Response on Behalf of the General Council of the Bar of England and Wales, the Faculty of Advocates and the Bar Council of Northern Ireland to the Office for Professional Body Anti-Money Laundering Supervision (OPBAS): Sourcebook Update, Consultation Paper CP22/16

Question 1: Do you agree that we should add the new chapters we have proposed to the OPBAS sourcebook? If not, please explain why. Is there different content you think we should include?

1. We agree with the proposed new chapters and do not think other content should be included.

Question 2: Do you agree that we have identified appropriate outcomes for chapters 3 to 11 of the sourcebook? If not, what outcomes do you think we should include?

2. While we broadly agree with the outcomes for chapters 3 to 11, we will address concerns with individual outcomes in our response to question 3 of the Consultation Paper.

Question 3: Do you have any comments on our proposed changes to the existing chapters of sourcebook?

3. Although not an existing chapter referred to in Question 3, we will first address chapter 2 (OPBAS approach to supervision).

4. Paragraph 2.7 introduces a 4-point scale of effectiveness by which a Professional Body Supervisor (PBS) is rated. We are concerned that a PBS may be deemed to be only

partially effective in circumstances where they cannot follow all the examples of effective practice listed in each chapter of the sourcebook because the examples do not apply to that PBS. The sourcebook should make it explicitly clear that OPBAS only considers the outcomes which are applicable to an individual PBS. We note that some of the outcomes and examples of effective practice have been taken from practice already existing in larger PBSs. OPBAS should compare each PBS' practice with what can or should be expected of that PBS rather than what would be expected of a larger PBS. The list of effective practice in each chapter should serve as an example and a PBS should not be marked as ineffective if they cannot achieve all outcomes.

5. The outcomes need to be scaled or contextualised to fit the PBS. While this may result in a misplaced perception of inconsistent practices between the PBSs, in reality scaling the outcomes would make them achievable for smaller PBSs and thus make the sourcebook and method compliant with the required risk-based approach.

6. While paragraph 2.9 of the sourcebook says that OPBAS does not expect all PBSs to put in place the same measures and that consistency is not about all PBSs doing the same thing, experience in relation to how OPBAS viewed compliance with Regulation 46A guidance has proved this not to be the case.

7. When OPBAS initially published an update on compliance with Regulation 46A, it made clear that "This update does not impose requirements but is intended to aid the PBSs in drafting their annual reports, required by Regulation 46A, by summarising the examples of possible content that were discussed at the workshop. These fall into two broad categories which support the requirements of Regulation 46A: (1) agreed good practice, which all attendees confirmed would be beneficial to include; and (2) practice which OPBAS and HMT consider can increase the effectiveness of the reports. The examples given are not mandatory and are non-exhaustive. PBSs' annual reports are more likely to be considered effective by including these and other supervisory points they consider useful and relevant."

8. Following its review of the Annual Reports published, OPBAS was publicly critical of bodies who did not, regardless of their scale or level of risk, demonstrate examples from the second category (Practice which would increase effectiveness). In a further update

of 4th July 2022 OPBAS commented that "This means that, while a report which includes practice only from the 'agreed practice' column may be compliant, we are less likely to also assess it as effective." This will directly cause small and low risk PBSs who, due to the inherent nature of their supervised populations rather than any lack of supervisory rigour, lack the material to be able to demonstrate these examples will be judged as ineffective despite all of their efforts to the contrary. This is manifestly unfair. To apply the same standard to the ratings contained in paragraph 2.7 would also be grossly unfair as it would directly contradict a commitment to a risk-based and proportionate approach.

9. Paragraph 2.8 sets out that a PBS' enforcement is unlikely to be deemed effective if its supervisory function is ineffective. We are uncertain what the rationale is for this statement or how linking the effectiveness of different arms of a PBS can be justified. This approach should not be adopted. As described by OPBAS itself in Chapter 4 a "risk-based approach to anti-money laundering means that there will be more than one 'right' answer to the same problem".

