

# BAR STANDARDS BOARD

REGULATING BARRISTERS

13 October 2020

## **Response to consultation by HM Treasury - Economic crime levy: Funding new government action to tackle money laundering**

As a starting point, it may be helpful to explain the structure of the Bar of England and Wales. Our response to the consultation should be read in this context.

There are two categories of barristers:

1. Practising barristers, who hold a practising certificate. There are 3 types:
  - a) Self-employed barristers. This accounts for the vast majority. These are either sole practitioners working on their own, or self-employed practitioners working in association with others in chambers. Only a small proportion do work that falls within the scope of Money Laundering Regulations; for those that do, only a proportion of the work they do falls within scope and this can vary from year to year.
  - b) Employed barristers. These work for organisations in an employed capacity, either:
    - In another organisation that is not regulated by the Bar Standards Board (BSB). Some barristers in this category do work under the Money Laundering Regulations in organisations regulated by another Professional Body or Statutory Supervisor.
    - In a BSB entity, ie a company or partnership that we authorise. All BSB entities are very small micro businesses or sole traders. A small minority do work under the Money Laundering Regulations.
  - c) Dual practising (a mix of the above).
2. Unregistered barristers. They do not have a practising certificate, but certain parts of our rules apply to them. We do not supervise them under the Money Laundering Regulations.

You can read more about this on our [website](#), where you can also find [statistics](#) about practising barristers.

Our response to the consultation is attached. We have responded to questions that are relevant to the BSB.

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## Levy Principles

### **Question 1: Do you agree with the design principles as set out above? Should the government consider any further criteria?**

We agree with the levy principles set out in this consultation.

## Spending the levy funds

### **Question 2: What do you believe the levy should fund? Are there any other activities the levy should fund in its first five years?**

When the Government's decision to levy the regulated bodies was first presented to us, the amount under consideration was in region of £20 million per annum for a fixed period to fund the Suspicious Activity Reports (SARs) IT programme, followed by funding ongoing costs to be determined. The amount now proposed has significantly escalated to £100 million per annum and the scope has significantly expanded to encompass funding of intelligence and law enforcement resources, and reform of Companies House, although a precise budget is not included in the consultation. We do not think that the consultation paper has been able to adequately justify why all these costs should fall to the private sector. For example:

- Companies House has considerable scope to fund its change programme from the four million companies it authorises. They are currently subject to some very low [fees](#), for example an incorporation fee of £12. It is unclear why this should be funded by barristers.
- It is unclear how the funding of activity under the Money Laundering Regulations will be ring-fenced in the resourcing of the various bodies mentioned in the consultation, which may have a wider remit.

We believe any levy should be based on a transparent budget that is consulted on in advance and is directly linked to activity under the Money Laundering Regulations.

### **Question 3: Do you agree with the government's approach to publish a report on an annual basis? What do you think this report should cover other than how the levy has been spent?**

We agree with this for the reasons set out in the consultation, but the starting point should be the publication of annual budget for consultation, aligned to a business plan that sets out intended outcomes. The annual report should reflect performance against not just the financial projections but also the outcomes in the business plan.

### **Question 4: What are your views on what the proposed levy review should consider and when it should take place?**

We agree with the proposal set out in the consultation, but the review should be annual, as set out in question 3 above.

## Levy calculation

### **Question 5: Do you agree with our proposal that revenue from UK business should form the basis of the levy calculation? Please explain your reasoning.**

We agree with your analysis of the different bases and that the preferred option of UK revenue is the most appropriate, for the reasons set out in the consultation.

If barristers were to be brought in scope of the levy, the basis chosen should reflect the following:

- the majority of barristers are self-employed;
- most BSB entities are very small micro-enterprises (fewer than 5 persons);
- most barristers and BSB entities do not do work that engages the Money Laundering Regulations; and
- for those that do, only a proportion of their work engages the Regulations.

### **Question 6: Are there any sectors that would be disproportionately impacted if revenue is used as a metric, or where revenue would be disproportionate to level of risk?**

Please see our answers to question 5 and 9. In particular, if the revenue threshold is set too low and is based on total income, the model has the potential to disadvantage self-employed relevant persons and those for whom only a small proportion of work that they do engages the Money Laundering Regulations.

### **Question 7: Do you believe other levy bases would provide a better basis for the levy calculation? These could be the ones outlined in Table 4.A or those not considered in the consultation document.**

We believe UK revenue from work conducted under the Money Laundering Regulations to be the appropriate levy base.

