

TLRC/ TAF1 12.7.2021

The tax administration framework: Supporting a 21st century tax system. Call for evidence. Tax Law Review Committee response.

Introduction and executive summary

1. This is a response by the Tax Law Review Committee (TLRC) to the call for evidence on the tax administration framework (TAF) published by HMRC on 23 March 2021.
2. The Institute of Fiscal Studies (IFS) created the TLRC to keep under review the state and operation of tax law in the UK. The TLRC asks in particular whether aspects of the tax system are working in a satisfactory and efficient manner and, if not, what might be done to improve matters. The TLRC does not routinely respond to consultative documents or new developments but chooses themes of importance for longer term reviews. However, this sometimes involves reacting to current consultations where this fits into its work programme.
3. The TLRC has taken a sustained interest in tax administration, HMRC powers and taxpayer safeguards, as evidenced by its previous publications, which may be found on the IFS website <https://ifs.org.uk/research/TLRC>
4. For this reason, the TLRC has concluded that it should respond to the call for evidence on the TAF, within the wider context of the Government's 10-year strategy to build a trusted, modern tax administration system, published in July 2020.
5. The TLRC notes that HMRC welcomes partial responses, focused on aspects of the framework that the respondents consider most important. Given its objectives, the nature of its expertise and its limited resources, the TLRC does not intend to respond to all the detailed questions in the call for evidence, but rather to make raise some broad strategic points.
6. A brief summary of the TLRC's headline points is as follows.
 - A. *Scope of the review and the relationship between administration and policy.***

A ten-year review requires strategic vision, given the changes likely over this period. The TLRC considers that administrative and technological innovations present opportunities for substantive law reform and this review should be holistic. This is especially so in the area of taxing work, which needs to be

improved as a matter of urgency.

B. Trust and the Taxpayer/HMRC relationship

In designing tax administration, HMRC is urged to consider the principles of responsive regulation: the importance of tailoring responses to the taxpayer to ensure it is proportionate and uses encouragement, information and education as well as penalties where appropriate. Although some interventions need to be resource intensive, all groups of taxpayers should be treated consistently and given appropriate accessibility to HMRC. Arrangements with each group of taxpayers should be transparent. This will support compliance.

C. Guidance

Urgent issues are arising around guidance, especially the reliability of guidance. Guidance is forming an increasing part of the tax system and is even referred to in legislation (eg the GAAR and the proposed legislation on notification of uncertain tax positions). Yet it can be hard to know if it is up to date, accurate and if it can be relied upon. As new forms of interaction with taxpayers are developed, automated and social media in particular, the issues are becoming even more pressing, and a separate review of this area is needed. The TLRC is also submitting a paper TLRC/TAF2, dealing with reliability in the context of guidance.

D. Digitalisation and digital exclusion

The TLRC urges HMRC to consider not only those who would be formally described as digitally excluded, but the far larger group of taxpayers who will experience difficulty using digital systems. It cannot be assumed that because people have smart phones they can manage this and it needs to be remembered that people find tax affairs difficult and off-putting, so support for compliance needs to be available. The issues of where responsibility for errors and faults lie is a matter of particular concern.

E. Automated decision making

Automated decision making is becoming more prevalent and may free up resources for more important work but the TLRC endorses the Government's own caution that algorithms are not the solution to every problem in view of the high risk associated with them.

7. The TLRC may respond on further issues raised in this call for evidence as and when more specific consultation papers are published or as the review proceeds.

A. Scope of review: administration and policy

8. The scope of the review is stated to be broad, and the objectives in box 2.2 are relatively wide, but the TLRC is disappointed by the lack of strategic vision in what is intended to

be a long term and long-lasting review.

