

# The implications of recent additions to HMRC powers and the shifting balance in the relationship with taxpayers



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Tracey Bowler  
**Tax Law Review  
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# **The Implications of Recent Additions to HMRC Powers and the Shifting Balance in the Relationship with Taxpayers**

**Tracey Bowler**

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This discussion paper was written for the Tax Law Review Committee by Tracey Bowler. The views expressed do not necessarily represent the views of the Committee. The Committee has authorised its publication to promote debate on tax policymaking in the UK and to elicit comments for its ongoing work in this area. Comments should be sent to the Research Director, Tracey Bowler, at the Institute for Fiscal Studies or the Chairman, Malcolm Gammie, at [mgammie@oeclaw.co.uk](mailto:mgammie@oeclaw.co.uk).

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# 1. Introduction

Over the last three years, Her Majesty's Revenue & Customs (HMRC) has been given additional powers which have generated significant comment and debate. Those powers have enabled HMRC to seek payment of tax that is disputed by taxpayers prior to its resolution ('Advance Payment Notices' or 'APNs'); to require taxpayers to follow judicial decisions or risk significant penalties if they continue to dispute the amount of tax due ('Follower Notices' or 'FNs'); and to extract money from taxpayers' bank accounts to pay outstanding amounts of tax.

Much of the comment regarding those powers has concerned the effectiveness of safeguards for taxpayers. Further measures to extend HMRC's powers were contained in the Finance Act 2016, raising similar concerns regarding the availability of safeguards for taxpayers. Yet further measures were proposed for the Finance Act 2017 and are now included in the 'catch-up' second Finance Bill of 2017.<sup>1</sup> This paper considers what safeguards are available and the extent to which the safeguards are adequate given the increased powers parliament is giving to HMRC. It also considers the implications of these measures for the relationship between HMRC and taxpayers.

Although the paper sets the recent additions to HMRC's powers in the context of the development of HMRC's powers over the past 10 years, it does not address HMRC's powers as a whole. It focuses on the powers to issue APNs and FNs and to impose General Anti-Abuse Rule (GAAR) penalties. It also considers the Finance Act 2016 provisions introduced to deal with 'serial avoiders' and 'unco-operative' large corporate taxpayers and powers to seek direct recovery of debts from taxpayers' bank accounts. Taken together, these powers are referred to as the 'New Powers' in this paper. The paper focuses on the powers affecting taxpayers, not their advisers.

The paper does not address the question of whether the New Powers are necessary. That is a policy matter for government and parliament. Given the policy decision to provide HMRC with powers of this nature, however, the Tax Law Review Committee considers whether there are sufficient safeguards for taxpayers and whether this part of the tax system is working in a satisfactory and efficient manner and, if not, what might be done about it.

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<sup>1</sup> A shortened Finance Act 2017 was enacted before the general election and draft provisions held over are contained in the second Finance Bill.

## 2. Executive Summary

### Key findings

**The New Powers have a role to play in removing the economic incentive for taxpayers to litigate tax disputes but are insufficiently focused and have inadequate safeguards.**

The New Powers are the product of increasing efforts to tackle tax avoidance and to reduce the time and cost to HMRC in dealing with unresolved avoidance cases. This paper recognises that, historically, some taxpayers may have felt that they had little to lose in engaging in tax avoidance and in prolonging disputes and litigation. The taxpayer's only financial exposure was to the costs of litigation itself. The amount of tax at dispute was not finally payable until negotiations with HMRC were concluded or even until HMRC's eventual success in court. HMRC found that it was incurring significant costs in pursuing cases where at times it appeared that the taxpayer was simply playing the system and delaying payment of the disputed tax. The introduction of APNs significantly changed the economics of tax disputes and litigation, and the underlying aim to tackle those seen to play the system is not challenged in this paper. However, there is concern that many of the New Powers (including APNs) are insufficiently focused (and therefore are capable of extending beyond their original target) and in any event include inadequate safeguards for taxpayers. At the same time, some of the powers (the FN penalty and GAAR penalty powers) carry the very real risk of effectively denying access to justice for taxpayers.

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**There is a risk of denying some taxpayers access to justice.**

HMRC does not make tax law. Parliament does. Nevertheless, HMRC necessarily forms its own view of what the law means and how it applies in practice and frequently makes that known through published material. It administers the law according to its view and, in doing so, it exercises a broad managerial discretion, given that the law as written by parliament can never be completely certain in its application in all cases. HMRC has argued for the New Powers, including their limited safeguards, from a perspective of seeking to change the behaviour of some taxpayers – 'the recalcitrant few'. In addition, it is argued that if the courts agree with HMRC in 80 per cent of cases, HMRC is well placed to identify what transactions will be

successfully countered. However, the powers are written in wide terms which go beyond the target of 'the recalcitrant few' and which may easily sweep up the 20 per cent who would otherwise be successful in defeating HMRC in litigation.

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**The lack of focus of the New Powers means that their scope depends substantially on benign operation by HMRC.**

Traditionally, the main independent safeguard to control the power of an administrative body such as HMRC has been the granting of appeal rights to the tribunals and courts. The New Powers have avoided that approach. Although the taxpayer retains the right to appeal the underlying tax assessment, there is no appeal right in relation to the use of the New Powers. While HMRC considers that appeal rights would simply delay the process again, the lack of those rights means that the effectiveness of other independent safeguards to supervise and control the exercise by HMRC of its New Powers has become a matter of some importance.

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**The lack of appeal rights makes other safeguards more important.**

As a general principle, it is unsatisfactory if powers are granted in an unfocused manner on the basis that a broad power conferred by legislation will be tempered by the way in which it is administered. For example, HMRC may be clear about the ways in which it will decide whether a court decision is sufficiently relevant to a taxpayer's situation to justify the issue of an FN and may currently plan to issue FNs only where there are almost identical situations. However, the lack of focus of the power means that there is little control to ensure that such a narrow application will continue.<sup>2</sup> Independent judicial scrutiny of particular measures may be of little value if the powers that the measures confer are so broadly cast as to put the matter beyond effective judicial scrutiny and make it solely a matter of administrative discretion as to their application in particular cases.

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<sup>2</sup> In particular, in the case of FNs, there was a failure by government to implement properly in legislation certain assurances that had been offered in the consultation process; see the Tax Professionals Forum correspondence at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/418639/Correspondence\\_on\\_Follower\\_Notices.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418639/Correspondence_on_Follower_Notices.pdf).

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**In the example of APNs, some safeguards have been added and their impact is generally less than in the case of some of the other New Powers, but problems have still arisen highlighting the lack of appeal rights.**

In the case of the APNs, the position is ameliorated by the fact that the taxpayer can recover all the money paid (plus interest) if successful in appealing the substantive tax issue. Although no safeguards were introduced in the APN legislation to limit the application of the powers where bankruptcy of the taxpayer would result, the courts have imposed such a restriction. With this restriction in place, the APNs generally lead to a process and cash-flow change so that taxpayers must expect to pay disputed tax at an early stage of a tax dispute, rather than after the matter has been litigated, but the APNs do not by themselves deter taxpayers from disputing HMRC's assessment of a tax liability. If the taxpayer served with an APN is successful in disputing the underlying tax, they get the tax paid back with interest. However, taxpayers can be, and indeed have been, served with APNs where HMRC has incorrectly applied the APN rules. The taxpayer must then seek to persuade HMRC that an error has occurred or incur the cost and procedural demands of seeking judicial review because there is no right of appeal to the tribunal against HMRC's procedural error.

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**FN penalty and GAAR penalty powers potentially give HMRC quasi-judicial powers and could prevent taxpayers accessing justice.**

A potentially more serious problem arises with the FN penalty and GAAR penalty provisions (the 'Penalty Powers'). They make the financial risks of appeal so great that even taxpayers with strong cases may not be prepared to risk going to court. Those powers, which have been introduced expressly to encourage taxpayers to settle disputes with HMRC on the meaning and application of tax law – in other words, to deter taxpayers from seeking an independent review by the tribunals and courts as to the meaning and application of tax law – have significantly increased the financial risks to taxpayers of continuing to dispute with HMRC the tax due in their cases. The taxpayer does not just pay over the disputed tax but faces the imposition of a 50 per cent or 60 per cent penalty if they continue to dispute the matter and lose in the courts. Concern has been expressed by others, and is shared by this paper, that the Penalty Powers have effectively given HMRC quasi-judicial powers to determine what tax law means and how it applies in particular cases. The financial risks to taxpayers



of seeking independent adjudication of their cases through the tribunals and courts are so high when some of the Penalty Powers are exercised that few taxpayers will wish to dispute the tax claimed by HMRC, even when they have a strong case deserving judicial consideration. In that situation, taxpayers are effectively denied access to justice.

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**The Penalty Powers could act as a brake on improvements to the underlying tax rules.**

The Penalty Powers may increase the potential for HMRC's view of the law to prevail irrespective of views to the contrary – in effect using those powers to enforce compliance with HMRC's view of the law – and for HMRC's view to be used to deal with defects in tax legislation instead of correcting the legislation.

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**The New Powers' use of inappropriate triggers contributes to the lack of focus on the intended taxpayers.**

The lack of focus of the New Powers has derived in part from using other powers – in particular, Disclosure of Tax Avoidance Schemes rules (DOTAS) – as triggers. In using DOTAS in ways for which it was not originally designed, the New Powers at times apply to taxpayers who are not within the stated target group and at other times fail to apply to taxpayers who are within the stated target group.

