Consultation response

Raising standards in the tax advice market: professional indemnity insurance and defining tax advice

June 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.

We welcome the opportunity to respond to HMRC's further consultation *Raising standards in the tax advice market professional indemnity insurance and defining tax advice.*[1] We previously responded to HMRC's consultation *Raising standards in the tax advice market* in August 2020 and much of what we said in that response is also relevant to the current consultation.[2]

In relation to the current consultation, we have the following comments to put forward for consideration.

General Comments

As we stated in our response to the consultation '*Raising standards in the tax advice market'*, we take this opportunity to again emphasise, Scottish solicitors who undertake tax services, including advising and representing clients on tax law related matters are robustly regulated under the provisions of the Solicitor (Scotland) Act 1980 (the 1980 Act). 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 normal course of their business. This includes advising and representing clients on tax law related matters. Scottish solicitors are expected to work to standards which reflect the legal, ethical, and professional obligations solicitors owe to clients.

The statutory regulatory regime is underpinned by strict professional service and conduct rules which are aimed at ensuring a robust level of consumer protection and to provide adequate and appropriate redress in the unlikely event that a client suffers detriment or loss because of fault on the part of a solicitor. We would be strongly opposed to any additional statutory and regulatory burden being placed on those members of the Scottish solicitor profession who choose to undertake tax-related services on behalf of their clients and who are already robustly regulated to the extent of those services provided.

We are, however, pleased to note that the consultation clearly recognises that some advisers, such as solicitors, are appropriately regulated. We are also pleased to note that to an extent, the consultation suggests that insurance requirements could be considered satisfied, if an adviser demonstrates that they are a

[1]Raising standards in the tax advice market professional indemnity insurance and defining tax advice - see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972427/Raising_standards_in_the_tax_advice_market_professional_indemnity_insurance_and_defining_tax_advice_-_consultation.pdf
[2] Law Society of Scotland; response dated August 2020 – see: https://www.lawscot.org.uk/media/369382/20-08-28-tax-reg-aml-raising-standards-in-the-tax-advice-market.pdf

member of a recognised professional body. We are supportive of this proposal; however the consultation fails to provide any detail how this would work in practice, and we would welcome more information on this to further consider any potential impact.

Professional Indemnity Insurance

We note that the focus of the current consultation is upon proposals to introduce compulsory indemnity insurance for those who undertake tax advice and services. Scottish solicitors working in private practice have professional indemnity insurance cover in place for any claims that may arise against them, and which relate to any services provided to clients whilst acting in their professional capacity. Unlike the position in England and Wales, where firms are individually responsible for arranging the necessary indemnity insurance with their own preferred broker, we, as the professional body for Scottish solicitors, require all Scottish solicitor firms to have in place indemnity insurance arranged through our Master Policy.[3]

The 'Master Policy' is a compulsory professional indemnity insurance arrangement[4] through the Society which covers most Scottish solicitors working in private practice. The exception to this is those solicitors who may work in-house, for example for local authorities or financial institutions, and who would not usually provide legal services directly to consumers.

Professional indemnity insurance through the Society's Master Policy was made compulsory for Scottish solicitors in 1978. The provisions relating to the Master Policy are set out within the 1980 Act and the Law Society's Practice Rules 2011[5], which place an obligation on every Scottish practice to contribute to the Master Policy annual premium. All Scottish solicitors must renew their practising certificate annually if they wish to continue practising. At this time, and for the practising certificate to be renewed, we require confirmation that the indemnity insurance is in place and has been arranged through the Master Policy.

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 Society. The insurance provides cover of up to £2 million for any one claim. The run-off cover provides and additional level of assurance for clients and recognises that the very nature of legal work means that potentially a solicitor may have ceased practicing, or for example, due to death, retirement, no longer solvent or cannot be traced, at the time the claim is made. There is no maximum length of term for the run-off period of the Master Policy, this will continue as long as the Master Policy is in place. A further benefit of the Society Master Policy is what is referred to as 'black-hole' cover. This means that if a claim is made based on circumstances which are not expressly provided for within the terms of policy and these circumstances were not anticipated, then the claim may proceed.

