Law Society of Scotland

Consultation Response

Enhancing HMRC's ability to tackle tax advisers facilitating non-compliance

May 2025

Photo: Glasgow

Law Society of Scotland

Consultation Response

Enhancing HMRC's ability to tackle tax advisers facilitating non-compliance

May 2025

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 Tax law sub-committee welcomes the opportunity to consider and respond to the UK Government's consultation '*Enhancing HMRC's ability to tackle tax advisers facilitating non-compliance*.'[1] The sub-committee has the following comments to put forward for consideration.

General comments

Regulatory burden

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. As the professional governing body for Scottish solicitors, we consider that in many cases where solicitors are knowingly providing advice which is harmful to the tax system, those solicitors will also be in breach of the Law Society's rules of conduct and we therefore have an intrinsic interest in investigating and tackling such behaviour.

We support strong action against the tax advisers who deliberately or knowingly harm the tax system. We are aware from our work that our members deal with a number of queries from clients enquiring why we are not advising them on the apparent vast savings that can be made, which as we all know often provides large fees for bad actors (which the client cannot recover if the advice is incorrect and must bear along with the tax due) and an expensive mess for clients and more reputable advisers to sort out.

As we have noted in previous calls for evidence,[2] we consider that any changes to tax compliance and HMRC's investigatory powers should be framed so as not to cause extra compliance costs (in terms of time and financial costs in complying

[1] Enhancing HMRC's powers: tackling tax advisers facilitating non-compliance - GOV.UK
[2] Law Society of Scotland Response: Raising standards in the tax advice market: professional indemnity insurance and defining tax advice, see: Law Society of Scotland Response June 2021

with further legislation) for the majority of tax advisers who do adhere to professional standards.

Any changes introduced should be proportionate and, in particular, narrowly targeted at the known "bad actors" and the ways they operate (and others who would act similarly) rather than the wide range of other tax advisers. As the consultation notes, most tax advisers act properly to advise clients on the tax implications of their particular situation. In our experience, many of the present difficulties lie with those who have little or no intention of "advising" their clients on the law and are simply applying a "template", a "solution" or a concept to a mass of clients without consideration of the individual facts of each client. In our view, it is often this "mass market" activity which leads to the inappropriate application of tax law, and any proposals for change should prioritise this activity as well as other deliberate "bad faith" activity in order to make the greatest impact on lost tax and cause minimum damage to the rest of the tax profession and its ability to provide advice to taxpayers.

As we have highlighted in previous responses,[3] Scottish solicitors who undertake tax services, including advising and representing clients on tax law related matters, are already robustly regulated under the provisions of the Solicitor (Scotland) Act 1980 (the 1980 Act). Scottish solicitors are also bound by the Law Society of Scotland's rules and guidance which, among other things, require solicitors to: (a) always act in a honest and non-deceitful manner so that their trustworthiness is beyond question (rule B1.2) and: (ii) always act in the best interests of their clients in giving independent and impartial advice (rule B1.4).

In addition, and for further information, the Regulation of Legal Services (Scotland) Bill currently progressing through the Scottish Parliament will further strengthen and enhance the Scottish solicitor regulatory regime. This will introduce greater investigatory and enforcement powers for Scottish legal sector regulators.

Professional privilege

We believe that it is vital that any new HMRC powers, or any extension of existing HMRC powers, must recognise not override legal professional privilege and our members' duty of client confidentiality. We note, for example that HMRC's existing file access powers (e.g. under schedule 38 of Finance Act 2012) cannot compel solicitors to disclose information to HMRC which is subject to privilege and any

[3] i) Law Society of Scotland Response: Raising standards in the tax advice market: strengthening the regulatory framework and improving registration, see: Law Society of Scotland response June 2024

ii) Law Society of Scotland Response: Raising standards in the tax advice market: professional indemnity insurance and defining tax advice, see: Law Society of Scotland Response June 2021

iii) Law Society of Scotland Response: Raising standards in the tax advice market, see: Law Society of Scotland Response August 2020

new law must not encourage the tax authorities to attempt to circumvent these rules. Any advice properly subject to legal professional privilege must remain so.

What are the Enhanced Powers intended to tackle?

