



Law Society
of Scotland

HM Revenue and Customs Consultation Response

Hidden economy conditionality – Northern Ireland
and Scotland

09-07-2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Licensing Law subcommittee welcomes the opportunity to consider and respond to the HM Revenue and Customs (HMRC) on the Hidden economy conditionality- Northern Ireland and Scotland (the consultation.¹)

The Licensing Law sub-committee is made up of members who represent the interests of the industry and are involved in advising individuals and organisations in relation to making licensing applications. They also include those working in-house in relation to granting, management and enforcement measures.

If the policy outlined in the consultation is put in place, they anticipate being responsible for advising clients about the implications of these tax checks. From the local authority perspective, they would be involved in putting in place the relevant tax checks and in administering the scheme.

Executive Summary

We are grateful to HMRC for hosting a question-and-answer session. However, as we set out below, we have a number of basic concerns about the consultation process in Scotland to date. These include:

Competence: Much of what is contained in the consultation reflects the consultation and practice that has taken place in England and Wales. Despite the reference to discussions with the Devolved Administration, this appears limited and to our surprise not to be set out in detail in the consultation. For this scheme to be taken forward and implemented in Scotland, issues such as competence need addressed and thereafter, how it will work as we suggest that it would require changes to Scottish legislation. It would not merely be implemented by means of a UK Finance Act.

Timescales: We have considerable difficulty with the projected timescales. Aside of the issues expressed above, which need resolved, we would have considered that watching how the system beds down in England and Wales was essential from a monitoring and evaluation perspective.

Next steps: We understand that the next steps will be for HMRC to undertake a response document; HMRC will consider if they have enough information to draft the UK legislation. There will then be an

¹ <https://www.gov.uk/government/consultations/hidden-economy-conditionality-northern-ireland-and-scotland>

opportunity for consultation on any draft legislation; meantime, HMRC are continuing to have conversations with stakeholders involved in the area to understand better the relevant issues.

We had also expressed concerns that there would continue to be non-compliance with those taxpayers who are determined to evade. HMRC appreciated this and considered that this measure is only one in the toolbox for tackling noncompliance. We welcome advice on the relevance of any other measures to licensing.

We reiterated that we as the Law Society would welcome continued engagement on this as the work moves forward, given our interests as outlined above.

The sub-committee has the following comments to put forward for consideration.

Introduction

The consultation seeks views about whether the renewal of certain licences in Scotland and Northern Ireland should be made conditional on applicants completing checks that confirm that they are appropriately registered for tax from April 2023. It sets out the preferred option to introduce these new tax checks designed to tackle the hidden economy in Scotland.

Given that the consultation is about implementation of the proposed policy in Scotland, it appears to lack evidence and information that would help justify this approach. For instance, crucially, as we outline in our answer to Question 1, with the preferred model, how is this to be achieved from a legislative perspective?

Additionally, from the Scottish perspective, the consultation includes timescales for Scotland too though how this approach is to be achieved seems not to be fully explained. We appreciate that the policy has already been taken forward in England and Wales in the (now) Finance Act 2021. These provisions are then due to come into effect in April 2022.

Leaving aside Scotland's acceptance of the policy intention, which is the purpose of this consultation, we would have thought that it would seem sensible to have allowed time to monitor the implementation of the scheme in England and Wales. As a digital system is required to be put in place, surely time is needed to ensure that it works effectively? In addition, time should be afforded for monitoring and evaluation so there is no delay in the process once rolled out to Scotland. April 2023 may well be far too soon for that to be undertaken effectively.

HMRC state that they will ensure that any digital service conforms to government accessibility standards and will ensure that suitable support exists for customers who require digital assistance. Alternative options and support will be available for those who are unable to complete their tax check online. These processes need to be much more clearly explained and the timescales for development of such a system set out clearly.

Time should also be allowed to consider how the relevant legislation in section 125 of the Finance Act 2021 introducing schedule 33² works in practice as presumably this would be the style³ that any future Scottish legislation would follow.

The aim of the proposed scheme is to address the hidden economy which consists of individuals and businesses with sources of taxable income that are entirely hidden from HMRC. The consultation is silent as to the existence of any hidden economy tax gap for Scotland which again would have helped provide a clearer Scottish perspective.

We have concerns about the justification for the scheme set out in the consultation being based on reference to mistakes and fraud being addressed. There is a significant difference between the two. Fraud is a criminal offence and justifies consideration for prosecution and all the implications following any conviction. A mistake may be due to a misunderstanding which is why making information available about tax responsibilities may be appropriate. However, that is the role of HMRC and should not increase the burden on the hard-pressed local authorities in ensuring that the proposed digital system works.