[3] For further information see Law Society of Scotland – Professional Indemnity Insurance ; https://www.lawscot.org.uk/members/regulation-and-compliance/professional-indemnity-insurance/

[4] This is provided through the Society's broker, Lockton. For more information see: https://www.locktonlaw.scot/insurance-services/master-policy.html

[5] Section 44 of the Solicitors (Scotland) Act 1980 and Rule B7 of the Law Society's practice rules 2011; see https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b7/rules/b7-1-master-policy/

The Society provides guidance online for any person wishing to make a claim.[6] The 2007 Act makes provision for the Scottish Legal Complaints Commission (SLCC) to oversee the operation of the Master Policy.

Therefore, we believe that any proposals to introduce compulsory indemnity cover for those providing tax advice must recognise and consider any compulsory requirements that may already be in existence for regulated professions, such as solicitors. It would be unjust and unfair to require those professionals, who are already subject to mandatory requirements, to carry unnecessary, additional indemnity insurance and the additional cost burden this will bring. This may also prove problematic from a service provider and claimant perspective as there would likely be a significant difference in term and conditions of any policy, exclusions, levels of cover, etc. In addition, it would lead to the situation of there being dual insurance which may raise legal issues as it would not be possible for a claimant to be indemnified under each and separate policy.

If the proposals for compulsory indemnity are to be carried forward then we suggest that consideration must be given to a process of 'passporting' for Scottish solicitors, respecting and recognising the insurance requirements (and the regulatory regime) already in place. As we highlighted in our previous response, we have previously experienced and raised similar issues regarding 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, such as indemnity insurance, will be recognised as superseding the regulations. We suggest that the HMRC may find it helpful and informative at an early stage to refer to these regulations[7] to understand the approach previously taken where the individual is a solicitor and already subject to stringent oversight.

The Society's Client Protection Fund (the Guarantee Fund)

We also highlight the additional and further level of protection and cover afforded to clients of Scottish solicitors. In addition to the reassurance provided for clients by way of the Society's Master Policy as referred to above, clients also have the benefit of the Scottish Solicitors' Client Protection Fund (CPF)[8].

This was set up by the Legal Aid and Solicitors (Scotland) Act 1949 and is now provided under section 43 of the 1980 Act. Its purpose is to '*make grants in order to compensate persons who suffer a pecuniary loss by reason of dishonesty*' on the part of a solicitor, an employee of a solicitor, a registered foreign lawyer or a conveyancing/executory practitioner or employee. The primary objective of the CPF is to prevent hardship amongst those who have suffered loss due to any dishonest actions performed by a solicitor.

The provision and maintenance of the CPF is a requirement of the 1980 Act. The CPF covers all Scottish solicitors holding a current practising certificate and is available for clients to make a claim albeit the solicitor in question may have since passed away or had his or her name struck off the roll of solicitors or been

[6] For further information on how a claim is made on the Master Policy see: https://www.lawscot.org.uk/for-the-public/client-protection/how-solicitors-are-insured/
[7]Letting Agent Code of Practice (Scotland) Regulations 2016, See: https://www.gov.scot/publications/letting-agent-code-practice/
[8] Formally the Guarantee Fund: See section 43 Solicitors (Scotland) Act 1980. For further information also see: Law Society of Scotland Client Protection Fund: https://www.lawscot.org.uk/for-the-public/client-protection/client-protection-fund/

suspended. In reality, the CPF would only be called upon where the solicitor holds client monies. Therefore, and as with the Master Policy, this would normally exclude in-house solicitors and those in the unregulated sector as they do not hold client funds.

The CPF is a discretionary fund and there are rules and criteria for an application and for making an award (referred to as 'grant'). It is a fund of last resort which means that it will only compensate those who have tried all other options to recover their losses. The amount of an individual grant from the CPF may not exceed £1.25 million. CPF guidelines are available on the Society's website.[9]

Consultation questions

Chapter 2

Q1: In your opinion, would introducing a requirement for anyone providing tax advice to have professional indemnity insurance satisfy the policy aims of improving trust in the tax advice market, by targeting poor behaviour and allowing taxpayers greater redress when things go wrong?

Professional indemnity in any profession has the effect of promoting consumer confidence and provides a level of protection in the event of loss suffered by a client because of negligent behaviour on the part of the service provider.   Indemnity insurance is crucial to ensure that those who seek and rely on advice from professionals can be assured that should they suffer loss through negligent advice then recompense may be available.