### **Question 8: Should a fixed percentage or banded approach be taken to utilising revenue as a metric? Please explain your reasoning.**

We believe a fixed percentage approach should be taken for the reasons set out in the consultation.

### **Question 9: What are your views on the principle of exempting small businesses from paying the levy, and on the level of a potential threshold?**

We agree that small businesses, sole practitioners and self-employed persons should be exempted from paying the levy, in line with the principle of proportionality. The supervised population across all Supervisors varies widely, ranging from sole/self-employed practitioners to very large firms with many fee earners.

The professions that are predominantly made up of sole practitioners/self-employed individuals will be disproportionately penalised by a revenue-based metric if the threshold is set too low. For example, in a barristers' chambers made up of 60 barristers, all 60 barristers will have to pay the levy individually, whereas a law firm that is established as a company with 60 fee earners will only pay once as a business. This potential imbalance will be mitigated with an exemption for small and sole practices.

Barristers and BSB entities will fall into the small business exemption if the threshold is set at the suggested level of £10.2 million, and also at £5 million. They will be exempt at £1 million if only the fee income that is derived from work under the Money Laundering Regulations is used as the basis of the calculation. If all fee income is counted, a small number of barristers may be captured if the threshold is set at £1 million. As the number will be very small, it would not meet the principle of cost-effectiveness to calculate and collect.

**Question 10: What are your views on having businesses below the threshold subject to a small flat fee?**

Having a small flat fee for those below the threshold would not meet the principle that the levy should be cost-efficient to collect and proportionate to the amount of activity that gives rise to risk and the ability to pay.

**Question 11: Do you believe the small business threshold should be determined by reference to revenue alone or to all three of the Companies Act 2006 criteria? Please explain your reasoning.**

Whether one or all criteria are used will make no difference to the Bar.

**Question 12: For businesses not exempted by a threshold, how should their revenue below the level the threshold is set at be treated – as an allowance, levied at the same level as the main levy rate, or levied through a fixed amount?**

As this is unlikely to affect the Bar, we have not commented.

**Question 13: How do you think money laundering risk should be accounted for in the levy calculation?**

We agree that it is not practical to consider money laundering risk at the level of individual businesses in the levy calculation as there is no common metric across supervisors to measure this, as the consultation paper points out. The consultation highlights further disadvantages, with which we also agree, in particular:

- the potential impact on SARs reporting;
- confidentiality of risk ratings of individual practices;
- the risk of incentivising regulated persons to be less open with their supervisors; and
- the volatility of the measure.

If the government decides that the levy should be used to fund human resources in the FIU, it should reflect evidence-based risk and where those resources are deployed. The 2017 [National Risk Assessment](#) (the latest available at the time of writing) assesses the risk to the Bar to be low: “the services at highest risk of exploitation are trust and company formation, conveyancing and client account services. Solicitors may offer any or all of these services and are therefore at greatest risk, while other legal professionals including barristers, legal executives and notaries are assessed to be exposed to lower risks.” Under the terms of authorisation in the BSB Handbook, barristers and BSB entities are not permitted to:

- undertake the management, administration or general conduct of a client’s affairs (rule rS25 for self-employed barristers, rS29 for BSB entities and rS33 for managers and employed barristers of BSB entities);
- receive, control or handle client money apart from what the client pays a barrister for their services, except where acting as a manager of a body authorised by another approved regulator to undertake reserved legal activities, such as the SRA (rule rC73).

This limits the Money Laundering risk to which they are exposed.

**Question 14: Do you believe using number of SARs reported as a metric through a banded approach would be an appropriate means of achieving this objective? Please explain your reasoning.**

The low level of SARs reported by the Bar reflects the extent of risk, as set out in question 13. Whilst the consultation paper says that the government thinks there is under-reporting in some sectors, we have not been provided with any evidence of this in relation to the Bar.

We agree with the comment in the consultation paper that using SARs as a measure could penalise good governance and incentivise poor behaviour.

#### Applying the levy calculation

**Question 15: Do you believe there should be a periodic or annual process for setting the levy rate? If periodic, what would an appropriate period be?**

As set out in our response to question 3, the levy should be set based on an annual budget that is subject to consultation.

**Question 16: Would you prefer to calculate the levy based on total revenue or revenue from AML-regulated activity only? Please explain why.**

If the levy is ring-fenced for spending related to activity under the Money Laundering Regulations, it should be based on revenue from AML activity only, but that may not meet the principle of cost-effectiveness of collection for small businesses.

**Question 18: Which is your preferred option for defining revenue?**

Most barristers are self-employed, so fee income would be the most appropriate definition.

