



Law Society
of Scotland

Consultation response

Raising standards in the tax advice market: call for evidence

August 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to respond to HMRC's call for evidence on *Raising standards in the tax advice market*¹. We have the following comments to put forward for consideration.

Regulation of Scottish solicitors

As the professional body for Scottish solicitors we have a statutory duty to work in the public interest, a responsibility we are committed to maintaining through a stringent, proactive and effective regulatory regime which places the protection of the consumer at the centre.

The current main regulatory framework for Scottish solicitors is provided under the provisions of the Solicitors (Scotland) Act 1980, and related regulation. Although, under the provisions of the 1980 Act, there are only a small number of legal 'activities' which are reserved to solicitors holding a current practicing certificate, the solicitor is regulated to the extent of all work undertaken in the course of their business; this includes advising and representing clients on tax law related matters. The statutory regulatory regime is underpinned by strict professional service and conduct rules which are aimed at ensuring a robust level of consumer protection.

Scottish solicitors are expected to work to standards which reflect the legal, moral and professional obligations solicitors owe to clients. The standards are divided into standards of service and standards of conduct. Standards of service set out the quality that clients should expect from solicitors, for example being competent, delivering on commitments and ensuring communications can be easily understood by clients. Standards of conduct covers the behaviour of solicitors, for example setting out that solicitors must act with integrity, maintain client confidentiality and should not act where there is a conflict of interest. Where complaints contain elements of both service and conduct each element is investigated separately. In the most

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/873540/Call_for_evidence_-_raising_standards_in_the_tax_advice_market.pdf

serious cases solicitors can be and have been struck off the roll of solicitors. The complaints process is elaborated on at question 15 below.

We are pleased to note that the call for evidence clearly recognises that some 'advisers' such as solicitors are robustly regulated. In particular, many professional bodies set standards such as those detailed above in relation to Scottish Solicitors and for some other professional bodies, the Professional Conduct in Relation to Taxation ("PCRT") applies², which HMRC recognises as going further than its standard for agents. Where either professional body standards (such as in relation to Scottish solicitors) and/or the PCRT apply, the agent standard does not impose any further requirements³.

However, we are concerned that the call for evidence fails to explain or propose what approach will be taken to those, such as solicitors, who are already heavily regulated to the extent of any tax advice work they may undertake in the course of their business or how any new proposed regulatory regime will recognise existing regulation so as to avoid duplication, contradictory, overlapping or inconsistent provisions. We have previously experienced and highlighted similar issues in regard to other sectors where regulation has been introduced which has overlapped with the regulation of Scottish solicitors. For example, in relation to the regulation of letting agents, issues were identified relatively early and, through engagement with ourselves the resultant regulations provide for when existing professional requirements will be recognised as superseding the regulations. We suggest that HMRC may find it helpful and informative at an early stage to refer to these regulations to understand the approach taken where the individual is a solicitor and already subject to stringent oversight.

HMRC may also find it helpful to look towards the regulation structure of those providing immigration and asylum advice and services. The Immigration and Asylum Act 1999 sets out who falls under the regulation of the Immigration Services Commissioner and who does not. Part V, section 84 excludes those who are already regulated - those authorised to provide immigration advice or immigration services by a 'designated qualifying regulator'. This means solicitors do not face double regulation because they come under a designated qualifying regulator - the Law Society of Scotland. This means they do not therefore fall under the regulation of the Office of the Immigrations Services Commissioner. This is a means of setting up a system of regulation that excludes those regulated elsewhere.

Overall, our view is that the difficulties HMRC has referred to in the call for evidence (that some tax advisers "are incompetent, some unprofessional, a few actively corrupt"⁴) are unlikely to be difficulties that exist with advisers who are subject to their own regulatory regimes (such as Scottish solicitors, solicitors in other parts of the UK or accountants, for example those who are members of ICAS or ICAEW). Therefore, any regulation imposed should be 'light touch' or admit 'passporting' where the tax adviser is already subject to regulation, as, for example, a Scottish solicitor. In this way any new regulation would have a greater chance of achieving its objective of driving up standards (largely an issue in relation to tax advisers not already subject to another

² The PCRT has not been adopted by the Law Society of Scotland.

³ Paragraph 5 of the standard for agents

⁴ See the Foreword to the call for evidence

regulatory code) while at the same time not imposing unnecessary duplication or further regulation on those advisers who are already regulated and are not those causing the difficulties HMRC refers to.

Our view is that unless backed by strong enforcement action from an external body, regulation is unlikely to achieve HMRC's aims, and will instead be another cost on those tax advisers who are compliant with professional standards and not causing the difficulties HMRC notes. There are other actions that we consider could be taken to improve the market, as noted below, including more publicity by HMRC of areas where it is aware that taxpayers are being targeted by unscrupulous agents, HMRC offering or requiring product rulings and more action being taken against those creating and promoting aggressive tax avoidance schemes (including, as set out in our answer at question 11, recovering tax and/or penalties from such promoters, and the individuals behind these in appropriate cases).