As mentioned above, we believe that as Scottish solicitors are already required to have professional indemnity insurance under the Master Policy, they should not be required to have additional professional indemnity insurance under any new requirements relating specifically to tax advice.

Q2: If the government introduces the requirement for professional indemnity insurance, what further steps would you recommend?

Professional indemnity will generally provide cover to insure against any claims made that may relate to, for example, things such as negligent advice or recommendations.   However, insurance of this nature will not generally offer cover for acts of dishonesty on the part of the adviser and where the client suffers loss as a result. It is worth considering how and to what extent, dishonest behaviour can be covered in any proposals for compulsory indemnity and if a scheme, like the Society's Client Protection Fund for example, would be appropriate or whether there should perhaps be a requirement that any indemnity cover must include cover for loss though actions which go beyond negligence.

[9] See Law Society of Scotland at: https://www.lawscot.org.uk/for-the-public/client-protection/client-protection-fund/

Q3: Are there any alternative options you would recommend?

We have none to suggest.

Q4: Apart from the costs and potential effects outlined above, are there any other costs you foresee for advisers?

We have none to suggest.

Chapter 3

Questions for tax advisers

Q5 – Q12

We note that question 5 to question 12 relate specifically to those working in the tax advice sector outside professional firms, to the insurance industry and to clients of tax advisers and we therefore have no comment to make.

Chapter 4

Q13. What is the minimum level of cover you recommend, and why?

We are not able to suggest a monetary minimum amount of cover as we do not have access to the necessary data to make an informed suggestion. However, as advised above, the Master Policy, which covers all practising Scottish solicitors (in private practice) provides minimum compulsory cover of £2 million.

Q14. What activities should it be mandatory to cover, and why?

It would be sensible, we suggest, that those activities normally undertaken by a professional in providing tax related services be covered by any indemnity insurance. As to the extent of those activities, we are not able to comment. However, as referred to earlier, it is worth noting that Scottish solicitors are covered by the Master Policy to the extent of all services provided in their professional capacity as a solicitor, and that would include tax advice services.

Q15. Should the government set mandatory minimum or maximum levels of:

- **cover**
- **run-off cover**
- **excess**

We suggest that it would be appropriate to set minimum levels for the above. This would help to provide certainty and manage expectations from both the client perspective and the insured service provider. In addition, setting a compulsory minimum level of cover allows for service providers to purchase additional cover should they so wish and potentially to reflect the size of their business and client needs. For example, the Society's Master Policy provides minimum compulsory cover of £2million. However, firms are permitted if they so wish to take additional cover up to any amount which reflects their needs.

Q16. What levels should these be?

We are not able to suggest what levels should be applied, but these should be determined fairly and proportionately.

Q17. Should the government specify what advice must be covered by the policy? What advice do you think should be covered?

We suggest that to specify the nature of the advice to be covered in any detail may result in ambiguity and uncertainty. Over recent years there has been a clear move within primary and secondary legislation to step away from prescriptive definitions, recognising that more general and permissive definitions can better capture intentions and achieve efficacy.

Q18. Are there any other insurance requirements the government should require?

This is difficult to answer as this depends on what loss would be covered by the proposed indemnity insurance. The UK Government may want to consider to what extent any loss resulting from potential dishonest behaviour on the part of the adviser should be covered. As referred to above, clients of Scottish solicitors are protected from both losses resulting from negligence and in the unlikely event of dishonesty.

Q19. Who should be required to hold the insurance? Should it be the firm, the principal, everyone who is acting as a tax adviser?

It would be a sensible approach for this to be held by the firm to cover all partners and employees engaged in providing tax advice services.

Q20. What impact do you think setting minimum mandatory levels of cover would have on:

- **the market including availability of insurance**
- **affordability**

Ultimately and realistically the cost of insurance by way of premiums levied on advisers will be borne by clients. We suggest that to support affordability and minimise cost to both clients and business, insurance premiums may be levied on an individual basis, possibly based on factors such as turnover, size of business and the number of employees / advisors. These are similar factors that are considered when determining the premiums for the purposes of the Society's Master Policy.

Chapter 5

Questions 21 – Questions 25

We note that question 21 to question 25 are aimed towards those working in the tax advice sector outside professional firms and we therefore have no comment to make.

