Revenue Bar Association (RBA)

Bar Council

Response to HMRC consultation document published on 26 March 2025:

"*Closing in on promoters of marketed tax avoidance*"

Introduction

1. The RBA is an unincorporated association of English barristers who practise in the field of taxation. The membership of the RBA is small and comprises self-employed barristers from several different chambers, as well as employed barristers. All members of the RBA that are qualified members of the English bar are regulated by the Bar Standards Board.
2. The Bar Council represents nearly 18,000 barristers in England and Wales, promoting:
   - Fair access to justice for all
   - The Bar's specialist advocacy and advisory services
   - The highest standards of ethics, equality and diversity across the profession
   - Business opportunities for barristers at home and abroad
3. The independent Bar Standards Board (BSB) acts as our regulatory arm for barristers and specialised legal services businesses.
4. A strong and independent Bar serves the public and is crucial to upholding justice. As specialist, independent advocates, barristers help people maintain their legal rights and duties, often supporting the most vulnerable in society. The Bar is vital to the efficiency of both criminal and civil courts. Its pool of talented people from increasingly diverse backgrounds provides a significant proportion of the judiciary, on whose independence the rule of law and our democratic society depend.
5. On 26 March 2025, HMRC published a consultation re closing in on promoters of marketed tax avoidance, in which they propose a range of measures to enhance their ability to counteract promoters and their schemes, with the intention of enabling HMRC to "*take decisive action against them*".

6. This response, prepared on behalf of the RBA and the Bar Council, focuses on the issues that will primarily impact upon self-employed barristers and in respect of which the Bar Council and the RBA can offer a unique perspective.

7. We therefore outline responses only to some of the questions posed by the consultation, directed in particular at the following topics:

    a. The existing regulatory framework for barristers;

    b. The new proposed criminal offences for a failure to make a DOTAS disclosure; and

    c. The proposed statutory override for legal professional privilege.

8. We begin with some general observations.

General observations

9. The consultation document states that the government is clamping down on tax avoidance – focusing on those selling tax avoidance schemes. It is aimed at clamping down on marketed tax avoidance schemes – but the consultation goes on to state that "*most tax avoidance schemes simply do not work*". The stated target of the proposed changes to the rules are "*a persistent and determined group of promoters of tax avoidance*" who "*seek to exploit every opportunity to harm the tax system by selling tax avoidance schemes they claim sidestep the rules*".

10. We consider that HMRC have not identified with sufficient precision, the behaviours which they seek to target. In particular, the introductory paragraphs of the consultation do not distinguish between promoters of tax avoidance schemes who honestly believe that the schemes work, and those that do not have that belief.

11. We consider that before proposing changes to existing regulatory regime and the introduction of new criminal offences, the starting point for HMRC should be properly to identify the behaviours which HMRC are targeting. If the behaviours that HMRC are targeting can properly be characterised as criminal behaviours, then there is no evidence that HMRC do not already have the powers to go after the individuals engaged in such behaviours; there is no evidence that HMRC need some of the additional powers they seek.

12. For example, HMRC may in fact be seeking to target advisors / promoter of schemes (i.e. schemes which are represented as "tax avoidance schemes"), but which the advisors /

promoters know perfectly well do not work. In those circumstances, the advisors or promoters could (in appropriate circumstances) be charged with criminal offences:

a. either under section 106A of the Taxes Management Act 1970 (**TMA**) (which is the statutory criminal offence of being "*knowingly concerned in the fraudulent evasion of income tax by that or any other person*"); alternatively,

b. at common law, i.e., with the offence of conspiracy to cheat the Revenue (which might encompass the conception of a scheme, the offer of a scheme to users and the operation of a scheme).

13. In either case, the behaviour which would be targeted is the behaviour of causing users of the alleged 'tax avoidance schemes' to make incorrect self-assessment declarations.

14. As to what can properly be regarded as an incorrect self-assessment declaration (for example, in relation to income and capital gains tax, to which the provisions of the TMA are relevant):

a. Section 8 TMA requires individuals issued with a notice under that provision to make and deliver a return to HMRC.

b. By section 9 TMA, a return must include a self-assessment.

c. Section 8(2) TMA provides (our emphasis) that: "*Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge* ***correct and complete***".

