



**MEMORANDUM OF POINTS RAISED BY THE BAR COUNCIL
following meetings with HMRC on the draft Finance Bill 2017
regarding 'Strengthening Tax Avoidance Sanctions and Deterrents'.**

Background

On 19 October 2016 the Bar Council responded¹ to the HMRC consultation "Strengthening Tax Avoidance Sanctions and Deterrents". On 19 December 2016 and 17 January 2017, Bar Council representatives, Richard Vallat (Chairman of the Bar Council Remuneration Committee's Taxation Panel), Andrew Walker QC (former Chairman of the Bar Council's Ethics Committee and now Vice-Chairman of the Bar) and Adrian Vincent (Head of Policy: Remuneration and Employed Bar) met with HMRC representatives including John Burey and Gary Coombs and Treasury representatives, to discuss the draft provisions of the Finance Bill 2017. At the meeting on 17 January, HMRC representatives asked Bar representatives to follow up their oral submissions with a memorandum giving more details and examples.

Memorandum

We do not agree that these proposals should affect lawyers at all, for the reasons set out in our response to the original consultation, and in the 'rule of law' points set out below. The remainder of this paper (including the Appendix) proceeds, reluctantly, on the basis that this regime will be enacted in a form which applies it to lawyers.

This paper is divided into several parts, reflecting all of the issues raised in our two meetings with HMRC and HMT together with some additional reflections following the second meeting:

1. Description of the five scenarios which give rise to concern.
2. Explanation of why it is unfair for the lawyer in each scenario to be liable to a penalty.
3. By reference to the Appendix, explanation of the rule of law and 'cab rank' rule issues that arise in relation to each scenario.
4. Explanation of why we believe that the lawyer in each would be at risk of a penalty, and our suggestions as to how the provisions should be revised to avoid this.
5. Difficulties with legal professional privilege.

¹

http://www.barcouncil.org.uk/media/497212/20161019_bar_council_response_to_hmrc_consultation_strengthening_tax_avoidance_sanctions_and_deterrents.pdf

6. Additional drafting problems with para.30
7. Concerns regarding the information-gathering powers.
8. Other drafting points.
9. Legal Professional Privilege (LPP) concern under Schedule 21.
10. Appendix – summary of the rule of law and ‘cab rank’ rule issues.

1. The five situations which give rise to concern

There are five types of situation involving lawyers which we suggest ought not to be caught by the new provisions, but which either would be or could well be (depending on how the provisions are construed by the courts and tribunals):

1. The lawyer is asked to advise on the effectiveness of an arrangement for tax purposes. The lawyer’s honest, independent, professional opinion is that the arrangement is not “abusive” (in the para.2(2) sense), or that it could be abusive but on balance it is not (e.g. 25% risk of it being abusive), and the lawyer gives that opinion. At the same time, the lawyer makes a suggestion as to how to make it less likely to be abusive. However, a tribunal later takes a different view, and decides that the arrangement in its original and suggested forms was abusive.

Example

At D31, the GAAR Guidance gives the example of “lending to fund UK real estate by foreign domiciliary” and says “This example illustrates how standard tax planning may have increasing levels of abnormality attached to it... the example aims to illustrate at approximately what point [the GAAR] boundary is crossed, although ... this will always be highly fact dependent.” It then sets 9 options for the foreign domiciliary seeking to buy UK property. The technical tax analysis will have to be revisited in light of the legislation, currently in draft, covering the IHT treatment of UK property held directly or indirectly by foreign domiciliaries, but the points about uncertainty are general ones.

Option 7 and 9 are:

“7. R has an existing substantive discretionary trust which he settled many years ago. R is a beneficiary of the trust, but his adult children are also beneficiaries and they have all benefitted from the trust over the years. The trustees previously owned a UK house, but sold it a couple of years ago. The trustees have been looking around for a new UK property suitable for R and his children to use as each of them visit the UK for a few weeks a year. The trustees could afford to buy the new house using existing resources but instead they accept an offer from R to lend them the purchase price via an offshore company that is wholly owned by R. The loan is interest free and repayable on demand. The company owned by R secures the loan on the house.

9. R adds cash from his overseas resources to a trust, known as the Loan Trust, where he is settlor and beneficiary. His spouse or other relative sets up another trust, known as the Property Trust, which is funded with, say, £1000 cash. R adds no funds to the Property Trust. The Loan Trust forms an overseas company into which the cash is transferred and the company lends the cash to the Property Trustees who acquire the UK property that R wishes to occupy. The loan is repayable on demand and may be interest-free, interest-bearing or index-linked. The Property

Trustees incur no personal liability as the lender may have recourse to the house only."

The guidance comments:

"In option 7, loans to trusts do occur for all sorts of non-tax reasons and therefore cannot be considered in themselves to be necessarily abnormal or contrived. Even though the loan is tax-motivated and (in some senses) self-generated, it involves a single straightforward step. The position might well be different, however, if the trust were not established for some time already or substantive: for instance if R were the sole or principal beneficiary or able to direct the trustees or revoke the trust. A loan to such a newly created trust might be considered a contrivance. In the above example the loan may not be mainly tax motivated anyway e.g. the trustees may wish to preserve cash for liquidity purposes, but even if it were the arrangement is still not necessarily abusive.

...

In option 9, the combination of a nominal-value settlement specifically set up to own the property coupled with the establishment of a separate loan trust and a corporate vehicle underlying it which is then used to make a loan which is on a non-recourse basis is on these facts set up only to achieve an artificial tax deduction. And, while taken individually, the steps may be considered normal, when taken in combination they may be considered abnormal. However, each case would be taken on its own facts and a situation where, for instance, both trusts were substantial and existing trusts or where the loan was on fully commercial terms or where the property trust was established for a different beneficiary apart from the settlor might be considered differently...

With option 7, while economically the liability appears to be self-generated, the trust is of substance and the arrangements are not necessarily contrived or abnormal. Thus, although some observers might consider this to be unreasonable, it is possible to see that other reasonable observers might reach a different view. As such these particular facts may well not be caught by the GAAR. However, it is important to realise that this is a borderline case and one where, for the purposes of illustration, the facts are inevitably condensed. Each case would have to be considered on its own facts and a subtly different set of facts might result in a different conclusion

Option ... 9, on these particular facts, would be caught by GAAR. The liabilities would be ignored in calculating the tax due on the house and the transaction counteracted on this basis. However, as with option 7, each case would have to be considered on its full facts and it is not impossible that different scenarios might potentially be saved from the GAAR by the double-reasonableness test."

