

Annex A

The Bar Standard Board's report on responses to the consultation on new information and registration requirements for the Bar

1. Introduction

1.1. In June 2017, the Bar Standards Board (BSB) launched a consultation on new information and registration requirements for the Bar. This proposed:

- the collection of practice area information;
- the registration of those working in proceedings involving young people;
- that all barristers must declare whether they will undertake work which engages the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ([‘the Regulations’](#)), with additional requirements for those who do; and
- that registration for the new My Bar portal must be with a unique email address.

1.2. A copy of the consultation paper is attached at Annex A. The consultation closed on 15 September 2017.

1.3. We received a total of 21 responses to the consultation. Responses were received from the following:

Bar Council
Council of the Inns of Court
Criminal Bar Association
Crown Prosecution Service
Equality and Human Rights Commission
Government Legal Service
Inner Temple
Legal Services Consumer Panel
Magistrates Association
Ministry of Justice
Newham Youth Offending Team
Standing Committee for Youth Justice
Youth Justice Board
Youth Justice Legal Centre
Five barristers
One solicitor
One social worker

1.4. We have not published individual responses but these can be made available on request.

1.5. This paper summarises the key issues raised and provides the BSB's response.

2. Overall summary of responses

- 2.1. The majority of respondents agreed that we should collect information on areas of practice, but there was less support for mirroring the categories used by the Bar Mutual Indemnity Fund (BMIF), particularly for those at the employed Bar.
- 2.2. The majority of respondents supported registration of those undertaking work in proceedings involving young people but many wanted the scope of the new requirement to be more clearly defined and felt that mandatory training should also be introduced to ensure that barristers who are undertaking this work are providing a competent standard of service.
- 2.3. There were a small number of responses to our proposed new declaration and associated requirements relating to the Regulations. There was some support for basic disclosure checks as this could increase consumer confidence, although several respondents questioned why all barristers falling within the scope of the Regulations should undertake a check when applying for a Practising Certificate.
- 2.4. We did not receive any responses regarding our proposal to require barristers to register for My Bar (a new online portal which barristers will use to apply for a Practising Certificate) with a unique email address.

3. Summary of responses by question and BSB response

Practice areas

- 3.1. Within the consultation, we proposed to require barristers to disclose their areas of practice, the percentage of their total income attributable to each area of practice for the last full calendar year and, for those who are registered to undertake public access work, the percentage of total income derived from public access work for the last full calendar year.
- 3.2. We proposed this to support our work as a risk and evidence-based regulator as this would ensure we have more reliable information about the Bar, provide a good understanding of the dynamics of the market and of the way in which consumers engage with the market, and it would support our risk profiles of the profession.

Question 1 – Do you agree with the proposal to collect areas of practice?

- 3.3. We received a total of eight responses to this question.
- 3.4. The majority of respondents were supportive of our proposal to collect practice areas. For one respondent, they thought this information should be made

publicly available and integrated into the Legal Choices website, to improve transparency for consumers.

We welcome and support the proposal to require barristers to declare information about their type and area of practice when renewing their practice certificate..... Moreover, this data would provide the BSB with some insight on risks and opportunities in the legal services market, including the challenges faced by consumers.

Legal Services Consumer Panel

- 3.5. Two respondents did not consider that sufficient information had been provided about how the information will be used and felt that more information should be provided.
- 3.6. A number of respondents raised concerns as to whether mirroring the categories used by BMIF for the employed Bar was the most effective way to collect the data for our purposes. A summary of these responses has been included below.

The current categories are not very relevant for employed barristers working for the Government Legal Service. Within Government work there is often a great deal of overlap between areas. For example.....work could be categorised as public international law, (English) public law, legislation, EU law, or specific sectoral areas of law.

An employed barrister

Having considered the practice areas used by the BMIF we are of the view that a new category should be introduced to cover the work of employed barristers working within the Government Legal Service..... a category of e.g. public sector employed barrister.