Similarly, paragraph 1.9 of the consultation indicates that those in the hidden economy may also demonstrate non-compliance with other regulatory requirements including health and safety violations, and failure to comply with employment rights for workers and immigration offences. If this is the basis on which the policy is to proceed, that relevant evidence should be stated clearly and set out within the Scottish perspective. This is a wide sweeping statement lacking actual evidence and especially with regard to the Scottish context.

Paragraph 1.16 of the consultation indicates that licensing body representatives have suggested that the checks can be incorporated into licensing relatively simply, and some representative groups have said that they welcome the check as a way of supporting compliance in the relevant sectors. No evidence of that discussion in Scotland has been included in the consultation. This would be helpful. From our meeting, we understand that there has been no specific information obtained as yet for Scotland and that is the purpose of the consultation. This should have been explicit.

Question 1. Do you have any comments about, or evidence of, the suitability of applying the existing conditionality policy model to taxi driver licensing in Northern Ireland and taxi and private hire car drivers, booking offices and metal dealers in Scotland?

Licensing bodies in Scotland and Northern Ireland will incur one off costs from updating their systems, ensuring compatibility with HMRC processes, issuing guidance and information, providing training and in ensuring staff are familiar with the new requirements. Timescales and costs and whose responsibility to

² <https://www.legislation.gov.uk/ukpga/2021/26/schedule/33/enacted>

³ SCHEDULE 33 Licensing authorities: requirements to give or obtain tax information Meaning of “authorisation”, “authorised activity” and “licensing authority” etc.

undertake these do not seem to have been factored into the consultation. Such costs will not be minimal and will have significant resource implications. How is this to be resourced and financed? This needs explored. If the purpose of this policy model is to ensure revenue delivery, we question if this is an appropriate use of the current Scottish civic licensing system.

HMRC officials have stated that they have met with officials in the devolved administrations while developing these proposals. Given as is recognised at paragraph 1.30 of the consultation, that licensing schemes in Scotland differ from the rest of the UK, it is essential therefore that proper consideration is taken of the proposed policy. It should not just follow what has taken place in England and Wales. From our meeting, the detail of these discussions was lacking and specifically, as to any clarification of the Scottish legal position and the competence perspective.

We are interested in how it is proposed to amend the 1982 Act which is within the competence of the Scottish Parliament (pursuant to the Scotland Act 1998). There is no reference or cognisance appearing in the consultation as to any assessment of the preferred policy model in the light of the Scottish jurisprudence that underpins our licensing law. For instance, there are wider legal principles applying to “proper purpose” as explored in a few Scottish cases such as *McLuskey v North Lanarkshire Council*,⁴ *Stewart v Perth & Kinross Council*,⁵ *Blusins Ltd v Dundee City Licensing Board*⁶ and *Brightcrew Ltd v City of Glasgow Licensing Board*.⁷

There seems to be a lack of specification regarding the choice of the activities to be affected by these proposed arrangements. Why are some included, and others excluded which also fall under the remit of the Civic Government (Scotland) Act 1982 (1982 Act) (as amended by the Air Weapons and Licensing (Scotland) Act 2015)? This is not explained.

The licences proposed to be affected are those for driving taxis and private hire cars, operating private hire car booking offices and are scrap metal dealers.⁸ However, the consultation also references that there may be an extension to other sectors included in previous consultations⁹ as well as wider areas of licensing and regulation. That means care as well as monitoring and evaluating of any model that is developed is vital. Time must be afforded for proper assessment before other categories could either be considered, included or extended.

Question 2. Do you agree that we should seek to apply conditionality using the

⁴ [2016] SC HAM 3

⁵ [2004] UKHL 16

⁶ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=830187a6-8980-69d2-b500-ff0000d74aa7>

⁷ [2011] CSIH 46

⁸ The relevant legislation seems to include the Civic Government (Scotland) Act 1982 (later amended by the Air Weapons and Licensing (Scotland) Act 2015) which involves the licensing of taxis, Private Hire Cars (PHCs) and metal dealers. The Civic Government (Scotland) Act 1982 (Licensing of Booking Offices) Order 2009 requires local authorities to license the use of premises used for the taking of bookings for taxis and PHCs.

⁹ This would follow previous consultations on tax conditionality and the hidden economy where responses were published in 2016⁹ and 2017.⁹

same model as England and Wales, if not, why not, and what alternative model do you suggest?

We refer to our answer to Question 1.

There are significant differences between Scottish and English and Welsh licensing law which need to be considered.

We remain concerned that this may amount to an improper use of the licensing system. No alternative model should be explored outside of licensing.

Question 3. Are there any features of the licensing regimes or processes used by licensing bodies in administering them, which are incompatible with conditionality, or the policy model outlined in chapter 2?

Section 45 D of the 1982 Act contains a “deemed grant” provision. Section 45 D (4) of the 1982 Act states that:

“Where the local authority has failed to reach a final decision on the application before the expiry of (a) the 6-month period referred to in subsection (1)(b), or (b) such further period as the sheriff may have specified on application under subsection (2), the licence is deemed to have been granted, renewed or, as the case may be, varied on the date of such expiry.