Consultation questions

Question about the HMRC Standard for Agents

1. Is the HMRC Standard for agents comprehensive enough to provide a baseline standard for all tax advisers?

The standard for agents is largely seen as irrelevant to at least two groups of advisers:

- those who provide purely an advisory role and have no element of acting as an agent for a taxpayer involved in their work (i.e. are not acting on behalf of the taxpayer in dealings with HMRC), for example, solicitors advising, perhaps as part of broader advice provided by a law firm, on the tax impact of a company restructure or sale. This could be advice to a company and/or to individuals such as investors, management or sellers; and
- those who set up (and sell) schemes designed to save tax; again, these individuals, firms or companies would usually have no element of acting as an agent involved in their work.

Many advisers in both of the areas we note above are unlikely to be aware of the standard for agents. The naming of the standard as a standard for “agents” (rather than for “tax agents and tax advisers”) is consistent with a view that it is only applicable to persons acting as agents (i.e. filing returns or otherwise acting on behalf of the taxpayer in dealings with HMRC).

In reality, however, this is unlikely to be of much importance; as noted above, many professional bodies set standards for their members, such as those in place for solicitors and those set out in the PCRT, which HMRC recognises as going further than its standard for agents such that the agent standard does not impose any further requirement. Those advisers within the first bullet above are likely covered by such professional body standards and those within the second are unlikely to be concerned with adhering to a standard that is not enforced on them by HMRC (or another body).

In terms of the content of the standard itself, we refer to our answer to question 28(d), where we query the meaningfulness of paragraph 3.3 of the standard regarding tax planning and avoidance. Further guidance or examples would be needed for this to have any usefulness for most advisers.

In addition, the standard does not currently require risks to be explained to taxpayers. This is often a difficulty in respect of those who are promoting tax avoidance schemes.

2. What clear distinction can be drawn between tax advice and tax services?

Please see our answers at question 1 and 3.

In addition, we note that figure 4 in the call for evidence document shows tax advisers as having a direct relationship with HMRC. That is not our experience in many cases. Many instances of tax advice we are aware of are in the form of advice in the form of, say, a report, being provided from the tax adviser to the client and the implementation of that (and therefore all contact with HMRC) being left to the client, their accountant, payroll provider or other party.

This could be viewed as a distinction between “advising” being recommending the structure or legal document that should be entered, and “services” being implementing or processing that. For example, most bookkeepers or payroll staff will not advise on a novel point, but they may seek advice and, once the advice has been sought and a decision made, they will then action that. Of course, at times both functions may be performed by the same person, for example an accountant preparing a tax return who suggests a client do something slightly differently next year in order to qualify for a relief.

3. From your professional point of view, how do standards differ between different types of tax advice? Could you provide examples?

Advisers providing purely advisory services (for example on a restructuring, company or property sale) are likely to be members of a profession (solicitor or accountant) or at least work in a firm of solicitors or accountants. As they (and/or their firm) are subject to professional regulation, they are likely to maintain high standards of competency.

Those acting only as tax agents (for example submitting tax returns) are also likely to fall within that group, however we consider that they are unlikely to provide the same level of detailed scrutiny to each transaction as those acting in an advisory capacity (due to both the work being considered more routine and fee constraints). Any errors that occur in this setting are likely due to time and/or fee pressure and staff with less experience being involved, not to a deliberate decision or view being taken as to a possible interpretation of tax law.

In the R&D claim field, there are many individuals or firms offering to make such claims on behalf of taxpayers who may not belong to any profession, and the standards of competency, attention to detail and customer care are likely to be lower. Fees may also be tied to the amount of a successful claim paid out by HMRC which acts as an incentive to the adviser to maximise claims made rather than examine the law closely for the boundaries. Software packages that make claims can only be set up for the ‘usual’ cases. This is exacerbated

where there are no professional or ethical conduct boundaries to be observed by those advisers. Clients (taxpayers) may be attracted to such advisers, as due to their lack of regulation to comply with, they may have lower fees (or be prepared to make a higher claim to HMRC).

4. Please share any data which would help develop assumptions on the market share, volumes or impact or on the value added by different sectors of the market?

We have no data.

5. What more could the government do to promote the work of good advisers?

Having the ability for advisors to contact HMRC over the phone and speak to knowledgeable staff with experience to discuss difficult cases would be of assistance. Of course, these matters could later be in writing to the extent they needed to be binding, but this is not always necessary. The removal of the ability to contact experienced HMRC staff in recent years has been a great loss of service by HMRC, for example the ex-Small Company Enterprise Centre staff were excellent, and now there is no ability to discuss these matters, with HMRC requiring that communication be by email – we understand anecdotally that this often results in a response from an inexperienced staff member that does not answer the question asked. The regional stamp duty offices are another example where the ability to contact experienced staff to discuss unusual cases or clarify technical points has disappeared.

6. Where else do good agents add value - for customers, HMRC and the wider economy? How could this be extended further?

We have no comments on this question.

7. What are the general characteristics of good and bad advisers?

The distinction between “good” and “bad” advisers may be the wrong one to draw. There will be many advisers who intend to do their best for their client and comply with the tax law but fail through, for example, tax law being complex or having insufficient time to devote to each client.

