We note the comment at paragraph 2.8 that supervisors should have the power to expel their members subject to internal disciplinary procedures. The Bar already has the ability to disbar a member from practise following a formal disciplinary process under which there is the potential for an appeal. Consequently, we believe that there is no need for a single appeals process for AML issues as outlined at 2.8 given that it would be difficult to integrate this into wider supervision responsibilities.
22. Furthermore, the suggestion at paragraph 2.9 that supervisors could increase resources for monitoring and disciplinary functions. The Bar takes the view that there is no need for an increase in resources at present given the size of the profession in this jurisdiction. However, we accept that this could be an option in the future if required.
23. The Bar shares the cautious approach outlined at paragraph 2.11 in relation to the sharing of sensitive information where it could risk prejudicing investigations or causing commercial harm. We take the view that information in respect of the outcome of any investigation should be shared with supervisors in the legal sector

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in Northern Ireland 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.

24. In considering the section around ensuring high standards of awareness, the Bar would highlight that we are keen to identify an appropriate provider to deliver an AML training course for members. In addition, we note the comments around the need for supervisory staff to better understand their sectors, particularly around innovative products and emerging risks. The Bar considers that the legal sector in Northern Ireland is likely to change in the coming years given the current trends in the marketplace and ongoing programmes of reform under the Department of Justice's Review of Access to Justice 2 and the Gillen Review of Civil and Family Justice. At present it is unclear as to how any of the risks associated with the changing sector will factor into the AML regime. Consequently, we expect that in future there would be a two way exchange of information between specialist supervisors in the legal sector and the new Office for Professional Body AML Supervision in order to navigate the risks associated with the future landscape.
25. We also note the transparency section and the proposal that all supervisors should provide an annual return for HM Treasury's Annual Supervision Report. The Bar considers that the current annual reporting mechanism remains sufficient for our reporting needs. We believe that it would be disproportionate to expand this within the legal sector in Northern Ireland but accept that this may be of greater relevance to other sectors.

### Chapter Three: Supervisors' Effectiveness

26. The Bar recognises the observation at paragraph 3.3 that there are a number of practical challenges to the pooling of resources within sectors, such as the incompatibility between professional body by-laws and across devolved administrations. We believe that this would be an issue across the UK's legal sector given the existing rules of the professional bodies in the various jurisdictions. This would include the Bar Council's Constitution, the Code of Conduct and the Constitution and Bye-laws of the Honorable Society of the Inn of Court of Northern Ireland.
27. Consequently, it would be a considerable challenge to reconcile the governing rules of the various legal professional bodies across the devolved administrations and their associated powers and functions for the purpose of pooling resources to improve the effectiveness of AML supervision. However, we agree with the

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point at paragraph 3.4 that the focus should be on the effectiveness of supervision and not the number of supervisors with the government setting clear standards and providing detailed guidance in order to aid compliance.

28. We note the comments at paragraph 3.12 under which one respondent highlighted Sir David Clementi's review of the legal regulatory framework which recommended professional bodies separate their advocacy and supervisory roles. The Bar does not agree that this would be appropriate for the legal sector in Northern Ireland given the size of the profession in this jurisdiction. The Bar's views on this matter is validated by the Review of Legal services conducted by Sir George Bain for the Department of Finance & Personnel in Northern Ireland. His report found that *"the legal professions have discharged their regulatory functions in a reasonable manner. The regulatory failure in England and Wales has not occurred in Northern Ireland. Nor is there the regulatory maze in Northern Ireland that Clementi encountered in England and Wales. Hence simply to apply Clementi's proposals to Northern Ireland would not be appropriate; they need modification to produce best practice in this jurisdiction. We believe that the professions themselves should continue to discharge regulatory responsibilities, but subject to enhanced oversight arrangements, and, where it adds value, increased lay participation. Oversight should be applied to both solicitors and barristers by a Legal Services Oversight Commissioner helped by advice from the Lord Chief Justice for Northern Ireland"*.

29. As outlined above, there are significant developments stemming from the Bain review to provide greater Government scrutiny of legal services with the creation of a Legal Services Oversight Commissioner to oversee new structures for complaints handling across the profession under the provisions of the Legal Complaints and Regulation Act (Northern Ireland) 2016. AML monitoring is best conducted by integration into a wider framework of compliance checks for our members, as identified at paragraph 3.13.

### **Q1. Are these powers to monitor supervisors' activities and penalise poor practice sufficient? If more powers should be added, which powers might be?**

30. The Bar takes the view that the powers to monitor supervisors' activities and penalise poor practice outlined in paragraphs 3.23 – 3.31 are sufficient. We welcome the indication at paragraph 3.26 that the new Office for Professional Body AML Supervision will work with professional bodies to develop high standards of supervision. We also have no objection to the focus at paragraph 3.27 on ongoing dialogue with professional bodies around meeting the obligations outlined in the regulations and promoting best practice in the sector.