1. Do you agree that HMRCs power to tackle tax advisors who harm the tax system could be more effective?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

We strongly support action to tackle tax advisors whose actions are dishonest or disingenuous and are harmful to the tax system, as per our previous responses.[4] Giving HMRC further power to tackle such bad actors should be welcomed as a measure to strengthen our tax system. Specifically, we recognise that

- There are bad actors in the legal sector facilitating tax avoidance and as the professional governing body for Scottish solicitors, we welcome the opportunity to assist HMRC to tackle harms caused by these individuals and organisations.
- HMRC require stronger powers to tackle problem advisors, though these powers must be proportionate and the scope should be carefully considered (see below).

2. Do you agree that with the government's aim that any enhanced powers should allow for swift, effective and proportionate action in cases of tax adviser activities that result in harm to the tax system and facilitates non-compliance?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

Whilst we agree with HMRC that in principle enhancing HMRC's ability to tackle bad actors among tax advisers is desirable, we have highlighted in past evidence

[4] i) Law Society of Scotland Response: Tackling promoters of tax avoidance, see Law Society of Scotland Response September 2020

ii) Law Society of Scotland Response: Raising standards in the tax advice market, see: Law Society of Scotland Response August 2020

that there will likely always be a small number of advisers who knowingly sell aggressive or incorrect tax advice irrespective of the regulatory environment unless direct action is taken against them.[5]

The consultation rightly notes that "Many tax advisers provide high quality advice and support their clients to pay the right amount of tax" and that it is a "small minority" causing disproportionate harm.

On this basis it is essential that proposed changes do not punish that vast majority of law-abiding and good actor advisors for the actions of a few. We would include within that notion of "punishment" a disproportionately imposed bureaucratic or administrative burden, particularly for those who are already regulated by at least one other professional body.

It is also not clear to us exactly what is meant by “facilitation of non-compliance”,- and we would welcome clearer definition as to what is intended to be within scope.

3. What actions that lead to harm being done to the tax system should be within scope of the proposals outlined within this consultation?

Please give reasons for your answer

We consider that the proposals should be aimed at countering acts where: (i) tax advisors are knowingly giving incorrect advice; or (ii) where tax advisors should be reasonably expected to know that their advice is incorrect (i.e., where a reasonable tax adviser with sufficient expertise would not reasonably have given that advice). We do not think the scope should cover situations where tax advisors have made innocent technical errors, where they have adopted a defensible filing position with which HMRC disagree, or where they are operating with incorrect information provided by their clients – save where it would have been reasonable for the tax adviser to suspect that such information was incorrect.

It is important in our view, to distinguish between cases such as the above (knowingly or reasonably should have known) from innocent or “good faith” errors for several reasons.

First, the UK has one of the most complex tax systems in the developed world – complexity which is only increased by the devolved tax landscape. Within the UK tax code there are many points where legislation and case law aren’t sufficiently clear, or well drafted, or where legislation cannot be clearly and unambiguously applied to the facts at hand. In such cases, tax advisors must exercise analytical skill, experience and professional judgement in assisting their clients. This is

[5] Law Society of Scotland Response: Tackling promoters of tax avoidance, see Law Society of Scotland Response September 2020

especially true within the legal profession where a good deal of advice is around resolving complex technical issues. In many cases legal opinions or advice are caveated – i.e., they are a "should" level of opinion or identify a "defensible filing position". This is not unique to tax law. It is possible therefore that advice as to how the law applies to a set of facts is not always clear cut and that two tax advisors with sufficient expertise could come to different, but equally reasonable, analyses. It also means that a tax advisor could issue reasonable well-argued advice on a complex topic which ultimately fails at the court or tribunal. This does not automatically mean that such advice is harmful, or should be considered as such, even where it is ultimately incorrect.

Second, in our view, the ability to consider, analyse and argue about the meaning and application of laws – including tax law – is a key feature of a common law and mixed legal systems such as we have in the UK.

Third, while HMRC produces (in many cases) excellent guidance on its interpretation of the UK tax code, and this is welcome and necessary, it has been repeatedly shown that: (i) such guidance lacks the force of law; (ii) HMRC are not bound by their own guidance where they subsequently disagree with it, or take the view that it doesn't apply to a specific set of facts and circumstances; and (iii) the bar for tax payers to have a "reasonable expectation" arising from HMRC guidance on which they can rely is a high one and not guaranteed. In other words, even where HMRC have stated a position on tax matters, it is not a guarantee that a taxpayer who cleaves to that guidance would be compliant. There are also cases where an adviser may reasonably (and correctly) disagree with HMRC guidance on technical grounds.

