

Please listen!

The way that the Government consults on tax policy leaves much to be desired, says **SIMON MCKIE**.

On the day of the current Chancellor's first Budget speech, 22 June 2010, the Government published a consultation paper entitled 'Tax policy making: A new approach'. In a foreword to the paper, David Gauke, Exchequer Secretary to the Treasury, explained:

'Making the right decisions on tax policy is critical – it makes a difference to almost every business and citizen in the UK. This is more important than ever as we face the urgent task of reducing Government borrowing ...

'The Government is committed to creating the best possible environment for a private sector-led economic recovery. A competitive system is at the heart of our approach ... but a competitive tax system is not only about the level of taxation and the policy choices that determine its instance. It is also about the quality of our tax law and the way in which we make tax policy. How we:

- propose;
- consult;
- legislate;
- implement; and
- evaluate changes to the tax systems.'

Some sensible points

On tax consultation, the paper makes some sensible points proposing a new convention for tax policy. This is that the majority of measures that have been included in the following Finance Bill should have been 'confirmed' at least three months before formal publication. This 'confirmation' will be accompanied by:

KEY POINTS

- Abuse of the consultation process in recent years.
- Use of guidance to correct faulty legislation.
- New legislation should be reviewed for accuracy.
- Current method of consultation is too one-sided.
- Use an independent body to oversee consultation.



- draft legislation for inclusion in the Finance Bill;
- an accompanying [sic] explanatory note; and
- a technical note, where appropriate, setting out how the legislation is expected to work in practice.

The paper analyses the development of tax policy as consisting of three stages:

- 'Stage 1: set out objectives and identify options;
- 'Stage 2: determine the best option and develop a framework for implementation, including detailed policy design; and
- 'Stage 3: draft legislation to effect the proposed change.'

In respect of this three-stage process, the paper contains a number of suggestions, the most important of which is that the Government will consult:

'... at each identifiable stage for all tax changes, where proportionate and practical to do so, and where revenue is not put at risk. For the simplest tax changes these three stages may run together, but for major reforms each stage will be distinct and may run for many weeks or months.'

Depth of the problem

All of this is both sound and sensible but one might recall that the previous Government claimed to consult on tax legislation and to take account of the results of that consultation in its legislation. That Government presided over the most precipitate decline in the quality of tax policy-making and tax legislation that has occurred during my lifetime. The starting point, when considering tax policy making, is to recognise the truly awful situation at which we have arrived, and I am afraid that the paper gives no sense that it does.

Although the previous Government paid lip service to the process of consultation, it rarely listened to the results of the consultations it launched. In particular, it rarely listened to responses that addressed the overall policy of the proposed

change or large strategic issues within the proposal. The only responses in which HMRC appeared to be interested were in respect of specific drafting points and then only in respect of those which prevented the Government exposing its incompetence by overlooking obvious howlers, or of corrections which favoured the Government and not the taxpayer.

In effect, the previous Government and HMRC abused the consultation process, ignoring responses in relation to the most important issues involved in legislative change and creating an illusion, for public relations purposes, of taking account of outside views while exploiting the resources of the private sector to correct work which it had performed inadequately.

When other faults were identified in the legislation by the professional bodies, the Government often simply pretended that the faults did not exist or said that it would put them right by introducing 'guidance'. What HMRC then did was to publish guidance expressing an untenable construction of the proposed new legislation that simply pretended the identified weaknesses did not exist at all.

A good example was the guidance on TCGA 1992, s 16A (restrictions on allowable losses), enacted in the Finance Act 2007. The result of the Government's refusal to amend faulty legislation, coupled with the pretence that the legislation was not faulty, is that taxpayers are now over-taxed by law and relieved by unacknowledged concession posing as guidance: a constitutionally improper situation.

The proliferation of 'guidance' in which HMRC deliberately make inaccurate statements of the law has had the result that much of the material published by HMRC, far from being useful to taxpayers, adds to burdens. That is because taxpayers must now obtain advice not only on the law itself but also on whether HMRC's guidance on the matter in question is accurate and internally consistent and, where it is not, whether they should follow the law or HMRC's inaccurate gloss on the law.

As the tax system became ever more unwieldy and unworkable, HMRC reacted by demanding increasingly complex anti-avoidance provisions and greater powers to search premises, obtain documents and impose penalties: provisions and powers which there was no evidence to suggest were necessary. It is a disturbing sign that the paper cites the review of Government powers, in which the Government ignored most of the substantive criticisms made by the professional bodies and conferred profoundly illiberal powers on HMRC, as a notable example 'of best practice' in consultations.

This combination of poor quality law, untruthful Government statements and expanded powers of interference in the lives of private citizens inevitably led to a decline in the trust and respect of the taxpayer for the Government, HMRC and the law.

Although the paper shows some awareness of the need to identify steps to improve tax policy making, it does not display a sufficient sense of the truly appalling state to which the last Government brought our tax system. Nor does it show an appreciation of the radical change of attitude which will be necessary if the Government is to reverse this decline. In particular the paper does not identify the fact that HMRC is,

in effect, allowed by the present system to be its own judge and jury in respect of estimation, the justification of new and existing legislation and in the conduct of consultations.