15. Similar declarations are required in respect of trustee returns (section 8A(2) TMA), and partnership returns (section 12AA(6)(b) TMA) where the declaration is in each case made by the person making the return.

16. In Hicks v HMRC [2020] STC 254, the Upper Tribunal held at [121] that (our emphasis): "*a taxpayer making a self-assessment must take care to get the assessment right. He must take care to get it right both as to matters of fact and matters of law*."

17. The relevance of this is that the criminal offences referred to above will be committed by an advisor or promoter if their belief is that the scheme does not work. Clearly, criminal charges would not be appropriate, if the analysis underpinning the scheme was honestly believed to be correct – even if the analysis later proved not to be correct.

18. We recognise, of course, that there may be evidence that a scheme is promoted on the basis of an honest belief that the scheme works. In those cases, it is unlikely to be appropriate for HMRC (or the CPS) to pursue criminal charges. Those may be the sorts of cases where HMRC may wish to consider improving upon the existing civil penalty regimes.

19. However, for the additional reasons explained below, we do not support the proposed creation of the new criminal offence of failing to make a DOTAS disclosure.

20. With those general observations in mind, we respond to the questions posed by the consultation document.

Questions 1 and 2: Other ideas and supporting users

Question 1: What other ideas, in addition to the ones in this document, should the government consider to deliver its intent of closing in on promoters of marketed avoidance?

21. We consider that a more effective deterrent against promotion of tax avoidance schemes would be to make clear that the marketing of schemes that do not work is liable to be regarded as a criminal offence. For example, we consider that it would be helpful to make clear that a promoter (or any individual behind a corporate promoter) who does not have an honest belief that the scheme works, is liable to be charged with a criminal offence. This might especially be so, if there is no evidence that the scheme is backed by recent comprehensive and independent legal advice in respect of the precise fact patterns expected to be involved when users of the scheme implement the scheme.

Question 2: Is there more HMRC can do to support those who use tax avoidance schemes?

22. The increasing complexity of tax laws is making it harder for people to know what their obligations are, and it makes it very difficult for users of schemes to be able to judge whether a scheme which is being sold to them works.

23. We are concerned that some of HMRC's proposal (e.g., a deemed waiver of LPP; or making it a criminal offence not to make a DOTAS disclosure) will undermine support for those who use tax avoidance schemes – in particular, by making it harder for them to seek and to be provided with independent and comprehensive legal advice from competent professionals.

24. We consider that it might help if HMRC were to require additional information to be included in tax returns – for example, the identity of any promoter or advisor in relation to a tax avoidance scheme. It may be appropriate to require evidence that independent advice

has been obtained (so long as the concept of 'independent advice' is explained). Certain categories of information could trigger automatic enquiries, thereby protecting HMRC's powers to enquire into those returns – and signalling to taxpayers that they may be the subject of the exercise by HMRC of future enquiry and collection powers. The removal of the prospect of finality may deter certain taxpayers from using schemes that trigger automatic enquiry powers.

25. Of particular relevance to disguised remuneration schemes: it may deter participation in schemes, if it is clear that there will be joint liability to tax for employment income and employee NICs on users of the scheme, combined with an information campaign – making it clear to potential users of the scheme, that they cannot escape the obligation to pay the tax and NICs due, simply because there is an employer, agent or end user who is also potentially obliged to pay the PAYE and NICs.

Questions 6 to 8: A criminal offence for failure to notify arrangements to HMRC under DOTAS

26. We note that the proposal is to criminalise a person's failure to take a positive step (making a DOTAS disclosure) by way of a "*strict liability offence*" which would apply "*regardless of the person's intent*". While we appreciate that there is a legitimate desire to ensure that the DOTAS regime is effective, we question whether that provides a sufficiently compelling policy reason for the creation of the suggested onerous and unusual offence, which criminalises a failure to do something, even in cases where the individual is not aware of the obligation to act.