There will be other, often highly skilled advisers, who know the law and tax practice well but who adopt an approach which most tax advisers would accept is very different from the ‘usual’ approach or interpretation of a tax matter, and in a number of cases, take an extreme position in order to achieve a tax saving, often without advising their clients of the attendant risks. For example, we are anecdotally aware of well-trained ex-HMRC staff who go on to advise, with one of their specialist strengths being knowing how HMRC operates in practice so being able to advise a fairly aggressive route to save tax while keeping their clients on the low chance end of being challenged by HMRC.

The distinction between “good” and “bad” advisers could perhaps be re-drawn as between:

- advisers who *inadvertently* make errors; and

- advisers who *deliberately* seek to take an extreme or aggressive approach or interpretation in order to have clients pay less tax, without advising their clients of the risk of HMRC challenge and the risks of the technical argument not succeeding.

The latter group is the one we consider should be given the most attention and priority by HMRC in taking action after this consultation as it would do the most to protect consumers, as well as protecting public revenues and trust in the tax system being enforced in a fair manner.

8. Are there any parts of the tax advice market where there are particular problems? Please share any evidence you have.

Please see question 3, regarding R&D claims.

Figure 5, example 5 in the call for evidence (page 18) seems to imply all solicitors will always know when a transaction involves a tax avoidance. If the solicitor is not an SDLT/ tax specialist (as in this example, they are a conveyancer) how would they be expected to know? HMRC's example says the solicitor implementing a sale of property has acted incorrectly, rather than targeting the tax adviser who created the tax avoidance scheme (maybe because the solicitor as a person subject to professional duties is an easier target for HMRC to focus on than a perhaps unregulated tax adviser?). It would be a concern if HMRC chose to target (in its regulation or any enforcement action it develops) solicitors who were tangentially involved in a transaction, rather than the person who created the tax avoidance structure or scheme, simply because the solicitor is easier to locate and subject to a regulatory body.

We are aware of a number of examples of SDLT/LBTT relief claim schemes promoted by unregulated tax advisors. Another example of a scheme promoted by unregulated tax advisers involves the purchase of bare land with planning permission with an attempt to claim Multiple Dwellings Relief. In these examples, conveyancers are likely to be involved in implementing the transactions for the clients, however, as noted in our above comments they are usually not tax advisers and be not be aware that the transactions form part of a tax avoidance scheme.

9. Do you have any evidence about the impacts of unqualified agents or agents that don't meet standards?

Please see question 3, regarding R&D claims and question 8 above.

10. How could HMRC and the professional agent community work together to identify poor practice at an early stage?

We consider that there are opportunities for HMRC to improve its processes for accepting intelligence reports about poor practice and schemes which are being promoted, and there is a need for HMRC to respond timeously and robustly to such reports. Appropriately raised HMRC inquiries are a good way of HMRC finding out about schemes which are being promoted. In addition, an increase in avoidance staff at grass-roots guidance level would be helpful.

Where HMRC is aware that an agent acts for numerous clients in the same area (for example the R&D claims mentioned at question 3), HMRC could investigate their processes or software upfront to see if due care is being applied rather than wait for errors to be made.

See also our answer at question 18, regarding product rulings.

11. How effective are HMRC's recent interventions? Are there other interventions that the government should be using to tackle poor practice?

We note HMRC's enforcement powers as set out in paragraph 53 of the call for evidence, however, from our knowledge, the more serious interventions have rarely, if ever, been used. How often has HMRC used its sanctions, especially criminal prosecution, set out at (l) on page 22 of the document? Does HMRC consider the penalties are proportionate to the extent of the behaviour and tax avoided?

As is acknowledged, it is unregulated tax advisers who are the main source of poor practice (and deliberate actions that lower the tax take) and currently, there is no professional body to undertake the task of sanctioning these advisers. Consequently, it is imperative that HMRC be seen to be using their powers against unregulated advisers where they have caused significant harm to consumers such as by mis-selling mass marketed tax avoidance schemes and leaving consumers with no recourse against the promoter when the schemes fail.

If a Scottish solicitor were involved in promoting such schemes, they could expect to be subject to a conduct complaint and face disciplinary action and sanctions if proven. HMRC have intervention powers, if used, to severely affect the ability of persons involved in such poor practices to conduct business.

As in other professions (for example financial advice), we consider that there should be a requirement that all persons providing tax advice be appropriately regulated, with financial penalties for unregulated persons who provide tax advice. The form of this regulation requires careful consideration given the breadth of the tax advice sector and the overlap with many other regulated professions (see question 14 below).

Thought should also be given to developing further sanctions, both financial and criminal. We query whether HMRC considers existing sanctions are fit for purpose? Are the sanctions and the penalties proportionate to the extent of the behaviour and level of tax sought to be avoided in mass-marketed aggressive tax avoidance schemes which do not work, and where taxpayers are often placed in a worse position than if they had not undertaken the proposed steps? It is notable the public tolerance of this sort of behaviour (anything seen as a person paying less than their 'fair share' of tax) appears to have changed significantly over the last decade. 'Avoidance' being acceptable (as opposed to 'evasion') appears to be a view that is now no longer uncritically accepted, and there has been a shift towards payment of the right amount of tax being seen as necessary in order to pay for public services. In relation to mass-marketed schemes, although it can be difficult to differentiate between the naïve and the greedy, public anger is not usually directed at the individuals who were targeted by the promoters (they are more often seen as victims), but at the promoters themselves. In light of this cultural shift and the potential targeting by promoters of more vulnerable and low paid groups, we suggest

there is a case for developing a penalty or sanction regime that imposes significant financial penalties directly on promoters.

