



Response from ICAS

**HMRC Powers and Safeguards Evaluation
Questionnaire**

4 March 2020

HMRC Powers and Safeguards Evaluation

Forum Questionnaire

The Financial Secretary to the Treasury has committed HMRC to evaluating the implementation of powers introduced since 2012 against the powers and safeguards principles that underpinned the 2005-12 powers review.

Evaluating the implementation of HMRC's post-2012 powers includes considering how HMRC ensures the correct tax is paid, and whether there is best practice the department can learn from. It is focused on HMRC's operational approach – i.e. how do our processes, procedures and internal safeguards ensure we intervene appropriately with our customers.

The findings of this evaluation will be published in early 2020 and will draw on evidence – including (anonymised) case studies and quantitative data. Where possible, it should highlight where HMRC has, is or intends to take action to improve our service for our customers.

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Guidance

- This evaluation:
 - **Considers HMRC's implementation of its post-2012 powers** against the powers and safeguards principles that underpinned the 2005-12 powers review (provided in Annex A); and
 - **Calls for evidence** of how HMRC has implemented the powers.
- As powers will be evaluated individually, it would be helpful if you could please complete a separate questionnaire for each power that you wish to provide evidence on, however, if you would prefer to provide case studies which cover multiple powers, please enter (at question 1) which powers are covered in your questionnaire.
- Please provide as much detail as possible about **how and where you have seen HMRC implement its post-2012 powers in practice, and whether this adheres with the principles or highlights scope for improvement**. Please provide:
 - **As much detail as possible** to answer each question (text boxes can be extended);
 - **References where possible** – including facts, figures or links to public statements/documents;

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- **Anonymised case studies**, drawing on actual cases. Please do not include customer details or anything that would make a customer easily identifiable. **Sample case studies are provided in Annex B**); and
- **Actual evidence**, as opposed to hypothetical examples or opinions.

Questions: Feedback on HMRC's implementation of a power

Introductory comments

The following evidence has been compiled by the ICAS Tax Board. The Board, with its five technical Committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants working across the UK and beyond; it does this with the active input and support of over 60 committee members. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 22,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.

We were pleased to have the opportunity to discuss the powers review – and issues commonly encountered by our members in day to day practice – at our meeting with Mark Frost, from the HMRC Powers team, on 26 February.

1. *Please provide the name of the power (and the number on the list) that you are evaluating. If you are providing a case-study/ studies which cover multiple powers, please provide the name and numbers of each of the powers covered:*

This response deals with themes relevant to many powers – rather than a specific power (or package of powers). We have included some comments related to powers which were highlighted for 'first order scrutiny' on the powers list – but we believe it is important that the review also considers broad themes around HMRC's implementation and use of its powers. HMRC has not made extensive use of some of the powers on the list (in some cases because they are too recent) so it is difficult to provide detailed evidence relating to these. There is therefore a risk of important issues being missed if the review does not take account of evidence related to issues common to a number of powers (some of which were introduced before 2012).

Some of the comments included in our response relate directly to our members' experience of powers introduced prior to 2012. Several of these were raised at our meeting with HMRC on 26 February. Due to the remit set out by the FST we appreciate that the current report will concentrate on post-2012 powers. However, we would like to see an acknowledgement in the report that there are issues with the exercise of HMRC powers more broadly, which need to be addressed; this could take the form of a recommendation for future work on how HMRC exercises its powers in the broader context.