Government Legal Service

BSB response

- 3.7. **We note the concerns from some respondents about our proposals, particularly with regards to the employed Bar. We will therefore look to engage with respondents to the consultation who raised these issues, as well as Specialist Bar Associations, to see if the current categories do not include some areas of work at the employed Bar. This could result in the creation of additional categories so that all work can be captured. In the short-term, however, we will proceed using the BMIF practice area**

categories. This will enable a direct comparison between the employed and self-employed Bar in the analysis of matters related to area of practice. This would be more difficult if practice areas were classified in a different way.

Question 2 – Do you agree with the proposal to collect information on the percentage of income attributable to practice area?

- 3.8. We received a total of eight responses to this question.
- 3.9. One respondent agreed with our proposal as it would help to provide a clearer understanding of the barrister’s specialism and areas of expertise.
- 3.10. A number of respondents to the consultation agreed to the principle to collect the percentage of income attributable to practice area but highlighted some concerns. For one respondent, they felt that insufficient information had been provided to enable them to support the proposal and they wanted greater transparency about how the information will be used.
- 3.11. For other respondents, concerns were focused around the issues for employed barristers, as for such barristers all income derives from the employer regardless of the work of the previous year and which practice areas it is categorised as falling within.

Employed barristers are typically paid a fixed annual salary by their employers, meaning their salary could be very difficult to divide into their different areas of practice. For this reason we would recommend that the employed Bar is not asked this question.

Bar Council

- 3.12. One respondent highlighted that this issue also affects the self-employed Bar:

I am concerned that the BSB may not have appreciated the complexity of allocating income to particular Bar Mutual Indemnity Fund (“BMIF”) categories. The nature of my practice means that the vast majority of my income is from cases that fall within more than one BMIF category.....The BMIF categories do not well reflect how practitioners divide their practice areas.

A self-employed barrister

BSB response

- 3.13. **We note the concerns raised. The self-employed Bar is already required to provide this information to BMIF. As such we believe it is proportionate to request this information as the administrative burden on self-employed**

barristers is minimal as they can provide the exact same information to us that they provide to BMIF. We acknowledge that the employed Bar will typically receive their income from their employer, regardless of the work they undertake, and therefore requiring a declaration of percentage of income may be difficult. To mitigate this, we will develop guidance which will ask employed barristers to allocate the percentage of their time spent on different areas of practice to determine the proportion of their salary.

Question 3 - Do you agree with the proposal to collect information on income attributable to public access work? Please give reasons for your answer.

3.14. We received a total of six responses to this question.

3.15. Some respondents were supportive, stating that the purpose seems legitimate and will help to provide a clearer understanding of specialisms and expertise. However, one respondent felt that we need to provide more information about how we will use the data, particularly so barristers do not feel they will be unfairly targeted by the BSB.

BSB response

3.16. **We note the concern around how data will be used. As our published Enforcement Strategy makes clear, the BSB takes a risk-based approach to the enforcement of our rules. As we do not consider the provision of practice area information to present a high risk, we would not look to take enforcement action against barristers who declare their areas of practice in good faith.**

Registration of Youth Court work and cases involving young defendants

3.17. We propose to require barristers who will be working in proceedings involving young people within the next 12 months to register with the BSB. This would apply to pupils requesting a provisional practising certificate and all barristers applying to a full practising certificate.

3.18. We proposed that those who did not register during the annual Authorisation to Practice (AtP) exercise should register promptly after the event if they subsequently undertake this work, by contacting our Records Office.

3.19. We also proposed that the registration will appear on the BSB's Register.

Question 4 – Do you foresee any practical challenges with introducing compulsory registration for Youth Court advocates? If you do, what are these?

3.20. We received a total of 17 responses to this question.

3.21. One respondent to the consultation highlighted a potential challenge could be ensuring that clerks are fully informed of these changes, and the rationale

behind the changes, as they play an important role in allocating work to barristers.