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**Reliance on HMRC's interpretation of the New Powers means that their application can change over time.**

The broad terms of the legislation granting the New Powers leave the scope of their application to be provided by HMRC guidance and/or benign operation under which HMRC deliberately refrains from exercising its powers to the extent actually permitted. This raises issues concerning the consistency of administration over time and the potential for the administrative policy to change over time so that the provisions are extended to situations that it was not originally envisaged would be covered when the power was first conferred.<sup>3</sup> If the focus of the power is not provided by legislation, it should be provided by clear statements from government against which the application and exercise of the measure can be

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<sup>3</sup> The use of DOTAS as a trigger for particular measures and the introduction of GAAR penalties are illustrations of how the policy accompanying the introduction of DOTAS and the GAAR has changed over time so that they are put to uses that were not envisaged by the original policy.

subject to independent ongoing scrutiny and evaluation.

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**The impact on the relationship between HMRC and taxpayers generally depends upon the New Powers being confined to the 'recalcitrant few'.**

Assurances have been given that the New Powers are designed to deal with the 'recalcitrant few'. If that proves to be the case, the impact upon the wider taxpaying community is limited and potentially positive. Who comprises the 'recalcitrant few' and how they are identified, however, are not matters of unchanging administrative view. Anyone who fails to act as the administrator believes he should is potentially 'capable of being viewed as "recalcitrant"'. If the New Powers come to be used more widely, generally accepted models of behavioural response to regulatory control suggest that a sense of unfairness could develop if it is felt that disproportionate burdens are placed on ordinarily compliant taxpayers who become a target of the New Powers merely because they disagree with HMRC on some aspect of their tax affairs. If that leads to greater disaffection with HMRC by taxpayers, it may in turn increase the risk of greater regulation and more HMRC resources to ensure compliance by those who would, in different circumstances, be expected to comply voluntarily.

There is therefore a careful balance to be struck between the need to assure the vast majority of compliant taxpayers that HMRC has sufficient powers to counter the activities of the minority who seek to evade their tax liabilities altogether or who endeavour to exploit the system by aggressive avoidance or by 'playing the system', and the need to ensure that those powers are not improperly used or deployed against ordinarily compliant taxpayers who are then left aggrieved by HMRC's handling of their tax affairs.

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**The other safeguards in the tax system take on greater importance but are inadequate.**

The lack of focus of the New Powers, coupled with the absence of ordinary appeal rights, means that taxpayers must rely upon such other independent safeguards as the system offers. These are currently judicial review, the Adjudicator, the Parliamentary Ombudsman and the Tax Assurance Commissioner. None of these is a satisfactory response to the New Powers; each has its inadequacies. Cumulatively,

they do not provide a coherent answer to the exercise of the New Powers beyond the 'recalcitrant few'.

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**Clear governmental guidance on the scope of the New Powers, a review of HMRC's powers generally, and consideration of a new independent safeguard are proposed for discussion.**

Given the significant concerns that have been raised about the New Powers, this paper proposes the following steps:

- A report by HMRC setting out the circumstances in which all of the New Powers have been used and the extent to which taxpayers have challenged their use.
- A wide-ranging review of HMRC's powers, deterrents and safeguards in line with the recommendation in 2015 of the Treasury Select Committee. Such review should address the extent to which the safeguards are sufficient and accessible and whether modernisation is needed.
- As part of that review, consideration of whether there should now be a new independent safeguard for taxpayers. In particular, it would be for consideration whether the exercise of HMRC's powers should be subject to a new form of independent scrutiny and monitoring. Regular reporting of the number of FNs and GAAR penalty notices being issued, coupled with identification of the results of those notices, would enable a better understanding of how the powers are being used and their effect on taxpayer and HMRC behaviour.

### 3. Background to and Overview of the Latest Powers

Following the merger of the Inland Revenue and Customs & Excise in April 2005, Ministers appointed a Consultative Committee in June 2005 to work with HMRC to consider options for future powers, deterrents and safeguards. Membership of the Committee included representatives from large and small business and the tax-related professions, as well as from HMRC.

During 2005–12, numerous consultative documents were issued by HMRC regarding the modernisation of powers, deterrents and safeguards as the various existing provisions and proposed new ones were worked through piece by piece. In 2007, there was a specific consultation document issued in relation to safeguards for taxpayers,<sup>4</sup> following the consistent raising of concerns by the Consultative Committee.

Following the responses to the safeguards consultation, the Taxpayers' Charter was introduced in 2008 and the Implementation Oversight Forum ('the Forum') was established in 2009. The Taxpayers' Charter sets out a general set of rights and responsibilities for taxpayers. The rights are expressed in general terms and are overarching rights such as the right to respect and the right to have information protected. The Charter was reviewed and revised at the start of 2016<sup>5</sup> and includes a commitment by HMRC to '*tackle those who bend or break the rules*'.<sup>6</sup>

The Forum's remit was to provide assurance to the Exchequer Secretary to the Treasury and the HMRC Chairman and Commissioners that the policy outcomes of the review of powers, deterrents and safeguards were being delivered in line with undertakings given to parliament.<sup>7</sup> The undertakings were to establish a Joint Committee to review the operation of this legislation in practice, to ensure that the legislation was working as intended by parliament. By 2012, HMRC and HM Treasury, at least, were of the view that the post-merger changes had been implemented and there was no need for the Consultative Committee or the Implementation Forum.

However, in the meantime, various steps had been taken by government with the aim of tackling tax avoidance. For some years, HMRC had sought to find new ways to reduce the amount of tax lost to tax avoidance beyond reactive legislative change, as it was realised that this cat-and-mouse game simply fed the tax avoidance industry. Various techniques were developed including: the introduction of the 'Risk Rating Approach', under which companies were allocated a risk rating by HMRC which would determine how much intervention the company could expect in its tax affairs; the introduction of tax avoidance disclosure rules (Disclosure of Tax Avoidance Schemes rules or DOTAS), which were then

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<sup>4</sup> [http://webarchive.nationalarchives.gov.uk/20130217082231/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageLibrary\\_ConsultationDocuments&propertyType=document&columns=1&id=HMCE\\_PROD1\\_027495](http://webarchive.nationalarchives.gov.uk/20130217082231/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_027495).

<sup>5</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/489872/HMRC-YourCharterAnnualReport\\_2014-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/489872/HMRC-YourCharterAnnualReport_2014-2015.pdf).

<sup>6</sup> <https://www.gov.uk/government/publications/your-charter/your-charter>.

<sup>7</sup> House of Lords 18 July 2008 column 1453, <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80718-0001.htm>.

repeatedly expanded in scope; the introduction of the Bank Code in 2009; and the introduction of a General Anti-Abuse Rule (GAAR) in 2013.

The Bank Tax Code was limited in scope to the banks but heralded a new approach to HMRC's powers, which has fed into some of the most recent changes. HMRC's powers were no longer limited to those that enabled it to obtain information or impose penalties for non-compliance with the legislation. The Code introduced a requirement for the banks to comply with 'the spirit of the law' as well as the legislation itself. HMRC would name the banks who signed up to the Code and would be able to 'name and shame' those who breached it. Although various safeguards were built into the Code provisions,<sup>8</sup> including notably an independent reviewer, the significant step had been taken of providing HMRC with the power to name and shame taxpayers where they disagreed about the approach taken to the interpretation of the law.

The new approach taken in the Bank Code had been developed after the banking crisis of 2008 when banks were viewed negatively. It was set against a background of repeated calls in the Public Accounts Committee of the House of Commons for HMRC to do more to tackle tax avoidance. Few people had any sympathy for what had been termed, by Graham Aaronson, QC, 'egregious' tax planning,<sup>9</sup> but the lines between lawful tax avoidance and unlawful tax evasion were increasingly being blurred, at least by some commentators if not by HMRC itself. HMRC and HM Treasury were faced with a change in the political dynamics, which resulted in a stated zero tolerance of tax avoidance. As a result, the approach developed that those involved in tax avoidance did not merit the same level of safeguards as other taxpayers.

In 2014, the Bank Code approach was extended to those described as high-risk promoters of avoidance schemes. Again provisions were introduced to 'name and shame', in this case high-risk promoters; as well as a range of new information requirements and associated penalties. However, there were notable differences in the way in which these powers were drafted as compared with previous powers: they were drafted widely with the potential to apply to organisations that would not naturally have been considered to be 'high-risk promoters', and they had limited appeal rights.<sup>10</sup> The safeguard of an independent reviewer was omitted. The response to the concerns regarding the width of application of the provisions was to say that, in practice, HMRC would not operate them so widely: in effect, that reliance should be placed upon a benign approach by HMRC.

The Finance Act 2014 included additional new powers that were stated by the government to be designed to tackle tax avoidance. Those powers provided for Advance Payment Notices (APNs) and Follower Notices (FNs).

In summary, HMRC can issue an FN where an enquiry or tax appeal is in progress in relation to transactions that HMRC considers were entered into for a tax advantage and HMRC is of the opinion that there is a final judicial ruling which is 'relevant' to the

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<sup>8</sup> In the Governance Protocol; see [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/263642/Governance\\_Protocol.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263642/Governance_Protocol.pdf).

<sup>9</sup> In his GAAR report of 11 November 2011, [http://webarchive.nationalarchives.gov.uk/20130321041222/http://www.hm-treasury.gov.uk/d/gaar\\_final\\_report\\_111111.pdf](http://webarchive.nationalarchives.gov.uk/20130321041222/http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf).