27. That last concern (lack of awareness of the obligation to act) is particularly pertinent given that DOTAS brings a huge range of matters under its ambit and is expressly not restricted to tax avoidance schemes as the Courts have made clear (see R (on the application of Carlton and others) v HMRC [2018] STC 589 at [69]). When combined with the very wide (and sometimes inconsistent) approach which the First-tier Tribunal has adopted to the meaning of 'promoter', the proposal creates a considerable exposure to criminal liability which extends far beyond the cases of serious non-compliance which might justify a more serious penalty.

28. Another problem with the wide definitions of 'promoter' (a problem exacerbated by the proposed further extension of the definition) is that, as the First-tier Tribunal has itself observed, it is perfectly possible for someone to be a promoter but not to be in a position

to make a DOTAS disclosure because they are unaware of the terms of the scheme (see HMRC v Curzon Capital Ltd [2019] UKFTT 63 (TC) at [79]).

29. We do not consider that it can be appropriate to criminalise a person for a failure to make a disclosure which they are not able (for lack of relevant knowledge) to make. This is particularly relevant in the context of the proposed removal of the exception of legal professionals from the definition of promoter. Absent that exception, the position of a professional who advises on arrangements within the scope of DOTAS is unclear. They may be committing a criminal offence for failing to disclose privileged information, the privilege belonging to the client rather than the legal professional. For this reason (as addressed below) a more focussed amendment to that provision is required – if one is to be adopted at all.

30. The justification for introducing the proposed new criminal offence would seem to be that the existing civil penalties are ineffective and/or that a stronger deterrent is needed. We question the basis for this. Since 1 January 2011 the civil penalty contained in section 98C TMA 1970 is £600 for each day of non-compliance. This can lead to very significant penalties (for example £900,000 in HMRC v IPS Progression Ltd [2024] UKFTT 136 (TC)). This would appear to be a significant deterrent. Considering that, we do not understand how it can be concluded that the civil penalties are ineffective or that an additional criminal penalty will alter matters much. We note that no evidence has been put forward to support the need for a further deterrent**.**

31. Further, we note that in HMRC v Root2 Tax Ltd [2022] UKUT 353 (TCC) the Upper Tribunal concluded that HMRC had misunderstood the operation of section 308(3) FA 2004 with the consequence that they were out of time to impose penalties under section 98C TMA. It may be that the operation of the existing civil penalty regime is of a more limited scope than expected. Against that background, a conclusion that a civil penalty regime is not an effective deterrent would seem premature. If there are issues with the operation of the current civil penalties' regime, it seems to us that a more appropriate first step would be to address any limitations by amending the current civil penalties regime, rather than to jump to the creation of a new criminal offence. The proposals under the heading 'Updating the DOTAS civil penalty regime' are directed to that point. We consider that they are a more appropriate response to perceived issues than the creation of a new criminal offence, and we welcome those proposals.

32. We are also concerned as to what appears to us to be a quite vague approach as to when the criminal offence would apply instead of the civil penalty. We note that it is suggested that the criminal offence should apply to "*more serious cases, where HMRC needs to send a strong deterrent message or where civil interventions are not effective*". We consider that it would be more appropriate for the conditions for seriousness to be provided for in the legislation rather than to be left entirely to HMRC discretion, particularly in light of the concerns as to the apparent width of the offence highlighted above. If a consequence of the new offence is that it will target tax professionals (including members of the RBA) with criminal sanctions, then this ought to be made clear on the face of the legislation so that the implications can be fully addressed and understood by Parliament before it becomes law; and if it becomes law, to make it clear to the targets of the deterrent, who those targets might be.

33. A final point which is not addressed in the consultation is the territorial application of the criminal offence. At present there are acknowledged questions around the territorial application of DOTAS obligations (see HMRC v Smartpay Ltd [2022] UKFTT 146 (TC) at [49]). Arguments against extra-territorial application of UK legislation are stronger in the context of a criminal offence (see Air India v Wiggins [1980] 1 WLR 815 at 819A-B). Furthermore, it is established that "*subject to limited exceptions, it is contrary to international law for country A to purport to make criminal conduct in country B committed by persons who are not citizens of country A*" (SOCA v Perry [2013] 1 AC 182 at [32]).