- 3.22. One respondent stated that the amount of work in the Youth Court is decreasing so it may be difficult to find a registered barrister, local to the court, who is able attend for an urgent overnight case or to make arrangements for a lengthy trial in either the Youth Court or Crown Court. Another also highlighted the fact that the Ministry of Justice is likely to increase the number of cases heard in the Youth Court (by moving those heard in the Crown Court), and that low fees and the additional burden of registration may adversely impact on the number of barristers available to undertake this work.
- 3.23. One respondent identified that barristers are often instructed at short notice and that requiring registration may mean that inexperienced practitioners are instructed over a more competent barrister who is not registered at the time. This may amplify the provision of services by 'inexperienced practitioners'. They also felt that the scope of the rule is insufficiently clear, as it is not known whether one case is sufficient to trigger the requirement to register.
- 3.24. A number of respondents highlighted concerns that registration could be seen as a measure or indicator of competency. They queried how we will make an assessment of competency and how we will supervise this and enforce our rules.
- 3.25. One respondent also queried how we engage with pupils who are undertaking Youth Court work, as there is not a requirement for them to undertake CPD¹.
- 3.26. Similarly, there were concerns that registration on its own would not prevent inexperienced barristers, or those lacking the appropriate skills, from regularly undertaking work in the Youth Court.
- 3.27. Another respondent felt it was important to ensure that the aim of registration is not lost and to provide guidance on training, supporting barristers to maintain their competency.
- 3.28. A number of respondents were unclear on the scope of the rule and whether this extended beyond the Youth Court. One respondent queried what 'promptly after the event' means, and sought greater clarity on the timeframes we would expect for registration.
- 3.29. One respondent felt that registration during the annual AtP exercise should be the default position and it should only be in exceptional circumstances (to be decided by the bench chair or judge) that advocates could register after the case. This position would recognise the specialism of Youth Court work and not frustrate the administration of justice. Similarly, another respondent felt that

¹ *The Youth Proceedings Advocacy Review: Final Report*, Ali Wigzell, Amy Kirby and Jessica Jacobson, Institute for Criminal Policy Research [12] highlights that there are a small number of pupils working in the Youth Court, Magistrates and Crown Courts

enabling retrospective registration undermines the purpose of the rule change and should only be a transitional position.

BSB response

- 3.30. **We note the concerns raised as to the scope of the rules requiring barristers to register if they are involved in proceedings involving young people. As a result, we will amend our proposals and limit the scope of our requirement to the Youth Court and to cases involving young defendants (those under the age of 18) that are heard in the adult magistrates' court, Crown Court or higher courts. This mirrors the scope of our Youth Proceedings Competences.**
- 3.31. **We will also amend the requirement to register 'promptly' if the barrister did not register at AtP and subsequently undertook work in this area. Instead, the barrister will now be required to register on My Bar within 28 days of undertaking the work.**
- 3.32. **We consider there is a significant risk that access to justice could be frustrated if we were to remove the ability to register retrospectively and we are therefore retaining this requirement.**
- 3.33. **Within the Youth Proceedings Competences, we outline possible training providers and other resources to support practitioners tailor their training needs.**

Question 5 - Do you agree with the proposal to require barristers undertaking work in proceedings involving young people to register?

- 3.34. We received a total of 17 responses to this question.
- 3.35. The majority of respondents to this question agreed with our proposal to require barristers to register.
- 3.36. A significant number of respondents felt that registration could help tailor training needs (through CPD) to ensure barristers have the specialist skills required for Youth Court work. One of these respondents did highlight that this assumes prior competence, or an ability to highlight where they could benefit from further training, which is not necessarily accurate.
- 3.37. It was suggested that the rules by themselves may not improve standards of advocacy, particularly because it does not combat the issue of low remuneration for Youth Court work². It was suggested that this could be mitigated by introducing clear guidance as to the level of training and expertise we would expect advocates to have before undertaking this work, or by requiring a declaration of competency against our Youth Proceedings Competences.

² Those respondents who highlighted this did recognise that this is beyond control of the BSB.

- 3.38. Another respondent was concerned that there was insufficient information provided as to how the CPD of Youth Court practitioners will be monitored. In particular, whether the BSB would require specific training to be undertaken, or whether this will be left to the barrister's judgment, with supporting guidance. It was also highlighted that our intention to monitor CPD records may deter barristers due to the concern that specific training may be expected.
- 3.39. The majority of respondents suggested that mandatory training should be introduced for all advocates practising in the Youth Court, with some suggesting this should be both pre and post qualification as a barrister.
- 3.40. One respondent put forward a number of alternatives, which included introducing a panel of advocates to ensure that all of those doing Youth Court work (including solicitors) are suitably qualified.