Suppose a barrister was advising R. Suppose R had a choice of two trusts to use for an arrangement along the lines of option 7, over one of which R had a greater level of control (in practice). The barrister might conclude, on the facts and in light of the guidance above, that the GAAR would probably (75%) not apply to an option 7 arrangement whichever trust were used but that the GAAR would be less likely to apply if the trust over which he had less control were used. The Tribunal might later reach a different view.

2. The situation is as in (1), but the lawyer considers the arrangement would be ineffective and/or fall within para.2(2). The lawyer's suggestion would make it less

likely to be ineffective and abusive, but the lawyer expresses his/her opinion that even as revised, it would be abusive, or that it is more likely than not to be abusive. The lawyer does not make any explicit recommendation in his/her advice not to enter into the arrangement.

Example

Using the same GAAR example as above, suppose R asked the barrister whether an arrangement along the lines of option 9 would work using either of two trusts and/or using a loan on commercial terms. In light of the guidance, the barrister might advise that using a more substantial trust and a loan on commercial terms was the better option but that, in his view, neither would avoid the application of the GAAR.

3. The scenario is as in (1) or (2), but the lawyer is asked not just to advise on an arrangement, but also to draft documents to be used in that arrangement.

Example

Varying example 1 above, suppose a silk had advised as above and a junior barrister is instructed, separately, to draft the relevant documents to give effect to the planning (but without revisiting the advice).

Alternatively, varying example 2, suppose the silk has advised that neither option would work, but R is determined to go ahead anyway and instructs the junior to draft the documents to give effect to the planning.

4. A lawyer is asked to advise on possible tax arrangements, and may also be asked to draft documents to be used in such arrangements, which are specifically intended by all involved, and designed, to enable the taxpayer to remain outside the circumstances caught by para.2(2) (i.e. it is intended and designed not to be abusive). This is to be identified by the lawyer, who will form his/her own opinion of the application of that test in the particular circumstances. This would typically arise in cases involving individual clients and their own particular circumstances, rather than the sort of widely-marketed schemes that are the main focus of the proposed regime.

Example

Suppose R's circumstances are such that it is possible to put in place an option 9 arrangement using substantial existing trusts. A barrister might be asked to advise whether this would be covered by the GAAR and if so whether the arrangement can be amended to ensure it is not. Suppose the barrister concludes, on the facts and in light of the GAAR guidance, that the GAAR should not apply to an option 9 arrangement in those circumstances if the loan is made on fully commercial terms. The barrister drafts a loan agreement intended to achieve this. The planning is believed and intended not to be abusive, but a tribunal later concludes that it is.

5. A lawyer is asked to advise on the law, or the application of the law to the facts, in relation to one or more particular aspects of an arrangement, and may also be asked

to draft documents or amendments to documents in the light of his/her opinion. The arrangements are intended to have tax consequences, but the lawyer's expertise is not in tax (or the relevant tax); rather, it is in an area of law relevant to the legal effect of the arrangements: for example, company law, trust law, or property law. The lawyer may be aware that the advice and drafting relates to an arrangement which is intended to have tax consequences, but the lawyer is no expert on tax law (or not on the law relating to the relevant tax²) and is not asked to advise on the tax consequences. Appropriately, the lawyer either makes no comment on any tax implications (because s/he has not been asked to do so), or may say specifically that s/he cannot give any advice on those implications because it is outside his/her area of expertise. The arrangements are caught by the para.2(2) test.

Example

Suppose, varying the example above, that, having received tax advice as above, R instructs a commercial barrister, with no significant tax knowledge or experience, to advise solely on the terms of the loan and draft a loan instrument that will be on "fully commercial terms." The commercial barrister will be aware that the advice and drafting is required for tax purposes but, as noted above, will not comment on the tax analysis, save to confirm that he or she cannot advise on the tax implications. A tribunal might later conclude that the arrangements are caught by the GAAR. This could be as a result of the tribunal's view about some other aspects of the arrangement, or about the arrangement as a whole, but it could also be as a result of taking the view that the commercial loan document is not for some reason on "full commercial terms" (which might or might not be due to some aspect of the way in which it was drafted).

The risk of a penalty being imposed on the lawyer in each of those five scenarios:

- 1) Is unfair on the lawyer; and
- 2) Gives rise to rule of law implications, including a problem with the 'cab rank' rule.

2. Why is it unfair on the lawyer in each scenario to be subject to a penalty?

Scenario 1

In scenario 1, the lawyer is subject to a penalty simply as a result of forming a different view on the application of the para.2(2) test.

The lawyer should not be subject to this risk because views can and will differ on the application of the test for an 'abusive' arrangement, given that this is an objective 'double-reasonableness' test.

One only has to consider how cases proceed through different levels in the courts and tribunals systems to see that different judges can readily take different views about whether a tax arrangement succeeds or fails, and the same will inevitably be the case with the

² This is important. Not only may tax lawyers' expertise be primarily in relation to certain taxes, but other lawyers in other fields may know a fair amount about certain taxes relevant to their fields of practice (e.g. a property lawyer may know a fair amount about SDLT) but very little if anything about other taxes.

application of the para.2(2) test. The views of judges and lawyers may differ. Just because one judge disagrees with a lawyer's opinion does not make that lawyer's opinion wrong, never mind negligent (i.e. one that no reasonable lawyer could hold). While there will be clear cases, HMRC's own GAAR guidance recognises that there will be situations in which it will not be clear whether or how the GAAR test (which is essentially the same test as is set out in para.2(2)) applies. In addition, advice in relation to the GAAR (or otherwise) which is correct in light of a decision at one level may subsequently be shown to be incorrect following an appeal³; and it cannot be right that a lawyer advising properly in light of the law as it stands when giving the advice should be at risk of a penalty because of a subsequent decision.

Having formed the genuine opinion that the para.2(2) test is not satisfied, or that it has less than a 50% prospect of being satisfied, it would be wrong to require the lawyer nevertheless to "recommend against" it, in order to avoid liability to a penalty; and in any event, a recommendation against it might not be effective for the purposes of para.7(5) in the light of the lawyer's opinion about the likelihood of para.2(2) applying. Such a recommendation could even be contrary to the lawyer's professional duties, particularly if the lawyer believes that para.2(2) would not be engaged. Accordingly, as a result of the lawyer in scenario 1 having formed an honest opinion on the application of the para.2(2) test:

- 1) That lawyer may be unable to avoid a penalty if that opinion turns out to be wrong; but
- 2) Another lawyer who takes a different view about para.2(2) (i.e. a lawyer who thinks it more likely that it will apply) will be able to avoid that penalty, by relying on para.7(5).