<sup>10</sup> The Finance Act 2016 included provisions to extend the potential scope of the powers further.

taxpayer's arrangements. Such a ruling arises if 'principles' laid down or reasoning given in the ruling would, if applied to the arrangements, deny the advantage claimed by the taxpayer (or part of it) and the judgment is not being appealed. Once issued, the taxpayer is required to amend their tax return or enter into an agreement with HMRC to settle the dispute within a specified time. After that time, a taxpayer is liable to a penalty of 50 per cent of the disputed tax but may seek reduction of the penalty payable to between 10 and 50 per cent if they choose to amend their tax return or reach agreement with HMRC. However, a taxpayer who chooses to pursue their tax dispute through the courts then faces the risk of the full penalty of 50 per cent of the tax due if the case is eventually decided against them. HMRC has been known at times to decide that it will not follow a court decision (especially one in the First-Tier Tribunal) because it disagrees with the result. There is no reciprocity involved in the FN legislation, should the taxpayer disagree with the earlier decision.

The issue of an APN can occur where an FN has been issued, notification has been made under the DOTAS rules or a taxpayer's transaction has been counteracted under the GAAR. The APN triggers a liability to pay an amount specified as 'understated tax' within 90 days.<sup>11</sup> This is in advance of any determination. The taxpayer has limited rights to 'make representations' about the amount or whether the statutory conditions are satisfied. The issue of the APN cannot be appealed. Unlike similar VAT provisions which require payment of contested VAT before an appeal to the courts,<sup>12</sup> there are no statutory hardship provisions. Failure to pay attracts a penalty of 5 per cent of the unpaid amount, with further penalties of 5 per cent at five months and 11 months, unless there is a tax appeal, where separate penalties apply instead.

Although there are provisions enabling a taxpayer to appeal the imposition of a penalty, the First-Tier Tribunal has confirmed that it has no jurisdiction to consider whether the conditions required for the issue of the APN have been met.<sup>13</sup> Instead, taxpayers have to make representations against the issue of the APN to HMRC and then seek judicial review following HMRC's response confirming the APN.

In practical terms, APNs mean that taxpayers who are disputing what tax is due are required to pay the disputed tax up front or incur penalties. The then Financial Secretary to the Treasury, David Gauke MP, said in 2014 that 43,000 payment notices would be issued.<sup>14</sup> It was expected that they would be issued to 33,000 individuals and 10,000 corporates and would cover about £7.1 billion of disputed tax, with the mean gross income of the individuals involved being £262,000 (nine times that of the average income tax payer).<sup>15</sup> Most of the notices were to be issued before April 2016. In the latest Annual Report, HMRC states that since 2014 more than 75,000 APNs have been issued (nearly 75 per cent more than Mr Gauke originally envisaged) worth in excess of £7 billion and

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<sup>11</sup> Sections 220 and 223 Finance Act 2014.

<sup>12</sup> Section 84 Value Added Tax Act 1994. Under these provisions, a taxpayer can pursue an appeal without paying the contested tax up front if it can be shown that the taxpayer would 'suffer hardship'.

<sup>13</sup> *Nijjar v. HMRC* [2017] UKFTT 0175 (TC).

<sup>14</sup> Public Bill Committee 17 June 2014 column 485, <https://www.publications.parliament.uk/pa/cm201415/cmpublic/finance/140617/am/140617s01.htm>.

<sup>15</sup> Public Bill Committee 17 June 2014 column 492, <https://www.publications.parliament.uk/pa/cm201415/cmpublic/finance/140617/am/140617s01.htm>.

collecting nearly £4 billion.<sup>16</sup> HMRC received a total of 40,000 representations in relation to the 75,000 notices issued. By the time of the Annual Report, HMRC had considered more than 32,000 of these representations: around 90% of the notices were upheld as valid – so around 10% were invalid – and nearly 20% had the original amount sought by HMRC changed.<sup>17</sup>

The practical effects of FNs are potentially much greater for taxpayers. If the taxpayer chooses not to pay the disputed tax, there is a right to appeal the 50 per cent penalty as well as the underlying substantive tax issue. The grounds of appeal are limited and much will turn on how narrowly the courts construe the relevance of one decided case to other disputes. Otherwise, the taxpayer is left to run the risk of losing any litigation and paying the 50 per cent penalty. Section 5 considers the issues raised for access to justice. Although there are rights to appeal to the First-Tier Tribunal (FTT), those rights are limited.<sup>18</sup> In particular, a taxpayer may appeal on the ground that the case that triggered the FN is not 'relevant' to them or that it was reasonable in all the circumstances for the taxpayer not to have taken the corrective action. However, given the wide definition of what is 'relevant', that may not get an appellant very far. A case may be 'relevant' as defined so the FN can be issued and the penalty can be triggered if the notice is not complied with even though the FTT or higher court may later decide that there are sufficient distinguishing features between the FN recipient's case and the relevant case to conclude that the result sought by HMRC was not correct. Similarly, reasonableness is likely to turn on the extent to which the case relied upon by HMRC is relevant. The problem is that to reach the stage of determining the relevance of the FN case, the taxpayer has to take on the normal risks of litigation and the risk of a 50 per cent penalty.

In 2016–17, HMRC issued 9,000 follower notices with a value of more than £520 million and 99 follower notice penalties with a value of £6 million.<sup>19</sup>

In 2014, the government also proposed that provisions should be introduced to permit direct recovery of debts (DRD) by HMRC. DRD was designed to enable HMRC to issue a notice to a bank freezing a taxpayer's bank account and then to take monies that HMRC considers are owed to it directly from the bank account in specified circumstances. The extent of concerns raised in relation to the other Finance Act 2014 powers was dwarfed by the huge reaction to the proposed DRD provisions and the government agreed to defer their introduction to enable the provisions to be consulted upon and thought through further. The DRD provisions are now contained in the Finance (No. 2) Act 2015.<sup>20</sup> The safeguards for taxpayers have been increased; most notably: it needs to appear to HMRC that the taxpayer has failed to pay a sum where there is no possibility that the sum, or any part of it, will cease to be due and payable to the Commissioners on appeal; and taxpayers

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<sup>16</sup> HMRC, *Annual Report and Accounts 2016–17* at page 24, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/635587/HMRC\\_Annual\\_Report\\_and\\_Accounts\\_2016-17\\_web\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/635587/HMRC_Annual_Report_and_Accounts_2016-17_web_.pdf).

<sup>17</sup> HMRC, *Annual Report and Accounts 2016–17* at page 25, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/635587/HMRC\\_Annual\\_Report\\_and\\_Accounts\\_2016-17\\_web\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/635587/HMRC_Annual_Report_and_Accounts_2016-17_web_.pdf).

<sup>18</sup> Section 214 Finance Act 2014.

<sup>19</sup> HMRC, *Annual Report and Accounts 2016–17* at page 23, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/635587/HMRC\\_Annual\\_Report\\_and\\_Accounts\\_2016-17\\_web\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/635587/HMRC_Annual_Report_and_Accounts_2016-17_web_.pdf).

<sup>20</sup> Section 51.

have a right of appeal to the County Court.<sup>21</sup> The County Court appeal can only be made on one of specified grounds, but those grounds include challenging that there is a sum due where there is no possibility that any part of it will cease to be due and payable. It remains to be seen on what basis the County Court will feel capable of entering into such potentially technical tax questions. It may be thought that such a question would be better determined by the FTT. However, the taxpayer can only appeal to the County Court once their account has been frozen.

HMRC then consulted upon measures which were included in the Finance Act 2016. Those measures included provisions that extend the naming-and-shaming approach developed for the Bank Code. A serial avoiders scheme was introduced under which taxpayers, including individuals, could be named as 'serial avoiders', with information about the tax 'avoided' and their addresses being disclosed.<sup>22</sup> The provisions also introduced surcharges for entry into a tax avoidance scheme after involvement with one avoidance scheme has been 'defeated', and restrictions on the availability of reliefs. Provisions setting out what is included as a defeat of a tax avoidance scheme are drafted widely and include complying with an FN and paying the tax claimed by HMRC in relation to a scheme notified under the DOTAS rules. Compliance with the law and with HMRC's requirements is not enough, therefore, to prevent a taxpayer being brought within a class of taxpayers who merit more intervention by HMRC and potentially penal charges. Two more 'defeats' within five years can lead to naming and shaming. There are limited appeal rights which do not appear to enable taxpayers to prevent naming and shaming. HMRC is also given power to name and shame large corporates considered by HMRC to have persistently engaged in 'unco-operative behaviour', as well as to apply special measures to such taxpayers including increased reporting and disclosure requirements. There are no appeal rights.

GAAR penalty provisions, which develop the FN approach further, were also introduced.<sup>23</sup> HMRC can give notice that a taxpayer may be within the scope of the GAAR, and the taxpayer will be given the opportunity to correct their tax position up until the point that their arrangements are referred to the GAAR Advisory Panel. If they do correct their tax position, they will not be liable to a GAAR penalty; otherwise, they are exposed to the risk of a 60 per cent penalty (in addition to any other penalties that may be imposed) if the GAAR Panel rules that the GAAR applies and the taxpayer does not subsequently successfully appeal the case. Again this raises concerns regarding access to justice addressed below. As with the FN penalty power, there is an appeal right.<sup>24</sup> However, the main basis of appeal for the purposes of this paper is effectively that the GAAR is not applicable in the first place.<sup>25</sup> Therefore this appeal right adds little. If the GAAR is not applicable, the penalty would be expected to fall away in any event, and the application of the GAAR will only be decided if the taxpayer risks the 60 per cent penalty and pursues their substantive case.

Although the summary above is brief, it can be seen that in the past two years there has been a dramatic change in the tone and content of HMRC's powers. There has been a

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<sup>21</sup> There are also a range of administrative safeguards set out in guidance following commitments from the Minister.