2. *Please enter your evidence or case study/studies to describe where you have seen HMRC implement the power(s) noted in your answer to question 1, please:*

- *Draw on the model case studies provided in Annex B;*
- *Describe HMRC's engagement with the customer and, where appropriate, the agent, highlighting specific points that demonstrate compliance (or non-compliance) with the principles, or scope for improvement. In particular:*
 - *Did HMRC prepare customers and agents for introduction of the power, and ensure the preparation was appropriately:*
 - a) *Comprehensive;*
 - b) *Accurate;*
 - c) *Proportionate;*

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- d) *Kept up to date; and*
- e) *Received by hard to reach customers or agents?*
- *How did HMRC ensure the customer and the agent were aware of their rights and obligations prior to the implementation of the power (e.g. through guidance or public communications) – was this fit for purpose?*
- *How did HMRC ensure the customer was aware of their rights and obligations whilst the power was being exercised – was this useful; and*
- *Did you seek additional information from HMRC – was this useful;*
- *Highlight if you provided HMRC with feedback on its approach and the outcome of that feedback; and*
- *Note whether HMRC's guidance was helpful in this case – if not, why not?*

A. Accessing legislation on powers and safeguards

The Powers Deterrents and Safeguards programme of consultation and legislative change ran from 2005 to 2012 and was intended to provide a modern framework of law and practice for tax administration. Following the merger of HM Customs and Excise and the Inland Revenue it also aimed to align powers, deterrents and safeguards across taxes, where this made sense. As a result of the programme significant changes were made to legislation in Finance Acts for every year from 2007 to 2012. In the years since 2012 additional changes were made every year – 120 powers appeared on the long list compiled for the current evaluation (not all of which are within the scope of the evaluation).

As a consequence of the extensive legislative activity between 2007 and 2019, legislation dealing with HMRC powers, deterrents and safeguards is now to be found in a variety of different places – particularly scattered across different Finance Acts and the Taxes Management Act 1970. This makes it very hard for taxpayers and agents to access and apply correctly.

The current evaluation is intended to consider HMRC's implementation of the powers introduced since 2012. An important part of this should be to consider whether it is easy for taxpayers to find and understand the legislation relating to those powers (and the safeguards) – transparency is essential in maintaining trust in the system. Feedback we receive indicates that the position is deeply unsatisfactory. We have included a recommendation for addressing this problem in our response to Question 3 below.

B. Basic principles underlying HMRC powers; balance is essential

ICAS believes that HMRC should have appropriate powers to enable it to administer the UK tax system efficiently and to enforce compliance; this means a degree of access to taxpayer information and the power to impose penalties.

However, there should be a balance between these HMRC powers and taxpayers' rights to certainty and privacy. HMRC should also provide adequate support and guidance to taxpayers who want to comply, particularly those who are vulnerable and may find dealing with their tax affairs challenging.

Taxpayers need to have confidence that HMRC is exercising its powers proportionately and that appropriate safeguards are in place. A degree of external scrutiny is required, so the right of appeal to an independent Tribunal against HMRC decisions is important.

ICAS believes that the following basic principles should underpin HMRC powers, but increasingly these are being eroded:

- A presumption that taxpayers are honest and telling the truth, unless HMRC has good reason to think otherwise. We have been given the following examples where this is not happening, which we understand are illustrative of such problems rather than simply one offs:
 - VAT policy team initiatives (which are rolled out via CCMs and VAT officers): the policy team assumes that the taxpayer is doing something wrong and compounds the problem by refusing to engage directly with the agent/taxpayer. Explanations of the substance/good reason behind the position are provided to the CCM/VAT officer, but everything has to be passed back to the policy

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team with any questions being passed back via the CCM/VAT officer. This process wastes considerable amounts of time for businesses and agents. In some cases, meetings are held with the CCM/VAT officer and agreement seems to have been reached. However, when a letter is subsequently issued it has clearly come from the policy team and does not reflect the discussions with the CCM/VAT officer, or what the agent thought had been agreed. If the taxpayer/agent opts for review the case ends up back with the same policy team, so there is no way of getting proper consideration of the issue – other than to go to the Tribunal (which may be unwelcome for taxpayers who do not wish to incur, or cannot afford, the cost).