9. It is stated that the review will look at the legislation, processes and guidance that underpin the administration of taxes and it is suggested that it will not consider policy decisions specific to individual taxes.
10. The TLRC considers this to be a false dichotomy. The opportunities offered by digitalisation and other technological advances should be seen as offering possibilities for reforming the structure of taxes. Rather than trying to fit modern technologies around existing forms of taxation, these technologies offer options for desirable changes to substantive taxation that were not feasible previously.
11. The call for evidence recognises (p9), that any reform considers not just the challenges of today but how to future –proof tax administration. It states, for example, that ‘Tax administration should be responsive to evolving ways of working and changes in how people wish to interact with the tax system, whether they are employed or self-employed’. The TLRC considers that tax administration should not only be responsive but could also be fundamental to the making of necessary changes. The digitalisation of taxation offers the opportunity for modifications to the underlying law in some areas.
12. In this way, taking this example from the call for evidence, the TLRC suggests that the existing system for taxing work needs to change substantially over the next ten years. There is considerable strain on the existing system and many calls for reform. Innovative approaches are now possible, and the way we tax labour should not be mired in nineteenth century inspired classification and case law. Deduction at source could encompass a wider range of workers than those classified as employees in the case law.
13. Therefore, instead of considering how tax administration can respond to the existing flawed legal structure, we need to consider the ways in which the taxation of work could be remodelled. Now that it is easier to collect information digitally, on a real time basis, and from third parties such as platforms, moving to this type of approach needs to form part of this review and opens opportunities for substantive changes.¹
14. Similarly, while we understand that the review cannot encompass the entire benefits system (p13), we do consider that it should extend to National Insurance Contributions (NICs) and consider whether improved administration and information gathering techniques could assist in merging the tax and NICs systems, given the cumbersome nature of running two income tax systems in parallel. The review should study whether

¹ J. Freedman *Tax administration shaping tax reform: does employment status matter for tax?* 18 Feb. 2021; available at <https://www.taxjournal.com/articles/-tax-administration-shaping-tax-reform-does-employment-status-matter-for-tax->; Office of Tax Simplification, *Platforms, the Platform economy and Tax Simplification* (2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/729322/OTS_platform_paper.pdf

any role that policy makers consider NICs should play separate from the role of income tax could be covered by one data collection and tax gathering mechanism. If this can be done the review needs to consider what purpose is served by separating the payments.

15. The call for evidence makes the point, at p10, that the current tax administration legislation is old and fragmented. Nevertheless, it does not expressly undertake to replace the Taxes Management Act. Even though this may be implicit in the discussion of the provision of a new framework. The TLRC considers that one essential outcome of the work for this review should be the creation of a modern Taxes Management Act, consolidating all management and administration provisions, including those around digitalisation. These provisions are currently found in many statutes and need to be brought together and, in some cases, rewritten.² The Taxes Management Act was due to be written and consolidated many years ago, but it was decided to defer the project. The development of a new framework as contemplated by this review requires a clear legislative structure (that can be built upon if necessary). The TLRC would like to see a commitment to that, and to the provision of resources for this exercise, even if the project will take some time.

B. Trust and the taxpayer/HMRC relationship.

Responsive regulation

16. The call for evidence places emphasis on trust. The TLRC agrees that a high level of voluntary compliance will be achieved only where there is trust in the government and revenue authority. Voluntary compliance is essential for viable management of any tax system.
17. Trust needs to be mutual. Taxpayers must have reason to trust the tax authorities. In addition, the TLRC suggests that tax authorities should start from a position of trusting the majority of taxpayers. Most taxpayers at every level wish to be compliant but the complexity of the law and the burdensome nature of tax administration can make this difficult.
18. In designing tax administration, it is important to encourage compliance by the majority through making it as easy and simple as possible, as suggested by the call for evidence. But it is also important to recognise that innocent errors may be made even by those who wish to be compliant. They may also be misled by incorrect, negligent and even unscrupulous advice.
19. HMRC is taking steps to strengthen its powers against promoters. However, this does not always protect taxpayers who have inadvertently become caught up in tax arrangements

² The TLRC supports the proposals of ICAS in their paper, *The Future of Taxation* (2020) on this point https://www.icas.com/_data/assets/pdf_file/0008/542393/The_Future_of_Taxation_May_2020.pdf

that ultimately will not work. The TLRC considers that part of HMRC's responsibility is to educate and publicise aspects of the tax system and traps for the unwary. This goes further than providing clarity and guidance on its website, for some taxpayers will not think to look at the website.