BSB response

- 3.41. **We are pleased that the majority of respondents agreed with our proposal to require registration of barristers undertaking work in the Youth Court and cases involving young defendants (those under the age of 18) that are heard in the adult magistrates' court, Crown Court or higher court. We believe this is a proportionate step to help improve standards of competency within this sector.**
- 3.42. **We recognise the strength of the case for mandatory training to be introduced once the value of this work has been raised. However, we are mindful that the market for this work is fragile and are keen that any additional regulation we introduce is not burdensome. At present, we feel that introducing compulsory (and likely costly) training into an area of work which already has low fees and low status is disproportionate and is likely to discourage barristers away from this kind of work.**
- 3.43. **We note the concerns that the rules by themselves may do little to improve standards. To mitigate this, we will undertake a spot check of the CPD records for those barristers who have registered to ensure they are maintaining their competency. As barristers are already required to maintain their competency for their areas of practice, we believe the additional spot check is a proportionate approach to take as it imposes a minimal burden.**
- 3.44. **We recognise that pupils are not required to undertake CPD but we would expect them to ensure they are competent before taking on the work.**

- 3.45. **We acknowledge the benefits of linking registration to competency³ and will therefore require barristers who register to declare their competency against the Youth Proceedings Competences.**

Question 6 - Do you agree that the registration should appear on the BSB Register?

- 3.46. We received a total of 15 responses to this question.
- 3.47. The majority of respondents agreed that the registration should appear on the BSB register, as it supports consumers and promotes the work as a specialism.
- 3.48. One respondent highlighted the following:

We also welcome the proposal to make the registration publically available on the BSB's Barristers' register, as this would increase transparency and may aid consumer choice.

Legal Services Consumer Panel

- 3.49. However, there were a number of respondents who felt that registration could mislead the general public, potentially as to specific training a barrister has undertaken, or that the absence of registration implies a lack of competence, and that guidance which explains what the registration means may be insufficient to dispel confusion.

We do not agree that registration of competence should be publicly available on the BSB Register..... Even if a lengthy explanation of registration were included on the register, we do not think that this would be sufficient to dispel any confusion.

Bar Council

There is also the danger that registration in accordance with the current proposals (appearing against the barrister's name on the BSB register) has the potential to mislead: a client may be misled into thinking that an absence of registration implies a lack of competence to undertake the work, or similarly believe that registration reflects a specialism in the area that is not truly held.

Inner Temple

³ Including the increased confidence which clients could have that their barrister has the specialist skills and knowledge required for undertaking this work.

3.50. One respondent believed that a kite mark/accreditation could also be developed to accompany registration. This would support consumers in identifying barristers who have been assessed as competent to work within the Youth Court. Similarly, another respondent outlined the complexity of Youth Court work, which can range from minor to serious matters, and therefore, one registration with no differentiation between different cases and the expected level of competence required to advocate for each, is unhelpful.

A kitemark could be developed to accompany registration. We regularly receive calls from parents looking for a youth justice specialist to represent their child at the police station or at court. We believe that there is a real need for defendants and their families to be able to be confident that the advocate they choose to instruct is competent in youth justice law.

Youth Justice Legal Centre

Most children and their parents will not know to check the register, or know what registration means practically. What is more, if they were to consult the register, with no accreditation requirements prior to registration, possible clients would assume that barristers are better qualified to represent them than they actually are.

Standing Committee Youth Justice

3.51. One respondent believed that in addition to the public register, the barrister's practising certificate should also contain the registration. This is because the certificate is renewed annually and it will be a minimal burden for those no longer wishing to undertake this work.

3.52. Two respondents did not agree that registration should appear on the public register. Aside from those issues outlined above, there is a risk that those who are registered to undertake Youth Court work may be offered more complex cases than they are competent to handle. This creates a pressured situation for both the barrister and client, as the instructions would be returned and alternative representation would need to be sought.

BSB response

3.53. We welcome the support for publishing registration on the BSB register. To mitigate the risk that this could mislead the public, we are developing guidance to appear alongside the registration to make clear what it means.