<sup>22</sup> Section 159 and Schedule 18.

<sup>23</sup> Section 158 Finance Act 2016.

<sup>24</sup> Paragraph 9 Schedule 43C Finance Act 2013.

<sup>25</sup> There is also an appeal right where the taxpayer considers that the amount categorised by HMRC as a tax advantage has been overestimated.



proliferation of naming-and-shaming powers. The Bank Code had a safeguard in that respect in the form of an 'independent reviewer' but more recent powers do not benefit from such a provision and have no appeal rights. The New Powers are widely drawn and there are few appeal rights. Compliance with the law may not in itself be sufficient to avoid sanctions. Much is left to the discretion of HMRC as to whether a taxpayer has complied with the spirit of the law, or whether a court decision is relevant to the taxpayer, and there is nothing to reserve the use of the New Powers to the most egregious behaviour.

In the case of APNs, the position is ameliorated by the fact that the APN only triggers advance payment of the contested tax. If the taxpayer wins their appeal, the amount paid is returned with interest. In the case of DRD, there are some appeal rights, albeit that only time will tell how accessible those rights are for taxpayers and especially the more vulnerable; and they only apply once an account is frozen. While these safety nets may be seen to give taxpayers some safeguards in relation to the use of APNs and DRD, the Penalty Powers are at the other end of the spectrum of concern given their potential for restricting access to justice.

Before considering the consequences of the change in nature of HMRC's powers, the extent of the existing available safeguards is addressed in Section 4.

## 4. An Overview of Current Safeguards

Non-fiscal legislative provisions provide high-level safeguards for taxpayers. These include the Human Rights Act, which makes it unlawful for a public authority to act in a way that is incompatible with the European Convention on Human Rights except if, as a result of primary legislation, the authority could not have acted differently. The Act also requires all new primary legislation to be accompanied by a statement of compatibility with Convention Rights. Recent cases have sought to rely on the Human Rights Act in relation to the APN provisions, but to date with no success. Unless there is a judgment ruling that the legislation is incompatible with the Human Rights Act, this potential safeguard is of little practical use to the majority of taxpayers who will not wish to, or be able to, pursue litigation on this basis.

Alongside safeguards that apply not only in the tax context are those that are specific to the relationship between HMRC and taxpayers. These range from internal review processes operated within HMRC to specific appeal rights.<sup>26</sup> Internal review processes are important, but by definition do not provide any independent oversight of the use of HMRC's powers.

In some cases, safeguards take the form of specific appeal rights which are provided to enable the taxpayer to appeal to the relevant tribunal: the First-Tier Tax Tribunal or the Social Entitlement Tribunal. Some of those safeguards have not been straightforward to apply. For example, as a general matter, if a taxpayer can show that there is a 'reasonable excuse' for a late filing, penalties will not be applied by HMRC. If HMRC does not accept the taxpayer's claim of a reasonable excuse, the application of the penalties can be appealed by the taxpayer in the FTT. However, the line between what is and is not a reasonable excuse is imprecise, consequently constantly shifting and a source of a large volume of litigation. There is a huge range of varying penalty provisions and safeguards, which led to HMRC issuing a discussion document considering the general approach to penalties in February 2015.<sup>27</sup> Specific appeal rights to the courts are therefore not without issues, but they do leave intact the relationship between HMRC and the taxpayer where the courts are left with the role of ultimately reviewing and ruling upon the meaning, scope and application of tax legislation.

In a few cases, the safeguard is in the form of the involvement of a specific independent review body. For example, in the case of the GAAR, if the taxpayer disputes the application of the GAAR, the provisions will only bite if the GAAR Panel decides that the transaction can reasonably be considered to fall within the terms of the GAAR.<sup>28</sup> In relation to the Bank

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<sup>26</sup> Annex 1 to the Safeguards for Taxpayers Consultation Document 17 May 2007 sets out the full range of safeguards as at that date. Although it is out of date, it gives a flavour of the breadth and range of safeguards in the system.

([http://webarchive.nationalarchives.gov.uk/20130217082231/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageLibrary\\_ConsultationDocuments&propertyType=document&columns=1&id=HMCE\\_PROD1\\_027495](http://webarchive.nationalarchives.gov.uk/20130217082231/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_027495).)

<sup>27</sup> A review and further consultation were proposed. That review then became, at least partly, tied into the introduction of Making Tax Digital, but Making Tax Digital has now been delayed: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/461357/HMRC\\_Penalties\\_a\\_Discussion\\_Document\\_-\\_Summary\\_of\\_Responses.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/461357/HMRC_Penalties_a_Discussion_Document_-_Summary_of_Responses.pdf); <https://www.gov.uk/government/consultations/making-tax-digital-sanctions-for-late-submission-and-late-payment>; and <https://www.gov.uk/government/news/next-steps-on-the-finance-bill-and-making-tax-digital>.

<sup>28</sup> Schedule 43 Finance Act 2013.

Code, there is provision for an independent reviewer to decide whether a bank has breached the Code. No such specific safeguard has been used for the New Powers. The GAAR Panel has only been called upon once to date and there is no evidence that the independent reviewer has been used yet. Therefore the value of them as safeguards is difficult to assess. However, the fact of their existence means that taxpayers are able to feel that there is some independent scrutiny of the use of HMRC's powers.

This leaves four potential safeguards in the system that could apply to HMRC's New Powers: judicial review, the Adjudicator, the Ombudsman and the Tax Assurance Commissioner. These are considered further in Section 5.

## 5. The Limitations of the Existing Independent Safeguards

### Judicial review

Where there are no appeal rights, the taxpayer can rely only on judicial review as a means of securing independent judicial intervention and scrutiny of administrative action. Judicial review allows taxpayers to hold HMRC to account for decisions that exceed its powers or breach its duty of fairness. With the increase in powers granted by parliament to HMRC without specific judicial oversight, there has been an increase in expectation that judicial review would provide an alternative safeguard. However, the use of judicial review is fraught with difficulty.

The first difficulties with judicial review are practical procedural ones. The FTT does not have jurisdiction to hear judicial review matters,<sup>29</sup> and as a general matter taxpayers are unable to pursue their claim for judicial review of HMRC's exercise of its powers in the FTT. Such cases are ordinarily dealt with by the Administrative Court under specific rules of procedure, including strict time limits, although there is now some scope for judicial review actions to start in, or be transferred to and dealt with by, the Upper Tribunal.

Judicial review involves specific and complex procedures, which makes the process inappropriate for use by litigants in person, such as taxpayers. Court fees are payable<sup>30</sup> but, because of the specialist nature of the process, those will be dwarfed by the legal fees. The complexity of procedure and the costs involved make this a safeguard with limited application for most taxpayers.

However, even if the procedural and cost issues can be dealt with by the taxpayer, recent cases have shown the substantive limits to the use of judicial review. It is not, despite its name, a general power to review the use of powers and to substitute the courts' view. Instead, the taxpayer will need to show that the action taken by HMRC is illegal, irrational or an abuse, or that HMRC has failed to follow the requisite procedural requirements.<sup>31</sup>

In the case of *Nigel Rowe and others v HMRC* [2015] EWHC 2293, the application to proceed by way of judicial review was made by 154 taxpayers involved in film partnership schemes.<sup>32</sup> The availability of the tax benefits sought by the taxpayers was being disputed by HMRC and the case was progressing through the FTT. Meanwhile, HMRC had issued APNs to the taxpayers involved.

The claimants claimed that HMRC's actions in issuing the payments notices breached natural justice, were irrational, represented an abuse of their rights under the European

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<sup>29</sup> The complexities of the interaction between substantive appeals and judicial review claims at the level of the FTT in relation to the exercise of discretion by HMRC are considered further in the TLRC paper at [http://www.ifs.org.uk/uploads/publications/TLRC/TLRC\\_DP\\_10.pdf](http://www.ifs.org.uk/uploads/publications/TLRC/TLRC_DP_10.pdf).

<sup>30</sup> Currently £275.

<sup>31</sup> These four heads of claim were described by Lord Diplock in the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

<sup>32</sup> A decision in the appeal of the case to the Court of Appeal is awaited.

Convention on Human Rights, breached their legitimate expectations that they would not be required to pay tax before the dispute had been resolved, and failed to comply with the legislative requirements for the issue of APNs. The High Court found in HMRC's favour on all the challenges.

Unsurprisingly, all agreed that HMRC must act fairly. However, the claimants argued that fairness requires the taxpayer to have an opportunity to make representations before HMRC issues the notice. Simler J held that the APN scheme already provides safeguards, which are the right to make representations as to the amount and whether the statutory conditions for issue are satisfied. It was possible for taxpayers to ask HMRC for time to pay. The accelerated payment does not involve any determination of final liability and does not deprive the claimants of their statutory right to challenge the underlying tax liabilities, by way of appeal to the FTT. She also held that the requirements for an enforceable legitimate expectation were not met and that, in any event, any expectations at common law could be defeated by legislation.

In relation to irrationality, the claimants had argued that HMRC had issued APNs 'on a blanket basis and on an industrial scale', without consideration of their individual circumstances. They asserted that HMRC had interpreted the word 'may' in the statute as 'shall'. However, Simler J held that irrationality is a stringent test. She stated that, given the purpose of the scheme, there was nothing irrational in HMRC having a general rule that when the statutory criteria are met, the discretion will be exercised by issuing the notice, save in exceptional circumstances. She went on to state that *'the claimants are correct that the approach adopted by HMRC ... demonstrates that in the overwhelming majority of cases where HMRC consider that the statutory conditions are satisfied, HMRC will exercise the powers conferred by FA 2014 by giving APNs ..., and the question is generally one of when, not whether, they will be given. However, that does not mean that HMRC's discretion has been unlawfully fettered or turned into a rule without exception'*.