The level of such penalty should be tied to how egregious their behaviour has been. A matrix of *culpability and harm* could be used. The penalty could be higher where the promoter had a high degree of culpability (for example, knew the practice or interpretation they sold was incorrect or had done it before) than where their behaviour arose only from recklessness, being negligent or a lack of knowledge. The penalty could also be higher the more harm the promoter caused (for example, factors such as the number of people they affected, whether those people were in vulnerable or low-paid groups, and the amount of tax lost due to their behaviour). Scoring high on both culpability and harm would lead to the maximum penalty, which could be tied to the amount of tax lost to HMRC or the amount of profit made by the promoter. Custodial sentences for the most serious offenders could also be considered.

There should be an ability to look through and behind any vehicles (such as limited companies) and target sanctions on the individuals who are driving, and profiting from, the schemes. This could involve shareholders and directors of promoter companies being liable to sanctions; to target where the profit from the schemes goes, and to prevent these people using companies to promote schemes with no personal culpability or risk being imposed on them. Any offshore advisers and promoters could be required, as a condition of registration as a tax adviser and promoter, to have a significant degree of presence in the UK (for example, a minimum level of assets, local directors, perhaps local shareholder/s); this would allow easier enforcement of any sanctions against such advisers and promoters.

Of course, advisers should be able to genuinely disagree with and challenge HMRC's interpretation of tax law without being penalised, and there would need to be strong safeguards built into any legislation for this. In practice, if enforcement by HMRC were to start at the top, targeting the most abusive cases and repeat offenders who significantly profit from promoting schemes, seeing enforcement action taken may lead to lower level promoters ceasing their activities.

12. Is there more that HMRC could do to manage agent performance through its transactional services (such as IT systems)?

Please see question 10.

13. How might increasing consumer protection affect individuals taking responsibility for their own tax affairs, and what behavioural changes might you anticipate?

At the moment, an individual could legitimately say they did not know their chosen adviser was not appropriately qualified, competent, or likely to act in an 'acceptable' manner (as regards guiding them to comply with their tax obligations rather than being involved in unacceptable avoidance behaviour). It would be more difficult for an individual to make this argument if there were promotion of the categories of regulated advisers (such as solicitors) and/or some sort of badging system for those who are not otherwise regulated (or, the opposite, a list of those previously involved in avoidance) endorsed by HMRC. Any badging system would require careful consideration so as to reduce the risk of misuse.

Promotion of regulated advisers could drive individuals to deal only with reputable advisers, if they were concerned about the risk to their reputation or concerned to comply with tax law. Reputational risk is likely to be a concern for companies or high profile individuals. However, HMRC research shows cost to be the driving factor for many in choosing an agent⁵ and so any regulation increasing only the costs of agents who comply could lead consumers to cheaper, unregulated agents (i.e. if compliance with regulation was voluntary).

At paragraph 62 of the call for evidence, there is a question around the government not wishing to erode the principle that the taxpayer remains accountable for their own tax affairs. Our experience is that many smaller taxpayers' involvement in their tax affairs is limited to selecting an agent and providing information to them. The tax system and associated legislation is very complex and is unlikely to be well understood by many taxpayers. Many are not able to, or interested in, having any oversight of the detail of the process or decisions. Accordingly, if a taxpayer's involvement is, in reality, limited to selecting an agent, it could be beneficial if there was a system that pointed to agents that are already regulated to a high standard such as solicitors, and perhaps to others by way of a badging system that taxpayers could rely on as indicating they had chosen an agent who worked to standards acceptable to HMRC.

Consumers remain responsible for providing their tax adviser with all relevant information and to honestly answer any queries the tax adviser may ask to allow them to provide advice or correctly prepare the client's tax reporting. If there is regulatory system holding all tax advisers to standards, consumers may be made more aware of their responsibilities by their adviser.

14. Who should take the primary role in improving consumer protection, government, the profession, or another third party?

This will depend as to what sector the proposals are to be aimed at. For example, where the service providers are unregulated, then it may be appropriate for this to be government led. Where the profession is already subject to regulation, the UK or Scottish Government should work with regulators to discuss and work collaboratively if any deficiencies found within current consumer protections and to proactively move forward together in addressing and enhancing these. This will also be required to ensure existing regulatory provisions are recognised to avoid the problems highlighted previously.

15. What do professional bodies currently do in respect of customers who need extra support?

In terms of vulnerable client groups, we have guidance for solicitors to promote effective support⁶. In terms of wider responsibility, a number of our members undertake pro bono work and/or volunteering work to assist in the provision of legal services, for individuals, charities, businesses and other organisations. Our members

⁵ See page 24 of the call for evidence document

⁶ B.1.5 Vulnerable Client Guidance (<https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/guidance/b1-5-vulnerable-clients-guidance/#:~:text=5%3A%20Vulnerable%20Clients%20Guidance.%20Introduction.%201.%20This%20guidance.factors%20which%20might%20vitiat%20that%20act%20or%20transaction>)

also provide legal aid with around 750 firms providing these services currently, though the financial eligibility requirements for this support does entail that tax issues are not widely covered.