- 3.54. **We are also producing guidance, which should be published at the end of 2017, which will provide support to those involved in these proceedings in terms of knowing what to expect from a barrister and what to do if things go wrong. This will include some information about the registration requirement to support clients.**
- 3.55. **Publication of registration will also enable solicitors, clients and third parties in the youth justice system to know whether the barrister is registered, and to report instances of poor advocacy or non-registration to us. We will then be able to work with the barrister, supporting them to improve.**
- 3.56. **We are not looking to introduce a kitemark at this stage as we would need to undertake research before developing this. We are not seeking to have registration appear on the practising certificate as this would mean barristers must have registered before undertaking this work. As outlined in our consultation, we believe the risk to access to justice to be too great if barristers were unable to undertake work before registration.**

Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the Regulations)

- 3.57. The Regulations transpose the EU Fourth Money Laundering Directive (and the Fund Transfer Regulation (FTR) which accompanies it), which seek to implement the international standards set by the Financial Action Task Force. They replaced The Money Laundering Regulations 2007 when they came into force in June 2017.
- 3.58. Within the consultation, we proposed a rule change to ensure compliance with the Regulations and would require barristers to disclose during the AtP process:
1. whether they are undertaking, or intending in the next 12 months to undertake, work which falls within the scope of paragraphs 11 (d), 12 (1)(a) to (e) and (2) (a) to (d) of the Regulations; and if they do fall within the scope of the Regulations, to declare:
 - a. whether, with reference to paragraphs 26 (8) and (11) of the Regulations, they have been convicted of a “relevant offence” as listed in Schedule 3 of the Regulations ; and
 - b. that they will obtain a basic disclosure check and provide the result to the BSB.

Question 7 - Do you foresee any practical challenges around declaring whether the work you do, or intend to carry out, falls within the scope of

paragraph 11 (4)⁴ and 12(1) (a) to (e) and 12 (2) (a) to (d) of the Regulations;? If you do, what are these?

- 3.59. We received a total of five responses to this question.
- 3.60. One respondent was concerned that our proposed rule is forward looking, which can create difficulty for barristers to make an annual declaration accurately, due to the cab rank rule.

The problem with the 'prospective' nature of the question is that the answer depends upon the personal view of the barrister as to what they think some hypothetical future instructions might involve. This is not a sound basis upon which to seek to build a statistical base.

Bar Council

- 3.61. Another respondent raised that we did not propose a rule requiring barristers to declare if they undertake this work part way through the year. They anticipated a gap as barristers who do not declare during the annual AtP exercise and subsequently undertake work which engages the Regulations do not need to notify us of this and therefore would not undertake a basic disclosure check.
- 3.62. One respondent was supportive of our proposal to require basic disclosure checks as this could increase consumer confidence in the profession.
- 3.63. One respondent considered the reasoning for requiring a basic disclosure check was unclear, given the duty already on barristers to notify the BSB if they have been charged with a criminal offence. They would welcome a further explanation as to why this is necessary.
- 3.64. Another respondent highlighted that all of their employees undergo a disclosure and barring service check during the recruitment process and therefore, requiring them to subsequently obtain a basic disclosure check imposes an additional burden and costs.
- 3.65. One respondent suggested that the check should be undertaken at the point at which instructions are accepted. This would also allow barristers to accept instructions on an urgent basis before the check can be obtained, so as not to adversely impact the client.
- 3.66. One respondent sought clarification as to how the costs of the Office for Professional Body Supervisors (OPBAS) will be apportioned.

⁴ Within our consultation paper, this was listed as paragraph 11(4). This was accurate within the draft Regulations but the paragraph numbering was amended when they came into force.

3.67. There was uncertainty from one respondent as to whether My Bar will have the facility for barristers to declare whether they have undertaken the basic disclosure check previously, thereby acknowledging that it is a one off process.