Fourth – and perhaps most importantly – while the proposals should be framed so as to counter "bad actors" they should not have a chilling effect on the ability of tax advisors to take good faith positions on technical matters, or push advisors into adopting overly conservative positions. Most tax advisors who are part of a regulated body (such as the Law Society of Scotland) are required to give independent advice, which is in their clients' best interests, and to do so without conflict of interest. If the proposals outlined in the consultation are framed too widely, then they have the potential to cut across all of these duties.

Finally, if the scope of the proposals is too wide, we are concerned they could be used by HMRC as a way of tackling difficult tax issues rather than litigating them on their technical merits.

4. Do you have any other suggestions for how HMRC might enhance its powers to tackle non-compliance facilitated by tax advisers?

Where non-compliance is facilitated by tax advisors within the legal profession, we suggest HMRC can work more closely with existing professional organisations, such as the Law Society of Scotland.

Scope of the proposals

5. Do you have any comments on the proposed scope?

We think it inappropriate that individuals not in business and those who are not paid for services, offering informal advice should fall within the scope of the new rules. It is unlikely that those offering informal advice will or should be aware of such rules.

We would appreciate clarity in terms of the precise definition of the scope, as it is unclear. For example, does "facilitation" require an element of intent to commit non-compliance on the part of the client and / or the adviser?

In the examples provided in paragraph 3 of the consultation document, we agree that the first two ought to be in scope – i.e.,

i) submitting claims for Research and Development tax relief for businesses that do not meet the requirements of the relief.
ii) encouraging taxpayers to submit claims for repayments of income tax, for example for employment related expenses, without checking whether the taxpayer is entitled to a repayment.

However, for the reasons set out above, we do not think that the third example is something sufficient – on its own – to fall within scope.

i) providing advice on tax to clients which they rely on, and which results in inaccuracies in the clients' returns.

We strongly suggest that the only conduct which should be in scope is that which either:

i) deliberately aims to facilitate non-compliance; or-
ii) entails a tax adviser adopting a position which no reasonably competent adviser acting reasonably would endorse.

In our view such a scope would cover the vast majority of objectionable conduct without unduly hampering the ability of advisors acting in good faith to support their clients. We think that there is also merit in an independent body (akin to the GAAR advisory panel) being set up to produce guidance and to act as an initial arbiter in cases where a decision is needed as around whether conduct is within scope.

The proposed scope takes into account a broad range of legal professions, including those that are not necessarily tax professionals. e.g An employment lawyer drafting a settlement agreement which impacts on the tax treatment of termination payments, high street conveyancers submitting SDLT, LTT or LBTT returns, and corporate lawyers dealing with stamp duty on share transactions. We consider that in some such cases, it would be more appropriate for the Law Society to take action rather than HMRC since tax advice is not the core component of the services being provided.

6. Are there any other groups HMRC should consider?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

Enhancing Powers to enable HMRC to investigate and request information from tax advisers.

7. Do you agree that it should be easier for HMRC to obtain information from tax advisers where HMRC reasonably suspects the tax adviser's activity has facilitated an inaccuracy in a taxpayer's document or return?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

Whilst we support strong action against the bad actors within the tax system, in line with our previous responses, we stress that any powers to tackle tax avoidance must not be used by HMRC to target reputable advisers and others who may be tangentially or inadvertently involved in the supply chain. For example, where a scheme has been sold by a promoter to a client and a solicitor has been involved in implementing aspects of that scheme. It would in our view be wrong to target the solicitor simply because they are likely to be a 'softer' target than the promoters (either for information or for penalties), by virtue of being UK based and subject to professional regulatory regimes unlike many promoters of tax avoidance.

Any power to obtain information needs have very clearly defined limits and safeguards and must take proper account of the different types of advisers and client potentially involved. See below also on legal professional privilege (confidentiality) in relation to lawyers.

To give an example, a tax adviser making a simple and entirely innocent transcription error would evidently "facilitate an inaccuracy" as proposed in the consultation. This would be disproportionate to the aims of this policy, giving

HMRC wide-ranging and broad powers of investigation and place an unnecessarily high burden on tax advisers.

The same would apply where an adviser had simply submitted a tax return based on incorrect information supplied by a client. The adviser has undoubtedly facilitated an inaccuracy by submitting an incorrect return; but the adviser is in these circumstances not the guilty party.