We have also been engaged in wider work around effective participation around digital justice, particularly as a result of the impact of Covid-19. The First Tier Tribunal (Tax Chamber) was an early adopter of virtual proceedings, and the evaluation positive⁷. It remains vital that the outcomes for individuals participating in these processes remain consistent, whether proceedings take place virtually or in person. Some individuals may require additional support; others may not be able to participate through technology. It is incumbent on government, state agencies and professional advisors to ensure a fair and effective system.

16. Is there anything useful the government can learn from other examples of market intervention, including those led by industry?

We refer to the example we provide above in relation to letting agents.

17. Are there other enforcement or regulatory agencies that you think should have a role in this area, and what are the advantages, disadvantages, benefits or risks of any of these organisations taking on a regulatory role?

To best protect consumers, there would need to be a system in place that ensured consistency across different regulatory bodies in enforcing the standards on tax advice.

18. Do you know of examples of effective law, or enforcement, from other countries or jurisdictions?

HMRC could offer “product rulings” as, for example, offered by the New Zealand Revenue⁸. This would mean for products or schemes designed to save tax the designer or promoter of the product or scheme could apply for a binding ruling from the Revenue that their product or scheme worked as they said under tax law. A scheme that was cleared by HMRC would be able to display an HMRC product ruling reference number in its marketing material (and the list of rulings could be available on the HMRC website), and one that did not have a product ruling would therefore put consumers on alert that there may be an issue.

As well as performing this kind of badging benefit to consumers by providing them with certainty of the tax treatment (and the ability to avoid those advisers who had not applied for rulings), there is a benefit to HMRC in being aware of situations where the boundaries of tax law may be being pushed and they can then take action to publish advice to the public or to change tax law if required.

A tangential benefit is that charging for the rulings (“user-pays”) pushes cost onto those advisers working in this area, rather than putting it on the vast majority of tax advisers who are not involved or on the wider body of taxpayers through further funding required for HMRC.

⁷ Ministry of Justice, *Implementing Video Hearings (Party-to-State): A Process Evaluation*, 2018 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740275/Implementing_Video_Hearings_web_.pdf)

⁸ <http://taxpolicy.ird.govt.nz/publications/2009-ip-binding-rulings/chapter-2-binding-rulings-system>, see para 2.6

In the absence of any product ruling system (or any timely and authoritative public statements by HMRC⁹), consumers generally rely on the 'badge' provided by the promoter of the product or scheme obtaining counsel's opinion that it complies with tax law.

19. What future changes do you consider will most impact the standards expected of the tax advice profession?

If taxpayers go from relying on a person to a program or software to file their returns, HMRC will need to be satisfied the program operates in accordance with its understanding of tax law, and consider which programs to promote as approved.

Questions on Option A

20. What other examples are there of existing powers (HMRC or other government powers) that could be used to tackle poor tax adviser behaviour?

We have no comments on this question.

21. What is your view of the effectiveness of HMRC's current powers?

It appears that there is little use of existing powers by HMRC. Does HMRC have any data it could share on its use of the powers? We are unaware of much action being taken to tackle promoters or agents by way of prosecution but HMRC could clarify whether this is the case, and, if so, if this is because its powers are insufficient or because it is unwilling or unable to pursue prosecutions. We consider it crucial that existing powers are used and that it is made clear that HMRC will take action where appropriate. See question 11 for our detailed answer on proposed promoter sanctions.

As referred to above, we consider that there are opportunities for HMRC to improve its processes for accepting intelligence reports about poor practice and schemes which are being promoted, and to respond timeously and robustly to such reports.

Question on Option B

22. What evidence do you have of problems clients have experienced due to lack of redress and what solutions would you propose?

In relation to those consumers seeking advice from a Scottish solicitor, these consumers can be assured that, in the unlikely event that something goes wrong, they will have an accessible path for redress. Scottish solicitors are covered by the Client Protection Fund¹⁰ (defined as the Guarantee Fund in the Solicitors (Scotland) Act 1980). This protects clients who have lost money because of the dishonesty of a solicitor or a

⁹ HMRC could also consider publishing detailed and authoritative "public rulings" on current issues/ areas where there is seen to be promoter activity and ensure that there is website links/ advertising for common schemes that would result in a taxpayer considering a scheme finding the HMRC view on it.

¹⁰ Client Protection Fund. For more information see: <https://www.lawsco.org.uk/for-the-public/client-protection/client-protection-fund/>

member of their staff and is paid for by regulated firms of Scottish solicitors. It is the final line of protection put in place for those who are unable to recover their losses by any other means.

In addition, all solicitors working in private practice are required to have professional indemnity insurance in place, with most covered by the Society's Master Policy.¹¹ This is the compulsory professional indemnity insurance arrangement. The Master Policy covers any valid claim against a solicitor for an act of negligence which has occurred in the course of his or her work, even if the solicitor is no longer in practice (referred to as run-off cover), no longer solvent or cannot be traced at the time the claim is made. It is one of the most important areas of consumer protection put in place and required by the Law Society. The insurance provides cover of up to £2 million for any one claim.