It would be wrong for lawyer to be subject to a penalty simply as a result of forming an honest opinion which turns out to be different from a view taken later by a tribunal or court. It would also be wrong for one lawyer to be subject to a penalty, and another not subject to such a penalty, solely as a result of the two lawyers taking different views.

In this regard, we have borne in mind that we think it unlikely that, in practice, there will be many situations that fall outside scenario 1 due to the absence of "suggestions", within the meaning of para.7(3). In reality, given what happens in practice and lawyers' duties to act in the best interests of their clients, there will be few situations in which advice is not "relevant advice". As a result, we do not see para.7(3) as likely to help lawyers very often, even those who are giving so-called 'second opinion' advice.

Scenario 2

In scenario 2, the lawyer is subject to a penalty despite having advised that the arrangement is likely to satisfy the para.2(2) test, even as improved.

³ See, for example, the *UBS / Deutsche Bank* litigation in which the Court of Appeal refused HMRC permission to argue the point that later succeeded in the Supreme Court: see [2014] EWCA Civ 452 at [48] to [66] and [2016] UKSC 13; see also *Furniss v Dawson* [1984] AC 474 in which the House of Lords took a very different view from the courts below.

Para.7(5)(b) already recognises that lawyers should not be subject to a penalty if they “recommending against” anything that they “suggest”.

It is unclear whether the lawyer’s advice in this case would satisfy para.7(5)(b), because the lawyer simply gives his/her opinion on the application of the law to the particular arrangement in question.

We do not agree that barristers (or, indeed, other lawyers) ordinarily make any form of ‘recommendation’ to their clients about whether or not to go ahead with an arrangement. The barrister’s job is to advise on the law and its application to the facts of a case. It would be unfair if the application of para.7(5) were to depend on a particular formulation of a barrister’s advice, the substance of which was otherwise the same, particularly when that formulation is not part of the lawyer’s role and (as a result) not what a lawyer would ordinarily do. It would also be likely to lead to an arbitrary distinction between barristers based only on whether or not the barrister has made a relevant “recommendation”.

Scenario 3

The unfairness in scenario 3 is essentially the same as in 1 and 2. The lawyer has acted as his/her professional obligations required, but despite this, is at risk of a penalty.

Scenario 4

The unfairness in scenario 4 is similar to that in scenario 1/3, but perhaps to an even greater degree.

Scenario 5

The unfairness in scenario 5 arises from a lawyer – particularly a lawyer whose expertise is not in the field of tax – being made liable to a penalty entirely unwittingly.

3. The rule of law and ‘cab rank’ rule implications

We set out our concerns in response to the original consultation. Although the draft Schedule is different in some respects from that original proposal, these concerns have not been fully addressed. We have summarised the main issues in these respects in the Appendix to this paper.

4. How the current provisions operate in our five scenarios, and what changes might be made

Our concerns with the operation of the current provisions are respectively:

Scenario 1

Here, the lawyer’s advice would seem to be “relevant advice”, but para.7(5) cannot apply because the lawyer’s view is that the arrangement is not abusive, or is more likely not to be

abusive, which is not likely to be seen as satisfying para.7(5)(b). As a result, the lawyer will be subject to a penalty, despite taking the honest view that the arrangement was not abusive, if the knowledge condition is satisfied.

The effect of this depends on two possibilities about the meaning of para.7(4) as drafted, although the lawyer would at least be at risk of being liable to a penalty on either meaning, despite having taken the view that the arrangement was not, or was not likely to be, abusive.

- a) If para.7(4) requires only that the lawyer knows or could reasonably be expected to know that it would be used in a tax arrangement, and not also that the lawyer knows or could reasonably be expected to know that the arrangement is abusive, then the knowledge test will be satisfied and the lawyer will be liable to a penalty.

This may not have been the intention, but we would suggest that it should be made clear. **For that purpose**, we would suggest at least the following changes to para.7(4):

(4) The knowledge condition is that, when the advice was provided, the person providing it knew or could reasonably be expected to know –

(a) That the advice would be used in the design of ~~abusive~~ tax arrangements or of a proposal for such arrangements, or

(b) That it was likely that the advice would be so used; and

(c) That such arrangements would be abusive tax arrangements.

- b) If para.7(4) also requires (either already, or as a result of the change that we have just suggested) that the lawyer knows or could reasonably be expected to know that the arrangement is abusive, then the lawyer's position is better, but still not safe. The lawyer is unlikely to be held to have known that the arrangement was abusive, but there is a clear risk that it would be held that lawyer "could reasonably be expected to know" that it was, given that the test for what is 'abusive' is an objective test based on reasonableness under para.2(2). The application of para.2(2) and para.7(4) would not (and should not) necessarily lead to the same conclusion, as the two tests serve different purposes: this ought to depend on the circumstances. However, the position needs to be considered realistically. If a tribunal has decided that arrangements could not reasonably be regarded as a reasonable course of action, then we are concerned that the tribunal (particularly if it is the same tribunal, which it will be if the question of 'abuse' was never formally decided by a court or tribunal as between HMRC and the taxpayer) will find it difficult then to go on to consider the reasonableness of the lawyer's opinion without being influenced very strongly by that conclusion. How realistic is it that, having decided that arrangements could not reasonably be regarded as a reasonable course of action, the tribunal will go on to say that a lawyer (particularly a specialist tax lawyer) could not reasonably be expected to know that. In practice, the two reasonableness tests are likely to lead to the same conclusion, including in cases in which the lawyer's honest, independent profession opinion was that the arrangement was not abusive.

There are also two possibilities about the lawyer's opinion:

1. The lawyer's opinion may have been an opinion that a reasonable lawyer (or tax lawyer) could have given, and so not be negligent. As we have already said, just because a tribunal has taken a different view does not mean that the lawyer's opinion was necessarily 'wrong', or even negligent. As a result, a lawyer may be liable to a penalty even where the lawyer's honest, independent, non-negligent, opinion was that the arrangement was not abusive.
2. The lawyer's opinion may have been negligent. If so, then the lawyer has made a mistake, and may be liable to pay damages to his/her client in a claim for professional negligence. But the lawyer has only been negligent; not dishonest. The lawyer still genuinely believed that the arrangement was not abusive, or was only at risk (but not likely) to be abusive (i.e. s/he thought that there was less than a 50% prospect of this). For that negligence, the lawyer may be subject not only to a claim in negligence (against which liability the lawyer can insure) but also to an 'enabler' penalty (against which the lawyer is unlikely to be able to insure).

As we understand it, neither of these lawyers is the target of the proposed enabler regime. Moreover, these are not situations in which there is any behaviour that the regime is intended to change: on the contrary, the regime is intended to enable lawyers to give their genuine opinions on tax arrangements, including on the question whether they are contrary to para.2(2).