34. It therefore appears that any criminal offence will not apply to persons situated outside the UK. That being the case we consider the proposed criminal offence could be counter-productive and lead to the DOTAS regime becoming less effective. It can be avoided by moving overseas and as such, there is a significant risk that it will drive the very people who it is targeted at (the hard core of persistent non-compliers) to locate overseas, if they have not already done so.

Question 6: Do you agree that the twofold approach of civil penalties and a criminal offence will provide a stronger deterrent?

35. In the light of the matters set out above, there is no evidence to suggest that it will alter matters. Worse, we consider that it may be counterproductive in further encouraging promoters to move overseas where it will not be possible for the criminal offence to apply.

Question 7: Should the criminal offence be restricted to schemes where there is a promoter acting?

36. As set out above, a problem with the offence as envisaged is that it criminalises a huge range of matters in circumstances where the individual concerned may not be aware that he or she has committed an offence. If the purpose is to reserve the offence to serious cases, then the offence ought to be limited and expressly and clearly directed only to such cases.

Question 8: What reasonable care/excuse arguments would be appropriate? How might these be framed to prevent promoters from abusing these aspects? What reasons should be excluded from reasonable excuse?

37. It is difficult to understand how a reasonable care/excuse argument can be abused. It is either reasonable or not and we consider that this is best left to the Courts/Tribunals to decide.

38. Further, we consider that imposing a criminal offence in circumstances where there would be a reasonable excuse – but for certain exclusions - is objectionable and difficult to justify.

Questions 9 and 10: Updating the DOTAS civil penalty regime

Question 9: Do you agree that moving the issuing of DOTAS penalties from the Tax Tribunal to HMRC (appealable to the Tax Tribunal) is appropriate?

39. We can see the merit of this proposal, provided that there are adequate safeguards in place.

Question 10: Are there any other changes to DOTAS penalties HMRC should consider?

40. For the reasons outlined above we consider that any issues identified by HMRC as arising from the current civil penalty regime are better addressed by effecting a change to that regime to make it more effective than by introducing a criminal offence, the need for which has not been adequately explained or justified.

Questions 11 to 32: Universal Stop Notices (USNs) and Promoter Action Notices (PANs)

41. These proposals and questions to not appear to raise matters specific to the RBA's membership and other barristers advising on tax. We therefore offer no comment on this aspect of the consultation.

Questions 33 to 43: Stronger information powers to effectively investigate those who own and control promoter organisations

42. These proposals and questions do not appear to raise any concerns which are specific only to the RBA membership and other barristers advising on tax, and we do not comment on this aspect of the consultation.

Questions 44 to 46: Disclosure of avoidance scheme by legal professionals who promote tax avoidance schemes

43. A concern with the proposal to remove the exemption in Regulation 6 (which deems certain legal professionals not to be promoters, see below) is that it is unclear how the legislation is intended to operate and what obligation - which does not currently exist - will be imposed because of the suggested repeal. We query whether it would be effective to do anything other than create uncertainty for those providing legal advice.

44. To understand the concern, it is relevant to consider the manner in which the DOTAS rules operate. The starting point is that where a person is a promoter they have an obligation to provide prescribed information relating to the notifiable proposal (section 306(1) FA 2004).

45. The prescribed information which the promoter is required to provide to HMRC includes "*sufficient information as might enable an officer of HMRC to comprehend the manner in which the proposal or arrangements are intended to operate*" (regulation 4(1) Tax Avoidance Schemes (Information) Regulations 2012 (**the Information Regulations**). As noted above, there is already a concern that some people who meet the definition of promoter may not be in possession of sufficient information to comply with this obligation.

46. Where, however, information is privileged, section 314 FA 2004 provides that nothing in Part 7 FA 2007 requires a person to disclose privileged information. This is not limited to lawyers or to the person providing advice but would seem to be capable of impacting on the obligation to provide prescribed information.