A reasonable suspicion of facilitating an inaccuracy is a huge extension from the current need for dishonesty. "Inaccuracy" is an exceptionally broad term, running from simple and in many cases excusable lack of care to outright dishonesty. If the power is to be extended, then serious consideration should be given towards an appropriately stringent threshold, more aligned with the current need for dishonesty. For example, by using the proposed scope we set out in our answer to questions 3 and 5.

In place of reasonable suspicion of a HMRC officer, if this power is introduced in any form, consideration should be given to its use being subject to approval by a completely an independent panel, operating according to guidance (with legal backing) which clearly sets out its remit.

8. Do you believe that 'reasonable suspicion' is the right threshold to issue a conduct and information notice? Are there any alternatives HMRC should consider?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

Given the inherent uncertainty in many aspects of tax law, it is important that the threshold for reasonableness is defined objectively and not subjectively defined nor defined solely in accordance with HMRC's interpretation.

Tax law is often complicated and, in many cases, the true import of pieces of law only emerges after some time of its operation and indeed Court and Tribunal cases. It is not acceptable that reasonable differences of view on the meaning of a piece of law which ultimately leads to an inaccurate (not dishonest) report to HMRC should open up advisers to information powers which may be quite disproportionate to any innocent error made. Please see our answer to question 7 for examples for innocent errors which undoubtedly "facilitate" inaccuracies potentially leading to the issue of such notices.

This is a significant lowering of the threshold and threatens to subject tax advisers to subjective interpretations of the law. If these powers are extended at all, it is essential that strong limitations and safeguards are put in place. It is simply insufficient if the exercise of this power depends on one HMRC officer's subjective

views (which could also lead to inconsistency of approaches across HRC based on different officers' views). As we stated in our answer to question 7, in place of reasonable suspicion of a HMRC officer, consideration should be given to this power being subject to approval by an independent panel operating according to guidance (with legal backing) which clearly sets out the remit.

There may also be merit in considering a system whereby information or documents sought are lodged with a Tribunal for consideration; this may be particularly relevant where legal professional privilege is involved.

9. Do you agree with the proposed changes to the powers to gather information from tax advisers?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

Our response here relates particularly to members of the Scottish legal profession when they act (as they often do particularly in some contexts) as tax advisers. Similar considerations will apply to lawyers in other parts of the United Kingdom. Gathering information must not breach legal privilege.

A client's right to this privilege is fundamental and very nearly absolute. We do not intend in this response to give a full account of the rights here but can do so if this is requested.

The key point here relates to what is termed in England and Wales "legal advice privilege", as opposed to the somewhat different (and perhaps even stronger) "litigation privilege". Not all information or documents as between client and lawyer are subject to advice privilege; and it is of course recognised that the public interest in ascertaining the truth may be sufficient to override privilege in certain circumstances.

It seems extremely unlikely that "reasonable suspicion" of "facilitating an inaccuracy" would meet this high bar. At the very least there would have to be careful consideration (as was raised at the time of the introduction of DOTAS) of which aspects of tax advice were and remain subject to privilege. There is also a distinction to be drawn between actual advice (probably subject to privilege) and implementation (which is less likely to be so subject).

If legislation purports to override privilege which might otherwise be relevant, that opens up human rights considerations in relation to the legislation in question and would increase uncertainty. Given this, it is essential that clarity is provided on

whether or not particular requirements are intended (and empowered) to override privilege.

A related point is that any purported weakening of privilege (which is a right of the client, not a right of the solicitor) places a significant burden on solicitors who may be faced with information notices under the new proposals. If a solicitor discloses too little information to HMRC they run the risk of censure for failing to comply with an information request. If they disclose to much then they are potentially in breach of a legal duty owed to their clients.

We also note in this context: (i) that under current law (Sch 38 of FA2012, sch 36 of FA2008 and The Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009) there is a statutory procedure for questions of privilege to be determined by Tribunal; and (ii) as part of autumn budget 2025 it was announced that HMRC would issue guidance around where it considers privilege to apply to reduce potential tribunal referrals. We are concerned about the impact of such guidance. For example, if a Solicitor discloses information in accordance with HMRC's guidance which is later found to have been privileged, does compliance with the guidance (given the legal status of HMRC guidance generally) provide a defence against the breach of privilege?