On the contrary, as we understand it, the regime is intended primarily to target those who are designing abusive tax arrangements and who either know that the arrangements they are designing are abusive, or who choose to close their eyes to what should be obvious to them. What should be obvious to a specialist tax lawyer, however, may well be different from what should be obvious to other lawyers.

We suggest that this issue could be addressed **in part** by making a further change to the knowledge test in para.7(4). In this respect, we focus on the words "*or could reasonably be expected to know*". We suggest that, for the reasons we have given, this sets the bar too low, and that the focus of para.7(4) ought to be on a higher level of knowledge. Although the term 'reckless' may not be one that is familiar in tax law, we suggest that this word catches the type of knowledge we have just described: closing one's eyes to the obvious.

If that change were to be made in addition to the change we suggested above, then para.7(4) might read as follows:

- (4) *The knowledge condition is that, when the advice was provided, the person providing it knew or was reckless as to the following could reasonably be expected to know –*
- (a) *That the advice would be used in the design of ~~abusive~~ tax arrangements or of a proposal for such arrangements, or*
 - (b) *That it was likely that the advice would be so used; and*
 - (c) *That such arrangements would be abusive tax arrangements.*

We could see an alternative argument that a lower level of knowledge might apply to (a) and (b), and a higher level only to (c). That might lead to slightly different revisions instead:

- (4) *The knowledge condition is that, when the advice was provided, the person providing it:*
- (a) ~~K~~new or could reasonably be expected to know –
 - (i) That the advice would be used in the design of ~~abusive~~ tax arrangements or of a proposal for such arrangements, or
 - (ii) That it was likely that the advice would be so used; and
 - (b) Knew that such arrangements would be abusive tax arrangements, or was reckless as to whether they would be abusive tax arrangements.

A further alternative might be to adopt a formulation based on obviousness instead of recklessness. For example:

- (4) *The knowledge condition is that, when the advice was provided,:*
- (a) ~~T~~The person providing it knew or could reasonably be expected to know –
 - (i) That the advice would be used in the design of ~~abusive~~ tax arrangements or of a proposal for such arrangements, or
 - (ii) That it was likely that the advice would be so used; and
 - (b) Either:
 - (i) The person providing it knew that such arrangements would be abusive tax arrangements; or
 - (ii) It should have been obvious to the person providing it, in view of that person's own knowledge of and degree of expertise in the law relating to the relevant tax, that such arrangements would be abusive tax arrangements.

Any of those changes would remove a risk of liability from someone whose honest view was that the tax arrangements were not abusive, except where that honest view is tarnished by recklessness or a failure to recognise the obvious (bearing in mind the degree of knowledge and expertise of the lawyer in question). If the application of the para.2(2) test were clear, then that might well establish recklessness or satisfy the 'obviousness' test, particularly in the case of a lawyer with tax expertise.

Such changes would also much reduce the risk of liability for someone who was genuinely, and reasonably (in their circumstances), not aware that the tax arrangements in relation to which their advice might be used were abusive: see our comments on scenario 5 below.

Scenario 2

As we indicated above, the problem with scenario 2 is with the wording of para.7(5)(b). This requires advice, when "reasonably read" to be "recommending against" the arrangements in question. This is an awkward concept in any event, but it also does not reflect the role or practice of lawyers, particularly barristers.

We suggest that the provisions of para.7 should be structured in such a way that a lawyer is not liable to a penalty if that lawyer has given and/or acted on his/her honest, independent, professional opinion (i.e. the type of opinion that the lawyer is required professionally to

form) about the applicability of the para.2(2) test, irrespective of whether that lawyer's view that the para.2(2) test does or does not apply, or that there is a risk of it applying to a greater or lesser degree. That would fit with the role of a lawyer, and with the way that lawyers advise in practice.

In scenario 2, this would enable a lawyer to avoid liability for a penalty if the lawyer has simply advised that the arrangement will be abusive, or is more likely than not to be abusive. This ought to satisfy the aim behind para.7(5), whilst reflecting both the role and professional duties of a lawyer (particularly a barrister) and the way in which lawyers (particularly barristers) advise in practice.

In addition, if our suggestions regarding para.7(4) were not adopted, then it could also enable a lawyer who had taken a more favourable view of the application of para.2(2) to an arrangement to rely on para.7(5)(b), although it would not help a lawyer who has simply concluded that para.2(2) does not apply, and so does not either need to be addressed in the lawyer's advice or raised as an issue in relation to documents that the lawyer has drafted.

Our suggestion might lead para.7(5)(b) to be revised to say something like this:

(b) in relation to which the advice includes the genuine opinion of the person giving it as to whether (in substance, and read reasonably) what it suggests would be abusive tax arrangements, or as to the risk of this being the case.

Alternatively (and perhaps preferably), para.7 might be re-structured slightly. For example, the definition of "relevant advice" might be altered as follows, with para.7(5) left in place to catch those situations in which the advice did not advise directly about the para.2(2) test, but nevertheless and for whatever reason (e.g. because it was advice from a non-lawyer), happened to "recommend against" the arrangement in question:

- (3) Advice is "relevant advice" if –
- (a) the advice of any part of it suggests arrangements or an alteration of proposed arrangements, and
 - (b) it is reasonable to assume that the suggestion was made with a view to arrangements being designed in such a way that a tax advantage (or greater tax advantage) might be expected to arise from them; but
 - (c) the advice does not include the genuine opinion of the person giving it as to whether (in substance, and read reasonably) the suggested arrangements or the proposed arrangements as altered would be abusive tax arrangements, or as to the risk of this being the case.

This adopts the phrase "genuine opinion" rather than a longer formulation (such as "genuine [or honest], independent, professional opinion") for two reasons: first, a longer term is probably unnecessary in the case of a professional lawyer; second, at the moment para.7 covers advice from any person, not just a professional lawyer. In view of para.7(5)(b), however, we could see a justification for phrasing paragraph 7(3)(c) in such a way as to limit it to, for example, the professional opinion of a regulated lawyer, or of a professional lawyer or tax adviser.

Scenario 3

We have identified scenario 3 in addition to scenarios 1 and 2 for two reasons.

First, we suggest that it is artificial, inappropriate and undesirable to try to draw a distinction between legal advice on the one hand and the drafting of legal documents or provision of other legal assistance on the other. Advice could well include suggestions as to how documents should be drafted; draft documents will often be accompanied by an advisory Note, or even just advisory footnotes, explaining their operation; and a lawyer's duties will be similar in relation to each task. These should be treated in the same way. At the moment, though, it is not clear how widely the word "advice" will be construed in para.7 in these respects.