**Question 21: Do you agree that the reference period for the levy calculation should be a business's accounting period? Please explain your reasoning.**

We agree with this for the reasons set out in the consultation.

**Question 22: Do you agree that the levy should apply to activity carried out from the date from which the activity is regulated? Please explain your reasoning.**

If required, the BSB would only be able to provide data to the collection agent from the date of authorisation by the BSB.

#### Collecting the levy

**Question 25: Do you think the agency should issue a notice to file or that businesses should be required to submit a return proactively? Please explain your reasoning.**

**Question 26: Do you think all businesses should report their levy liability to the agency? If not, do you think small businesses should report a nil declaration or nothing at all?**

The approach to requiring the BSB to share information with the collection agency and the approach to filing of notices will need careful consideration in order to preserve the principle of cost-effectiveness, and also to ensure GDPR compliance. This is because, as set out above, most barristers and BSB entities do not do work that falls within the scope of the Money Laundering Regulations and those that do may not engage in relevant work every year. Also, most, if not all, are likely to fall within the small business exemption.

The best solution to this will be to ensure that barristers and BSB entities fall within the small business exemption, which would be the case at a threshold of £10.2 million.

**Question 27: Do you agree with the proposed approach for calculating the levy rate, invoicing, and payment of the levy? If not, please explain why.**

We agree with the proposed approach.

**Question 28: What are your views on the proposed compliance framework in a single agency model?**

We agree with the proposed compliance framework.

**Question 29: Do you agree that supervisors should be able to determine the frequency of reporting and payment, provided they transfer levy payments to the government a maximum of a year after the end of a business' accounting period?**

Please see our answer to question 31.

**Question 30: What are your views on the supervisor carrying out compliance activity as set out above?**

Please see our answer to question 31.

**Question 31: Which model do you prefer? Please explain why. Do you have suggestions for any other models that could be used?**

Our view is that the single agency model is the preferred approach for the reasons set out in the consultation and summarised in table 6B.

If the Supervisor model is adopted, primary legislation will need to be brought in to allow the BSB to collect the levy as this is not a core function under existing legislation.

**Question 32: If you are a supervisor, what do you estimate your costs would be in each model?**

Given the proposed thresholds and that most, if not all barristers and BSB entities would be out of scope, the administrative burden under both models appears to considerably outweigh the financial gain. This is further complicated by the fact that, in principle, any barrister could fall in scope in one year but out of scope another.

Under the Supervisor model, the legal framework for enforcing collection would have to be established as there are no existing legislative powers to collect or enforce the levy under the Legal Services Act 2007. Furthermore, we would need to submit a rule change to the Legal Services Board, our oversight regulator, to enable the BSB to collect and enforce the levy. We will also have to plan, build and implement the mechanism for collection, including administrative processes and IT requirements. This is not proportionate.

For the reasons above, the best model would be a single agency.

### Funding for fraud

#### **Question 33: How much did your organisation spend on countering fraud in 2019? What are these funds spent on, in high level terms?**

The BSB does not collect data on how much it has spent on countering fraud. Fraud risk is relevant to a number of risks that we have identified in our [Risk Index](#) and to various strands of our [Strategic and Business Plans](#). We report the total cost of regulation in the [BSB annual report](#).

Some examples of the work we have done includes the following:

- Most of the work that barristers and BSB entities undertake relates to advocacy, litigation, and specialist legal advice. Litigation is one way in which criminals may seek to abuse the legal system through sham litigation and therefore barristers and BSB entities must ensure the case brought to them is genuine and not an attempt to move criminal funds. We have provided [guidance](#) on this for the Bar.
- Some students have been approached by apparent fraudsters offering pupillages for cash. We have reported this to student bodies for them to raise awareness with their students.
- We have recently issued a [Regulatory Return](#) to around 350 chambers, BSB entities and sole practitioners. This includes a question about whether the organisation or individual has been subject to any instances of fraud. This will enable us to update our assessment of the level of risk of fraud to the profession and to consumers.

#### **Question 34: What additional financial contribution should the private sector contribute towards improving fraud outcomes?**

Barristers are already subject to a Practising Certificate Fee to fund the cost of regulation, which encompasses supervision of the effectiveness of risk management.

We are not aware of a particularly high risk to consumers of fraud relating to barristers' services.

#### **Question 35: Which sectors do you think should be involved in countering the system-wide fraud risk? Please explain your rationale – for example whether you believe that those included should be included based on benefit, or risk?**

Please see our answer to question 34.