- When businesses wish to agree a special partial exemption method the request is sent to the Tax Avoidance and Partial Exemption method department i.e. HMRC's assumption appears to be that avoidance must be behind the request.
 - In a case involving a valuation, the valuation office presumption was clearly that the large corporate taxpayer was 'trying it on' – in spite of supporting documentation and third party information being provided. The taxpayer was also required to provide responses within two weeks, but it then took two months for HMRC to reply.
- Where taxpayers have complied with their filing obligations, they should have certainty and closure within a reasonable timeframe. This was an explicit guarantee when self assessment was introduced but is now being eroded. In several recent consultations (and resulting legislation) HMRC has sought extended assessment time limits to give it extra time to deal with data being received under the Common Reporting Standard regime and complex offshore matters – apparently because its resources are inadequate. This is a cause for concern and this trend to extend time limits should not continue.

We have also had reports that poor legislation, combined with poor communication and HMRC administrative problems have led to unintended failures to notify by taxpayers – HICBC is a good example of this. As there has been a failure to notify, the time limit is 20 years. This might be appropriate in cases where the failure to notify is deliberate, or an avoidance scheme is involved – but in cases (such as those involving HICBC) where the failure is inadvertent, there is a case for giving taxpayers closure after 6 years.

- Respect for the taxpayer's right to appoint an agent to deal with HMRC on their behalf (and HMRC should work with authorised agents). HMRC's failure to ensure that agents can see and do what taxpayers can see and do is adversely affecting the ability of agents to act effectively on behalf of their clients – and undermines the vital role of agents in supporting compliance.

It is also being made increasingly difficult for taxpayers (particularly those who are digitally excluded or digitally reluctant) to authorise agents; the new digital handshake procedures for the CGT reporting system and the Trust Registration Service require taxpayers to set up Government Gateway accounts to authorise an agent. Many taxpayers appointing an agent do not want to interact with HMRC at all, or do not wish to interact digitally, so we do not believe that requiring the creation of a Government Gateway account is acceptable or in line with the HMRC Charter. We discuss this in more detail below (response to Question 3, part B - Basic principles underlying HMRC powers; balance is essential – recommendations).

- A helpful, efficient service for taxpayers (which requires HMRC to have adequate resources) and taxpayer-friendly filing and administrative systems. Cuts to HMRC resources have led to frequent episodes of poor performance on HMRC helplines, making it difficult to resolve even routine issues. It is also difficult, sometimes impossible, for smaller agents and taxpayers (i.e. those who are not large enough/wealthy enough to have CCMs) to access the right specialist HMRC resources for more complex matters; the current escalation routes do not work properly.

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We have been told about numerous examples of problems with inexperienced/inadequately trained HMRC staff and related HMRC delays, which are causing considerable problems for agents and taxpayers – particularly in the personal and indirect tax areas.

There is a perception that whilst there are still experienced, well-trained officers within HMRC, many have left (possibly as a result of the office reorganisation) or are increasingly difficult to access. Many caseworkers appear to be inadequately trained and are unable to provide any technical/legal basis for their actions. Odd questions are asked – and when information is provided cases often seem to be put on the ‘too difficult’ pile leading to lengthy delays. In one case HMRC had information for 18 months without dealing with it.

In the last 12 months there have been additional problems caused by frequent changes of caseworkers on enquiry cases; where in the past an enquiry might have been dealt with through two letters to one caseworker, now it can take seven letters to two or three caseworkers.

Processing times for VAT error corrections are leading to increased interest costs for businesses.

Access to the right HMRC technical resource to resolve issues in a timely manner is essential for all taxpayers, not just those large enough/wealthy enough to have CCMs – we make some suggestions for improving access in our response to Question 3 below.

Whilst feedback from large companies with CCMs is generally more positive, we have also recently received reports of delays here too. It is not clear why these delays are occurring, but examples include:

- The example noted above, with information being required from the taxpayer within two weeks but HMRC then taking two months to respond, once it had been supplied.
 - HMRC taking two years to respond after information had been supplied by the taxpayer in response to a minor query raised by HMRC.
 - Transfer pricing enquiries taking four to five years to resolve.
- A robust regulatory and oversight framework to ensure that the right balance is maintained between HMRC powers and taxpayers’ rights.