Second, there may well be situations in which either the giving of advice or the drafting of documents (or other legal assistance) could be caught by para.8 as involving the organisation or management of arrangements. Indeed, they could all potentially be caught by both para.7 and para.8. This gives rise to uncertainty as well as to potential unfairness and artificiality, not least because whether either or both applies in a particular situation may well involve arbitrary distinctions, never mind be difficult to predict.

We suggest that all of these activities by lawyers – legal advice, drafting documents, and any other form of legal assistance – should be subject to the same rules, and that these rules should include the protections applying to legal advice. As we explain below, we believe that this can be achieved without undermining the main aims of the 'enabler' regime. Were it otherwise, then the simple act of drafting a single document would expose a lawyer to a risk of a penalty, simply for assisting an individual client to implement what is believed to be a non-abusive scheme, whereas the lawyer who simply advised and left it to someone else to draft any necessary documents (e.g. a barrister giving advice which is then acted on by a solicitor, or perhaps an accountant) would not. That would be both illogical and unfair.

This might be achieved by extending para.7 to apply also to the drafting of documents by a regulated lawyer (i.e. a lawyer who is authorised to carry out reserved legal activities under the Legal Services Act 2007, and who will thus be regulated), and to other legal assistance provided by such a lawyer; and then exempting the extended activities from para.8. As this would probably require more than a simple amendment, we have not attempted to suggest any particular form of drafting, but we could do so on request.

Scenario 4

The problems here arise in the same way as the problems with scenario 1/3. Our suggestions to address this scenario are the same as in relation to scenarios 1 and 3.

Scenario 5

The main problem with scenario 5 is that para.7 (and, indeed, para.8) proceed on the basis that the advice or assistance will be being sought by someone operating the tax field. Scenario

5 shows that this may not be the case. The concern is that use of the phrase “*could reasonably be expected to know*” might bring lawyer in scenario 5 within the scope of the provisions, even if unintentionally. The main issue here might be described as similar to the principle that ‘ignorance of the law is no defence’, at least in the case of a lawyer. Would a court or tribunal necessarily say that the lawyer in scenario 5, who does not have relevant expertise in relation to the tax in issue but who knows that his input will be used in relation to tax arrangements of some sort, “*could not reasonably be expected*” to have the knowledge stipulated in para.7(4)?

If para.7(4) were changed as we suggest, and if para.8 were addressed too (see our comments on scenario 3), then that would reduce significantly the risk of liability for someone who was genuinely, and reasonably (in their own circumstances), not aware that the tax arrangements in relation to which their advice might be used were abusive. This would arise because the knowledge condition would be tested by reference to the individual lawyer’s (lack of) knowledge and expertise in relevant tax law. We suggest that this would be a fair and just result.

We suggest that a lawyer in a scenario such as scenario 5 also be given additional protection by making the change we suggest below to para.7(3)(b).

On the other hand, there would still be a risk of exposure to a penalty, because a lawyer who is not an expert in the relevant tax⁴ (or, indeed, any tax law) will not be able to give an opinion about the application of the GAAR, and so will not be able to avoid liability by doing so (unlike the expert tax lawyer) in any case in which it ought to be obvious to that lawyer that the GAAR may be engaged. This might in part be catered for by para.7(5)(b), but as we have already explained, we would not expect most lawyers in scenario 5 to be making any recommendation about the arrangements in question. We suggest that this should be addressed by enabling a lawyer in scenario 5 – whether advising on non-tax law or drafting documents – to avoid liability either (1) through advising the client to seek expert tax advice on the tax consequences of what the lawyer has “suggested” or drafted, or (2) through relying on a statement in the lawyer’s instructions that the client had already sought, or was seeking, such advice. One possibility regarding advice (which would also need to be reflected in whatever changes are made to address scenario 3) might be to add an additional sub-paragraph, as follows (adopting for this purpose the current approach in para.7(5)):

(..) For the purposes of sub-paragraph (3), advice given by a person who does not have expertise in the application of the law relating to the relevant tax is not to be taken to “suggest” anything –

(a) which is mentioned in the advice, but

(b) on which that person also advises that expert tax advice should be sought, or in circumstances in which that person has already been instructed that expert advice on relevant tax law has been, or will be, sought.

If our suggested changes to deal with scenarios 1 to 4 were not made, then an exception ought to be included in para.7 and 8 in order to protect lawyers in scenario 5. An alternative – but only partial – solution might be to clarify how the phrase “*could reasonably be expected to know*”

⁴ We use this concept in the way we explained in footnote 1 above, and in the text to which that footnote relates.

should be applied to a lawyer (or, indeed, other person) who has no expertise in tax law, or in the relevant tax. We have not attempted any drafting in relation to either of these two alternatives as we regard our proposals above as being far preferable.

5. Legal professional privilege

We consider that legal professional privilege will not be properly protected by the provisions as they stand, other than at the expense of lawyers being unable to defend themselves (in breach of the fundamental rights of the lawyers themselves).

We are hampered in commenting effectively on this by the lack of certainty as to the terms of the proposed regulations. As a consequence, the following observations are necessarily provisional.

Based simply on the outline that has been provided, we suggest that legal professional privilege has not been addressed sufficiently in the following situations, with the result that a lawyer will not be able to raise a proper defence, resulting in the lawyer being made liable to a penalty when not truly liable:

- 1) How this operates will depend very much on how the form of declaration is framed. We can readily see forms of declaration that will involve the lawyer revealing privileged material.
- 2) Moreover, it may be identifiable from other sources that only one of the situations in the list of several might be the case. If so, then making the declaration will reveal that this is/was the case.

For example, information available from other sources may mean that the only possibility left in the list is that the lawyer “recommended against” an arrangement. Whether the lawyer recommended against the arrangement is privileged information. In that event, the lawyer may be obliged to refuse to make the declaration, as the declaration would confirm whether the client was advised to enter into it or was advised against it; in other words, merely making the declaration would breach LPP.

A refusal to make the declaration would leave the lawyer unable to challenge a penalty, even though the lawyer was not subject to such a penalty.

- 3) The same could happen if other information becomes available after the declaration has been made.
- 4) Merely making a declaration may involve the use of privileged material in a way that is contrary to the privilege.
- 5) Para.30 does not enable a lawyer to refer to privileged material in mitigation of any penalty. As a result, a lawyer may be unable to explain the circumstances (e.g. by putting forward particular information or assurances given in the lawyer’s privileged instructions, or particular statements or caveats in the lawyer’s advice), and may thus

be deprived of what might otherwise be a very real possibility of the penalty being mitigated.

