



Bar Council response to the HMRC “Strengthening Tax Avoidance Sanctions and Deterrents” consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the HMRC consultation paper entitled “Strengthening Tax Avoidance Sanctions and Deterrents: A discussion document.”¹ The Bar Council are grateful to HMRC for granting us a one week extension of time to submit our response.

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council does not propose to comment on the proposals in detail – others will have a greater degree of detailed knowledge and so be better placed to do that, and to answer the questions specifically – but the Bar Council has identified some very important issues of principle in relation to the proposals:

- 1) It would be wrong, and would undermine the rule of law, if the proposals were to interfere with the fundamental right to seek independence legal advice, and the right of lawyers to give such advice. We are very concerned that they will do so.

¹ HMRC, 2016, “Strengthening Tax Avoidance Sanctions and Deterrents: A discussion document” <https://www.gov.uk/government/consultations/strengthening-tax-avoidance-sanctions-and-deterrents-discussion-document>

- 2) It would be wrong for lawyers to be under threat of penalties being imposed by the state for giving lawful legal advice. This would be particularly oppressive, particularly in the case of a threat which depends on whether the lawyer reaches a particular opinion on the law or gives advice a particular way about the lawfulness of a set of circumstances. This, too, would undermine the rule of law. The proposals would appear to have this effect.
- 3) Such a situation would either be even more oppressive to barristers or would exacerbate the impact on the right to obtain lawful legal advice in the case of barristers. Barristers are unable to refuse to act on instructions which require them to act lawfully, by reason of the cab rank rule; but barristers are also unable to accept instructions giving rise to a conflict of interest between their own interests and those of their clients, or in relation to which they are unable to maintain their independence.
- 4) It would be wrong in principle for those who give honest, independent legal advice to be under a threat of civil penalties being imposed on them by reference to attitudes and decisions of their clients, the state (including HMRC) and/or the courts after the event. Again, this appears to be the effect of these proposals.
- 5) We note with approval that there appear to be no proposals to make inroads into legal professional privilege; but it must be recognised at the same time that legal professional privilege will present a significant barrier to professionals who might wish to defend themselves, as they will be unable to reveal any information given to them or advice given by them in confidence, without the consent of their clients.
- 6) The size of any potential penalty is wholly disproportionate in relation to any lawyers involved simply in giving independent legal advice or other legal services. Such lawyers will receive only their proper and reasonable fees for doing so, and will have no control over the manner in which, or the extent to which, their advice is relied upon. A civil penalty related to the amount of tax involved could be very many multiples of that, and would be wholly disproportionate, unjust and unjustified.

Development of the above points

5. We propose to expand on the first five of those issues below. The last needs no further elaboration.

6. If any proposals are to be pursued, then we urge HMRC to ensure that they avoid all of the problems we have identified. We suggest that any proposals should be more focussed, and be targeted only at those marketing, promulgating, or profiting by reference to the success of, ineffective tax avoidance arrangements, and not on those providing independent legal advice. We understand that the Revenue Bar Association, in particular,

have undertaken a detailed analysis of the proposals, and have made various suggestions as to how greater focus might be achieved. We would urge HMRC to give these serious consideration.

7. The effectiveness of any revised proposals would be reinforced (and the need for it reduced) if there were also a renewed focus on making the tax legislation clearer, more effective, and a lot less complicated. This would be expected to avoid, or much reduce, the scope for tax avoidance of 'abusive' types in the first place, as well as being beneficial to the United Kingdom and its citizens in many other ways.

1) Right to independent legal advice

8. The right to seek independent legal advice is a fundamental right. It is a right which underpins the rule of law. Legal rights cannot effectively be identified or asserted without access to legal advice.

9. In addition, what is required is access to legal advice which is independent of outside influences and interests.

10. The legal profession provides such advice. Barristers are professionally obliged to act and advise independently, in the best interests of clients, and they do so.

11. This is a right from which the Government and HMRC benefit. Indeed, HMRC benefits from being able to seek advice from members of the Bar who give independent advice on tax law and its application both to HMRC and to taxpayers, as those barristers can bring to bear a wider perspective and a wider range of experience.

12. The right to seek independent legal advice is a right on which the proposals themselves, and other existing measures taken by HMRC, rely. For example, the proposals in Part 3 of the consultation paper depend on taxpayers being able to take independent legal advice, in order to avoid being careless: see, in particular, paragraph 3.23. Similarly, existing materials published by HMRC (such as the leaflet, 'Tempted by Tax Avoidance') positively encourage taxpayers to seek independent legal advice – which could be by way of a second opinion – on any tax avoidance schemes which have been marketed to them. Indeed, in that leaflet, HMRC recommends taking advice from an independent, reputable tax adviser.