Where there is a dispute between HMRC and a taxpayer about the correct treatment of a particular issue, the ultimate safeguard is the taxpayer’s right of appeal to an independent tribunal. However, for a taxpayer who cannot afford the costs, this safeguard may be more apparent than real. It is therefore essential that other safeguards – particularly internal review - work effectively.

C. Engagement with customers and agents

The sheer volume of new powers and new penalties has undermined their effectiveness. The 2019 policy paper “Tackling tax avoidance, evasion, and other forms of non-compliance” listed over 100 measures introduced by the government since 2010 to tackle avoidance, evasion and non-compliance.

As the paper makes clear HMRC has been given a constant succession of extra powers and the ability to impose new penalties. Whilst we support government and HMRC efforts to tackle tax avoidance (and evasion), the new regimes are not given time to settle down or for their effectiveness to be assessed – before the next new regime is introduced.

The main purpose of penalties should be to act as a deterrent, but an effective deterrent relies on taxpayers being aware of (and understanding) the increasingly large numbers of different penalties and how they might be relevant to their own affairs. The question asks whether HMRC’s preparation of agents and customers, for the implementation of new powers was appropriately:

- a. *Comprehensive;*
- b. *Accurate;*
- c. *Proportionate;*

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- d. *Kept up to date; and*
- e. *Received by hard to reach customers or agents?*

Feedback we receive suggests that many of those affected by new penalties or powers are unaware that they exist until it is too late. Clear evidence of this can be seen, for example, in the large number of Tribunal cases relating to NRCGT penalties – and in the feedback we have received from our members. Many normally compliant taxpayers did not realise that they had an obligation to report (particularly where there was no tax to pay) until they came to complete their normal SA tax return (which included information on NRCGT). More targeted communications should have been provided; it would also have made sense to include advance information in tax returns the year before implementation. In cases where there is no tax to pay – and the taxpayer was unaware of the filing requirement due to the poor HMRC communications – the penalties also appear disproportionate and intended to raise revenues – rather than intended to act as a deterrent/incentive to comply.

Whilst agents and others (for example, financial institutions) have a role to play in communicating some new penalties and powers to clients, this should never be regarded as a substitute for adequate communications initiated by HMRC. Only HMRC has access to all taxpayers and access to information which would help to target communications effectively. The requirement imposed on agents to issue Notification Letters about penalties and powers relating to offshore tax matters almost certainly resulted in some taxpayers receiving more than one notification – but others (particularly unrepresented taxpayers) receiving nothing.

The Corporate Criminal Offence (CCO), which came into force on 30 September 2017, provides another example where HMRC's preparation for the launch of a new regime was insufficiently comprehensive, with HMRC communications failing to reach many taxpayers who were within scope. CCO applies to all partnerships and bodies corporate, with no exemptions for smaller entities or charities. Anyone within scope needed to ensure they assessed their risk and put in place appropriate procedures. However, research commissioned by HMRC ([published in March 2019](#)) revealed that awareness amongst partnerships and companies interviewed was low (particularly amongst smaller entities). 72% of participants in the research were not aware that the new legislation meant that companies and partnerships can be found criminally liable for failing to prevent the facilitation of tax evasion. Only 24% had assessed the risk of being exposed to the facilitation of tax evasion by those providing services on their behalf.

Concerns were also raised with HMRC via the Charity Tax Forum, that awareness of the CCO amongst charities was particularly low – and that their needs were not addressed by the HMRC guidance on GOV.UK (50 pages long and aimed at large organisations). As a result, a briefing on the implications of the legislation for small charities was eventually prepared by charity representatives and published on the Charity Tax Group website.

It still seems likely that many smaller entities within the scope of the CCO remain unaware of their obligations and will not have taken steps to assess their risk, or to put in place the necessary procedures to deal with it.

A further problem with the introduction of so many new powers is that HMRC does not appear to be able to use some of them effectively. For example, the POTAS (Promoters of Tax Avoidance) regime allows HMRC to impose monitoring notices on promoters of avoidance schemes who breach a conduct notice.