10. Do you have any comments about the proposal to remove the safeguard requiring tribunal approval for a file access notice?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

As noted, the new rules would seem to represent a significant lowering of thresholds which HMRC must meet. As such, if they are introduced, we consider it essential that genuinely independent input is involved.

11. Are any other changes to safeguards needed to ensure Schedule 38 can be used more swiftly and effectively?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

A possible way forward might be a "sealed envelope" arrangement through the Tribunal, under which the Tribunal could consider the single question of whether it was indeed appropriate that information sought should, in all the particular circumstances, be subject to disclosure.

12. Are there any unintended consequences of the proposed changes?

- Yes
- No
- Maybe
- Don’t know

Please give reasons for your answer

Please see our answer to question 3.

Tax law is a complex area and there is debate as to what is appropriate advice in areas of uncertainty. Given the breadth of the enhanced powers proposed for HMRC, there is the potential that law-abiding tax advisers may be unfairly targeted if they have a differing interpretation of aspects of tax law than HMRC in one of these areas of uncertainty.

There must be a clear distinction between wrong and harmful advice and advice with which HMRC does not agree, in order to prevent unfair penalising of law-abiding tax-advisers.

We consider there to be numerous unintended consequences of these proposals, Firstly, as stated in previous answers, these proposals risk undermining of legal privilege, a central and essential principle of the legal system.

Secondly, due to the broad nature over the powers accompanied by the low threshold for their use, law firms may reduce their existing tax operations to decrease their exposure.

Thirdly, individual tax advisers may be incentivised to give conservative advice on tax, creating additional costs for clients and potentially incentivising clients to seek out bad actors promising to cut their tax bill through avoidance schemes.

Fourthly, tax advisers (and firms) will also be incentivised to liaise with HMRC more frequently where they believe there is a risk of inadvertently facilitating non-compliance, posing a resourcing problem for HMRC, who will have to deal with an increase in enquires.

The unintended consequences listed above risk creating a two-tier system, where law firms who can afford what could be substantial extra compliance costs will continue to take on tax work whilst smaller operators will be pushed out. And truly bad actors who will perhaps choose not to comply with any new regime in any

event will continue to act to the detriment of all. This could affect access to tax advice for those individuals unable to pay the fees of the larger firms, driving them further towards the bad actors.

What is clear is that this is not a "one size fits all" problem. If changes in the law and enforcement of it were concentrated on these bad actors rather than increasing the regulatory burden for all, this might well deter at least some of the advisers and the egregiously wrong advice about which HMRC is justifiably concerned.

13. Are there additional/alternative ways HMRC should gather information related to tax advisers who cause harm to the tax system?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

HMRC often has quantitative evidence available (through DOTAS and otherwise) of the relatively limited number of advisers supplying advice which leads to incorrect tax loss. We would support HMRC in publishing their reaction to such advice as is publicly available – not just in general terms but with particular reference to marketed schemes.

Bad actor tax advisers do not generally have the benefit of the protection of privilege; and further information on "bad schemes" may thus be available to HMRC, enabling deterrence of both advisers and perhaps more importantly potential clients.

We reiterate that while we think that "reasonable suspicion of facilitating inaccuracy" does lower the threshold too far, we are fully supportive of cracking down on "bad schemes" that are obviously wrong in tax technical terms and which are promoted by bad actors who are known to deliberately abuse the tax system.

Enhancing financial penalties for tax advisers who cause harm to the tax system.

14. Do you believe that the current penalties under Schedule 38 Finance Act 2012, Tax Agents: Dishonest Conduct provide an adequate deterrent against non-compliance that causes harm to the tax system?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

In principle, we are in favour of stronger penalties than currently exist to act as a further deterrent. We understand that the maximum penalty under Schedule 38 Part 4 of £50,000 may well be insignificant against the potential revenue lost (and fees received by tax advisers), particularly if there are a number of taxpayers involved.

15. Do you believe that penalties should be introduced for tax advisers who have facilitated non-compliance that causes harm to the tax system?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

We are in favour of introducing penalties for tax advisers who have deliberately facilitated non-compliance. However, we are not clear what facilitating non-compliance means in this context. As we highlighted in our answers to questions 7 and 8, this creates a risk that tax advisers incur penalties without acting deliberately, for example, where a tax adviser acts based on incorrect information they are given by clients. Also, given the complex nature of the UK tax system, genuine mistakes can be and are made. In these circumstances enhanced penalties are not appropriate and would not act as a deterrent, but there may well be harm to the tax system.