Putting it right

Reversing this sorry tale of decline at a time when the Government's finances are in a worse position than they have ever been requires the new Government to stick firmly to its principles. One of the key principles is to ensure effective consultation. That consultation, as the paper proposes, should be divided into three stages:

- a broad consideration of the policy of the proposed change and of alternative strategies for implementing that policy;
- a more detailed consideration of the particular strategy for implementing the policy which is identified as best under the previous stage of consultation; and
- a consultation on draft legislation produced in the light of the results of the previous stage of consultation.

There should be a presumption that these processes should not be conflated. Sufficient time should be given not only to receiving representations but also to considering the representations. The caveat to the paper's commitment to a three-stage process of consultation quoted above ('... where proportionate and practical to do so, and where revenue is not put at risk ...') suggests that the Government and HMRC do not wish to be bound to objective standards of whether the time allowed for consultation is adequate.

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There is no point in consulting if the results of the consultation are to be ignored. So it is important that there should be an examination of the results of the consultation and the extent to which those results have been reflected in changes to the proposed policy, strategy or draft legislation. There should also be a review, after new legislation has been introduced, of the extent to which the results predicted by HMRC and respondents have actually arisen. Such a review would help to identify errors in forecasting by HMRC and thus improve the reliability of their forecasting.

Obviously, that review cannot be undertaken objectively by the department which has sponsored the proposal. Control of the process of consultation on proposed tax changes should be given to a body which is independent of the department making the proposal which is the consultation's subject. Much of the detailed work of consultation must continue to be undertaken by HMRC, but deciding the scope of the process, controlling it and reviewing both the conduct and the results of consultations should be the responsibility of an independent body.

Independent oversight

The consultation on the paper itself demonstrates the inappropriateness of the department involved being in charge of the consultation process. Reforming tax policy making requires an objective view of the failings of HMRC and of HM Treasury particularly during the lifetime of the last Government. It is wholly inappropriate that those two departments should be put in the position of reporting to ministers on their own failings.

I recently attended a meeting which provided a forceful example of the inappropriateness of HMRC and the Treasury being in charge of this consultation. It was supposed to form part of the consultation on paragraph 2.15 of the paper, on whether or not the Government should introduce a general anti-avoidance rule (GAAR) into the tax system.

A large number of professionals attended. Only after the meeting commenced were the attendees informed that HMRC wanted the meeting to take place under the Chatham House rule. Inviting a large number of members of the public to a meeting on a public consultation and attempting to impose a secrecy requirement on them only when they have arrived is a strange way of conducting an open consultation on matters of such importance.

The meeting opened with a talk of some 50 minutes by one of the few commentators who are partisans of a GAAR outside the Civil Service. The talk proceeded to set up a series of assertions that no commentator had ever made as Aunt Sallies to allow the speaker to present her highly controversial views as the only alternative to plainly untenable positions.

For example, the speaker said that opponents of a GAAR had suggested that it would introduce uncertainty into the tax system and answered that 'point' with the truism that the system already contained uncertainty. No informed commentator on a GAAR has ever suggested that it does not. Most commentators do not say that a GAAR would introduce uncertainty into the tax system but, rather, that it would significantly increase it. There was no other speaker at the meeting to provide balance.

Having so subtly tried to direct the meeting's views, the first question the gathering was asked to debate by the organisers

was not what the effects of introducing a GAAR would be or whether a GAAR should be introduced, but rather 'which taxes should a GAAR cover', thus begging the very question which was the subject of the consultation. One cannot envisage any respectable market research agency conducting its research in such a biased fashion.

No mechanism was provided for participants to check the accuracy of the summaries of their responses which were to be submitted to ministers.

Worthy though the sentiments of the paper in respect of the conduct of consultations may be, it is clear that a consultation process cannot command public trust unless it is overseen by a body independent of the departments whose activities or proposals are the subject of the consultation.

Overseeing consultation

There should, therefore, be an independent body charged with responsibility for overseeing consultations, determining their scope, reviewing their conduct and results and challenging HMRC over any failure to accept those results or to reflect them in the development of the proposal concerned.

That would involve accepting the risk that the result of the consultation would be unfavourable both to the broad policy and to a detailed method of implementation of the proposed change, that HMRC would be revealed as incompetent and that, if the Government proceeded with the change in spite of the result of the consultation, it would be seen to do so in the teeth of expert opinion. If it looks on consultation as simply an exercise in public relations the Government will not take such a risk.

If it is serious about improving tax policy making, however, and truly recognises the importance of consultation in doing so, the Government will introduce this long overdue element of independence into a key element of the process of tax policy making. ■

Simon McKie is a designated member of McKie & Co Advisory Services LLP. He can be contacted on tel: 01373 830 956 and by e-mail: simon@mckieandco.com.

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daniel.wild@lexisnexis.co.uk
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