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31. The Bar also welcomes the statement at paragraph 3.29 that professional bodies should take the Office's guidance into account as they fulfil their obligations but that that this will not be binding. We believe that professional bodies should be able to develop their own risk-based approach to supervision where appropriate if it meets the required legal obligations. We are supportive of a climate of supervision but a 'one size fits all' approach will not be translate across a diverse supervisory landscape. The guidance issued by the Office must be informative and relevant to the legal sector in Northern Ireland whilst not fettering the actions of professional bodies to the adoption of a particular practice.

#### **Q2. Should the Office's powers to request information or attendance at interviews be extended to supervisors' members as well as supervisors themselves?**

32. The Bar takes the view that the Office's powers to request information or attendance at interviews should not be extended to supervisors' members as part of the routine AML monitoring regime. However, there is the potential that it might be appropriate for the Office's powers to extend to supervisors' members in the case of a critical incident involving a breach of AML obligations. Protocols would need to be developed to determine how this might operate in practice.

#### **Q3. Should the Office report annually on other issues, in addition to its performance against its objectives in that year, priorities for the coming year and expectations around emerging risks? If so, which issues should the Office report on?**

33. The Office should report on good practice in addition to its performance against its objectives in that year, priorities for the coming year and expectations around emerging risks as outlined in paragraph 3.33.

#### **Q4. The government envisages the Office having representation at the Money Laundering Advisory Committee and the Anti-Money Laundering Supervisors Forum, and engaging with the Accountancy and Legal Affinity Groups. What role could the Office best fulfil in each forum, and are there other fora the Office should attend – if so, which?**

34. The Bar believes the Office must fulfil the role of AML experts with specialist knowledge of the legal sector in Northern Ireland if it is to have representation at the Money Laundering Advisory Committee and the Anti-Money Laundering Supervisors Forum, as well as engaging with the Accountancy and Legal Affinity

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Groups. As highlighted earlier in our response, the Office must be a source of expert AML guidance to assist in improving the effectiveness of professional body supervisors specifically working in this sector in Northern Ireland.

#### **Q5. How might the AML supervisory regime evolve over the next five to ten years, especially in the legal and accountancy services sectors? What are the advantages and disadvantages to the potential options – how might government help minimise the disadvantages?**

35. HM Treasury's focus in relation to the AML regime has very much been on larger financial institutions in recent times and good practice is therefore not as advanced across the legal sector, particularly in a devolved region such as Northern Ireland where the profession is comparatively small. The Bar takes the view that it will be vital to consolidate and establish best practice in AML across the sector in NI in the next five to ten years with the professional bodies playing a key role in this. Greater clarity must be provided to the professional body supervisors in terms of the obligations that should be placed specifically on members in order to minimise risk and provide greater oversight to this work.
36. The legal sector in Northern Ireland is likely to evolve significantly over the next five to ten years with the breakdown of traditional business models and a greater move towards automation and online services. There are a number of reform programme which have been ongoing in recent years proposing policy developments in this area, including the Department of Justice's Access to Justice 2 Review in 2015 and the Gillen Review of Civil and Family Justice in 2016. The reforms proposed include enhanced recognition for personal litigants, changes to legal aid funding, the development of online dispute resolution and greater provision for a range of mediation services.
37. The potential presented by these proposed reforms for changes to the structure of the legal sector could likely to result in the new entrants to the legal market in Northern Ireland and greater instability in direct supervision with the proliferation of unregulated providers. For example, the development of online dispute resolution could result in an increase in the unregulated, uninsured and often untrained providers of advice through McKenzie Friends; people typically require lawyers and assistance with representation when facing legal action and this desire for support will not simply change if cases are determined by a new type of online dispute resolution. Such a development could mean that it would ultimately become very difficult for the proposed new Office for Professional Body AML Supervision to adequately monitor and manage these unregulated providers to ensure that they are compliant with AML obligations.

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### **Q6. Are there other issues you would like government to take into account as it considers increasing the oversight of AML supervision in the accountancy and legal sectors?**

38. As outlined earlier in our response, the Bar would request further specific information on the value which the new Office for Professional Body AML Supervision will provide given that it will be funded through a new fee on professional body supervisors. We believe it is vital that the Government ensures that once established the Office provides relevant advice and guidance for the legal sector in this jurisdiction to ensure that it makes a worthwhile contribution to the wider AML supervisory regime. The Bar is keen to engage in any future consultations run by the Financial Conduct Authority on this matter.

### **Chapter Four: Supervisory Guidance**

39. The Bar notes the reference at paragraph 4.11 to the importance of robust customer due diligence requirements. As outlined earlier, the Bar of Northern Ireland remains an independent referral Bar with no form of direct public access. The relationship with lay clients is managed by the instructing solicitor, who is primarily responsible for confirming compliance with due diligence requirements. Consequently, solicitor firms will be managed through their own supervisor by way of the Law Society in this jurisdiction. This means that our members are heavily reliant on the due diligence checks being carried out to the satisfaction of the instructing solicitor. The solicitor is also responsible for maintaining the relationship with the lay client and will hold the relevant case file containing identification information and relevant documentation.