13. HMRC rightly envisages that disinterested advice from lawyers may have a significant role in deterring taxpayers who might otherwise be minded to enter into arrangements of the sort which HMRC seeks to discourage, and in ensuring compliance with taxpayers' disclosure obligations.

14. It is essential to what HMRC seeks to achieve by this, that the available advice both is and is seen to be independent, expert advice, uninfluenced by the personal interests of the lawyer giving it. To take measures which put this at risk would be self-defeating.

Why this concern arises

15. It is not clear to us that the proposals recognise the right to seek legal advice sufficiently, or that they appreciate the difficulties which they may present to the continued availability of access to independent legal advice. In particular, our impression of the proposals is that, as currently envisaged, they are likely to present very real difficulties for barristers and other lawyers in giving independent legal advice. We accept that this can only be an impression, as the proposals appear still to be at an early stage in terms of their formulation, but even the possibility of such impacts is a significant concern.

16. Our concern arises primarily because it is far from clear that barristers providing legal advice are excluded from the proposals: on the contrary, the QC in case Study 2.2 seems to have been included by HMRC in the description of a relevant “player” who is said to have ‘enabled’ the ‘scheme’ in that case study by giving legal advice, and as being one of the targets of the proposed penalty according. If this is what HMRC intends, then we take strong issue with that description. There is nothing to suggest that the QC has done anything more than to provide lawful, independent legal advice, and apart from earning a fee for his work (as any barrister would for giving advice), the QC has not profited from the marketing or implementation of the ‘scheme’. The reference in paragraph 2.12 of the consultation paper to planning and bespoke advice also seems likely to catch all forms of legal advice.

17. Indeed, the breadth of the proposals would appear to catch any member of the Bar (or other legal adviser) who gives advice in any situation in which the structure of an intended arrangement may have tax consequences. This could be relatively simple. The following are just some examples of what this might involve:

- 1) advising on the structure of a possible settlement of litigation or a dispute;
- 2) advising on the settlement of the financial aspects of a divorce;
- 3) advising on how best to use the proceeds of a substantial sum paid as compensation for serious personal injury or medical negligence;
- 4) advising company directors or shareholders about a transaction affecting the structure of a company, about the lawful use or distribution of profits, about the sale of the company or its business, or about a company’s business dealings with others;
- 5) advising an employer or employee on the settlement of an employment law claim;
- 6) advising a landowner on a land transaction who identifies a potential but apparently avoidable tax trap; or
- 7) advising trustees on their legal and equitable duties in relation to trust funds and the distribution of trust assets.

18. All of these are lawful and unexceptionable, and yet it is difficult to see how a barrister giving such advice could avoid being subject to a potential penalty if some aspect of that advice proved not to have a particular consequence from a tax perspective that the barrister envisaged.

19. The second and third bullet points in paragraph 2.29 of the proposals strike us as wholly inadequate to protect a barrister in these situations, as they are too narrow to provide any realistic protection. It is difficult to see how, in practice, a lawyer can advise a client simply on the wording of a piece of legislation without also advising on the application of that legislation to the particular factual situation in issue; and that lawyer would be at clear risk of failing in his duties to his client if he were to fail to advise his client on a lawful alternative approach which the client might take and which that lawyer has identified or of which he is aware. Moreover, it is far from clear to us how any legal advice which takes account of possible tax consequences (as it often must, in order to comply with the lawyer's duty to his client) could ever sensibly fall outside the description of "[contributing] to the tax ... advantage element of the arrangements". Whether or not the exceptions referred to in paragraph 2.29 might be sufficient in their current context – a matter on which we make no comment – they are not fit or sufficient for their proposed new purpose.

2) The threat of penalties

20. It would be wrong, and contrary to the rule of law, for the state to deter lawyers from giving lawful legal advice. This applies clearly to these proposals, under which lawyers would be under threat of penalties being imposed on them by the state for giving lawful legal advice.

21. Barristers would be in an even more difficult position than other lawyers in this regards, as they are unable to refuse to give such advice, by reason of the cab rank rule (as explained further below).

22. Despite those principles, if we have understood the proposals correctly, the giving of legal advice to clients will become perilous; and, in the case of barristers, practising at all will become perilous (as barristers will be unable to refuse any instructions which require them to act lawfully, despite the risk of a penalty).