20. The onus should not be on taxpayers to understand complexity, seek expensive advice or check websites regularly. Easy compliance needs to be a seamless part of everyday systems. In some instances, achieving this outcome may require reform of the substantive law as well as of administration, as discussed with the taxation of work above.
21. Simpler, better tax design should be an objective but improved administration could assist by creating more pro-active systems. There needs to be more exploration of whether HMRC might provide alerts and protections, rather than relying purely on the publication of information on the HMRC website, which unsuspecting taxpayers may not think of checking. To illustrate this point we refer to the High-Income Child Benefit Tax Charge. As illustrated by the reaction to the recent case of *HMRC v Wilkes* ([2021] UKUT 0150 (TCC)), a system which causes many otherwise compliant taxpayers to become liable for taxation without being aware of this, and which relies on them having seen a press release many years previously, is not one that will inspire trust.
22. The TLRC notes the importance of ensuring that regulation of compliance is fully responsive and proportionate. For those who are generally compliant, automatic reminders and flagging through digital systems should precede penalties. Where errors are innocent the possibilities for opportunities to amend and rectify without a penalty should be explored. Although the imposition of automatic penalties may have a place in an automated system, exceptions and human intervention in appropriate cases should be built in to ensure responses are proportionate and fair. Escalation of enforcement to penalties should be reserved for cases of genuine non-compliance in order to prevent regulation from becoming more burdensome for the compliant than for the non-compliant. Of course, when necessary, HMRC should use a full range of civil and, where necessary, criminal penalties.³
23. Achieving the optimum balance between the carrot and the stick (trust and power) is essential for good tax administration.⁴ The TLRC is concerned that in some areas where co-operative compliance with taxpayers was once the objective, there has been a move away from collaborative working towards a greater and quicker use of mandatory disclosure, penalties and enforcement. Although the penalties may be aimed primarily at the non-compliant minority, the danger is that the burdens imposed on the compliant

³ V. Braithwaite, 'A New Approach to Tax Compliance' in *Taxing Democracy* (2016) http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-05/BraithwaiteV_TaxDem-Ch1_0.pdf

⁴ E. Kirchler, E. Hoelzl and I. Wahl 'Enforced versus voluntary tax compliance: The "slippery slope" framework' *Journal of Economic Psychology* 29 (2008) 210–225.

majority by the new requirements are so great that the benefits of trust and co-operation are lost.

24. An example of this is the proposal to require notification of uncertain tax treatment by large businesses. The TLRC has explained its view further in its responses to the consultations on that topic.

Large business administration review

25. The TLRC recommends that the balance between trust and power should be reconsidered in this and other contexts as part of the review of large businesses' experiences of UK tax administration, announced in Budget 2021, as well as more generally.
26. The TLRC would like to see an open consultation on large business tax administration. Transparency about differential provision for different parts of the taxpaying community is essential to ensure that taxpayers are treated equally, within their own context, and perceive that to be the case. While there may be good reasons to focus resource on large and complex organizations, all taxpayers need to feel they have access to HMRC officers when it is needed.
27. This is an example of the issues raised in question 28 of the call for evidence. Maintaining consistency and fairness between different groups of taxpayers while enabling HMRC to take account of different circumstances is challenging and requires transparency and discussion by all parties and not just one conversation with one group of taxpayers.

The 'right' amount of tax and the problem of uncertainty: dispute settlement

28. The TLRC has concerns about the frequent references in the call to evidence to HMRC ensuring that everyone pays the 'correct' or 'right amount of' tax. If the 'correct' tax is the amount due under the law as it stands, then this should be expressed in that way.
29. These references do not reflect the genuine uncertainty that exists in a complex tax system. There may be cases where there are reasonable differing views about what is 'correct'. Ideally the law will be amended to clarify the position.
30. However in some cases any change of law will come too late for the taxpayer concerned. In such cases the administrative system needs to provide taxpayers with a path towards clarification as discussed in the section on guidance below. Beyond that, the administrative framework needs to facilitate speedy dispute settlement and litigation where this is necessary.

31. The TLRC agrees with the call for evidence (p28) that there is room to improve the process for resolving tax disputes and, where necessary, for bringing matters to the tax tribunal more quickly than at present. Delay in resolving issues is costly for all concerned and does not foster trust or good relationships with taxpayers. Therefore the TLRC agrees that dispute settlement in the widest sense should form part of the TAF review.