If a consumer wishes to make a complaint in relation to the actions of a solicitor or the services they have received, there is a statutory complaints route and process.¹² This provides consumers with clear redress through a signposted complaints pathway. All solicitor firms are required to have a complaints partner. Where a complaint cannot be resolved to the satisfaction of the client, then this can be referred to the Scottish Legal Complaints Commission (SLCC).¹³ This is an independent complaints body who will consider and investigate the complaint. In instances where the complaint raises a conduct issue, this is referred to the Society to investigate, and where appropriate to prosecute before the Scottish Solicitors' Discipline Tribunal (SSDT).

Although the current complaints process is recognised as unwieldy and complex, and is the subject of a wider review of Scottish legal services, it does provide for an independent and robust route of redress. Therefore, in relation to clients of Scottish solicitor, we are not aware of any evidence that clients have experienced problems through a lack of a redress route.

For clients of other advisers, the lack of redress could be resolved by compulsory insurance for all tax agents and advisers (as with the compulsory Scottish solicitors' policy referred to previously) that would pay out to their clients in defined circumstances, or compulsory contributions to a fund that would do likewise.

However, individual clients may not be likely to want to take the lead in taking claims or action against tax advisers (for fear of costs, time, inexperience of the legal process, having signed agreements that purport to exclude their ability to bring action), so it may be useful if HMRC could instigate action by reporting to an independent body, regulator or ombudsman where an adviser failed to live up to standards. HMRC will also be in a position where it will be aware of certain advisers repeatedly breaching standards, perhaps at a low level so that it is not worthwhile for any one individual to raise the matter.

¹¹ Professional Indemnity, Master Policy. For further information see: <https://www.lawscot.org.uk/members/business-support/professional-indemnity-insurance/>

¹² Legal Profession and Legal Aid (Scotland) Act 2007

¹³ Scottish Legal Complaints Commission. See <https://www.scottishlegalcomplaints.org.uk/>

Question on Option C

23. How could consumers be helped to make better choices?

Please see our comments at question 13 regarding promotion of regulated advisers, “badging” mechanisms and advisers and/or “blacklisting” for bad advisers. However, as noted there, as cost (not adherence to regulation or other badging criteria) is a key factor for many in choosing advisers, this is unlikely to fully deal with the problem. As also referred to above, greater and timeous promotion of avoidance schemes that are in use and HMRC’s views on these would help to raise awareness of bad practice for consumers and other advisers.

In so far as costs of advice are relevant to a consumer’s choice, we note that we recently published guidance to encourage Scottish solicitors to provide greater transparency on prices for legal services. The objective of the guidance is to help consumers in Scotland make better-informed choices when selecting a solicitor to provide a legal service. It has been recognised that some consumers may have the perception of legal services being too costly for them. This may result in the consumer approaching an unregulated provider (with potentially very little or no consumer protections) or avoid seeking any kind of legal advice or help.

The design of any regulatory regime for tax advisers should ensure the costs of any additional regulation are not disproportionately borne by already regulated tax advisers while failing to cover those persons not currently regulated and unlikely to adhere to any further voluntary regulatory requirements. This will only increase the costs to consumers of obtaining advice from regulated advisers and may inadvertently increase the number of price driven consumers obtaining advice from unregulated advisers.

Question on Option D

24. Are there any circumstances where a penalty should be levied on the adviser instead of, or in addition to, the client?

We do not believe that it would be appropriate for those professions subject to a strong regulatory regime, such as Scottish solicitors, to be further subject to what would, in effect, amount to a double ‘penalty’ and we would be opposed to this proposal. Regulated professionals will, in most instances, be subject to regulatory sanctions imposed by the regulator where fault has been proven. For Scottish solicitors, potential sanctions may include censuring, imposing of a fine, a restricted practicing certificate and ultimately being struck off the Roll and prohibited from practicing as a solicitor. We cannot foresee any instance where it would be justified to impose a second penalty. We suggest that where a professional body imposes a sanction on a regulated person then this should be recognised and there should be no further sanction or penalty levied on the adviser. It would be unjust for those already subject to a sanction imposed by their respective professional body, to be further subject to a second and further sanction for the same matter.

If there was an occurrence of a practicing Scottish solicitor providing tax advice which was negligent, then the client would be in a position to bring a claim for professional negligence. If this was to be proven, the client would be afforded and benefit from protection offered under the Society’s Master Policy (set out in more detail in response to question 22 above). There is also a significant self-insured amount (excess) which the solicitor

will be liable for before the Master Policy is called upon. If the Scottish solicitor is proven to have acted dishonestly, as opposed to negligently, then in addition to sanctions that can be imposed by the Scottish Solicitors Discipline Tribunal and, or, the criminal courts, the client would be able to call upon the Society's Client Protection Fund. Further detail of both the Master Policy and Client Protection Fund are set out more fully in response to question 22 above.