47. Regulation 6 of the Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations 2012 (**the Promoters Regulations**) currently addresses the interaction of those two provisions by providing as follows (our emphasis):

> *A person is not to be treated as a promoter in relation to a notifiable proposal or notifiable arrangements where his involvement with the proposal or arrangements is such that he is not required to provide all of the information prescribed in regulation 4(1) of the Tax Avoidance Schemes (Information) Regulations 2012 by virtue of section 314 (legal professional privilege).*

48. The effect of this is that conflict between the obligation in regulation 4 of the Information Regulations and section 314 FA 2004 will not arise, because there is no obligation to provide information in the first place.

49. Our concern with the proposal simply to repeal Regulation 6 is that it will not resolve that conflict. On the contrary it will create uncertainty as to the scope of the obligation (if any) to provide prescribed information in circumstances where section 314 FA 2004 means that there is no obligation to do so. It is at least arguable that repeal would make no difference to the obligations of those providing privileged advice.

50. The concern which the proposal is seeking to address appears to be that a person who (i) undertakes activities which do not involve provision of privileged advice and (ii) is in a position to make a disclosure which would not require provision of privileged advice might claim not to be a promoter by reason of the application of Regulation 6 of the Promoters Regulations.

51. If that is the case, then we query whether the best approach to addressing this concern is to repeal Regulation 6. We suggest that a better approach, one which would allow legal professionals to better understand their obligations (and potential exposure to criminal and civil liabilities), would be to clarify the legislation by making clear that a person can still be a promoter where they undertake activities going beyond provision of legal advice and where they are in a position to meet their obligations as a promoter. That would seem to better address the concerns raised in the consultation.

Question 44: Should Regulation 6 be repealed?

52. Thus, and for the reasons set out above we question whether the repeal of Regulation 6 would be effective to achieve the objective of the proposed change. We suggest that it would be better to highlight the situations in which a person who be required to comply with obligations under DOTAS notwithstanding that they are a legal professional or that privileged advice has been provided.

Question 45: Are there any risks in making such a change? For example, could the change bring into scope those that we might not wish to include?

53. As addressed above, there is a question as to whether the change would achieve its objective. It would seem to add (rather than to remove) a degree of uncertainty as to the operation of the provisions.

Question 46: Does the government's proposal to retain the statutory protection for LPP material in primary legislation provide an adequate safeguard?

54. Yes. As addressed below legal privilege is of fundamental importance in a democratic society governed by the rule of law. Maintaining the protection will ensure it is safeguarded.

Questions 47 to 50: Publishing the names of legal professionals who design tax avoidance schemes

Question 47: Should the rules on publishing be changed to allow HMRC to publish the names of legal professionals that design tax avoidance schemes, even when most of or all their activity is subject to legal professional privilege?

Question 48: Could there be any unintended consequences from making this change?

Question 49: If the government does change the rules, as per question 47, how should HMRC utilise this information to assist taxpayers and representative bodies?

Question 50: How should we deal with the issue of representations against publishing the details of a legal professional who has designed a scheme when LPP applies?

55. We consider that there is a serious question of fairness here, in particular if representations cannot be made by a lawyer in the context of any challenge to a decision by HMRC to publish their name, because LPP applies. We also note that it is unclear who HMRC would regard as legal professionals who design tax avoidance schemes – i.e. that fall within this category.

56. If HMRC's target is legal professionals who do not have an honest belief that the schemes work – then, for the reasons explained in our general observations above, we recognise that naming these professionals would act as a deterrent – and would be welcome. Self-evidently, it would be appropriate for the Bar Standards Board to investigate such individuals and to take appropriate steps.

57. But if the target includes any legal professionals who have designed a scheme which they honestly believe to work, it seems to us that the proposal is ill-thought through and draconian. We would not support it.