10. Please see our comments on the proposed changes to the existing chapters of the sourcebook below:

a. Chapter 3 (Governance)

11. The preferred characteristic of a Single Point of Contact (SPOC) to be at board level, set out in paragraph 3.11, might not be suitable for smaller PBSs. The sourcebook should not specify such requirements when they are not risk-based. By including this preference, we are concerned that a PBS will be rated less effective if its SPOC is not at board level. Smaller PBSs have a limited number of executive staff and including this blanket preference in the sourcebook would be disproportionate. Determining who in the PBS should be the SPOC should be decided by the PBS taking into account its own size and risk profile.

b. Chapter 4 (A risk-based approach)

12. We welcome emphasis on a risk-based approach in the sourcebook. As barristers and advocates are low-risk professions compared to other providers of legal services, we agree with further embedding this approach to allow for tailored supervision. However, we do not think that all the examples of effective and less-effective practice listed in Chapter 4 match a risk-based approach. In particular, "*There is no, or insufficient, assessment of members categorised as low risk. Members are placed onto an extended supervisory cycle without adequate touchpoints, preventing a regular review of the risks*" suggests that PBSs should place all of its members on a regular cycle of review regardless of the level of risk. Further, the case study in Chapter 4 represents one extreme of the scale and does not serve as a practical example for most PBSs. The sourcebook should contain more middle ground case studies which a small to average size PBS could use as an example on which to model its practice.

c. Chapter 5 (Supervision)

13. Paragraph 5.12 requires a PBS 'as a minimum' to require a DBS check as part of the 'gatekeeper' role to be performed when a member 'joins the profession and on an ongoing basis thereafter' (paragraph 5.9). There is also a suggestion that for those who have not been resident in the UK for 5 years, information from overseas criminal records agencies should be required (paragraph 5.17). We note that these requirements are not strictly 'new', but we do raise the point because:

    (i) the drafting does not clearly distinguish between those who conduct work in the regulated sector (to whom the MLRs apply) and those who do not and to whom different considerations could well apply;

    (ii) while we understand that the Bar Standards Board (BSB) requires all new barristers to undertake DBS checks, and it is understood that that was not in order to comply with the MLRs, if the BSB were to decide to change its position and no longer consider it necessary to require a DBS check from all new practitioners, it would be unfortunate if the OPBAS sourcebook prevented it from doing so, and

(iii) we doubt the appropriateness of such specific and prescriptive requirements of this kind being included in the OPBAS sourcebook. We consider that it is more appropriate, in the first instance, for each PBS to assess what information it requires to meet its statutory obligations.

d. Chapter 6 (Information and intelligence sharing)

14. We agree with the sourcebook's aim to improve the effectiveness of information and intelligence sharing. However, the National Intelligence Model (NIM) is not currently used by all PBSs and we do not agree with its inclusion in paragraph 6.1(c). We are uncertain what the rationale is for including the NIM as a required method of information and intelligence sharing. The risk-based approach should apply and allow for different methods of achieving the shared aim of effective information and intelligence sharing. Barristers and advocates do not engage with member of the public or other business entities in the same way as other legal professionals and accordingly receive and send a different set of information relating to them. There has been insufficient evidence provided about the value that adopting the NIM model would yield for those who supervise barristers and advocates and, whilst it can be suggested and, where appropriate, encouraged it should not be mandated.

15. We similarly do not think PBSs should be made to join the Financial Crime Information Network (FIN-NET) and/or the Shared Intelligence Service (SIS) if they can show they can effectively share information and intelligence in other ways as suggested in paragraph 6.6. FIN-NET and/or SIS should not be considered the default but instead be seen as two potential ways in which information and intelligence may be shared. These systems do not serve a useful purpose in aiding nor improving the AML supervisory function of the Bar, do not add value and are not appropriate when taking a risk-based approach to anti-money laundering supervision. Use of theses systems would also add additional cost to the profession. OPBAS has accepted this position over several years to date. We are concerned that, by including these systems in the sourcebook, the direction of travel is for a PBS to be given a lower effectiveness rating when they do not sign up to one or both. Any requirement or adverse finding to make supervisors adopt these specific systems under duress would be a manifestly unfair and challengeable outcome. It would be both contradictory and disproportionate to apply

such pressure when this would not necessarily be the best approach for that PBS and its regulated population.