In addition, if this proposal were to be adopted, what would be the position where a professional body found no fault on the part of the regulated person, but HMRC (or a tax regulator) considered that there was fault? This would result in inconsistent approaches, confusion to both the consumer and the regulated professional. Any penalty system that did apply to regulated professionals such as solicitors should at least dovetail with that professional regulation by taking into account the professional body's decision and position on the matter, and, preferably, reaching a result that is consistent with that.

We agree there is likely to be a role for the suggested penalty system where advisers are otherwise unregulated and so not otherwise subject to sanction. As noted elsewhere, the idea that a taxpayer retains any meaningful oversight after asking an agent or adviser to prepare their tax return or put in place tax planning is usually flawed; therefore, imposing the penalty on a taxpayer who has relied on an agent or adviser is an indirect (and potentially unfair) way of solving the problem. In some cases, businesses promoting tax avoidance schemes will no longer exist by the time problems come to light, for example, as a result of 'phoenixing'. This supports a need for HMRC to be able to go behind entities to directors themselves in order pursue remedies in such cases. If there is a real risk of penalties or other sanctions for those promoting tax avoidance schemes, this may be factored into the costs of their advice or services. If penalties were to be potentially very significant and HMRC exercised the powers, that would likely impact the economics of such schemes. See question 11 for our detailed answer on factors to consider in any proposed promoter sanctions.

As well as applying to the worst cases of deliberate action such as deliberately using false information, fines or penalties could apply where an agent clearly had a lack of reasonable care regarding processes adopted in preparing returns. As noted above (at question 22) it may also be useful to have a body to which HMRC could bring claims where tax advisers failed to live up to standards; individual clients may not be likely to want to take the lead in this (for fear of costs, time, inexperience of the process etc). That body could determine penalty appeals.

Question on Option E

25. What scope is there for the professional bodies to take on a greater regulatory role in a similar way to anti-money laundering (AML) supervision? (where some professional bodies supervise their members and the professional body in turn is supervised by the Office for Professional body AML Supervision (or OPBAS) within the Financial Conduct Authority)

As referred to above, although under the provisions of the 1980 Act there are only a small number of legal 'activities' which are reserved to solicitors holding a current practicing certificate, a Scottish solicitor is regulated to the extent of all work undertaken in the course of their business, which includes advising and

representing clients on matters related to tax and tax law. Scottish solicitors are therefore already highly and robustly regulated to the extent of any tax advice work they may undertake in the course of their business. We do not believe that it is necessary to subject a professional that is already tightly regulated to further or an additional layer of regulation. Any new proposed regulatory regime should recognise this existing regulation so as to avoid duplication, contradictory, overlapping or inconsistent provisions.

We note that paragraph 84 states that one option open to HMRC would be to recognise the work that many professional bodies do to maintain standards and therefore to introduce a requirement for anyone who wishes to provide tax advice on a commercial basis to belong to a recognised professional body. The consultation further suggests criteria by which HMRC would determine if a professional body would be recognised as providing the necessary high standards for inclusion.

The Law Society of Scotland would currently meet all of the proposed criteria set out in paragraph 86 of the call for evidence.¹⁴ Having members of existing professional bodies subject to regulation by those existing bodies (subject to the body meeting certain criteria) would ensure that there was no duplication of regulation and help to avoid the potential problem of differing standards if professionals such as solicitors and accountants were to be regulated by their current professional bodies as well as a new body specifically in relation to tax advice. It is important to note that any requirement for regulation or supervision of our members which is additional to current regulatory requirements may require additional resources and therefore bear costs.

It is not clear from the call for evidence whether it is proposed that this option would in turn, require recognised professional bodies to be supervised themselves, for example, as per the OPBAS model in relation to AML matters. If the approach were to be taken to supervise those recognised as suitable professional bodies, while this would allow regulation (where sufficiently robust) provided by existing professional bodies to be grandfathered into the new regime, this may result in further resourcing requirements and therefore potentially cost implications. If these costs were to be passed to the professional bodies, these would in turn require to be passed onto our membership, and ultimately to consumers.

If this option were to be followed, consideration would need to be given to how those tax advisers that are currently unregulated would be regulated. We note that unregulated tax advisers could be required to join an existing regulatory body, however, this may be more difficult for some existing bodies to accommodate than others. Membership of the Law Society of Scotland is currently only available to Scottish solicitors, licensed paralegals, trainee solicitors and registered foreign lawyers. It would not be feasible to create a form of membership for tax advisers who do not fall into any of the above categories to allow such advisers to be

¹⁴ Paragraph 86 criteria to determine whether a professional body would be recognised as providing high standards: the organisation has an independent regulatory disciplinary process, the organisation has a public interest function, the organisation carries out assurance of the fitness to practise of its members, there is appropriate governance, so that regulatory functions and representative functions are separate, members must be required to demonstrate professional competence either through a relevant qualification or through many years' experience, all members in practice must have professional indemnity insurance, all members in practice are required to undergo continuing professional development (CPD), the professional body is an anti-money laundering supervisor

regulated by the Law Society of Scotland. Any such approach would require significant legislative and regulatory change, as well as changes to the Law Society of Scotland's internal and external operations and processes. Alternatively, a new body could be created specifically for those not otherwise regulated by a recognised professional body. Consideration would be required as to the costs involved in establishing a new body.