Questions 51 to 55: proposed override of LPP in respect of promoters who utilise legal opinions to market schemes

58. The proposed override of LPP concerns cases which the consultation document notes: "*calls into question how robust the original advice was*". The proposal is to introduce what is referred to in the consultation document as a "deemed waiver" of LPP in certain circumstances, where a promoter markets a tax avoidance scheme and when do doing highlights that the scheme is supported by a legal opinion. The intended purposes of the proposed "*deemed waiver*", are:

    a. That it "*might allow HMRC to challenge some of the promoter's claims about the scheme with regards to the legal advice they have received*"; and

    b. That it "*may, under existing powers, also allow HMRC to publish details of these legal professionals alongside the scheme information and names of the promoters and potentially the legal advice, on GOV.UK*" (but HMRC do not explain what existing powers would permit them to publish details of these legal professionals. Indeed, the proposal appears to contradict the proposal (addressed above) to extend HMRC's publication powers, to include designers of tax avoidance schemes).

59. We begin by noting that the term *"deemed waiver"* is a misnomer. What is proposed by the consultation is a statutory override to the operation of LPP. LPP is a cornerstone of our legal system. In R v Derby Magistrates' Court [1996] AC 487 at 507C Lord Taylor CJ said: "*The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests*." In Three Rivers DC (No 6) [2005] 1 AC 610 at [25] Lord Scott said: "*Certainly in this country legal professional privilege, if it is attracted by a particular communication between lawyer and client or attaches to a particular document, cannot be set aside on the ground that some other higher public interest requires that to be done*." LPP was described by Lord Hoffman in R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax [2003] 1 AC 563 at [7] and [9] as a fundamental human right.

60. Given the importance of LPP, we do not support the proposal for a "deemed waiver" for a number of reasons.

61. **First**, in the circumstances envisaged by the consultation (reliance on the content of advice), it seems likely that privilege has been waived.

62. **Second**, it may be that the iniquity exemption applies. We consider that HMRC have not adequately focused on the distinction between criminal behaviour and behaviour which is not criminal. If there is no tenable basis for the opinion expressed by a legal designer of a tax avoidance scheme that the scheme complies with the law, i.e., where the adviser does not honestly believe that the scheme works, it follows that the iniquity exception should apply, and that a claim by a lawyer that LPP attaches to the documents concerned with its creation is bound to fail. The law on the iniquity exemption was recently clarified in by the Court of Appeal in Popplewell LJ's judgment in Al Sadeq v Dechert LLP [2024] EWCA Civ 28. The following relevant principles emerge from his judgment:

    a. Privilege does not exist if the document comes into existence in relation to a fraud, crime or other iniquity, [53].

    b. The exemption applies to criminal cases, and civil cases, and applies equally to legal advice privilege and litigation privilege, [54].

    c. The exemption is not confined to cases in which the legal adviser is party to, or aware of, the iniquity. The relevant iniquitous purpose is that of the client, or if the client is being used as a tool for the iniquity by a third party, that of the third party, [56].

    d. Save in exceptional cases, the merits threshold for the iniquity exception is a balance of probabilities test: the existence of the iniquity must be more likely than not on the material available to court at the time the decision is made on any application in which the issue arises. In an interlocutory context there is no distinction to be drawn between cases in which the iniquity is one of the issues in the proceedings and those where it is not, [63], [108].

    e. Consideration of whether the iniquity exception applies will usually have to take place without the decision-maker being able to assess all the evidence which will subsequently be available on the issue. Where the iniquity is an issue in the proceedings, its existence or otherwise will only be determined at trial, often with the benefit of oral evidence. The court determining a disclosure application may have evidence of each party's case, but it will rarely be feasible or appropriate to conduct a mini trial on the issue for the purposes of disclosure. The Court has to

assess such evidence as the parties put before the court for that purpose, without oral evidence on disputed issues, [70].

f. If there is a disputed version of events, there may be established a *prima facie* case of iniquity. What matters is the quality of the disputed evidence on either side, at the time the issue falls to be resolved, which can be assessed to determine whether it meets the necessary threshold, [103].

g. It is unhelpful, and apt to mislead, to gloss the test itself (which is simply whether on all the evidence there is a *prima facie* case) either directly, or by applying the epithets "strong" or "very strong" to the clarity of the evidence required, [98], [107].

h. If there is sufficient evidence of the iniquity to meet the relevant merits threshold, it is necessary to undertake an assessment as to whether there are any documents which satisfy the relationship test, so as to fall within the iniquity exception and be disclosed, [154].