Trust and power- finding the balance

32. In summary, our response to question 27 on what principles should govern HMRC powers, sanctions and safeguards to build trust in the tax system is that the objective should be to create responsive regulation according to the Braithwaite regulatory pyramid.⁵ This requires proportionate and responsive approaches according to taxpayer type and behaviour in order to achieve the optimum balance between trust and power.⁶

C. Guidance

33. The call for evidence makes several references to guidance but does not ask any specific questions in relation to this. The TLRC considers that a review of all aspects of guidance is needed as a stand-alone consultation, and that this should take place during the first cycle of the TAF review, since issues are arising currently.
34. There is an increased use of HMRC guidance (in a broad sense) of all types and it is now referred to expressly in legislation (for example in relation to the GAAR in Finance Act 2013 and, it is proposed, in legislation of notification of uncertain tax treatment by large business).
35. Guidance is of vital importance within a modern tax administration framework, given the complexity of tax law. It assists taxpayers with both rights and responsibilities, supports the rule of law by providing certainty to taxpayers in respect of their legal liabilities and is conducive to increasing trust. It also supports the commitment in HMRC's charter to work with taxpayers to 'get tax right'.⁷
36. Guidance is important for all taxpayers. At one end of the spectrum, unrepresented and low-income taxpayers are particularly reliant on HMRC communications. At the other end of the spectrum, taxpayers involved in the most complex transactions where the law is unclear also require considerable guidance in order to be able to manage their affairs, as HMRC makes clear in the paper on notifying uncertain tax positions.

⁵ See Braithwaite n 3 above. The pyramid is illustrated at p3 of that article.

⁶ See Braithwaite n3 above; Kirchner n4 above.

⁷ HMRC, *The HMRC Charter* (5 November 2020), available at: <https://www.gov.uk/government/publications/hmrc-charter/the-hmrc-charter>

37. We suggest that five benchmarks could be utilised to judge guidance.⁸
- i. *Correctness*: guidance should illuminate the correct legal outcome. Misleading or incorrect guidance is to be avoided.
 - ii. *Clarity*: guidance must be clear, though some tolerance must be accepted in terms of ambiguity. Guidance which uses specialist terminology inconsistently falls short of this benchmark.
 - iii. *Accessibility* to all who are affected by the guidance – in terms of it being physically available to persons concerned and it being clear how it applies at any given time.
 - iv. *Scrutiny*. This is important as it ensures that the guidance is correct, clear and accessible, thereby enhancing these qualities.
 - v. *Reliability*. To the greatest extent possible, people ought to be entitled to rely upon HMRC guidance which affects them.
38. Currently some aspects of HMRC guidance fall short of these benchmarks.
39. The TLRC is particularly concerned about ‘reliability’. There needs to be clarification of the extent to which HMRC statements can be relied upon. We understand that this question will be considered as part of the TAF and urge that this is seen as a matter of urgency. We have prepared a separate paper on the narrow issue of what updates could be made to HMRC’s ‘reliance statement’ without any changes to the law. This is being submitted to HMRC alongside this paper.
40. As more forums for communicating with taxpayers open up online, clarifying the extent to which taxpayers can rely upon HMRC communications becomes even more important. Though it might be tempting to limit the circumstances in which HMRC would be held to guidance that it issues, that would be to undermine the utility of it in the first instance. Focus instead should be placed on ensuring that the guidance is correct, clear, and accessible. If it is not intended that information given on social media and elsewhere can be relied upon, that needs to be made very clear. If general responses are subject to a caveat that more information is needed from the taxpayer to be sure the information given is accurate, that must also be made apparent to users.
41. In many countries, binding rulings are given by tax authorities. The fact that binding statutory rulings are available only in very limited circumstances in the UK adds to the uncertainty around guidance and its reliability and the decision of the tax administration framework should include a consideration of whether the rulings system should be extended.
42. Other issues relating to guidance include the way in which it is updated and the extent to which it can, and should, be automated. We know these issues are being considered by

⁸ Stephen Daly, “The Rule of (Soft) Law” (2021) 32(1) King’s Law Journal 3, p. 10, available at: <https://www.tandfonline.com/doi/full/10.1080/09615768.2021.1885326>

the Guidance Forum but urge that the discussion should be published and consulted on widely as part of the TAF.

43. We note that considerable analytical work is being undertaken in the USA on the issues around automated guidance for tax purposes. In addition a great deal of wider work is being done on automated decision making and suggest that HMRC should watch these developments and those in other jurisdictions.⁹