Chapter 6

Q26. Do you agree with the 3 elements of enforcement?

We note that the '3 elements of enforcement' are referred to in the consultation as being transparency, checking advisers have insurance, and sanctions for non-compliance.

In relation to transparency, the consultation document is not entirely clear as to what is intended in this regard. Several specific questions arise on which clarification would be helpful:

- What information are HMRC intending to share – for example, would it be only that insurance is in place, or the details and extent of the cover provided?
- Will specific information be provided to individual clients, or will this be in the form of a searchable online database of advisers who HMRC have confirmed have the appropriate insurance in place?
- If a searchable online database is intended, who will be responsible for ensuring that an advisor's entry is accurate and how often will this be done? Will HMRC create and maintain the database from the information advisers provide or will advisers maintain an entry on the register as a means of providing the information to HMRC? If the latter, what quality control checks will be involved?
- If passporting is available for those who are a member of a recognised professional or regulatory body that requires insurance, will a passported adviser have to maintain an entry on any online database or will there be a block entry for members of such bodies? If a block entry is used, there could be a disadvantage for those included in the results of a database search.
- Will a public database disclose the insurer (or broker) with whom the professional indemnity insurance is held?

In relation to checking advisers as to their indemnity insurance status, we agree with the proposal that those who have the necessary indemnity insurance as a requirement of their professional or regulatory body should automatically be recognised as being appropriately insured and no further checks should be necessary. Sanctions for non-compliance would be appropriate. As referred to previously, all practising Scottish solicitors are covered by the Society's Master policy. Therefore, we would not anticipate non-compliance to arise in the Scottish solicitor sector. It is also worth noting that it is already a criminal offence for a person to hold themselves out as a Scottish solicitor when not entitled to do so and to practice they are required to have a current Practising Certificate. This is only provided by the Society once it is confirmed the indemnity insurance (Master Policy) requirements have been complied with.

Q27. What are your views on the enforcement options described above?

Please see our comments at Q26 and 29.

Q28. Do you agree that advisers who already hold professional indemnity insurance as it is required by their professional or regulatory body should automatically satisfy the new requirement? How could we check?

Yes, we strongly agree, and we welcome the suggestion (at paragraph 68 of the consultation document) to automatically consider the requirement for insurance satisfied if the adviser can prove they are a member of a recognised professional or regulatory body that already requires insurance. To require those who are members of a regulated profession, and therefore already subject to a mandatory requirement to have indemnity insurance in place, to then satisfy further requirements would incur increased and unnecessary resources, both on the part of the regulated individual and HMRC.

To impose any additional indemnity insurance requirement on those already subject to such requirements by their respective professional body, such as Scottish solicitors, would be unfair and problematic, and would increase costs for solicitors and ultimately their clients.

In relation to Scottish solicitors, it is very easy to check who is covered by the Society's Master Policy (as referred to above). All those solicitors in private practice holding a current practising certificate, and therefore covered by the Master Policy, can be viewed electronically via the Society's online 'Find a Solicitor' search[10]. This provides a comprehensive database of all solicitors in Scotland entitled to practise and acts as a way for consumers to be assured that any solicitor listed will not only be subject to regulation but will have the necessary indemnity insurance in place through the Society's Master Policy.

Q29. The government's ambition is for HMRC to share information about the adviser with the client digitally. What are your views of this?

We broadly support information being made available digitally, although it is important that individuals who are digitally excluded or may have difficulties in accessing information in this format, can access the relevant information with ease in another way.

Chapter 7

Q30. What effects do you foresee of introducing the requirement for everyone at the same time?

This would provide simultaneous requirements across the tax advice sector, which would provide clarity and certainty for both consumers and businesses within the sector. To stagger the introduction would be confusing to consumers and potentially lead to the situation where a client may wrongly believe that their chosen adviser was either adequately covered by indemnity insurance or risk confusion for consumers in relation to advisers that already hold indemnity insurance voluntarily or under professional body requirements.

[10] Law Society of Scotland, Find a Solicitor, See: https://www.lawscot.org.uk/find-a-solicitor/

There may also be the risk of price disparity between those with indemnity insurance and those without, the latter perhaps attracting clients through lower pricing.

For further information, please contact either:

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