i. As to the legal test for the relationship between the communication and the iniquity which must be established in order to bring the CFE into play. Where there is a *prima facie* case of iniquity which engages the exception, there is no privilege in documents and communications brought into existence "as part of or in furtherance of" the iniquity. These are two categories, either of which is sufficient. "Part of" will include documents which report on or reveal the iniquitous conduct in question. Documents brought into existence in preparation for the iniquity are not excluded. There is no temporal limit on the documents, since documents revealing the iniquity may come into existence after it is complete and, if so, should be within the exception. The exception is not confined to communications which are iniquitous in themselves, [166], [169].

j. The abuse of the lawyer/client relationship is a prerequisite to the exception applying at all, and it may be important to distinguish on a document by document basis whether the exception applies in the first place e.g. when legal advice is sought "in the ordinary run of cases", [168].

63. We recognise that there may be practical difficulties with reliance on waiver or the iniquity exemption. In particular, it would be for HMRC to satisfy the Court, on the balance of probabilities, that the evidence before it on the application shows a *prima facie* case of fraud by reference to the identified "iniquity". However, for the reasons explained below,

we do not consider that the proposal would overcome these difficulties, in particular because the provision could be sidestepped.

64. **Third**, the Bar Standards Board, are vested with the power by statute to order barristers to produce LPP material upon request: see The Legal Services Act 2007 (General Council of the Bar) (Modification of Functions) Order 2018 (SI 2018/448) and see the BSB Handbook as rC64. (Similar regulatory powers apply regarding solicitors – see s.44B of the Solicitors Act 1974) . So, a complaint to the BSB about the activities of individual barristers could already lead the BSB to order production of LPP material, and to steps being taken by the BSB. HMRC have provided no evidence that this would not provide adequate redress (for example) against barristers whose advice was not compliant with the code of conduct. Indeed, as HMRC note in the consultation, HMRC can already share information with the BSB so that they are aware of the alleged behaviour of their members, which would allow the BSB to investigate.

65. **Fourth**, and perhaps most importantly, we consider that the proposal is likely to be counterproductive. We consider that if the deemed waiver is enacted in the proposed terms:

    a. It may be possible to sidestep the 'waiver': promoters may simply decide not to advertise the fact that the advice has been obtained, so as to avoid the publication powers of HMRC and to prevent waiver of privilege. That *could* lead to barristers giving the green light to more outlandish schemes than otherwise they might, which would have a detrimental effect on members of the public who are looking to invest.

    b. We consider that there is an even bigger risk that the advice given will be verbal, as opposed to written, so that no documents are created, to which LPP could attach. That would make the new regime easier to manipulate for unscrupulous promoters, for unscrupulous and/or incompetent barristers, and worse for scheme users.

66. As noted in the consultation document, HMRC already have many information powers at its disposal, including the existing DOTAS, POTAS and other anti-avoidance legislation (e.g. The Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009), all of which are given effect by the tribunals and Courts.

67. In those circumstances we consider that HMRC have sufficient powers to obtain the production of documents to which a claim of LPP attaches, and there is no need for an extension of its powers.

68. That said, we wholeheartedly support the proposal to make clear HMRC's position on when LPP does not apply.

Question 51: Would you support the introduction of a deemed waiver of LPP?

69. For the reasons set out above, we do not support the proposed introduction of a deemed waiver of LPP.

Question 52: In which circumstances should LPP be waived?

70. N/A, see above.

Question 53: Could a deemed waiver of LPP have any unintended consequences?

71. Yes: see above.

Question 54: If you support a deemed waiver, do you consider that it should be a waiver for all purposes or only limited ones? If the latter, what purposes?

72. N/A

Question 55: Are there other things HMRC should do to address instances where promoters rely on dubious legal advice to market avoidance schemes, or use legal advice to market avoidance schemes to persons to whom the advice was not given?

73. HMRC could provide clearer guidance about the duty on individual taxpayers to obtain their own advice in respect of the scheme.

Question 56: Is there any further action that HMRC should be taking to tackle those legal professionals that are involved in the promotion of tax avoidance?