BSB response

3.68. **We have carefully considered these responses, which were constructive in helping us to refine the way we pose the questions. We recognise that the nature of practice at the self-employed Bar means that, for most barristers, it is generally not possible to predict what work they intend to undertake. On reflection, we agree with the consultation responses and have amended our question to focus the declaration on work that a barrister has undertaken in the last 12 months, is currently undertaken or has accepted instructions for.**

3.69. **Under the direction of HM Treasury, the Legal Sector Affinity Group of legal sector regulators and professional bodies have published joint guidance on the Regulations which apply to the entire legal profession⁵. This will be supported by additional guidance and training that is being developed by the Bar Council to help barristers understand how the Regulations apply to the Bar and what type of work engages the Regulations. We have also developed FAQs which will support barristers when completing the declaration during the AtP process. We appreciate that it can be challenging to identify when the Regulations apply to the work that barristers do, but we think that, combined, this information will help barristers to better understand their obligations under the Regulations and our proposed rule.**

3.70. **We are asking barristers to obtain a basic disclosure check to meet the requirements of section 26 of the Regulations. In developing our rule, we have been in discussion with HM Treasury about our current rule that barristers are required to report to the BSB if, inter alia, they are charged with an indictable offence or are convicted of a criminal offence⁶. However, the Treasury has indicated that it requires, as a minimum, that a one-off basic disclosure check is completed. They have set a deadline in the Regulations of 26 June 2018 to comply.**

3.71. **We will not be requiring barristers to undertake a new check if they have had a basic disclosure check or a disclosure and barring service (DBS) check since being called.**

3.72. **We will allow barristers to obtain the basic disclosure at the point of accepting instructions for relevant work for the first time, although instructions should be accepted subject to receipt of a clean basic disclosure check. Currently, the basic disclosure check takes around 10**

⁵ <https://www.barstandardsboard.org.uk/regulatory-requirements/anti-money-laundering-and-counter-terrorist-financing/>

⁶ rC65.1-.8

days, although we understand that testing is underway with new systems that will enable same day checks⁷.

- 3.73. **Barristers who are already undertaking work that falls within the scope of the Regulations on a regular basis will need to get the check done in advance of the deadline set for compliance with HM Treasury's requirements (26 June 2018).**
- 3.74. **Barristers will only be required to make a declaration around the basic disclosure check once, which will then be stored in our system. It will therefore not be necessary for barristers to make subsequent declarations if they have previously undertaken a check. We are producing an FAQs document to support barristers.**
- 3.75. **We anticipate that OPBAS will invoice the BSB and we will pass this cost on to all barristers through the PCF. We agree with the Bar Council's response that this is in the interests of the Bar as a whole. We do not yet know how OPBAS costs will be apportioned between regulators/Professional Body Supervisors. That will be subject to consultation that has not yet started. We want to do everything that we can to ensure that the approach that OPBAS takes to its role as oversight regulator is proportionate to the risk in the Bar. One way to demonstrate that is to collect the best data that we can to indicate the number of barristers engaged in the Regulations and the type of work that they do.**

4. Equality and Diversity

- 4.1. We asked stakeholders whether they agreed with our equality impact analysis. We received a total of four responses to this question.
- 4.2. The majority of respondents agreed that the proposals would not adversely impact upon equality and diversity. However, one respondent commented on a section of our Equality Impact Assessment (EIA) for the Regulations which highlighted that the requirement to undertake a basic disclosure check may affect those who are foreign qualified as it could be more challenging for them to satisfy the requests for documents, thereby affecting their ability to practise.

BSB response

- 4.3. **The Supervisors Forum of regulators have raised the question of how relevant persons based overseas should be managed. The Treasury have agreed that regulators should develop their own risk based approach. We will expect barristers who have declared that their work engages the Regulations to undertake the basic disclosure checks by 26 June 2018. If a barrister has been unable to do this, we would expect them to contact**

⁷ <https://www.gov.uk/government/news/disclosure-and-barring-service-is-introducing-new-online-services>

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/650127/DBS_News_October_17.pdf

the Supervision department at the BSB. We will then take a risk-based approach in response and review each matter on a case by case basis. We do not therefore anticipate that foreign lawyers will be adversely impacted as we are not proposing that a failure to obtain the basic disclosure check by 26 June 2018 will necessarily mean they must cease practice until the result is available.