Simler J envisaged circumstances where the issue of APNs might be challenged as irrational, but those were limited. For example, if there were clear judicial authority (at whatever level) that a particular tax scheme was legally effective to produce the tax advantage asserted, that would be a basis for challenging the rationality of the officer's determination in relation to an APN involving the identical tax scheme. Overall, the case confirmed that judicial review was not an appropriate way to challenge the use of HMRC's APN powers.<sup>33</sup> A later case has confirmed that view.<sup>34</sup>

In *R (on the application of Dunne) v HMRC* [2015] EWHC 1204, the claimants sought an injunction to prevent HMRC issuing APNs. The court granted limited relief in terms requested by HMRC in the form of an order that, in the event that the claimants had established hardship, HMRC could not, without first applying to the court, take steps to enforce any sum due and payable under any APN. This is of notable value given the perhaps surprising lack of a hardship provision in the legislation itself. The implication that a taxpayer has some protection against suffering hardship as a result of the use of APNs has the potential to deal with one of the concerns most often voiced by advisers to those affected: that taxpayers are being forced into bankruptcy in order to pay the APN

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<sup>33</sup> However, permission to appeal was granted and the case was heard by the Court of Appeal in the autumn of 2016.

<sup>34</sup> *Walapu v HMRC* [2016] EWHC 658 (Admin).

amount as they do not have the cash to pay the liability, which may relate to many prior tax years.

However, in relation to the more general application for an injunction, Laing J said that even if she had jurisdiction to grant the injunction requested (which she doubted), she would not exercise it because the legislation imposes statutory duties on HMRC and '*any relief granted by the court would directly interfere with the performance of those statutory duties*'. The legislation provided that any questions that might arise as to whether there was an excuse for the non-payment of penalties could be dealt with by the FTT.

What these cases show is that even if the procedural problems and costs of bringing judicial review are overcome, it has limited application as a safeguard in relation to HMRC's use of the New Powers given the broad terms in which those powers have been granted by primary legislation and in the absence of any clear statement or criteria establishing the manner in which those powers should be exercised. This paper does not intend to suggest that those taxpayers who were sufficiently aggrieved to pursue a judicial review remedy and who failed should instead have succeeded. Nor does it necessarily suggest that their circumstances would have fallen outside the terms of any clear statement or criteria that the government might have issued at the time the powers were granted. This paper, and the Committee, express no view on those questions. The essential point is that judicial review is of limited value as a mechanism for limiting the scope of wide powers granted in general terms or for testing their use and execution in practice.

## The Adjudicator

The Adjudicator considers complaints made regarding HMRC. It is a post that was created by HMRC in 1993. The role, which is non-statutory, is to review independently the handling of a complaint when a complainant remains dissatisfied with the outcome after final departmental consideration. Unlike the Parliamentary Ombudsman, whose function – as set out in the Parliamentary Commissioner Act 1967 – is to investigate cases of 'maladministration', the Adjudicator's role is to measure the performance of HMRC against its own standards and guidelines. The Adjudicator therefore looks to see whether HMRC has followed its own internal instructions, whether Codes of Practice have been followed and whether it has otherwise adhered to its own standards. The Adjudicator is therefore not entirely independent of HMRC: she enforces HMRC's own standards. She is still effectively part of HMRC, with most of her staff drawn from HMRC secondees.

The Adjudicator can look at complaints about mistakes, unreasonable delays, poor or misleading advice, inappropriate staff behaviour and the use of discretion. However, the Adjudicator cannot consider complaints where there is an ongoing investigation or enquiry, matters of departmental policy, or any technical question. If the Adjudicator upholds a complaint, HMRC can be required by her to repay amounts paid by the taxpayer and, in appropriate circumstances, her intervention has resulted in compensation being awarded to the taxpayer for the worry and stress caused to them. The Adjudicator is specifically referred to in the context of the government's amended DRD proposals as the person to whom complaints can be made if HMRC does get it wrong.<sup>35</sup> However, in the context of the New Powers that have been provided for HMRC to tackle tax avoidance, it

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<sup>35</sup> <http://taxnews.lexisnexis.co.uk/TaxNewsLive/Members/BreakingNewsFullText.aspx?id=5589&css=1&xml=0>.

remains to be seen to what extent the Adjudicator will feel that she has the ability to be involved.

To begin the Adjudicator process, the taxpayer must seek two levels of review by HMRC. If these do not resolve the issue, then the taxpayer may refer the matter to the Adjudicator. If the taxpayer still considers that the matter has not been appropriately resolved, they can ask their MP to refer the case to the Parliamentary Ombudsman.

The examples given in the Adjudicator's Annual Report for 2014<sup>36</sup> show that the Adjudicator will uphold complaints where it is shown that HMRC fails to take into account the circumstances of vulnerable customers. However, the fact that the Adjudicator specifically commented in her report in 2015 that she was critical of the large number of complaints where HMRC had failed to consider the circumstances of vulnerable people, especially where it had the ability to exercise discretion,<sup>37</sup> suggests that the existence of the Adjudicator was, at that stage at least, achieving less in terms of HMRC behaviour in that area than might be hoped. It is more positive that there has been no such comment about vulnerable people in the 2017 Report.<sup>38</sup> It is to be hoped that the Adjudicator's earlier comments may have helped to reinforce the need to fulfil the commitments to vulnerable people made in relation to the operation of DRD.

However, the limits on what the Adjudicator can do mean that in many cases she is unable to provide any safeguard. In particular, her inability to consider complaints where there is an ongoing investigation or enquiry would be expected to mean that she would not consider complaints made in relation to FNs or APNs. In any event, the process of referral to the Adjudicator is slow and the Adjudicator's resources are limited. She does not provide a suitable safeguard in relation to the use of the New Powers by HMRC. At most, she can offer redress for individual complaints after the event.

## The Parliamentary Ombudsman

The Parliamentary Ombudsman is accountable to parliament and the Ombudsman's work is scrutinised by the Public Administration and Constitutional Affairs Committee. The Ombudsman describes the service offered as follows: *'The law gives us the power to investigate and make final decisions on complaints about public services for individuals. We make recommendations on how organisations should put right mistakes they have made. We also ask them to produce action plans to show what steps they will take to prevent similar mistakes in future.'*<sup>39</sup>

An example of the cases determined by the Ombudsman illustrates her powers and the process involved: *'HMRC did not set up Mr S's Self Assessment tax details correctly when he went into business. It then sent Mr S a computer-generated notice asking him to file a tax return for the wrong year (2009-10). When he did not submit the return by the due date, he received an automatic £100 penalty notice. However, although HMRC agreed that the penalty notice should not have been issued, it did not take the necessary steps to prevent this*

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<sup>36</sup> <http://www.adjudicatorsoffice.gov.uk/pdf/report2014.pdf>.

<sup>37</sup> <http://www.adjudicatorsoffice.gov.uk/pdf/report2015.pdf> at page 12.

<sup>38</sup> <http://www.adjudicatorsoffice.gov.uk/pdf/report2017.pdf>.

<sup>39</sup> [https://www.ombudsman.org.uk/sites/default/files/Strategic\\_plan\\_2015-16\\_to\\_2017-18.pdf](https://www.ombudsman.org.uk/sites/default/files/Strategic_plan_2015-16_to_2017-18.pdf) at page 8.

*happening again, which it did. ... When HMRC eventually admitted to a number of errors that had caused Mr S worry and distress, it offered him compensation of £25. ... The Adjudicator then took 20 months to deal with Mr S's complaint because of major resourcing problems. It concluded that although Mr S's tax affairs and his complaint had been poorly handled by HMRC, the apologies it had offered, plus the compensation of £45 (increased by £20 for poor complaint handling), was reasonable and in line with its redress policy. ... We took a different view to the Adjudicator on the level of the injustice and the amount of redress needed to remedy that injustice. We also upheld Mr S's complaint about the inadequacy of the redress provided by HMRC in respect of its service failures and poor complaint handling and asked it to increase its compensation from £45 to £145.<sup>40</sup>*

The Ombudsman therefore provides a second line of complaint, subject to a taxpayer persuading their MP to support them. In most cases, the taxpayer will need to seek redress via the Adjudicator first. In the case quoted above, it is notable that the Ombudsman commented that the Adjudicator had been unable to deal with the taxpayer's complaint because of lack of resources. Given that the Ombudsman also has a wide remit, it is uncertain how effective and efficient these safeguards are for taxpayers in the context of recent changes.

With the significant increase in HMRC's powers, it would not be surprising if the number of complaints about the use of the New Powers increases. However, both the Ombudsman and the Adjudicator deal with case-specific individual complaints. They do not monitor or control HMRC's use of its powers generally. While they may be expected to deal with process and administration complaints and may consider the use of DRD powers especially in relation to vulnerable customers, it is less likely that they will be prepared to examine the use of powers in the context of tax avoidance.

## **The Tax Assurance Commissioner**

In 2012, HMRC created the position of Tax Assurance Commissioner (TAC). This was in response to concerns expressed by the Public Accounts Committee and its Chair, Margaret Hodge MP, concerning the lack of transparency in negotiating and agreeing tax settlements in the largest cases, which it was said had led to a loss of confidence that settlements were being reached on a basis that respected the interests of taxpayers at large. The intention was that the TAC would be an experienced tax professional with no role in HMRC's engagement with taxpayers on their particular tax affairs and with no line responsibility for caseworkers. The TAC was also to be responsible for shaping tax policy and strategy and for tax professionalism within HMRC. The original conception was that the person appointed as TAC should be drawn from outside the Department.