74. We note that "*HMRC intends to engage with the legal regulatory bodies to discuss the operation of their codes of conduct and how HMRC can better support them to take the most effective appropriate action against their members when they are breaching these rules*". We understand that this includes amending the relevant codes of conduct to include the Professional Conduct in Relation to Taxation Rules ("the PCRT") which have been adopted by other bodies.

75. It is of course open to HMRC (as it is to any user of legal services) to engage with professional regulators where it appears that members of the legal profession have not complied with their professional obligations. In respect of our members the Bar Standards Board can (and does) investigate and satisfy itself that those standards are maintained. In

doing so it has access to privileged material and is competent to address the position as an independent regulator should.

76. We do not understand there to be any difficulty with the Bar Standards Board being able to regulate our members and take steps against legal advice which is either dishonest or incompetent. We are concerned, however, that HMRC's objection goes further than this and seeks to challenge legal advice more widely.

77. A problem in this respect is that HMRC's primary function is the collection and management of tax. In the exercise of that function disputes can arise as to when tax is due. It is open to individual citizens to insist on paying tax according to the law as prescribed by Parliament and interpreted by the Courts. As this does not always accord with HMRC's interpretation of the law, such disputes can and do arise an independent legal profession is vital to the resolution of such disputes. The ability to access legal advice is all the more important, given the complexity of the UK tax code: it can be far from straightforward to identify what the correct position might be.

78. Given this context, we consider it vitally important and consistent with the rule of law that citizens have access to independent legal advice. This is a well-established principle which is recognised by Parliament. For example, the regulatory objectives of the Legal Services Board include: "*supporting the constitutional principle of the rule of law*"; "*improving access to justice*"; and "*encouraging an independent, strong, diverse and effective legal profession*" (section 1(1) Legal Services Act 2007).

79. We further note that the UK has recently become a signatory to the Convention for the Protection of the Profession of Lawyer the purpose of which "*is to strengthen the protection of the profession of lawyer and the right to practise this profession with independence and without discrimination, improper hindrance or interference, or being subjected to attacks, threats, harassment or intimidation*" (Article 1). This reinforces the importance of an independent legal profession as currently recognised in the UK regulatory regime.

80. Of course, any change to the regulatory rules will be ultimately a matter for the Bar Standards Board and/or the Legal Services Board. However, if HMRC are intending to devote time and resources to the issue it is important to understand why we consider that the PCRT proposal creates a problem and the principled basis on which we would oppose any attempt to rewrite the code of conduct to reflect the PCRT.

81. The concern is as follows. If HMRC become involved in the regulation of barristers, it undermines the independence of barristers and therefore we consider that it undermines the rule of law. In particular, we note that the PCRT obliges those who are subject to it to provide advice which is not independent or to refuse to provide advice at all. It requires that regard is had to the interests of the exchequer in relation to any advice which is provided. For HMRC to become involved in regulation of lawyers by imposing limitations on what lawful activities can be advised upon is with respect a startling and excessive step. It would make the area of revenue law truly exceptional and undermine a central legal principle which is recognised in the current regulatory regime and the UK's international obligations.

82. Further and in any event, it would not prevent tax avoidance schemes being adopted. It would merely mean that those advising may not be regulated by any relevant body, with the consequence that there may be limited redress to prevent dishonest or incompetent advice.

Questions 57 to 62: Ensuring that promoters face significant consequences / Providing HMRC with the tools needed to act quickly and decisively / Fully optimising advances in technology to ensure the maximum impact of HMRC's actions

83. These proposals and questions do not appear to raise any concerns which are specific only to the RBA membership and other barristers advising on tax, and we do not comment on this aspect of the consultation.

Concluding remarks

84. In short, the Bar Council and the RBA's position is that HMRC should consider refining and using existing powers rather than asking for new and far-reaching powers that go beyond what is needed to address the problems identified and may even be counterproductive.

18 June 2025

On behalf of the RBA:

Richard Vallat KC Chair; **Marika Lemos KC** Secretary; **Rory Mullan KC** Treasurer

On behalf of the Bar Council:

Adrian Vincent Head of Policy: Legal Practice and Remuneration