



## **Economic Crime and Corporate Transparency Bill**

### **Proposed new regulatory objective under the Legal Services Act 2007**

#### **Briefing for Peers**

### **About Us**

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

### **Summary**

The Bar Council opposes **draft clause 183 of the Economic Crime and Corporate Transparency Bill** (the Bill) which seeks to insert a new regulatory objective of “promoting the prevention and detection of economic crime” into the Legal Services Act (LSA) 2007, because it is unnecessary, confuses the role of lawyers with the role of law enforcers, and may lead to wasted regulatory effort and costs.

Economic crime takes many forms. It destroys lives and removes livelihoods. Its victims are often the most vulnerable in society. Its perpetrators are amongst the most sophisticated and callous criminals. Money laundering is the lifeblood of organised crime.

All right-thinking people wish to see economic crime both detected and prevented, just as all right-thinking people want to see violent crime, and sexual crime, prevented and detected. The Bar Council supports policies and funding decisions which promote the prevention and detection of crime – of all types, not just economic crime.

However, the detection and prevention of crime is not a task for lawyers whilst acting as lawyers (as opposed to in their private capacity).

There is therefore no good reason to add this new regulatory objective to the LSA 2007, and there are very good reasons not to do so, because it muddles up the role of lawyers with the role of law enforcers.

### **The Bill**

The Ministry of Justice (MoJ) have proposed a provision in the Bill that seeks to amend the Legal Services Act 2007 to add a 9<sup>th</sup> regulatory objective relating to economic crime. Clause 183 reads as follows:

#### **“183 Regulators of legal services: objective relating to economic crime**

(1) Section 1 of the Legal Services Act 2007 (regulatory objectives) is amended as follows.

(2) In subsection (1), after paragraph (h) insert—

“(i) promoting the prevention and detection of economic crime.”

(3) After subsection (4) insert—

“(5) In subsection (1)(i) “economic crime” has the meaning given by section 179(1) of the Economic Crime and Corporate Transparency Act 2023”.

**The Bar Council’s view is that this proposed new regulatory objective should not be adopted. The proposal fails the tests imposed by the Better Regulation Principles, and will lead to confusion, wasted regulatory effort, and unnecessary regulatory cost both direct and indirect, which will ultimately be borne by consumers of legal services.**

## Background – Legal Services Act

Under the Legal Services Act 2007 the Legal Services Board (LSB) and the Approved Regulators must act in a way “(a) which is compatible with the regulatory objectives, and (b) which [it] considers most appropriate for the purpose of meeting these objectives”. (See sections 3 and 28)

The existing regulatory objectives include, *inter alia*, improving access to justice, protecting and promoting the interests of consumers, and promoting and maintaining adherence to the professional principles.

The “professional principles” include:

“(a) that authorised persons should act with independence and integrity;

(b)...

(c) that authorised persons should act in the best interests of their clients;

(d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice; and

(e) that the affairs of clients should be kept confidential.”

In the MoJ’s impact assessment it is suggested that the proposed objective is necessary to deal with lawyers who commit financial crime by dealing with a lacuna in the Money Laundering Regulations 2017 in respect of legal services.

**The Bar Council does not accept the MoJ argument that there is a lacuna. There is no evidence presented that the current framework is inadequate to deal with lawyers who commit financial crime or otherwise fail to comply with economic crime rules. It would be wholly surprising if the current framework could not adequately deal with those who commit serious crime.**

In addition, there is no complaint nor evidence from those responsible for the prevention and detection of economic crime, i.e. the law enforcement authorities such as the police<sup>1</sup>, calling for this change in the law.

---

<sup>1</sup> See the written evidence submitted by the Association of Police and Crime Commissioners (APCC) (ECCTB19); and City of London Police (ECCTB11).

## Money Laundering Regulations

The application of the existing anti-money laundering regime to lawyers is carefully focused. It has also been the subject of litigation in England and Wales and elsewhere directed to ensuring that the particular role of the legal profession is respected.

By regulation 8 and 12 of the Money Laundering Regulations 2017, the Regulations apply to lawyers only when the lawyer is carrying out professional tasks in which there is a risk of them facilitating money laundering. The definition of a legal professional for the purposes of the Regulations is restricted to those who perform tasks that are rarely carried out by barristers:

- (a) the buying and selling of real property or business entities;
- (b) the managing of client money, securities or other assets;
- (c) the opening or management of bank, savings or securities accounts;
- (d) the organisation of contributions necessary for the creation, operation or management of companies; or
- (e) the creation, operation or management of trusts, companies or similar structures.

The list does not include the advisory and advocacy tasks that form the bulk of a barrister's professional practice. The 2017 Regulations create a number of obligations on lawyers carrying out these specified tasks, designed to forestall and detect money laundering. The procedures they enact also have a broader deterrent and practical effect in relation to financial crime generally.