16. We do not agree that a PBS should assess the quality of the content of SARs submitted by its supervised population to improve SARs' effectiveness as set out in paragraph 6.13. The National Crime Agency have not indicated there is an issue with the quality of SARs submitted by the Bar, PBSs have not requested this power and it would fundamentally alter the relationship between the supervised population and its regulator as supervisor.

e. Chapter 7 (Information and guidance for members)

17. We do not have any comments on Chapter 7.

f. Chapter 8 (Staff competence and training)

18. Paragraph 8.7 sets out the outcomes which indicate an effective approach to staff training. The way that the outcomes are drafted suggest that *all* PBS staff must meet the requirements set out. The sourcebook elsewhere (paragraph 8.4) draws a sensible distinction between the training given to all staff and to those staff who have a particular AML-related role. Insofar as the outcomes ignore that distinction and could be taken to suggest that detailed AML training must be given to all PBS staff whether their role has anything to do with AML or not, it seems to us that they are too broadly drafted.

g. Chapter 9 (Enforcement) and Chapter 10 (Record keeping and quality assurance)

19. We do not have any comments on Chapters 9 and 10.

20. While also not referred to in Question 3, we do have some comments on this Chapter which we will set out here. Paragraph 11.5 sets out a list of things that the PBS's annual report to HMT (now also to be submitted to OPBAS – paragraph 11.2) "*should include*". We consider the list to be unduly prescriptive and to include elements that are unlikely to be appropriate or proportionate for all PBSs. This is also reflected in the list

of examples of "*more effective practice*". Some of the examples given (e.g. "*a gap analysis*" and "*case studies*") may well be suitable for other PBSs who encounter a higher number of AML cases and issues, but are unlikely to be suitable for the Bar. We note that paragraph 11.6 makes clear that the list in paragraph 11.5 is not mandatory and the categories appear to reflect the existing template for reporting. We refer you however to our comments in paragraph 8 above.

Question 4 - Do you agree with our analysis of costs in Annex 2 of this consultation? If not, please explain why, providing evidence of costs where possible

21. Regarding the costs to professionals and the public outlined in paragraphs 7-9 of Annex 2, we are concerned that depending on the position ultimately adopted to the matters raised (see paragraphs 8, 14 and 15 above), several small PBSs will experience a significant increase in the cost of supervision with no discernible benefit being accrued. For PBSs with a small or non-existent regulated population the increased costs will inevitably be required to be absorbed by the PBS itself due to the limited possibilities it has to pass this on to the regulated population. Annex 2 seems to suggest that OPBAS "anticipate the impact on the public will be minimal". This implies that if a PBS is expected to substantially change its supervisory approach to meet the outcomes in the sourcebook but cannot pass these costs on to a regulated population because of its limited size, it should simply absorb these costs itself. We do not think this can have been the intended meaning of Annex 2 as that would permit unlimited financial imposition to be placed upon PBSs even where the premise for the costly supervisory activity is weak, inappropriate and unfounded. That should be made clear.

22. We note the benefits cited in Annex 2 relate to macro-economic or systemic benefits and no suggestion has been made that the benefits will accrue to PBSs and those they supervise.

Bar Council of England and Wales, the Faculty of Advocates and the Bar Council of Northern Ireland

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ANNEX 1

The General Council of the Bar of England and Wales

1. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

2. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

The Bar Council of Northern Ireland

3. The Bar Council of Northern Ireland is the regulatory and supervisory body of the Bar of Northern Ireland- a profession of over 650 self-employed barristers. Members of the Bar of Northern Ireland specialise in the provision of expert independent legal advice and courtroom advocacy.

4. The Bar Council of Northern Ireland champions the rule of law, serving the administration of justice and the public interest. Our barristers play a vital role in safeguarding the legal rights afforded to all citizens right across Northern Ireland.

5. The maintenance of an independent referral Bar represents one of the cornerstones of the legal system in this jurisdiction. The existence of a strong and independent Bar is paramount in promoting public confidence in the expert representation provided by barristers. As independent professionals, barristers are free of any external pressures or intrinsic interests other than to serve their clients to the best of their ability, whilst also

serving justice and fulfilling their duties to the court. The specialist advocacy skills which they deploy are essential in helping to contribute to the high regard in which our legal system is held around the world.

The Faculty of Advocates

6. The Faculty of Advocates ensures that the people of Scotland, regardless of wealth, background or location, have access to the very best independent, objective legal advice. The Faculty has been at the forefront of legal excellence since 1532 and regulates the training and professional practice, conduct and discipline of advocates.

7. As well as ensuring excellence in the specialist field of courtcraft, the Faculty is constantly evolving and is at the forefront of innovations in alternative dispute resolution methods such as arbitration and mediation.

8. Members of the Faculty have access to the country's finest legal resource - the Advocates' Library and the Faculty provides a collegiate atmosphere which allows advocates to exchange views in a way that gives them a unique insight into the law and helps ensure that they are always at the leading edge of analysis.