23. This risk will put lawyers at odds personally with the best interests of their clients, most obviously in any situation in which the lawyer advises on the tax consequences of what the lawyer honestly considers to be a lawful arrangement, scheme, or set of circumstances. The only safe course for a lawyer where there is any possibility at all (however small) of a particular arrangement, scheme, or set of circumstances not achieving the full effect anticipated from a tax perspective would be to advise that it would not do so. In many cases, such advice would be incorrect in law, negligent, and quite contrary to the client's best interests. Moreover, no client could have faith in such advice, and would thus be disinclined to rely on it, even if they had been persuaded to seek that advice in the first place.

24. This would be quite wrong, and wholly inconsistent with the rule of law. It would put pressure on lawyers not to give their independent opinion, and would seem to lead even more fundamentally to lawyers being prevented from acting at all, due to the risk of conflict between the lawyer's personal interests and the client's interests.

25. There are also serious practical problems for lawyers arising from the proposals which would compound this:

- 1) A lawyer will be able to form a view about whether a particular arrangement, scheme, or set of circumstances would be a lawful and effective way of mitigating or avoiding incurring particular tax liabilities only once he has considered the arrangement, scheme or circumstances.
- 2) A lawyer thus needs to be able to accept instructions to do so, in order to be able to reach a conclusion about it. Having done so, the lawyer will have no choice but to give his opinion and advice, whether it is favourable or unfavourable.
- 3) If the lawyer takes an unfavourable view of the proposal, then he will advise accordingly. It appears that the lawyer might escape the risk of a penalty in this situation, but only if he does not go further and comment on any changes that might be made to make the proposal lawful. This is far from certain however, as it may be that even by giving unfavourable advice, the lawyer may unwittingly have contributed to the tax advantage element of a revised arrangement which is later implemented by the lawyer's client.
- 4) The lawyer may take an honest view, based on significant expertise in the subject, that the arrangement, scheme, or set of circumstances would be lawful and effective; or he may be professionally bound to advise that it would be lawful and effective if certain changes were made. If that is the lawyer's view, then he will be obliged to advise accordingly. In doing so, however, the lawyer will be taking the risk that he may at some later time become subject to a penalty. His view will very often be right, but correctness can never be guaranteed, some conclusions will be clearer or easier to reach than others, and the correctness of the advice may be affected by subsequent events (such as unanticipated decisions of the courts).
- 5) Either way, the lawyer will not know until after he has already become obliged to give advice whether or not he is taking the risk of becoming subject to a penalty. He will also not know whether this is the case until after he has done the work required, for which he can rightly expect to be paid. This will put the lawyer in an impossible position of being unable to know whether it would be 'proper' to accept instructions, without at least taking the risk of doing the work but then refusing to finish it and to go unpaid; the only alternative would be to refuse all such forms of work, at any level of risk, which would have the effects we outlined in relation to our first point. A barrister will not even have that choice to refuse the instructions, or to return

them after having done the work and to forego any fee for that work: the barrister will be obliged to accept the instructions and to do the work.

26. Those various additional concerns arising from the proposed penalty regime add very significant emphasis to our first concern about access to independent legal advice. Barristers (and other lawyers) are unable to act in a situation in which there is a conflict between their own interests and those of their intended clients. Barristers are also unable to accept any instructions if there is a real prospect that they are going to be unable to maintain their independence. The likely effect of the penalty regime is, thus, that lawyers will be unable to advise or assist clients in a wide range of situations, going far beyond the situations at which the proposals appear to have been intended to target.

3) The cab rank rule

27. As we believe HMRC are aware, Rule C29 in the Bar Code of Conduct requires a barrister to act on instructions from a professional client, and to do so irrespective of the nature of the case to which the instructions relate and any belief or opinion which the barrister may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.

28. This duty is for the benefit of all clients – including the Government and HMRC – and it is a duty which operates in the public interest by underpinning access to independent legal advice and representation. It applies as much to instructions to draft documents as it does to instructions to give legal advice. It also helps to preserve the important principle that lawyers are independent professions, and that they should not – and cannot properly, in a society governed by the rule of law – be identified with their clients or their clients' causes, whether those clients be taxpayers, the Government or HMRC.

29. Subject to what we say next, the cab rank rule would have the result that barristers would be put in an even more difficult position than other lawyers, if proposals are brought forward which extend to their professional activities.