In *Bowman v. Fels* [2005] 1 WLR 3083, the Court of Appeal looked at the extent to which the substantive money laundering offences and the reporting obligations in the Proceeds of Crime Act 2002 applied to lawyers involved in litigation. The Court of Appeal's conclusion that bona fide litigation and settlement of litigation fell outside the regime was based on some of the fundamental principles set out here.

**The 2017 Regulations represent a detailed, focused and carefully crafted piece of legislation. In truth, these Regulations apply to only a small part of the work of a very limited number of barristers, and no evidence is given for this (or any other aspect) representing a 'lacuna' in respect of legal services. The inclusion of all legal services within the 2017 Regulations was carefully considered by both legislators and the Court of Appeal and rejected.**

If, contrary to the above, there is evidence of a lacuna within the 2017 Regulations in respect of legal services, this must be identified clearly and addressed by appropriate legislation that has been carefully designed in consultation with the professional bodies, not through a broad statutory provision for regulators to interpret. This is a bad way to legislate and builds in uncertainty and the scope for disputes between the LSB, the front-line regulators and the legal profession.

## The role of a barrister and the 'cab rank' rule

The role of the Bar is to advise clients objectively and represent them in courts and tribunals independently and robustly. The Bar's ethical conduct rules require barristers:

- to accept instructions irrespective of the identity of the client, the nature of the case, or any belief or opinion the barrister may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client. This is known as the 'cab rank' rule.
- to act independently in the client's interests (subject to a barrister's duties to the court).

The law of legal professional privilege (LPP) requires all lawyers to keep most communications between a lawyer and a client confidential. Communications in furtherance of a criminal purpose are not protected by LPP.

These rules are fundamental to the rule of law and recognised in domestic law and the European Convention. For example, in *R (Morgan Grenfell and Co Ltd) v. Special Commissioner of Income Tax and Anor* [2003] 1 AC 563 at paragraph 7, Lord Hoffman said of LPP and associated rights:

*“...LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice... It has been held by the European Court of Human Rights to be part of the right of privacy guaranteed by article 8 of the Convention...and held by the European Court of Justice to be a part of Community law...”.*

Barristers frequently advise and represent those who have or may have committed financial crimes. It is not part of the function of such barristers in carrying out those tasks to “promote the prevention and detection of financial crime”. How can a lawyer advise their client properly and have the appropriate open and ethical professional relationship if the client knows that any admissions of past wrongdoing on the client’s part is to a person whose regulator thinks they have duty to prevent and detect financial crime?

**Any such obligation would be incompatible with the ethical conduct and legal rules and of the rule of law itself. If a barrister were to act as a police officer in those circumstances they would, rightly, be subject to disciplinary action.**

### **The scope of the proposed regulatory objective**

The MoJ’s reasons given in the impact assessment can be summarised as follows, with Bar Council responses:

- (a) **MoJ reason:** to ensure that lawyers are not breaching the economic crime regime (see pages 1, 4 and 6 of the impact assessment)

**Bar Council response:** the proposed regulatory objective is not an objective to ensure that lawyers are complying with the existing financial crime regime. It is a broad obligation to “promote the prevention and detection of economic crime”. That is a very different objective.

- (b) **MoJ reason:** to facilitate regulatory action and reduce the risk of challenges to that action (see pp. 2, 4, 5)

**Bar Council response:** There is no evidence provided that the existing regulatory system is inadequate to deal with lawyers who commit financial crime offences. There is also no evidence provided that there is a particular difficulty with challenges to regulatory action against lawyers on these grounds. In the absence of any such evidence it would seem a surprising suggestion that the regulators cannot appropriately discipline barristers for committing financial crimes under the existing regime. It is hard to see how such conduct would not attract the most serious penalties.

(c) **MoJ reason:** “The primary rationale for the intervention in this case is efficiency: clarifying the role of regulators with regard to financial crime will create greater legal certainty as to when interventions are required and act as an extra deterrent to those who might otherwise commit these offences” (p4)

**Bar Council response:** The assertion that the new proposal will reduce challenges and lead to greater legal certainty is simply incorrect. The proposal is widely expressed and cuts across both other regulatory objectives and barristers’ professional duties. If it were to be enacted, it would be very likely to significantly increase challenges to any regulatory action and create a good deal of uncertainty and consequent litigation.

(d) **MoJ reason:** It will preserve public trust in the legal services sector (p7)

**Bar Council response:** This proposal will undermine rather than increase trust in the legal profession. The public expects to be able to consult barristers in confidence (see Lord Hoffman statement). It also expects that barristers will represent them robustly in court whatever the nature of the allegation or the strength of the evidence. That confidence would be significantly undermined by a regulatory objective of promoting the prevention and detection of financial crime.

**The Bar Council does not agree with the Ministry of Justice’s reasons for the proposed regulatory objective, as set out in the impact assessment. In some cases, the reasons for the new objective expressed by the MoJ may be undermined by the proposed regulatory objective.**

**The Bar Council**  
**January 2023**