The imposition of a monitoring notice would mean that HMRC could publish information about the promoter and would require the promoter to tell clients that it is a monitored promoter. This would act as a clear warning to compliant taxpayers and agents – which would be welcomed by many. However, whilst we understand that HMRC has issued a very small number of conduct notices, no monitoring notices have so far been imposed.

Whilst we appreciate that in some cases the issue of a conduct notice may have caused a change of behaviour by the promoter, we note that the recent independent loan charge review noted ongoing promotion of loan schemes (with approximately 3,000 first time users in the first half of the 2019-20 tax year). It is hard to see why HMRC has not imposed monitoring notices on some of these promoters already.

D. HMRC's approach to penalties and behaviour

Some of the new powers on the list relate to penalties; we have had feedback from members about HMRC's approach to a range of penalties (not confined to those on the list).

The last review of powers, deterrents and safeguards recognised that there should be a different approach to tackling different types of behaviour. For example, the level of penalties for incorrect returns will be different, depending on whether the taxpayer's behaviour is deliberate, arises from lack of reasonable care or from a simple mistake. Penalties can also be reduced to recognise the level of cooperation given by the taxpayer and there will be no penalties in cases where the taxpayer has a reasonable excuse. HMRC also has stronger powers to tackle serious non-compliance.

Our members experience is that HMRC officers are adopting a very rigid approach to compliance and penalties and are reluctant to exercise discretion (using their 'care and management powers') in cases where this may be merited. This is doubtless in part due to the reaction against the perception that HMRC had previously made favourable settlement arrangements with some taxpayers. However, the current approach is perceived as too rigid; in some cases, questions arise about whether 'fairness' is being considered. One example of this would be where a new agent is taking over from a 'failing' agent. The new agent files outstanding tax returns for a number of years but HMRC seeks to impose large penalties; this acts as a disincentive. Given that it is in everyone's interest for the taxpayer's affairs to be brought up to date a less rigid approach would be helpful.

Some HMRC officers are also reluctant to accept that taxpayers have made a mistake or have a reasonable excuse – instead seeking to argue that there has been a lack of reasonable care which carries increased penalties.

Issues are now beginning to emerge with the Requirement to Correct and associated Failure to Correct Penalties. Where someone knew that they had undisclosed liabilities and deliberately did not take advantage of the previous disclosure facilities and also failed to correct, penalties of 100% or 200% might be viewed as proportionate. However, cases are already emerging of honest errors being made i.e. the taxpayer was unaware they had anything to disclose – where a 100 or 200% penalty would be completely disproportionate but where it isn't clear that HMRC will accept that there is a reasonable excuse.

We have also been made aware of a case where an unrepresented taxpayer had been unaware that small amounts of income from an overseas trust were taxable in the UK; they registered for RTC within the deadline – but did not receive a reference number from HMRC and so could not complete the submission and payment. This came to light when HMRC issued a reminder – but this was more than 90 days from the date HMRC subsequently claimed to have issued the reference number. The taxpayer completed the submission promptly after becoming aware of the reference number and the tax due was agreed - but HMRC is now seeking a 100% penalty on the basis that the disclosure requirements were not met. This seems to be a clear cut case of an unrepresented taxpayer having a reasonable excuse – but HMRC is refusing to accept this.

Our members have also reported issues with HMRC's reluctance to suspend penalties in some cases, and a lack of consistency in the approach to suspension. This can produce unfair outcomes. At present the process is subject to the interpretation of events by the case worker. Refusals to accept that SMART conditions may be set for "one-off" events persist, although where the agent follows up most cases will be successfully resolved in the taxpayer's favour. This process does however incur further costs for the taxpayer, which could have been avoided. In an indirect tax case HMRC was initially reluctant to agree to suspension but conditions were eventually agreed (for a 12 month period). At the end of the set period the agent had to chase HMRC to obtain confirmation that the taxpayer had met the conditions; again this increased costs for the taxpayer.