Edward Troup, HM Treasury's Director General for Tax and Welfare, was appointed the first TAC and as Second Permanent Secretary at HMRC. In 2016, he was appointed HMRC's Executive Chair and First Permanent Secretary following the retirement of Dame Lin Homer. His position as TAC was filled by Jim Harra, previously Director General for Business Tax.<sup>41</sup> Although it was stated that the arrangements for assuring large tax

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<sup>40</sup> <https://www.ombudsman.org.uk/about-us/how-our-casework-makes-difference/case-summaries/246>.

<sup>41</sup> Recruitment for the role is being advertised; see <https://www.gov.uk/government/news/hmrc-to-recruit-a-second-permanent-secretary>. It is expressly stated that only current civil servants with the requisite tax knowledge will be considered.



settlements in HMRC would be reviewed following Edward Troup's appointment as Executive Chair, the outcome is awaited. The following explanation of the role is based on its operation to date.

The role is designed to ensure that HMRC is, and is seen to be, fair and even-handed in applying the law and, in particular, that it is not favouring big business. However, the TAC is not independent of HMRC (even as originally conceived) and, within the confines of the present tax system, cannot be.<sup>42</sup> That is because parliament has given the responsibility for collection and management of tax to the Commissioners of Her Majesty's Revenue and Customs. Therefore in order to give decisions which bind those Commissioners about settlements with taxpayers, the TAC is, and has to act as, one of the Commissioners of Her Majesty's Revenue and Customs.

Responding to concerns about the lack of independent oversight in relation to APNs and DRD, the government stated that it would commit to enhanced transparency and publish, in the Tax Assurance Commissioner's Report, statistics on the number of times these powers are used and appeals that are raised.<sup>43</sup> There is no commitment to monitor the use of those powers beyond reporting those statistics. The HMRC Annual Report published information regarding the number of APNs issued and the numbers about which representations were made<sup>44</sup>. No information was provided about the use of the DRD powers and the reporting was done by HMRC itself rather than by the TAC.

The main concern regarding the role of the TAC as a safeguard in relation to the use of the New Powers is that the role is not independent of HMRC. The TAC is one of the seven HMRC Commissioners. In October 2014, Edward Troup gave evidence to the Treasury Committee of the House of Commons.<sup>45</sup> Concerns regarding his independence were expressed by the Committee and, in particular, the Committee was concerned that the TAC reports to the Chief Executive of HMRC. It was suggested that further thought should be given to making provision for the situation where the Tax Assurance Commissioner disagrees with the Chief Executive, with the possibility of the TAC reporting to the Chancellor or the Treasury Committee being raised.

However, concerns regarding the lack of independence of the TAC go much further than considering potential conflicts with the Chief Executive. Despite all his best efforts, it will never be possible for the TAC to be *seen* to be independent when he is also a senior member of HMRC and one of its Commissioners.

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<sup>42</sup> Indeed, Jim Harra is a long-term Revenue employee, having joined the Inland Revenue in 1984. Edward Troup had been mainly engaged in private practice until joining HM Treasury in 2005.

<sup>43</sup> The government also said that it would strengthen HMRC's governance procedures for DRD, including oversight by the Commissioners of Her Majesty's Revenue and Customs (including the Tax Assurance Commissioner) and promised a full review of DRD by HMRC to be laid before parliament, covering its implementation and impact on customers, after the policy has been operational for two years, although it is not clear who will produce that report.

<sup>44</sup> As noted above.

<sup>45</sup> <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/treasury-committee/work-of-the-tax-assurance-commissioner/oral/14333.html>.

## **Conclusion about the extent of safeguards**

One of the principles of the Implementation Forum's work was to ensure that safeguards were sufficient and accessible. The conclusion of this paper is that the independent safeguards available where the New Powers are used are neither sufficient nor accessible.

## 6. The Fundamental Issues Arising in Relation to the New Powers and Inadequate Safeguards

This paper is not addressing detailed points of drafting about the New Powers, but identifies fundamental issues raised by their introduction. The issues can be seen to fall into two groups:

1. the implications of widely drawn powers being introduced without appeal rights; those implications arise from the way in which the New Powers are drafted, the effects of the drafting on existing provisions, and the relationship between HMRC and taxpayers;
2. the implications of the Penalty Powers for access to justice and possibly for future drafting of the tax code.

### The implications of the New Powers generally

During the powers review in 2005–12, the extent of safeguards was a recurring issue. A distinction between the consequences of inadvertent error and wilful error was generally applied, although concerns regarding the balance between HMRC's powers and safeguards were being regularly voiced in the Consultative Committee, the Implementation Forum and parliament. For example, in 2008, the following comment was made in debate by David Gauke MP, who was at the time in Opposition: *'there is concern about balance regarding HMRC's powers and deterrents. They are mostly increasing and are perhaps advancing faster than the safeguards. What HMRC requires to collect tax efficiently and enforce tax law, and the safeguards for protecting the taxpayer, are out of sync to some extent. That point is at the heart of the concern expressed by the professional bodies, and we raised it on numerous occasions in Committee'*.<sup>46</sup>

Those concerns regarding the balance between powers and safeguards have increased significantly in recent years and this part of the paper illustrates, by reference to the New Powers, two main drivers of the concerns: the granting of powers which are seen to be insufficiently focused; and the quasi-judicial nature of some of the New Powers. (It is beyond the scope of the paper to address all the concerns raised by commentators in relation to the New Powers.) The wider implications in terms of regulatory control of taxpayer behaviour and for the tax system as a whole are then considered.

### **Lack of focus of the New Powers**

Commentators generally have little sympathy with the people who are seen to 'play the system' and this paper shares that view. However, one of the main issues raised with the New Powers is that they are insufficiently focused. The legislation is drafted in broad terms, which in some cases means that it will be necessary either to rely upon HMRC's own guidance to narrow it down – which can change and offers taxpayers little in the way

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<sup>46</sup> Hansard 1 July 2008 column 794, <https://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080701/debtext/80701-0013.htm#080701105000573>.

of enforceable rights – or to hope for benign operation by HMRC – in other words, that HMRC deliberately refrains from exercising its powers to the extent actually permitted. Benign operation is difficult for HMRC to justify as the New Powers are mandatory, not discretionary, and again offers taxpayers nothing by way of enforceable rights if HMRC does in fact choose to exercise its New Powers to the extent actually permitted.<sup>47</sup> This paper suggests that when additional powers are introduced, there should be a clear statement from the government, in a way that taxpayers can rely on, explaining what the powers are intended to achieve and in what circumstances they are to be used.

The lack of focus in the legislation is illustrated by the APN provisions. Those provisions can be triggered by a taxpayer having made a disclosure under the DOTAS rules. Many taxpayers have made precautionary disclosures under the rules even where they considered that those rules did not in fact apply. This was indeed consistent with the initial policy of the DOTAS regime, which was designed to provide a flow of information to HMRC that would improve its ability to assess current planning and avoidance opportunities and seek amending legislation earlier than it might otherwise do.

As a result of that historical precautionary disclosure, the taxpayer is now exposed to the possibility of an APN being issued if a dispute arises in relation to that taxpayer's tax returns, even though, when the DOTAS disclosure was made, it was arguably not necessary and the likelihood of the transaction being successfully challenged by HMRC is low. At the same time, 'piggybacking' on the DOTAS rules has left groups of taxpayers whom an observer would expect to be caught by the APN rules, outside them. In one reported case, around 2,000 self-employed contractors had APNs withdrawn months after they were issued because it became clear that the DOTAS rules had not required disclosure of the scheme used by them to reduce their income tax bills.<sup>48</sup> The APNs had to be withdrawn even though the marketed scheme used by the contractors to reduce their income tax bills was exactly the sort of thing HMRC said the powers were designed to catch.<sup>49</sup> In another case, APNs had to be withdrawn after judicial review proceedings were started because the transactions involving employee benefit trusts were again not notifiable under the DOTAS rules.

It is undoubtedly difficult to define precisely who should be subject to the New Powers, but using rules such as DOTAS, which were designed to achieve different objectives from those envisaged by the New Powers, has given rise to anomalies. Anomalies can lead to a sense of unfairness. In addition, using DOTAS as a trigger for HMRC to use its New Powers, including APNs and the serial avoiders regime, means that taxpayers and their advisers will be less likely to notify under DOTAS. Although there are penalties for failure to comply with DOTAS, the cautious disclosures will now be discouraged, and the question raised is whether this change in behaviour is something HMRC wants.

### ***Quasi-judicial powers?***

There is also an underlying theme in many of the New Powers that if HMRC considers tax to be due then it is due. However, it is well recognised that, albeit in good faith, errors do

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<sup>47</sup> The lack of focus in legislation is not a new problem. It has been seen in many taxing provisions in recent years and raises significant policy issues in itself.

<sup>48</sup> <http://www.ft.com/cms/s/0/1ebe52d8-bdd5-11e5-9fdb-87b8d15baec2.html#axzz43jMSZOlx> and <http://www.step.org/news/hmrc-withdraws-accelerated-payment-notices-montpelier-clients>.