Similar to our concerns highlighted in our answer to question 12, we are concerned that the lack of clarity with regard to these penalties could incentivise tax advisers to give conservative advice on tax, creating additional costs for

clients and potentially incentivising clients to seek out bad actors promising to cut their tax bill through avoidance schemes.

16. Should the government reassess how penalties for tax advisers are determined to enhance deterrence against non-compliance?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

Yes, please see our responses to Questions 14 and 15 above.

17. Which approach do you think will be most effective to reduce tax advisers facilitating non-compliance in their client's returns?

A) a penalty based on the potential revenue lost

B) a penalty based on the tax adviser's fees

C) a penalty based on a business's global turnover

D) other (please specify)

Please give reasons for your answer

In many cases, there is no correlation between the potential revenue and the potential benefit for the tax adviser, and therefore we do not consider a penalty based on potential revenue lost to be appropriate.

A potential issue with option A) is that they this could result in advisers declining to act, in often the most complicated and high value matters, due to a disproportionate personal risk for them. This is because in many cases, tax advisers will be disincentivised from providing reasonable advice in the many areas where there are multiple interpretations of the law. It is not in the interests of preserving the overall operation of the tax system if advisers are disincentivised to act.

We consider a penalty based on a business' global turnover (option C)) would be disproportionate to levy on an individual tax adviser. This would severely disadvantage tax advisers who work for large organisations. The penalties would be much greater for them compared to a tax adviser in a smaller organisation advising on the same fact pattern, which does not seem appropriate. In particular, in a law firm, the tax function may be relatively small, or the tax advice given compared to all legal advice given by a firm may be a small percentage of the business's overall turnover.

We are concerned that option A) and/or option C) could have severe career consequences, particularly for junior tax advisers due to the severity and disproportionality of these options in comparison to option B). We are concerned to ensure that being a tax adviser remains a career option that attracts the best talent to properly advise taxpayers to pay the appropriate amount of tax.

We therefore consider the most appropriate approach is a penalty based on the tax adviser's fees (option B)) as this correlates with the benefit to the tax adviser (albeit indirect benefit since the fee will typically be paid to their firm unless they are a sole trader). This is particularly true when advisers are engaged on a 'success' fee/ fee based on tax saved basis.

18. Do you believe there should be a maximum penalty amount?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

We consider it is essential to have a clear framework to consider appropriate penalties in a particular case, and to prevent excessive or unknown risks to ensure offenders are treated fairly under the law.

19. If you believe a maximum penalty should be in place, how do you feel it should be calculated?

Please give reasons for your answer

We consider the maximum penalty should be linked to the fees received by the tax adviser or their firm for the matter or matters in question. It may be appropriate for there to be a multiplier of fees, for example, up to a maximum of say 150% of fees received.

If there are not maximum penalties then we would question whether this could give rise to practical difficulties for professional firms negotiating professional indemnity insurance, and whether insurance would be available, impacting on the viability of tax advisers. We are aware that law firms already face issues recruiting tax lawyers in Scotland.

20. Do you agree the penalty should escalate in stages, based on additional instances of facilitation of non-compliance?

- Yes
- No
- Maybe

- Don’t know

Please give reasons for your answer

There may be cases for escalation for tax advisers providing the same or similar advice to a number of clients. However, if the maximum penalty was based on fees received by that tax adviser or their firm for the relevant advice this may not be required.

21. What other changes to the maximum and minimum financial penalty thresholds would be needed to ensure that a penalty charged in a case is more proportionate to the tax loss poor tax advice has caused?

For the reasons stated in our previous answers, we do not consider that penalty thresholds should be proportionate to the tax loss since the tax adviser/ their firm has not benefitted from the tax loss (in most cases). We note the reference to 'poor tax advice' and strongly suggest that a distinction needs to be drawn between deliberate non-compliance and genuine mistakes (against the backdrop of the ever-increasing complexity of the UK tax system).

22. Do you agree with the government’s proposal to introduce an option to charge penalties on tax adviser business entities rather than individuals, except where it can be evidenced that the wider business was not aware of the individual tax adviser’s actions?

- Yes
- No
- Maybe
- Don’t know

Please give reasons for your answer

We do believe it is more appropriate for the business entity receiving the fees for the relevant tax advice to suffer any penalty. This also recognises the reality of day-to-day tax advisory work, which is often delivered by teams, and where multiple tax advisers at different stages of their career are involved.