3. *Please describe your recommendations for how HMRC should change the way that it implements this power to make it fairer/ more transparent for taxpayers (or powers, if you are providing a case study which covers multiple powers):*

A. Accessing legislation on powers and safeguards - recommendation

As noted in our response to Question 2 it is important that it is easy for taxpayers to find and understand the legislation relating to HMRC's powers (and the safeguards), both pre- and post- 2012 – transparency and ease of use is essential in maintaining trust in the system. Currently, this is not the case.

The time has come for a consolidation of all tax management and administration provisions in a new Taxes Management Act. This should be written in the more user-friendly style which the Tax Law Rewrite project applied to other important tax statutes.

Developments in digital processes and handling of information also mean that some parts of the legislation relating to powers and penalties are no longer fit for purpose as evidenced by numerous Tribunal cases considering issues arising from computer generated communications and decisions. Rather than tackling the underlying issues an unsatisfactory sticking plaster has recently been announced to address some immediate revenue-threatening issues, as set out in a [Technical Note: Automated decisions](#) published on 31 October 2019. A new TMA would also provide the opportunity to update the older legislation to take account of digital developments.

We appreciate that a decision on this recommendation will be a matter for government, but we would like to see the problem (and suggested solution) included in the report.

B. Basic principles underlying HMRC powers; balance is essential – recommendations

The tax system should reflect the diversity of taxpayers and should be accessible to all members of the taxpaying community; in many cases this will mean access through agents, which should be properly supported by HMRC. 'Your Charter' states that taxpayers are entitled to appoint an agent to represent them and that HMRC will deal with an authorised agent. HMRC should ensure that agents are able to see and do what their clients can see and do, so that they can act effectively on their behalf. Agent access should be properly designed and built into all new online forms and systems from the beginning, not added as an afterthought.

The process for obtaining the taxpayer's authorisation of an agent should not be too onerous and there should be alternatives to 'digital handshakes' for those who cannot (or do not wish to) engage digitally with HMRC. In general, a taxpayer who appoints an agent will wish to delegate the handling of their statutory obligation to report income and self-assess their tax liabilities to the agent. Many taxpayers who appoint agents do not want to interact with HMRC at all – which includes not wanting to set up Government Gateway accounts in order to authorise an agent. Security is important but making it unduly difficult to authorise an agent prevents taxpayers exercising their rights under the Charter or may lead to the adoption of insecure 'workarounds'.

Agents and taxpayers need access to HMRC support and (where appropriate) to relevant experts within HMRC. Helplines and online forums need to be properly resourced and able to deal quickly and efficiently with routine questions and issues. Escalation routes for more complex matters need to work effectively.

HMRC should introduce a designated HMRC contact for all larger agent firms – whose clients account for substantial amounts of tax and whose affairs are often complex. This contact would have a similar role to a Customer Compliance Manager working with large companies in ensuring that access to relevant HMRC expertise is available on a timely basis. We appreciate that it is not feasible to give everyone a designated contact but if there is to be trust in the tax system, and a perception of fairness, all taxpayers and their agents should have adequate access to HMRC, when they need it. Escalation routes from agent and customer helplines therefore need to be considerably improved. For smaller agents an enhanced and improved Agent Account Manager service could be a useful starting point.

As noted above, in our response to Question 2, many problems arise when CCMs and VAT officers are acting as 'mouthpieces' for a VAT policy team pursuing a particular initiative. In these cases, the VAT policy team should be prepared to engage directly with businesses and their agents, rather than passing information/questions backwards and forwards through VAT officers and CCMs. If meetings are held, any subsequent 'decision' letter should accurately reflect the discussions at the meetings and any agreement reached – not the views of a policy team member who was not present at the meeting.

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HMRC needs to take steps to clamp down on poor standards and behaviour by some agents. HMRC has the ability (under MoUs agreed with each of the main professional bodies) to report members to their professional body for poor behaviour – but has made very little use of this. There is also a much bigger problem with agents who are not members of any professional body and who do not adhere either to the standards set out in PCRT (which applies to members of the main professional bodies) or to HMRC's much weaker standard for agents. HMRC has the ability to restrict access to its systems and should be more robust in applying this approach to 'rogue' agents.