<sup>49</sup> A view supported by a decision of the FTT, which decided that the scheme was not effective.

occur and that, indeed, HMRC's view of the law is not invariably correct.<sup>50</sup> The assumption that HMRC will correctly identify the amount of tax due, and that consequently appeal rights are unnecessary or inappropriate, has led to the assertion that HMRC is being given quasi-judicial powers. Those concerns have arguably been at their strongest in relation to the DRD provisions. The Treasury Select Committee report on the 2014 Budget stated that *'This policy is highly dependent on HMRC's ability accurately to determine which taxpayers owe money and what amounts they owe, an ability not always demonstrated in the past. Incorrectly collecting money will result in serious detriment to taxpayers'*.<sup>51</sup>

Following the chorus of concern raised in relation to DRD, the provisions were delayed. Notwithstanding the changes made between the initial proposals and what was eventually enacted, the practical effects for taxpayers of bank accounts being frozen remain and are considerable and obvious. A system requiring court approval before HMRC could freeze accounts rather than giving an appeal right after HMRC has taken that action would offer taxpayers real protection against the consequences of HMRC getting it wrong. That was the previous system. HMRC had to apply to the courts for an order to recover debts from taxpayers' bank accounts. HMRC defends the new DRD rules on the basis that the existing process is slow and expensive and gives recalcitrant taxpayers too much time to move their money. However, there are still concerns with that stance. The new provisions shift the problems of the 'slow and expensive' County Court system to the taxpayer, who may be in a much worse position than HMRC to deal with them. If, as stated by the Financial Secretary (although not provided for in the legislation), the taxpayer must meet HMRC face-to-face before the DRD provisions are used, the recalcitrant taxpayer, against whom the provisions were supposed to be needed, will still have time to move their money. Those left exposed are likely to be those who are more vulnerable, whether because of illness, age or inability to engage with the tax authorities.<sup>52</sup> Although the legislation requires HMRC to consider whether a person is at a particular disadvantage before proceeding, the Adjudicator's Annual Report for 2015 was critical of the large number of complaints where HMRC had failed to consider the circumstances of vulnerable people, especially where it had the ability to exercise discretion.<sup>53</sup> Exercise of discretion remains a concern in the Adjudicator's Annual Report for 2017.<sup>54</sup>

Further concerns regarding the quasi-judicial powers of HMRC have arisen in relation to the power allowing HMRC to issue FNs where *'HMRC is of the opinion that there is a judicial ruling which is relevant to [the taxpayer's] arrangements'*<sup>55</sup> without any right of appeal. This

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<sup>50</sup> Indeed, quite apart from anything else, HMRC only claims an 80 per cent success rate in avoidance cases. Once all cases that are litigated are taken into account, its success rate is lower than that. One external commentator has recently estimated that more than half of the challenges brought by taxpayers against HMRC decisions in 2015/16 were successful; see <http://www.out-law.com/en/articles/2016/august/more-than-half-of-taxpayer-challenges-to-hmrc-decisions-successful/>.

<sup>51</sup> <http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news/budget2014report/>.

<sup>52</sup> Brown envelope fear and the consequent refusal to respond to official letters is a recognised phenomenon; see, for example, <http://www.newstatesman.com/economics-blog/2012/11/fearing-brown-envelope-sickness-benefits-and-welfare-reform>.

<sup>53</sup> <http://www.adjudicatorsoffice.gov.uk/pdf/report2015.pdf> at page 12.

<sup>54</sup> <http://www.adjudicatorsoffice.gov.uk/pdf/report2017.pdf>.

<sup>55</sup> Section 204(4) Finance Act 2014.

lack of appeal rights has caused some to comment in the strongest terms.<sup>56</sup> The concerns raised by the FN provisions are considerable and go beyond the general concerns raised here, as described in the next subsection of this paper. However, again the general theme of the quasi-judicial nature of the New Powers is raised. To recap, HMRC has been given a power to require a taxpayer to follow an unappealed decision of the First-Tier Tribunal or risk incurring a 50 per cent penalty. HMRC has been given the power to rely on judicial decisions in ways that the courts themselves cannot. The FTT decisions do not create legally binding precedent. Therefore an FTT sitting tomorrow is entitled to reach a different decision from an FTT sitting today when considering essentially the same facts. Yet HMRC can choose to rely on any unappealed FTT decision despite it having no precedential value. At the same time, HMRC has at times refused to apply FTT decisions it does not agree with (and is expected to continue that approach).

Not only do the provisions ignore the lack of precedent of the FTT decisions but they also fail to recognise the rules for deciding which parts of a decision are binding. The English legal system works on the basis that cases setting precedent contain a core judgment, which sets out the principles in the case (and the precedent), as well as more general statements, which do not strictly apply to other cases. The two parts of the judgment are often difficult to delineate and much litigation arises from disputes as to which parts of a judgment are binding and how those parts apply to the particular facts of the case. However, HMRC has been given power to rely on judgments it considers relevant to a taxpayer with no apparent limitation to those generally applicable powers of precedent.

If a case is won by HMRC in the FTT, the extent to which that case can be used as a trigger for FNs is not clearly stated by the legislation. HMRC is only required to consider whether the decision is relevant. HMRC has issued guidance about how it will apply the relevance test,<sup>57</sup> but given that there is no right of appeal, the taxpayer would need to argue in judicial review proceedings that the interpretation of the test was not one that any reasonable HMRC official could reasonably have reached. This is a high threshold even if the taxpayer is in a position to pursue judicial review.

It is therefore not surprising that some argue that HMRC has been placed above the law through the FN provisions. Reliance on benign operation by HMRC is not a safeguard.

It is important to remember that the New Powers have been developed to deal with tax avoidance, not tax evasion. Tax avoidance, whether approved of or not, involves action within the bounds of existing tax legislation. It is, to varying extents, a product of the tax system that is in place and, in particular, the boundaries placed in that system by successive governments. Over the past 10 years, the political dynamics regarding the distinction between avoidance and evasion have changed significantly and a growing sense has developed of acceptable and unacceptable tax avoidance. The boundaries between the two are, and always have been, uncertain and subject to changing views over time. However, the New Powers that, for example, enable taxpayers to be named and shamed because HMRC disagrees with their interpretation of the law, not because they have been convicted of tax evasion, raise significant questions as to whether

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<sup>56</sup> See, for example, the article by Robert Venables QC at <http://www.taxchambers.com/wp-content/uploads/2014/07/Attacking-Follower-Notices-and-Accelerated-Payments-Notices3.pdf> where he describes the APN and FN provisions as '*the most pernicious attack on the Rule of Law [since 1688]*'.

<sup>57</sup> <https://www.gov.uk/government/publications/follower-notices-and-accelerated-payments/follower-notices-and-accelerated-payments>.

disagreement with HMRC as to the meaning and application of the law is an appropriate basis for such measures.

Independent checks and balances on HMRC's New Powers are required and previously those checks and balances were provided by way of rights to appeal to the courts. Concerns such as those identified above were sufficient to prompt the Law Society to publish a paper, 'Tax and the Rule of Law', in April 2015 expressing concern that the changes in HMRC's powers threaten the application of the rule of law in the area of tax.<sup>58</sup> As mentioned above, numerous commentators have made similar comments, at times in the strongest terms.

### ***Behavioural implications***

Some of the New Powers also raise questions about their behavioural impact. Attempts have been made to identify the most effective models of regulation. The model often referred to and used in more or less modified forms by many regulators is known as the Braithwaite model.<sup>59</sup> It is based on two concepts: the compliance pyramid, which suggests that the majority of people will comply with rules if they are encouraged and helped to do so, meaning that the authority can focus its efforts and resources on the 'recalcitrant few' who choose not to comply; and the concept of responsive regulation, under which authorities adapt their regulation of taxpayers according to the risks shown of them not complying with legislation. For the tax arena, it has been suggested that the pyramid is more of an egg shape with a large number in the middle who consider themselves compliant but disagree with the interpretation of the tax authority.<sup>60</sup> How to deal with that bulging middle is the problem faced here.

The Organisation for Economic Cooperation and Development (OECD) has observed that taxpayers '*who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply*'.<sup>61</sup> The government no doubt considers that the New Powers are aimed at the aggressive few and therefore can be more draconian. To the extent that the taxpaying public sees that this is the case, the behavioural impact of the New Powers may be seen to be in line with the Braithwaite model and positive. However, a sense of unfairness could develop if it is felt that disproportionate burdens are placed on those taxpayers who are not contravening the law but simply take a position with which HMRC disagrees. These burdens include, in particular, the high levels of penalty risked by taxpayers who choose not to pay the tax claimed by HMRC where an FN or GAAR penalty notice has been issued.

The Finance Act 2016 provisions for serial avoiders provide a clear example of the behavioural issues raised by some of the New Powers. Those provisions are triggered by what is described as a 'defeat' (which can include compliance with an FN or notification of a transaction in accordance with the DOTAS requirements) which is then counteracted by HMRC. The triggering of the serial avoider provisions means that additional reporting requirements are imposed on the taxpayer. It is possible for a taxpayer to be denied tax

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<sup>58</sup> In some cases, safeguards take the form of specific appeal rights, which are provided to enable the taxpayer to appeal to the relevant tribunal: the First-Tier Tax Tribunal or the Social Entitlement Tribunal.

<sup>59</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, 1992; John Braithwaite, 'The essence of responsive regulation', 2011, 44:3 UBC L Rev 475.

<sup>60</sup> See further Judith Freedman, 'Responsive regulation, risk, and rules: applying the theory to tax practice', <http://www3.law.ox.ac.uk/themes/tax/documents/08.03.12Freedman.Resp.Reg.pdf>.