We remain unclear if HMRC has adequately considered this section in relation to the proposed renewal of applications with a mere “undertaking” that the tax checks will be done. What happens if the application is granted under the deemed grant provision, but then transpires the tax check has not been completed?

Furthermore, this “undertaking” approach does not appear to be available when a licence is to be renewed, meaning a driver may have lodged a renewal with the relevant timescales, allowing the licence to subsist pending determination, only to discover at a later period that the application may have been deemed incompetent. This could lead to a situation where they are unlicensed and therefore uninsured activities occur which is a public safety issue.

In addition, the 1982 Act imposes no requirement on licensing authorities to issue “reminders” in relation to renewals so there is no process to be relied upon to advise licence holders of these additional steps which may have to be taken to have an application declared competent.

That would need to be the subject of considerable advice and publicity by HMRC before there could be any question of the legislation coming into force.

Question 4. Do you have any comments on the suitability of safeguards outlined in

chapter 2 and are there any further safeguards needed in addition to those outlined in chapter 2 for the licences outlined in chapter 3?

The only safeguards which we can see mentioned are those specified in paragraph 2.14.

These safeguards outline that the licence application process can continue without undue delay where the applicant was unable to complete their tax check, or the licensing body was unable to obtain confirmation of completion of the tax check for 5 days due to an HMRC failure.

That seems a very short period - and we can foresee other failures of the system especially where presumably the digital system is not yet in place or tested. That new system would need to be piloted first to see it works effectively as the licensee could be in risk of operating without a licence due to matters totally out with their control.

Question 5. Are there any licence holders who may need additional support to engage with the tax check and what support do they need?

Whilst we note that there is a proposed “phonenumber” put forward in lieu of the proposed online process, we are concerned that this does not go far enough to address issues of digital exclusion especially considering the demographic of the licence types identified. We are also concerned about the difficulties licensing authorities may face in resource burden where it is inferred that it will sit with them to offer additional support to affected applicants.

We agree were this scheme to be introduced, the focus must be on the process being as simple as possible. That is essential.

We have concerns at the minimal discussion on the equalities impact as we would suggest given the nature of those holding the relevant licences that this will need specific signposting and information tailored to meet their needs. That requires discussion, forward resourcing and planning to ensure that information is shared before any implementation. Exactly what the HMRC plans are should be well publicised in advance and should be a requirement as part of any legislation including thereafter, imposition of relevant monitoring and evaluation processes.

The consultation does envisage those who require additional support, or who are unable to engage with HMRC through digital services. We suggest that it is more than merely exploring but ensuring that the digital system works and can address these groups’ specific needs. That is a minimum requirement.

How will the Government ensure that these changes are adequately signposted to individual taxi operators? Drivers are not always actively involved with their operator or associations. In some areas of Scotland, there are no associations. This needs explained.

Question 6. Do you have any comments about, or evidence of, any impacts (positive or negative) of applying tax conditionality to taxi driver licensing in Northern Ireland and the licensing of taxi and private hire car drivers, booking offices and metal dealers in Scotland?

We have general observations to make which relate to the practical implications of this new scheme, if imposed:

Costs of the introduction:

What cost analysis has been done to identify the additional burden which will be placed on licensing authorities who are already struggling with resources, especially arising from the impact of Coronavirus on staff and backlogs? This was touched on above when referencing the difficulties with the timescales set out in the consultation.

Paragraph 1.13 of the consultation indicates that it is “an innovative, cost effective and simple way to tackle this part of the tax gap and help level the playing field making it more difficult for people to enter or stay in the hidden economy.” We query cost effective for whom as there will be costs involved for those who require to implement the scheme within the local authorities and for those who require to obtain legal or financial advice to comply with these obligations?

System:

What thought has been given to how long the “code” obtained through this new digital service will remain “live”? There could be complications with this in relation to the interaction required between the applicant, the licensing authority and the DVLA.

Number of licences:

What analysis has been done on the impact of provision/demand of licensable activities should this new policy model result in less licences being granted and how that might affect public access to wider economic, social, and health provision?

As indicated above, the implementation timescales appear to us to be unduly ambitious, especially with the wider and continuing uncertainties arising from Coronavirus and considering the Scottish Parliament’s intention to extend the provisions of the Coronavirus (Scotland) Act 2020 until September 2022

Question 7. Do you have any comments about excluding taxi operators in Northern Ireland from conditionality, in view of the existing checks undertaken?

We have no comment – this is not relevant to Scotland.



For further information, please contact:

Gillian Mawdsley
Policy Executive
Law Society of Scotland
DD: 01314768206
gillianmawdsley@lawscot.org.uk



Law Society
of Scotland