23. What else should be considered when looking at penalties charged on tax advisers?

The tax system relies heavily on having competent tax advisers, the vast majority of whom are committed to ensuring the integrity of the tax system and that their clients get the best advice and pay their fair share of tax. Care therefore must be taken to ensure that there is not a disproportionate disincentive to work as a tax

adviser, while recognising that we do need a robust deterrent mechanism against those who deliberately facilitate non-compliance by their clients.

Broadening disclosure of HMRC's concerns about tax advisers to professional bodies.

24. Are there any reasons why HMRC should not make further non-PID disclosures to professional bodies, as well as continuing with PIDs (where appropriate)?

We have no comments.

25. What types of behaviours or activities do you consider it appropriate for HMRC to make further disclosures about?

We have no comments.

Broadening the scope of publication of tax adviser details when they are the subject of an HMRC sanction.

26. Do you believe that it is in the public interest for HMRC to publish more information about its activity, such as the details of tax advisers subject to a formal sanction by, or a restriction on their dealings with, HMRC?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

We consider that this question has two elements. The first is whether is it in the public interest for HMRC to publish more information about its activity and we would support HMRC wholeheartedly in doing so with the aim of raising the profile of their efforts to tackle bad actors in this area. We believe that greater visibility of HMRC's "anti-avoidance" activity would disincentivise advisors undertaking this type of activity and give public reassurance that HMRC is working to ensure that everyone pays the correct amount of tax.

The second element is whether it is in the public interest for HMRC to do this through publication of the details of tax advisers subject to sanction or restriction.

We are in principle in favour of this, as this will disincentivise taxpayers from seeking or accepting advice from those proven to have abused the tax system and encourage taxpayers to seek appropriate advice from reputable advisers.

However, we would welcome clarity on the intended aim of publication; if the aim is to encourage tax advisors who have been sanctioned to improve their practice it is doubtful that "naming and shaming" will be an effective strategy. If the aim is to remove persistent offenders from the advice marketplace, the strategy might be more successful, but we are cautious of the potential for a published list to be used as a directory for those seeking to engage in tax avoidance. If the sanction regime applied to advisors becomes so heavy that good advisors feel unable to safely offer advice on complex or high value transactions taxpayers will inevitably seek out those who are known to have a more cavalier attitude.

Furthermore, given the severity of this sanction and the implications for reputational damage, we would welcome reassurance that these proposals should only be applied as a measure at the upper end of the list of sanctions on offer to HMRC officers, where malicious intent or persistent behaviour is in consideration. Clarity would also be welcomed as regards to what measures will be put in place to ensure that the correct individuals are "named and shamed"; this sanction could have severe and career altering implications for more junior advisors and we do not consider that it would be proportionate in most cases where an individual was not "the controlling mind" behind a particular activity.

27. When considering where to set the threshold of proportionality for publication, which types of sanctions do you believe should be included, and which should be left out?

We are not convinced that the nature of the sanction should be the determining factor behind publication and consider that a focus on the nature of the behaviour is more appropriate. Where bad behaviour is extreme, malicious or persistent, publication could be proportionate but if sanctions have to be tied to the value of the transaction or the advisor's fee, a focus on the sanction could see an adviser placed on the list as a result of a single instance of non-compliance, which may have been reckless or negligent rather than actively malicious.

We do not believe that publication in respect of a tax adviser failing to meet their personal tax obligations is appropriate beyond the existing possibility of publication under PDDD, which applies to all individuals. Many advisers are experts in one particular area of tax while still being very much a layperson in respect of other areas. We do not consider it fair that an individual should be subject to harsher punishment simply because of their occupation.

28. Is the short-form and long-form approach to publication sufficiently flexible to allow HMRC to take a proportionate response to different degrees of poor tax adviser behaviour?

- Yes
- No
- Maybe
- Don't know

Please give reasons for your answer

Short-form publication includes a sanctioned adviser on a list while the consultation document indicates that long-form publication, which includes statements detailing the concerning behaviour, is used for extreme and complex cases. This could have the opposite impact to what is intended. The short-form list is more likely to be checked by those seeking tax advice and silence as to the reason for the sanction leaves the taxpayer to imagine why it might have been imposed. The greater practical visibility of the sanction and lack of explanation as to the wrongdoing leaves the taxpayer with the information that the adviser is "a bad advisor" but with no further context.

