

BAR STANDARDS BOARD

REGULATING BARRISTERS

30 July 2020

FCA Quarterly Consultation No 28: Chapter 4 - Changes to the Sourcebook for professional body anti-money laundering Supervisors – criminality checks

This is the Bar Standards Board's ("BSB") response to Chapter 4 of the FCA Consultation Paper [CP20-7](#).

We understand that OPBAS proposes to add an addendum to the OPBAS Sourcebook on how it expects Professional Body AML Supervisors (PBSs) to comply with Regulation 26 of the Money Laundering Regulations ("MLRs").

Q4.1: Do you agree with our expectations of the term 'sufficient information'? If not, why?

In relation to an application for approval under Regulation 26, OPBAS considers "sufficient information" to:

- a) exclude acceptance of a 'self-declaration',
- b) mean, by default, a criminal record check by the Disclosure and Barring Service (DBS), Disclosure Scotland or Access Northern Ireland, and
- c) include evidence of UK residency within the previous 5 years (from the date of application). A PBS may take into account existing information it holds on a member."

Broadly, we agree with this definition and it aligns with our processes. However, we have the following points to raise:

1. As set out in paragraph 4.9 of the consultation, the OPBAS Sourcebook will need to reflect the structure of the Bar and the fact that [section 207 of the Legal Services Act](#) gives the Inns of Court the role of Calling barristers to the Bar, not the BSB, as set out below.

Our processes are as follows:

- a) Practising barristers who declare that they are carrying out work within the scope of the MLRs must obtain a basic DBS check. The requirement to do so is set out in [rule S59](#) of the BSB Handbook.

- b) An owner, manager, Head of Legal Practice or Head of Finance (ie. “BOOMs”) of a BSB entity must, upon authorisation (whether or not they do work that falls under the MLRs) meet the suitability criteria set out in [rule S110](#) of the BSB Handbook. This will include obtaining and providing a copy of a DBS check to the BSB where the relevant individual is not an authorised person (ie. not a barrister or solicitor).

We have taken steps to strengthen controls at point of entry to the Bar. When an individual has successfully completed the vocational component of training they are “[Called to the Bar](#)”. Under the Legal Services Act, Call may only be conferred by the [four Inns of Court](#), not the BSB, and it is the Inns that conduct fit and proper tests. Once a student is Called to the Bar as a barrister, responsibility for conduct passes to the BSB.

In 2019, we signed a [Memorandum of Understanding with the Inns](#), which sets out the roles and responsibilities of the BSB and the Inns, including in relation to the administration of fit and proper person checks, both upon admission to an Inn as a student member and, again, before being Called to the Bar. From July 2021, all barristers will be required to have a standard DBS check in order to be Called. The BSB will not receive a copy of each DBS check but the process will be subject to risk-based supervision by the BSB as set out in the Memorandum of Understanding.

2. We do not think that the definition should exclude a self-declaration, which we think forms a part of the information that the Inns and BSB collect to inform membership, Call and authorisation decisions. Alongside other processes, including DBS checks, self-declaration plays an important role at Call, on application/renewal of practising certificates and under [rule C65](#) of the BSB Handbook (see 4.3 below for more on this). A false declaration would have serious consequences as it would be likely to be a breach of Core Duty 3: “You must act with honesty, and with integrity”.
3. Evidence of UK residency within the previous 5 years is a requirement for the DBS check. This is not information that the BSB would routinely collect for the purpose of authorisation.

Q4.2: Do you agree with our expectations regarding applicants who are residing or have resided overseas? If not, why?

We agree with this.

Q4.3: Do you agree with our expectations regarding the obligation and approach to the monitoring of criminality checks? If not, why?

We agree that PBSs should apply a risk-based approach to monitoring criminality checks. As set out under 4.1 above, we have addressed this in the Memorandum of Understanding with the Inns. In addition, we have conducted spot checks of DBS checks obtained by self-employed barristers who are relevant persons under the MLRs.

Requiring all relevant barristers and BOOMs to obtain a criminality check every five is neither risk-based nor proportionate, particularly given that the Bar is considered low

risk for money laundering and barristers are restricted by our Handbook from handling client money and managing clients' affairs. OPBAS have not provided an evidence base in the consultation paper to support the assertion that renewing a DBS check every 5 years is "good practice". We note, for example, that [CQC guidance](#) says: "There is no requirement for a service that directly employs its own staff to repeat DBS checks within a set period. For example, there is no blanket rule such as re-checking all employees every three years. However, employers can recheck their staff whenever they think it is necessary. Any additional checks should be proportionate to risk." [Ofsted](#) does not require cyclical DBS checks and says (page 24) that schools should take "proportionate decisions on whether to ask for checks beyond those that are required".