30. There are, however, limited exceptions to the cab rank rule. It goes without saying that barristers are not required to act for a client in relation to the illegal evasion of tax – indeed, it would be impermissible for them to do so – but that is not what HMRC's proposals are concerned with. Of greater relevance are the overriding rules that barristers must not accept instructions giving rise to a conflict between their own interests and those of their clients, or if there is a real prospect that they are not going to be able to maintain their independence. For the reasons already explained in relation to the second issue, rather than the cab rank rule operating to protect taxpayers, these duties may well have the result that barristers are unable to accept instructions to provide legal advice or assistance in a wide range of situations in which such advice ought to be available. We would be surprised if this were HMRC's intention, but at the moment, this would appear to be the likely effect of the proposals.

4) Threat of penalties after the event

31. The proposals also have three further aspects which are unjust and unjustified, and risk causing substantial unfairness to lawyers, adding yet further to the risks to the availability of professional legal advice (and potential additional prejudice to barristers) which we have already described.

32. First, they would appear to involve a professional person giving legal advice or assistance to clients being made subject to a penalty for doing so without being able to know with confidence whether what he was doing was 'proper' or 'improper'. Such a professional might be made subject to a penalty even if he believed, entirely reasonably, that what he was doing was not in any way 'improper'. That cannot be right.

33. Second, a lawyer cannot fail to act on what that lawyer honestly considers the correct legal analysis to be, but by doing so that lawyer will be taking a risk that his advice will later be challenged by HMRC or decided by the courts to be wrong – even as a result of the actions of some entirely unconnected party in unrelated circumstances (such as through a court decision in legal proceedings involving someone other than the lawyer's client, even in a context other than tax). The lawyer may, thus, believe that his actions are subject only to a low risk, or even to no real risk at all, so that he is confident that he is in no way assisting in anything which might open himself up to criticism. The lawyer's view may be an entirely reasonable one. Nevertheless, he may still find himself subject to a penalty.

34. Third, under the proposals as we understand them, liability to a penalty will depend on the attitudes and decisions of a lawyer's clients, the state (including HMRC) and/or the courts after the event, perhaps very many years after the event and in very different circumstances. Those circumstances would even appear, potentially, to include later legislation, and would certainly include a decision by the taxpayer to accept HMRC's approach (whether right or not) or to accept a first instance tribunal or court decision (whether right or not). Those are attitudes and decisions:

- 1) over which the lawyer can have no control;
- 2) which the lawyer cannot predict; and which may, indeed, be entirely contrary to the lawyer's own honest, professional opinion;
- 3) which the lawyer is unable directly to challenge;
- 4) which the lawyer should not have to challenge, with all of the cost, worry and risk to professional reputation that this would entail;
- 5) which, given the legal professional privilege applicable to the lawyer's advice, the lawyer will be practically unable to challenge in any event; and
- 6) which could well give rise to a situation of conflict between the lawyer and his client, particularly where the client wishes to adopt a stance or to take a course of action which would be contrary to the interests of the lawyer. This is likely to lead to unavoidable and unjust prejudice to the lawyer.

35. These are risks against which we anticipate lawyers may well be unable to insure themselves, with the result that their own assets (and, thus, their families' financial position) will be put at risk, as well as their professional reputations.

5) Legal professional privilege

36. Legal professional privilege will apply to legal advice given by a lawyer, but not by others. This is a right of the client, not the lawyer, to withhold the instructions given to, and the legal advice given by, the client's lawyer. It may well not be in a client's interests to permit the lawyer to disclose or use privileged materials. Without the client's consent, the lawyer will not be permitted to disclose such materials. As a result, legal professional privilege may make it practically impossible for a lawyer to defend himself against the imposition of a penalty. The proposals take no account of this.

37. This is even more unfair to lawyers when compared with others involved, as those others will not be subject to any such difficulty.

Conclusion

38. For all of the reasons we have set out above, we would urge HMRC to reconsider the proposals, so as at least to ensure that lawyers who give lawful legal advice or provide lawful legal assistance are not subject to the proposed new regime. The current proposals are fundamentally flawed, if not wholly unworkable, as regards lawyers. They may even have the opposite effect to that intended, by removing or much reducing the scope for taxpayers to obtain independent, expert legal advice, which would work counter to HMRC's intended aims. More fundamentally still, it would undermine the rule of law: a principle which underpins our society and our prosperity, and for which the United Kingdom is internationally renowned and can rightly be proud.

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