- 6) Para.30 does not at the moment cover any form of legal assistance or drafting of documents which does not fall within the description of “*advice*”. We have commented on this earlier. This provision needs to cover the full breadth of materials that may be subject to legal professional privilege. It needs to do so for two types of reason:
 - a. First, we would refer again to our reasons for addressing scenario 3: see above.
 - b. Second, it is quite possible that all of these activities by a lawyer may take place in a situation in which litigation privilege applies, with the result that they are all protected by litigation privilege (with the exception of the final agreement and any relevant implementation documents themselves): for example, each may be undertaken by a barrister or other lawyer in the course of advising on, drafting and implementing an agreement settling litigation.

On the other hand, if the provisions of paras.7 and 8 were to be amended in the way that we have suggested above, then we can see the possibility that this might also reduce the risks to LPP; but again, we could not have any confidence in this without seeing and having the opportunity to comment on draft regulations.

Information-gathering powers and LPP

The application of these to lawyers raises questions over the protection of the confidentiality and LPP of other clients of lawyers.

6. Additional drafting issues relating to para.30

- 1) Lack of clarity makes it difficult to comment effectively. This has the result that there may prove to be other, important points that are not set out below.
- 2) Para.30 needs to state its aim and purpose, otherwise there is no proper test against which the *vires* of any regulations made by the Treasury under para.30(4) can be tested. We understand the aim and purpose to be to enable lawyers to avoid a penalty for which they are not liable where LPP prevents them from responding effectively, whilst preserving and not undermining LPP. Without a stipulation to this effect, the power being sought would be inappropriately wide, and para.30 may not achieve its intended object. We do not believe that para.49 of the draft Explanatory Memorandum is a satisfactory substitute or remedy for this, and para.48 of the draft memorandum appears to be factually incorrect.
- 3) Para.30(1) will not work unless the declaration is “conclusive” evidence of the things stated in it. We understand from our initial discussion that this is HMRC’s intention. It needs to be stated.

- 4) Para.30(5) is too wide, as it could have the result that an immaterial inaccuracy (unrelated to the critical information or privileged matters) prevents a lawyer from relying on it. That cannot be right. It is also not clear that it is framed in such a way that it will work in the context of the proposed regulations.
- 5) Unless our suggested changes are made to para.7(4), a lawyer in scenarios 1, 1/3, and 4 will not be able to make a declaration on the basis that s/he did not believe the arrangement to be abusive. In this regard:
 - a. This needs to be possible. A declaration can only be given based on the lawyer's honest belief. A lawyer should not be subject to a penalty for making an honest declaration, simply because a different view is taken by someone else which makes it incorrect.
 - b. This is even more important given that the issue may come to light many years later, leaving the lawyer with limited records and a limited recollection, and no access to any records from his/her former client.
- 6) Similarly:
 - a. Unless our suggested changes are made to address scenarios 2 and 2/3, a lawyer in that sort of situation either may not be able to make a declaration, or may not be able to say with confidence whether or not s/her can do so.
 - b. Unless our suggested changes are made to address scenario 5, a lawyer in that sort of situation either may not be able to make a declaration, or may not be able to say with confidence whether or not s/her can do so.
- 7) We are far from convinced that the idea of a list of circumstances will be sufficient both to protect LPP and to enable lawyers to defend themselves properly, but without even draft regulations it is impossible to assess this effectively. Draft regulations are needed at the very least, in order that their potential effect can be analysed, and these need to be produced in time to be considered properly as part of the pre-legislative process. The effectiveness of this provision may also depend on the information that HMRC is able and required to make available to the lawyer: for example, how is the lawyer to know whether the arrangements in question are the same as those on which the lawyer advised or was involved in designing? Schedule 20 contains no provisions requiring HMRC to share any information with an alleged enabler for this purpose, and the lawyer may well be unable to obtain any usable information from his former client taxpayer, never mind any permission to use privileged information.
- 8) Even if the proposed approach under para.30 could be made to work, a declaration will need to deal with a very wide range of circumstances, not all of which may be predictable. It needs to be wide enough, for example, to enable a lawyer to make such a declaration in all circumstances in which a lawyer may not be liable. Examples include:

- a. that, on the basis of the information supplied to the lawyer at the time or on the basis advised by the lawyer, the lawyer believes that the arrangements on which the lawyer was asked to advise or assist were not or should not have been abusive;
- b. that the arrangements in question are not the same as those on which the lawyer advised or was involved in designing; and
- c. that the lawyer's advice was misused.

7. The information-gathering powers

- 1) The information-gathering powers given by paras.26-29 are too wide:
 - a. The powers under FA2008 Sch.36 are concerned with gathering information from taxpayers. For this purpose, the normal threshold is simply relevance to the matter being considered by HMRC. The tribunal treats this as a low threshold.
 - b. That is appropriate for checking tax liabilities, but it is inappropriate for investigations into whether particular persons have 'enabled abusive tax arrangements'. There are two points here:
 - i. The 'copying across' of these provisions is an inappropriate way of approaching this, given the different (and much wider) purpose of FA 2008 Sch.36. The provision excluding elements that cannot be relevant is not good enough.
 - ii. It would appear to allow HMRC to engage in speculative enquiries: for example, without having any firm basis for believing that a particular person was an 'enabler' of a particular arrangement (e.g. HMRC may have identified that a member of a particular set of chambers was involved in giving advice on an arrangement, but may not be sure who it was), or even without having any particular arrangement in mind.
- 2) In addition, the proposed manner of adoption of these powers does not restrict their use to obtain information from alleged 'enablers' in the course of an unresolved dispute between HMRC and a taxpayer. This goes too far. The powers in FA 2008 Sch.36 cannot be used in the course of an appeal involving the taxpayer. The draft provisions would appear to be subject to no such restriction, and could thus enable HMRC to side-step the current restriction on the use of FA 2008 Sch.36 against a taxpayer.
- 3) In addition, there should be no power to give an information notice to a tax adviser, or to enter the tax adviser's premises. This threatens the LPP and confidentiality of other clients. Alternatively, it needs at the very least to be possible to challenge this on its merits and to secure conditions and limitations: at the moment, challenge to

notices is limited, and there is no power to challenge entry/search (other than to refuse to allow it (relying on the lack of a penalty under para.39(1)(b), but only if the tribunal has not already approved it (*ex parte*)).

We question anyway, however, whether these powers could ever be exercisable in practice, even if LPP were waived, as a result of FA 2008 Sch.36 paras.10(3)(b), 23, and 25-28, but there should be no room for argument about this (e.g. in relation to a request for a lawyer's working papers relating to "*relevant communications*" within the meaning of para.25).