29. What information about each tax adviser should be published, and is there anything that should not?

The information published about each tax adviser should vary depending on the circumstances and we would refer back to our request for clarification at question 26. about which individuals will be subject to publication.

Where an organisation has a culture of non-compliance, we consider that publication of the names of the organisation and those individuals in charge of the provision of tax advice services proportionate.

However, we consider that it would be disproportionate to include more junior members of staff who might reasonably expect to be guided on proper practice by their supervisors. Where non-compliance is traced to an individual and the organisation takes action to provide additional training, implements additional supervision measures, moves the individual to a non-tax related role or terminates its relationship with the individual, it is difficult to understand what purpose publication of the organisation's details would serve. However, we would not wish HMRC's practice around publication to encourage organisations to scapegoat individual staff members and on balance consider that HMRC should have the power to publish details of individuals and/or their organisations. We would appreciate reassurance that HMRC will be conscious of power-dynamics and the wider context of the situation in exercising this power.

30. For how long should details remained published and in the public domain for short-form publication, and for long-form publication?

We are comfortable that a 12-month publication period is appropriate for short-form publications but have concerns about the open-ended nature of the proposals for long-form publications. If the risk expires in under 12 months would this allow a long-form publication (for a presumably serious occurrence) to be removed in a shorter timeframe than a less serious "short-form" publication? Where an adviser has taken steps to rectify their practice it would seem unfair that those whose malfeasance was more serious are able to escape public censure more quickly that those who have caused less damage to the tax system.

If long-form publications are to be viewable "until there is no longer a risk to the tax system from the tax adviser concerned" how is the cessation of the risk assessed? If the assessment refers only to an individual taxpayer, an organisation who terminates the employment of a "rogue agent" could find that they remain on the list of sanctioned advisors indefinitely if the individual continues to engage in poor tax behaviour in a subsequent role. Conversely, an individual who was engaging in poor behaviour because of the culture within his employing organisation but who moves to a more reputable employer might find that their name is indelibly tied to a previous practice from which they have attempted to move away.

31. Which criteria for publication would set a fair and proportionate threshold for using publication?

As with all other actions, the criteria for publication must be proportionate to the harms caused both by the behaviour and to the adviser. We agree that those who act with malicious intent, reckless disregard to the tax system and those who persistently engage in poor behaviour should be "named and shamed". However, given the complexity of the tax system and the number of areas where there is genuine scope for interpretation of legislation, we consider that publication would not be appropriate where an adviser has given a view on a matter which is ultimately deemed to be incorrect, regardless of the value of the transaction involved. Any risk that serious reputational damage could arise despite the good faith of the adviser makes the provision of tax advice an unattractive service for businesses to offer, particularly where (as with law firms) tax advice is only a small part of their offering. If good, mindful practitioners either withdraw from the advice marketplace or increase their charges to reflect the risks involved it is likely that the quality of advice available to taxpayers at an affordable cost will decrease, undermining the purpose of the enhanced powers.

32. Do the proposed safeguards provide for a fair, proportionate, and workable publication framework?

We welcome the proposal that sanctions of less than 2 months will not be published, but we would welcome clarity on how the exception for "matter of fact" situations will be applied. The example given "where a tax adviser is not registered for anti-money laundering supervision…and is therefore trading in breach of the MLRs" could represent a wide range of wrongdoing and in some contexts publication may be disproportionate (for example, in the case of a genuine oversight following a change in business structure which is immediately rectified when the adviser is made aware of the position).

Requiring the need for approval from someone not connected to the case is a sensible safeguarding provision but on what basis are officers expected to make "an assessment of the impact upon the relevant business" where they are not familiar with the business or the marketplace in which they operate? We appreciate that the introduction of an external body to carry out safeguarding assessments would have additional costs but would alleviate concerns about how assessments are carried out and give reassurance to those affected that an initial decision is not simply being "rubber stamped" by colleagues.

33. Are there any other safeguards which you think the government should consider for this publication power?

We would welcome HMRC's consideration of whether an independent person or body could be introduced to the decision-making process. This could either be an integral part of the pathway to publication or as an appeals body.

For further information, please contact:

Reuben Duffy
Policy Team
Law Society of Scotland
DD: 01314768150
reubenduffy@lawscot.org.uk