In our case, ongoing monitoring is already achieved through a number of controls:

- Under rule S59, barristers that carry out work that engage the MLRs must confirm, when they renew their practising certificate annually, that they have not been convicted of a relevant offence under schedule 3 of the MLRs. A similar declaration is in place when BSB entities renew their authorisation annually.
- Under rule C65 of the BSB Handbook, barristers are obliged to report, to the BSB if, *inter alia*, they have been charged with an indictable offence, or a criminal offence of comparable seriousness in any other jurisdiction.
- Under rule C66, barristers are also obliged to report to the BSB if they have reasonable grounds to believe that there has been serious misconduct by a barrister, a registered European lawyer, a BSB entity, manager of a BSB entity or an authorised individual who is working as a manager or employee of a BSB entity.

Whilst OPBAS has said in the consultation that self-declaration is not an acceptable control, this fails to recognise the seriousness of the obligation under our rules. The [BTAS sanctions guidelines](#) set out that dishonesty is regarded as a very serious matter (see, for example, paragraph 6.2). Our experience is that barristers are cautious when making declarations to the BSB (ie. they tend to declare when in doubt). Our [2018/2019 Annual Enforcement Report](#) says "barristers still appear to be erring on the side of caution when reporting serious misconduct and this is positive. The reporting obligations are an important means to allow the BSB to be alerted to potential issues of serious concern".

However, we do not rely solely on self-declaration:

- Daily media reports are scanned by the BSB. If there are any reports of barristers that have been charged or convicted of a criminal offence, or if there was any indication that a barrister or BSB entity had been involved in anything that would amount to misconduct, the Conduct and Assessment Team would conduct a risk assessment of the information and further information would be sought where relevant.
- Anyone can [report a concern](#) to the BSB. Such information is risk-assessed by our Contact and Assessment Team to decide on an appropriate regulatory response. We have a dedicated phone line for concerns about Money Laundering.

- We have [Memoranda of Understanding](#) in place with other regulators. These are actively used, for example the Legal Ombudsman regularly refers to the BSB matters identified in complaints by consumers that indicate potential misconduct. Where an unregistered barrister that is regulated by another regulator becomes subject to that regulator's disciplinary action, a referral will be made under the MoU. However, in the latter scenario, the barrister would not be authorised by the BSB to conduct work under the MLRs by virtue of being unregistered.
- We also receive reports directly from the police authorities.

The combined effect of the above means that it is highly unlikely that a practising barrister could be convicted of a "relevant offence", given the seriousness of the "relevant" offences, without it coming to our attention. We do not think it is proportionate or risk-based to require all relevant persons under the MLRs to obtain a DBS check every 5 years. When we conducted a spot check of DBS checks after the 2017 MLRs came into effect, no undisclosed offences were identified.

Another point to consider is that the vast majority of barristers that conduct work under the MLRs are self-employed, rather than employed barristers in BSB entities. Chambers have no obligations in relation to internal controls under the MLRs. For the reasons set out above, we do not think that it would be a good use of our resources to require all relevant self-employed barristers to obtain a DBS check and send it to the BSB to check. For a self-employed barrister to be asked to obtain a DBS check for their own information as a matter of course every 5 years would be meaningless - it will not tell them anything they do not already know.

We think that the decision on whether to require a barrister to obtain an updated DBS check should be at the discretion of the BSB where we have conducted a risk-assessment of information that we have and concluded that it is appropriate, in the circumstances, to require a barrister to obtain one.

Q4.4: Do you agree with our expectation that the requirements in Regulation 26 are considered to apply to all existing BOOMs and relevant SPs? If not, why?

We agree with this to the extent that we have described under questions 4.1 to 4.3 above.

Q4.5: Do you agree with our expectation that a PBS factors into its supervision the fact that an existing BOOM or relevant SP has chosen not to apply for approval under Regulation 26? If not, why?

We agree with this, however we ask OPBAS to note the following:

1. Standard DBS checks will, from 2021, be conducted on all persons being Called to the Bar, not just those engaging in work under the MLRs. The same applies to non-authorised persons being approved as BOOMs in BSB entities.
2. Individuals who are Called to the Bar but do not hold a practising certificate are classed as unregistered barristers. The BSB Handbook applies to a limited extent to unregistered barristers and we have [guidance on what they can and cannot do](#). Unregistered barristers are not required to register up to date contact

information with the BSB not are subject to active supervision. Unregistered barristers who are doing work that does not require them to hold a practising certificate but which engages the Money Laundering Regulations (eg Trust and Company Service Providers) would be required to register with HMRC.

Q4.6: Are there any other matters you wish to be considered for guidance on compliance with Regulation 26?

We have no further matters.

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