Our members also report extensive problems with incorrect R&D and CA claims made by unregulated agents – many of which are accepted by HMRC (apparently because the amounts involved are too small individually to justify the work involved in challenging them). This causes problems for legitimate agents who come under pressure from clients to make inappropriate claims because they are aware of other businesses in their field succeeding – in some cases agents are asked to submit inappropriate claims prepared by an unregulated agent, on behalf of their client. Where this cannot be resolved the regulated agent then has to disengage from the client – which is not in the best interests of the agent or HMRC (or the client in the long term).

C. Engagement with customers and agents - recommendations

New regimes should be given time to settle down and effectiveness should be assessed – before the next new regime is introduced.

In order to ensure that new powers, and particularly new penalties, can act as an effective deterrent – and to ensure that taxpayers who want to comply are given the opportunity to do so – communications to agents and to affected taxpayers need to be properly targeted. If affected taxpayers are not aware of a new penalty, then it is effectively being used purely as a revenue raising device – which is not in accordance with the principles for penalties set out in the 2015 HMRC discussion document on penalties.

As noted above whilst agents and others (for example, financial institutions) have a role to play in communicating some new penalties and powers to clients, this should never be regarded as a substitute for adequate communications initiated by HMRC. Only HMRC has access to all taxpayers and access to information which would help to target communications effectively. The requirement imposed on agents to issue Notification Letters about penalties and powers relating to offshore tax matters almost certainly resulted in some taxpayers receiving more than one notification – but others to whom these powers would have been relevant (particularly unrepresented taxpayers) receiving nothing. Direct, targeted communications from HMRC should have been considered, alongside the Notification Letters from agents – this would at least have ensured that some unrepresented taxpayers would have received notifications.

As noted in our response to Question 2 HMRC's communications relating to the launch of the CCO were insufficiently extensive or targeted. There was (and probably still is) widespread lack of awareness of the CCO amongst those within scope – particularly smaller entities. The HMRC guidance was undoubtedly useful for large entities affected by the CCO regime. However, it failed to address the needs of smaller entities, particularly smaller charities. Whilst eventually some targeted guidance was produced for small charities, it was not generated by HMRC and there was a delay in getting approval so it could be published on the Charity Tax Group website. HMRC should take steps to ensure that suitable guidance for all groups affected by a new power is available at the time the power comes into force – and is published on GOV.UK. HMRC should also provide more targeted communications – which would have been relatively easy to do, in the case of corporate charities.

In addition to guidance which does not meet the needs of all users, there is a general problem with the guidance relating to new powers and penalties not being made available sufficiently far ahead of the legislation entering into force. As outlined above tax legislation is increasingly complex and guidance on how HMRC will use its powers and impose penalties is essential. Those affected need time to prepare and to put in place the right procedures and often new/updated software. This is not entirely in HMRC's hands – disruption to the parliamentary timetable in the last few years has delayed the availability of final legislation for some measures. However, HMRC's aim should be to have suitable guidance available to taxpayers affected at least 6 months before new powers and penalties take effect.

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HMRC also needs to ensure that its own staff are aware of HMRC's position on the applicability and scope of new powers in advance of their introduction – particularly where their role involves helping businesses to prepare for the new regimes. We have been told by large businesses that in the case of both CCO and the Diverted Profits tax, CCMs and other HMRC officials liaising with industry groups were not ready for the introduction of the new measures and gave misleading or incorrect information about how the new regimes would apply.

We have also received feedback about the poor quality of guidance on GOV.UK which is not considered to be 'up to the job' when it comes to compliance. The HMRC manuals provide better information but are often not updated sufficiently quickly. It is also very important that HMRC officers understand that HMRC guidance gives HMRC's view of the law. Reports we receive suggest that there is a widespread view within HMRC that the guidance is the law – and that officers are frequently unable or unwilling to use the actual legislation, or to respond to arguments citing the legislation.