<sup>61</sup> OECD, *Principles of Good Tax Administration – Practice Note*, GAP001, 2001, page 3.

reliefs (or even to be named and shamed) by virtue of three 'defeats' within five years even though the taxpayer has fully complied with the law and HMRC's requirements. The regulatory message here is far from clear. If a taxpayer pays the tax demanded after an FN has been issued or a DOTAS transaction has been counteracted, and the taxpayer is therefore fully compliant, why are the extra punishments of the serial avoider provisions necessary? Regulatory models indicate that rating a taxpayer as high risk when they consider themselves compliant can reduce the likelihood of future voluntary cooperation. In these cases, the taxpayers may feel more inclined to litigate the transactions covered by the FNs or DOTAS counteraction so that they do not fall within the serial avoider provisions. This illustrates the other behavioural concern of such an approach: the more regulation is used to deal with broadly compliant taxpayers, the greater the resource demands are on HMRC to operate the rules.

Looking ahead, if HMRC can use the New Powers to enforce its own views as to the correct interpretation of the law, the incentive to make tax law simpler and clearer is reduced. That is a problem for many more taxpayers. Tax law will never be completely certain, but the right way to deal with tax laws that are open to varying interpretations, and boundaries that are used for avoidance, is to make better tax law and to remove some of the boundaries. If it is considered that HMRC is heavy handed with its use of its powers and taxpayers are exposed to HMRC's changing views of uncertain legislation, the behavioural impact of that, including the attractiveness of the UK as a place for business to locate, is uncertain.

## **The additional issues raised by the Penalty Powers**

As noted above, the high levels of the FN and GAAR penalties can be expected to deter many from pursuing their cases where ordinarily it might be expected that a tribunal or court would provide an independent view of the meaning and application of tax legislation to the taxpayer's circumstances. Given the costs and uncertainties that always apply to litigation where the meaning and application of the legislation is uncertain, the Penalty Powers have been described by many commentators as loading the dice so heavily against taxpayers that taxpayers are more likely to concede even where there is a real issue about the correct interpretation and application of the legislation to the case that the courts would ordinarily be called upon to resolve.

Such a deterrence effect can have additional implications beyond those for the particular taxpayers involved. It can increase the potential for HMRC's views of the law to prevail irrespective of views to the contrary – in effect using the Penalty Powers to enforce compliance with HMRC's view of the law – and for HMRC's view to be used to deal with defects in the legislation instead of correcting the legislation.

In the context of the GAAR penalty power, there is an additional concern that, as a matter of practical reality, the power circumvents the safeguards built into the GAAR, which provided the very basis for its adoption. When enacted, the GAAR contained specific safeguards to recognise the fact that it may apply in circumstances that lie outside the normal limits of the tax code. In other words, the provisions recognised that a taxpayer's arrangements could in fact produce a particular tax outcome which HMRC could override by invoking the GAAR. The safeguard was known as the double reasonableness test. However, the GAAR penalty provisions are crystallised at an earlier stage in the application of the GAAR, after the GAAR Panel has considered the case. The GAAR Panel does not



apply the double reasonableness test. Therefore the potential application of the GAAR penalty is not preceded by an independent adjudication corresponding to the final adjudication that would be made. The ability to challenge HMRC's action in invoking the GAAR to override the tax legislation in question may be severely limited by the financial risks involved in a 60 per cent penalty that now attaches to that challenge. In effect, the value of the double reasonableness test (which was previously at the heart of the GAAR) has been significantly reduced.

## 7. An Alternative Safeguard?

In Australia, the office of Inspector-General of Taxation (IGT) was set up as an independent statutory agency in 2003. It is independent from the Australian Taxation Office (ATO). When it was set up, the main role of the IGT was *'to review and report to Government with recommendations on: systems established by the ATO to administer the tax laws, including systems for dealing or communicating with the public generally, or with particular people or organisations, in relation to the administration of the tax laws; and systems established by tax laws, but only to the extent that the systems deal with administrative matters'*. From 1 May 2015, the IGT is also *'able to help members of the community to address complaints they have about the actions of the ATO'*.<sup>62</sup>

The IGT consults with taxpayers, tax professionals and their representative bodies, the Assistant Treasurer, the Parliamentary Standing Committee on Tax and Revenue, the Commonwealth Auditor-General, the Commonwealth Ombudsman, the ATO and the Department of Treasury to identify concerns and 'improvement opportunities'. A programme of work is then announced in a manner similar to that used by the Law Commission.

The IGT is therefore independent of the ATO, but the extent of its ability to drive change is limited. The Protocol agreed between the ATO and the IGT states that *'the Tax Office will implement agreed recommendations of Inspector-General reviews as soon as practicable and will provide the Inspector-General with regular reports on progress. The Inspector-General will periodically review implementation progress'*.<sup>63</sup> The key point here appears to be that the ATO agrees to implement 'agreed' recommendations. Outside of that agreement, while the IGT can make recommendations, it cannot enforce compliance with them by the ATO. For example, in the recent debt recovery report,<sup>64</sup> the IGT was worried by a system under which debt collection officers made decisions in isolation from the legal and audit specialists, but the recommendation to merge the debt and audit areas of the ATO was not accepted by the ATO.

Until May 2015, the role of the IGT was expressly limited to administration systems, rather than individual taxpayer matters or the handling of particular cases.<sup>65</sup> It remains to be seen what the impact of the extended role will be.

The problem with adopting an independent safeguard along the lines of the IGT is that such a person does not have powers to require the tax authority to alter its behaviour. It is therefore a limited form of control.

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<sup>62</sup> <http://igt.gov.au/about-us/history/>.

<sup>63</sup> <http://igt.gov.au/about-us/accountability-and-reporting/protocol-igt-and-ato/>.

<sup>64</sup> <http://igt.gov.au/publications/reports-of-reviews/atos-approach-to-debt-collection/>.

<sup>65</sup> <http://igt.gov.au/about-us/accountability-and-reporting/statement-of-expectations/>.

## 8. Conclusion

HMRC is a huge organisation and, despite all its best efforts, errors can and will inevitably be made. As this paper has indicated, however, concerns regarding the scope and operation of the New Powers are not limited to cases of error. They can also extend to the issue of the proper interpretation, application and effect of the UK's tax code and the basic right of taxpayers to have their liability to tax adjudicated upon by an independent appeal tribunal.

When the taxpayer has the ability to seek redress via the FTT then, even though that process has its own costs and limitations, the taxpayer can feel that there is independent control on the use of HMRC's powers. For example, in the recent case of *C J Palau & R C Loughran v HMRC* [2015] UKFTT 0038, the FTT concluded that HMRC's approach of imposing a penalty for simply filing the wrong form where there was no loss of revenue was a step too far. Hacking J said that HMRC's argument led to the '*logical absurdity that the appellants' accuracy in the completion of a form designed to check eligibility under the [VAT] scheme gives rise to a penalty for inaccuracy*'. That case had been through review processes and had reached the FTT without HMRC recognising the unreasonable nature of its demands. HMRC might argue that it was simply applying the law provided by parliament, but that argument is of particular concern where the powers given by parliament are as widely drafted as the New Powers.

In the case of the New Powers, where there is no or limited ability to appeal to the FTT, the remaining safeguards are limited and cumbersome. The Adjudicator and Ombudsman offer some opportunity for redress in individual cases, but the process is slow and it is doubted whether those departments have sufficient resources to cope with the potential increased pressure arising from the recent HMRC powers. The Tax Assurance Commissioner's lack of independence means that he cannot be seen as an effective control on the use of HMRC's powers. Judicial review is neither sufficient nor accessible as a safeguard.

As a starting point to assess the operation of the New Powers, a report on their use is asked for, setting out the circumstances of their use, the number of times the New Powers have been used, what steps, if any, have been taken by taxpayers to challenge their use and whether those steps taken by taxpayers have been successful. While some information is provided by HMRC in its Annual Reports, that is in the form of statistics for the use of APNs and FNs only. Other New Powers are not covered.

It is eight years since the last review of safeguards by HMRC. In 2015, the Chartered Institute of Taxation and the Association of Taxation Technicians published a joint report on the workings of HMRC's penalties, compliance checks and reviews. Overall, it was concluded that their survey of members revealed that the current system was not operating as well as hoped. The Office of Tax Simplification also called for a full review of all penalties in its report in 2014.<sup>66</sup> HMRC was due to be undertaking a review of penalties and, if still to occur, this is to be welcomed. This paper urges a wider-ranging review of HMRC's powers, deterrents and safeguards in line with the recommendation of the Treasury Select Committee, which stated that '*The Committee believes that sufficient time*

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<sup>66</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/374509/OTS\\_tax\\_penalties\\_final\\_report\\_121114.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/374509/OTS_tax_penalties_final_report_121114.pdf).

*has now passed to warrant a post-implementation review of these powers. The aim of this review should be to ensure that all the powers HMRC has at its disposal remain relevant and are no more than are sufficient to enable HMRC to achieve its objectives'.<sup>67</sup>*

This paper also suggests that some form of independent control of the use of HMRC's New Powers, beyond that provided by the existing safeguards, is necessary, if only to provide confidence in the system and the position of HMRC as administrator rather than lawmaker. The Tax Assurance Commissioner's role could be extended for this purpose but the role would need to become truly independent of HMRC; or the Adjudicator could be placed on an independent statutory basis with enhanced powers. Alternatively, a separate body could be established.

Given the extent of concerns regarding the Penalty Powers, a regular (ideally annual) report on the use of the powers and the results of such use would hopefully illustrate the limits on their use applied by HMRC.

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<sup>67</sup> Paragraph 248 of the Report on the 2014 Budget,  
<http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news/budget2014report/>.