We are unclear as to the significance of the point (noted on page 31 of the call for evidence) regarding recognised tax advisers in New Zealand being able to claim legal advice privilege? This would imply that there are some tax advisers who cannot claim it because they are not a member of a recognised group i.e. being a member is not compulsory. This appears inconsistent with the aim of this option that all tax advisers belong to a recognised body. We would also note that legal advice privilege is only available to lawyers and not to other professionals in the UK.

Questions on Option F

26. What would the impacts be of introducing external regulation, particularly on clients and on those agents already meeting high standards?

We recognise the benefits of regulation of tax advice in order to ensure consumer protection. However, if external regulation is considered, it is crucial that due regard is given to the existing regulation which many professional providers, including Scottish solicitors, may be subject to so as to ensure there are no unintended consequences, as we highlighted earlier. For example, paragraph 88 of the consultation document suggests that 'advisers' may be subject to a fit and proper test. For Scottish solicitors, this would be duplication. The Law Society of Scotland requires that those seeking to practice as a solicitor are 'fit and proper' to be admitted to the solicitor profession and are of suitable character to practice in the area of law. Many other regulated professions have similar requirements. We suggest that recognition must be given to those professionals (such as solicitors) who already satisfy strict 'fit and proper' and other regulatory requirements.

While a stand-alone body could have the benefit of simplicity in monitoring and enforcement and would draw in those currently unregulated (without the need for them to become a member of an existing body solely for this purpose, it is likely to be more congruous for the various professions to continue to be regulated by their own professional bodies rather than having a separate regulator solely for tax advice.

If an external regulator is to be established, we further suggest that consideration must be given to a process of 'passporting' to minimise as much as possible the duplication of information requested. For example, we would suggest that it would be sufficient for advisers to demonstrate membership of an existing professional body or provide confirmation from their own professional body that they have satisfied particular requirements, such as a 'fit and proper' person.

External regulation could level the playing field across all advisers. However, in addition to the matter of dual regulation discussed in our response to this question, some further issues to resolve with such an approach would be:

- would the individuals and/or the firm providing the tax advice be required to be registered?

- the definition of tax agent is very broad. Solicitors undertaking many types of work with ‘incidental’ tax advice could be caught by this definition: for example, conveyancers submitting SDLT and LBTT returns, solicitors advising on merger and acquisition transactions, private client solicitors advising on deeds of variation, and many more. All would potentially need to be regulated, not just those regularly providing tax law advice as a large part of their professional practice, and this is likely to be very onerous if no ‘passporting’ arrangements are in place; and
- there must be enforcement in respect of those who are not currently subject to any regulation as these are likely to be the individuals causing the current difficulties and also be those least likely to voluntarily comply with any regulation.

27. Are there any existing bodies that might be well-placed to act as regulator? What potential conflicts of interest could you see?

As we have set out earlier, any attempt to introduce overlapping or duplicating regulation in relation to Scottish solicitors may give rise to the potential for a conflict of regulation.

28. The government is particularly interested in views on the following questions:

(28a) the benefits of the options set out above

Any regulation that is not mandatory for all or not enforced could end up being an additional cost only on those advisers who currently cause no difficulties. This could drive up their fees and drive taxpayers towards cheaper providers who may be the more likely cause more of the difficulties.

(28b) whether there are sectors or types of tax advisers which would face particular challenges, and what those challenges would be

Many tax advisers do not belong to any professional body, for example many R&D claim specialists, so regulation by reference only to professional bodies is unlikely to achieve HMRC’s aims.

How would any mandatory external regulation apply to those providing “incidental” tax advice? For example in the course of an M&A transaction, conveyancing transaction, or private client work, either a specialist tax lawyer or a corporate or private client lawyer may provide such advice. Will this individual or firm be classed as providing the tax advice?

(28c) views on the impacts of each option, for example: - costs for customers, advisers or other costs - impacts on any particular groups effects on competition and the paid tax advice market - how any impacts could be mitigated behavioural effects – what might advisers or customers do in response?

See our answers to questions 13 and 28a, above.

(28d) alternative options which meet the objectives outlined above.

Instead of attempting to address the problem by providing standards which it wishes advisers to adhere to, an alternative could be robust prosecutions by HMRC/ or other body of those advisers who have created or assisted in the most egregious avoidance schemes (legislation would of course be needed to define what was impermissible and the sanctions). This may have a deterrent effect for other advisers and would prevent regulatory costs falling on the vast majority of tax advisers who do not create difficulties for HMRC. Of course, we anticipate there would be significant difficulties in first drawing the boundaries between what is and what is not acceptable tax planning. See our fuller answer at question 11.

29. Can you suggest or support any other activities which should be considered?

As referred to above, having the ability for advisers to contact HMRC over the phone and speak to knowledgeable staff with experience to discuss difficult cases would be of assistance.

30. What market failures need to be addressed?

We have no comments on this question.

31. What evidence is there that will enable understanding of customer and agent behaviour and likely responses to any intervention?

We have no evidence in this regard and wonder if HMRC's behaviour modelling team may be able to assist.

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