- 4) These issues should be addressed in the following way:
 - a. There should be a stipulation that there must be a reasonable basis for believing that the person against whom the powers are used is liable to a penalty: "*reason to suspect is or may be liable*" is just too low a test.
 - b. There should be a stipulation that the powers may not be used, and no information obtained under the powers may be used, in connection with any investigation or proceedings involving any relevant taxpayer.
 - c. The powers should not apply in relation to alleged 'enablers' who are lawyers; or there should at least be a power to challenge the use of those powers on the merits, and to secure conditions and limitations.
- 5) The relationship between the use of these powers (particularly in terms of timing) and the procedure for making a declaration needs to be clarified. They should in any event not be exercisable in respect of a lawyer after a lawyer has given a para.30 declaration.

8. Additional drafting points

- 1) The provisions do not mirror the GAAR provisions in full: e.g. as regards seeking an opinion from the GAAR Advisory Panel on the application of the GAAR test, and as regards the material which is admissible when applying the provisions in paras.2(3)-(6). The reason for this is not explained, and could lead either to unfairness and/or to inconsistency of approach and treatment. In this regard, para.64 of the draft Explanatory Memorandum may be misleading, at least as regards the provisions of the Finance Bill itself. The provisions should:
 - a. mirror the GAAR provisions from which they take their origin in all respects relating to the application of the test set out in para.2(2);
 - b. require a reference to the GAAR Advisory Panel before any penalty is levied, which would thus require this in those situations in which HMRC had not already referred an arrangement to the panel before resolving the tax position with the relevant taxpayer; and
 - c. allow for representations from any alleged 'enablers' in that process.

- 2) The words “reasonable to assume” in para.7(3)(b) are inappropriate. There should be no room for assumptions being made in deciding whether someone is subject to a penalty.

We suspect, however, that this may actually be directed more to the drawing of inferences, rather than the making of assumptions. If we are right about that, then we suggest that these words should be – and can safely be – omitted. Inferences are matters of evidence, and a tribunal and court will be entitled to draw appropriate inferences from the evidence in any event. All that the statute needs to identify is the question of fact which needs to be decided on the evidence, and that question is the purpose of the suggestion. We also suggest that the words “*might be expected to*” are partly otiose (given the words “*with a view*”, which mean essentially the same thing) and partly inappropriate. Our suggestion, therefore, is that para.7(3)(b) should be amended as follows:

“(b) ~~*it is reasonable to assume that*~~ the suggestion was made with a view to arrangements being designed in such a way ~~*as to secure that*~~ a tax advantage (or a greater tax advantage) ~~*might be expected to arise*~~ from them”

- 3) Para.13 is too wide, in two respects:
- a. It is difficult to see what other categories of person might be added; but in view of the seriousness of the proposed provisions, and the annual opportunity in a Finance Bill to amend them, this is unnecessary and inappropriate.
 - b. We see no justification for the ‘Henry VIII’ element in paras.13(3)(a) and (b), even less so in the case of para.13(3)(a) which does not even include the limiting words in para.13(3)(b). Both may be of less concern if para.13(1) were excised, but we do not see why the same limiting words should not be included in (a) as in (b) (in which case, the two could be merged together).
- 4) It is not clear what the words “*any proceedings for such a penalty*” in para.19(1) could refer to. The only proceedings for a penalty would seem to be an appeal under para.20, and it is difficult to see how it is right that HMRC could have a power to stay or compound appeal proceedings to which it was a respondent. This may be the result of including provisions taken from a different context.
- 5) It is not clear what “*after judgment*” refers to in para.19(2). Is it intended to refer to the position after a decision has been made at some point in appeal proceedings, or is it based simply on including provisions taken from a different context?
- 6) We question the meaning of, and justification for, the word “*flawed*” in para.22(3)(b). Our concerns including, but are not limited to, the following: (a) why the tribunal should not have the same discretion as HMRC; (b) what “*flawed*” means in the context of a discretion; and (c) what test and what standard are to be applied in deciding whether HMRC’s decision was “*flawed*” (e.g. a test of mere disagreement, a test of ‘error’ in some way (and, if so, in what respects a discretionary decision would be in

error), or a judicial review test, of mistake of law, irrationality, taking into account irrelevant circumstances or ignoring relevant circumstances). We suggest that para.22(3) should be redrafted so as simply to give the tribunal the same discretionary power as HMRC under para.19, which the tribunal may exercise for itself. There is no reason why the tribunal should not have the same discretion, after having considered all the circumstances (which may not be the same as those put before, or considered by, HMRC).

9. Separate concern regarding legal professional privilege under Schedule 21

Under Schedule 21, it is not completely clear (but ought to be) that para.35 does not authorise the voluntary disclosure of information or documents that are the subject of legal professional privilege.

A court ought to conclude that para.35 does not have this effect, applying ordinary principles, but there should be no room for any doubt or argument about this, particularly given that para.32 has been included with the intention of making the situation clear as regards LPP.

Para.32 does not resolve this issue because it simply states that nothing in the schedule requires any person to disclose privileged material: it ought also to be clear that nothing in the schedule makes permissible the disclosure of privileged material (i.e. that although para.35 overrides other restrictions on disclosure, it does not override LPP).

This could be achieved by simply adding the words "*or permits*" in para.32 after the word "requires" and/or by adding "*, other than legal professional privilege,*" in para.35 after "*(however imposed)*".

Bar Council
26.1.2017

APPENDIX

Rule of law issues

In the following sections we refer directly to the GAAR. We appreciate that the draft provisions are not directly concerned with the GAAR, but the test adopted in para.2(2) is the GAAR test. Accordingly, we have referred to the application of the GAAR for convenience.