D. Digitalisation and digital exclusion

44. Much of the call for evidence is taken up with discussion of digitalisation and data collection. The TLRC supports the collection of data from third parties and pre-population of returns subject to appropriate safeguards. The TLRC also supports the use of a single digital portal or personal tax account for all individuals and entities, again subject to proper safeguards.
45. In particular, the TLRC considers that it must at all times be clear who is liable for the accuracy of data provided and used. If taxpayers are ultimately liable for errors, this must be made clear, and opportunities and reminders be given for checking and challenging incorrect data. Liability must also be imposed on third parties providing data for inaccuracies due to their negligence or fault.
46. The TLRC agrees strongly that the concerns that need to be addressed include digital exclusion. There is some (though not enough) assistance and recognition of the expressly digitally challenged. However, the problem goes beyond those who qualify for exemptions and assistance. Although this difficulty may decline to some extent as more of the population becomes familiar with online working, many people who do engage digitally do so only in fairly simple activities online, through their telephones, rather than via complex programmes and forms on laptops and PCs. The new personal tax accounts and requirements need to be designed with this in mind, recognising that even those with smartphones may not be able to undertake complex transactions using these devices. Therefore systems need to be trialled with different types of taxpayer and consulted upon with tax charities serving low income taxpayers and the elderly. Assistance and training needs to be provided to ensure that systems set up are widely accessible and comprehensible and that support is available for those who are experiencing difficulties.
47. Currently many have great difficulties in securing access to their accounts due to complex identification requirements. The need for security and reassurance of validity must be balanced with ease of access for those validly using their accounts. Multi-factor

⁹ See the work of Blank and Ofskofsky <https://law.unc.edu/news/2021/06/osofsky-administrative-conference-united-states/>

authentication for all communications from HMRC should be explored, since emails from HMRC may too easily be assumed to be scams, and scams are far too common.

48. There is an assumption that third party software providers may be relied upon to support the new systems to be introduced. The TLRC considers that HMRC should provide software free of charge, at the very least for those on low incomes. This software needs to recognise that those on low incomes might have complex tax issues and might include some small businesses. The extent to which third party software providers should become an essential part of the tax system needs very careful consideration as part of this review. More sophisticated taxpayers may wish to use third party designed software, and third-party software designers can contribute much to development and integration with other business software, that HMRC cannot be expected to provide, but care needs to be taken over where duties and responsibilities lie if there are errors resulting from software errors and faults and provision needs to be made for these eventualities.

E. Automated decision making

49. The TLRC has previously expressed concerns over automated decision making in a paper submitted to the House of Commons Finance Bill Committee in June 2020, on what was then clause 100 of the Finance Bill (now section 103 Finance Act 2021).¹⁰ During the debate on the Bill, the Financial Secretary to the Treasury recognised the need to consider safeguards around the use of automation for the taking of discretionary decisions. There is also a need to consider whether automated decision making might be delegated to third parties.
50. The TLRC notes the publication in May 2021 by the Government of *Guidance on the Ethics, Transparency and Accountability Framework for Automated Decision Making*.¹¹ We welcome the recognition of risks and limits on the use of algorithms in that paper, which states that

Scrutiny should be applied to all automated and algorithmic decision-making. They should not be the go-to solution to resolve the most complex and difficult issues because of the high-risk associated with them.

¹⁰ Appendix I to this paper.

¹¹ <https://www.gov.uk/government/publications/ethics-transparency-and-accountability-framework-for-automated-decision-making/ethics-transparency-and-accountability-framework-for-automated-decision-making>

51. There are recent examples of automated decision making causing serious harm and difficulty.¹² Although we recognise the value of automation in improving efficiency and freeing up staff for higher level activities, it is vital that human intervention should be possible and indeed essential at various stages.
52. Therefore, the TLRC considers that these issues should form part of the TAF review and every decision to apply automated decision making by HMRC should be subjected to scrutiny in accordance with the Government's own guidance.

F. Conclusion

53. The TLRC welcomes the decision to undertake a long-term review of the framework underpinning tax administration. This short response outlines some of the key issues that we consider should be examined and which should govern this review.
54. These can be summarised as the need to look at substantive law and administration holistically in order to ascertain opportunities for system modernisation; the principles on which trust can be built; the use of guidance; digitalisation and automation, looking at the advantages but also the problems with removing human intervention, and the importance of accessibility and support for taxpayers of all kinds in order to encourage and sustain compliance.
55. The TLRC hopes that in addition to the detailed consultations that will arise from this review there will be a continuing debate about the high-level principles and vision needed to create a 21st century tax system supported by a modern tax administration. The TLRC looks forward to contributing to this debate at each level.

Tax Law Review Committee

13/7/2021

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¹² See, for example, Global Government Forum, 'Automated welfare fraud detection system contravenes international law, Dutch court rules' 9/2/2020 <https://www.globalgovernmentforum.com/automated-welfare-fraud-detection-system-contravenes-international-law-dutch-court-rules/>