Restriction on access to legal advice and assistance:

The draft provisions interfere with the right of citizens to seek advice on the enforceability and appropriateness of tax arrangements, including the application of the GAAR:

- 1) The provisions make it impossible to advise that particular arrangements do not fall foul of the GAAR if there is any element of suggestion in them, and make it risky to advise on the enforceability of other tax arrangements.
- 2) This is because the draft provisions assume incorrectly either:
 - a. That there is certainty as to the application of the GAAR in any particular situation, so that there can be no personal risk to a lawyer in advising that an arrangement is not within the GAAR, or in proceeding on the basis of the lawyer's view that the GAAR does not apply to it; and/or
 - b. That lawyers must err on the side of caution, and to such an extent that there could be no personal risk to themselves; and/or
 - c. That the only situations that may be caught by the draft provisions are tax arrangements which are not aimed at the circumstances of particular taxpayers but are rather intended for 'marketing' in some way; and/or
 - d. That lawyers giving 'second opinion' advice will at least be able to rely on para.7(3).
- 3) In fact, however (following the same numbering):
 - a. There is inevitable room for disagreement over the application of the GAAR, heightened by the fact that there are no existing decisions or even GAAR Advisory Panel opinions that might provide a guide to how the GAAR should be applied in particular situations.
 - b. Lawyers are professionally obliged to give their honest, independent professional opinion of the true position, including the correct dividing line between what does and what does not fall foul of the GAAR, and any available suggestions that might improve the prospects of an arrangement succeeding (even if the prospects remain debatable, and there is still a risk to a lesser or even a greater extent of the GAAR being infringed). Indeed, the rule of law demands that lawyers advise clients of such dividing lines in order that clients' rights are protected.

- c. The draft provisions will catch arrangements arising solely out of the circumstances of individual clients, and not in any way intended for any sort of ‘marketing’ or use by third parties.
 - d. Given the practicalities and lawyers’ duties to advise their clients honestly, independently, competently, on what the lawyer believes the law and its correct application to be, and to act in the best interests of clients, legal advice (including so-called ‘second opinion’ advice) is likely ordinarily to be “relevant advice”. In simple terms, it is difficult to see how a lawyer could avoid his/her advice being ‘relevant advice’ given the legal and professional duties on the lawyer to advise on what measures may be taken to ensure that an arrangement is effective, or as effective as possible (even if the lawyer’s advice is, still, that the arrangement will not achieve the hoped-for tax benefits); and if the lawyer is asked to give tax advice, then para.7(3)(b) is likely ordinarily to be satisfied (even if amended as we suggest). As a result, the inclusion of para.7(3) is not likely to help a lawyer in most cases, particularly expert tax lawyers (who are those best placed to advise clients about the GAAR).
- 4) As a result, for practical purposes, and particularly in any case involving potential doubt over the application of the GAAR (including so-called ‘second opinion’ cases), there will be a conflict between the client’s best interests and the lawyer’s personal interest, which will mean either that a lawyer will be obliged to refuse to accept the client’s instructions or, in the case of a barrister, to take a personal risk (as a result of the cab rank rule) whether the barristers wants to or not.

For the same reasons, the draft provisions interfere with the right of citizens to seek advice and assistance (including drafting of documents) in setting up bespoke arrangements that:

- 1) Their lawyer does not believe to be ‘abusive’; or
- 2) Are specifically intended and designed to enable them to remain on the right side of the GAAR, even though the client is prepared to take a risk that they prove to be ineffective (for reasons other than being ‘abusive’ in the GAAR sense); or
- 3) In circumstances of the type described in scenario 5.

Penalty for acting in a way that is honestly believed to be non-abusive

For the same reasons as lead to an infringement of the right to seek legal advice, the draft provisions would lead to lawyers being at risk of incurring a penalty for acting in a way that they honestly believe does not involve an abuse of the tax system.

Para.7(5) is not an answer to this because it only applies if the lawyer “*recommends against*” the arrangements. Leaving aside difficulties with the meaning of that phrase – see below – a lawyer cannot properly “*recommend against*” something that the lawyer believes would not fall foul of the GAAR. The lawyer must give his honest, independent, professional opinion as to both (1) whether an arrangement is effective or ineffective, including the prospects of both,

and (2) whether (where there is a possibility of this) the arrangement may fall foul of the GAAR, including the prospect of this happening.

At the moment, a lawyer might give his/her honest, independent, professional opinion that an arrangement had, say, a 50% prospect of success and a very low prospect of falling foul of the GARR. Under the draft provisions, the lawyer would be at risk of a penalty if HMRC or (if the lawyer were able in practice to appeal the matter to a court or tribunal – which would be at the lawyer's own cost) a court or tribunal were later to decide that it was ineffective and fell foul of the GAAR; i.e. simply as a result of a different view being taken by someone else, however reasonable and non-negligent the view of the lawyer may have been.

Under the cab rank rule, the lawyer cannot refuse to give that opinion at the moment. Under the draft provisions, a material risk of that result would require the lawyer to refuse to accept instructions. Even if the risk is minimal, the lawyer will have to decide whether to refuse the instructions or to accept then and accept that risk. Neither is right. Moreover, as a result, the greater the risk that the GAAR applies, the less likely clients will be to receive advice in the first place.

Penalty levied without the lawyer having a proper opportunity to challenge this

It may be inevitable that a regime along the lines proposed will lead to a multiplicity of proceedings, as proceedings against 'enablers' will be separate from proceedings against taxpayers. However, one consequence is that HMRC may take the view that an arrangement falls foul of the GAAR, or a court or tribunal may find that it does so, without alleged 'enablers' having had the opportunity to explain why they believe that it did not fall foul of the GAAR.

It appears at the moment that neither HMRC's view nor the decision of the court or tribunal (nor, indeed, any concession by a relevant taxpayer) would be binding on any alleged enablers. This must be right (and the draft provisions ought to make this clear), but it does mean that the issue will inevitably have to be resolved at least twice.

Even on the assumption that this is the case, however, alleged enablers are likely to be at a disadvantage, particularly where the issue has been resolved by a court or tribunal, because any court or tribunal dealing with an enabler's appeal is likely to be influenced by the earlier decision.

In effect, the regime is one of strict liability, in which the lawyer may have no or little say, as regards the application of the GAAR. There is an insufficient role for lawyer's own opinion on the matter, and the lawyer's justification for that opinion.

Restriction on client's choice of lawyers

The risk of a penalty for lawyers giving advice is likely to have the result that lawyers who advise taxpayers on arrangements at the outset will in many cases be unable to act for their taxpayer clients if and when those arrangements are challenged. This will be due to a potential conflict of interests between the client taxpayer and the lawyers. For example, it

might be in the taxpayer's interest to settle with HMRC, whereas it may be in the lawyers' personal interests to challenge HMRC.

As a result, clients will be deprived of their choice of lawyers (who may even be the best experts in the field), and will have to incur additional costs in instructing new lawyers, in circumstances where this would otherwise not be necessary.

Legal professional privilege will not be properly protected

For the reasons set out in the main body of this paper, legal professional privilege will not be protected properly by the provision as they stand.

Information-gathering powers

The application of these to lawyers raises questions over the proper protection of confidentiality and LPP in relation to other clients.

For further information please contact
Adrian Vincent, Head of Policy: Remuneration and Employed Bar
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 020 7611 1312 Email: avincent@barcouncil.org.uk