Many of our comments above relate to guidance linked to the introduction of new powers. However, there is also a wider issue around guidance where HMRC changes its interpretation of the legislation. We have seen several examples, in the indirect tax area, where members of HMRC forums (such as the JVCC) are aware that HMRC has changed its interpretation but HMRC does not issue a Revenue and Customs Briefing or update existing guidance until significantly later (one or two years in some examples). This is unfair on taxpayers in general who rely on HMRC publicising changes in its approach via RCBs, VAT Notices, and other material available on GOV.UK.

As also noted in our response to Question 2, a further problem with the introduction of so many new powers, over a relatively short period of time, is that HMRC does not appear to be able to use some of them effectively. As noted above the loan charge review recorded that there is ongoing promotion of loan schemes (with approximately 3,000 first time users in the first half of the 2019-20 tax year). However, to date we understand that HMRC has only imposed a tiny number of conduct notices – and no monitoring notices under POTAS.

HMRC should take steps to ensure that monitoring notices (under the POTAS regime) are imposed on promoters of loan schemes (and other schemes, where relevant). HMRC could then publish information about the promoters and the promoters would be required to tell clients that they are monitored promoters. This would act as a clear 'red flag' to compliant taxpayers and agents. In the case of agents who belong to one of the main professional bodies (and who must therefore comply with the PCRT requirements), POTAS is specifically referred to in the PCRT Help Sheet on Tax Advice:

"FAQ 5. I am considering introducing my client to another adviser's planning arrangement. What should I consider?"

Before considering the other adviser's tax planning you need to ascertain whether the promoter is subject to a monitoring notice within the POTAS regime. If they are it is difficult to envisage any circumstance in which it would be appropriate for you to introduce their arrangement to your client."

D. HMRC's approach to penalties and behaviour - recommendations

HMRC should ensure that officers are applying the behavioural approach to penalties consistently and fairly – in order to address the problems identified in our response to Question 2 above.

All HMRC officers need to recognise that in some cases a taxpayer will have a reasonable excuse – or that a taxpayer may have taken reasonable care but still have made a mistake. The default position should not be to argue that where there has been a mistake, there must have been a lack of reasonable care. HMRC may need to introduce more internal scrutiny of penalty cases to ensure that there is consistency and fairness.

Our members have also expressed concerns that a recent Court of Appeal case (HMRC v Tooth) may have the effect of diluting the meaning of 'deliberate' in the context of discovery – but also potentially in respect of penalties for inaccuracy. We believe that the clear intention behind the use of the word 'deliberate' in the legislation is that a taxpayer should have intentionally submitted an incorrect return or other document i.e. to have acted dishonestly. This view is supported by the examples of deliberate behaviour provided in HMRC's own guidance.

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The Tooth case suggests instead that it might be enough for the taxpayer to have made a conscious decision to do something – without any dishonest intent at all. In that case the taxpayer had included a loss claim in the incorrect box on his tax return (because the tax return software did not allow a claim to be made in the correct box); this was explained in the white space in the return, so there was clearly no intention to mislead HMRC. The government and HMRC should act to clarify the meaning of deliberate, by amending the legislation – and confirming that it does require a dishonest intention, as had always been understood.

Our members have also reported that wider use of suspended penalties by HMRC would produce fairer and more effective outcomes. HMRC needs to apply more consistency in agreeing SMART conditions for the suspension of penalties. At present the process is subject to the interpretation of events by the case worker. Refusals to accept that SMART conditions may be set for “one-off” events persist, although where the agent follows up most cases will be successfully resolved in the taxpayer’s favour. This process does however incur further costs for the taxpayer, which could have been avoided.

HMRC has been testing the use of up front honesty (UHD) declarations on VAT returns. We understand that these have had a positive impact when first used – although the effect apparently wears off over time. There appears to be scope to help taxpayers to avoid penalties through the use of this kind of intervention – although currently they are largely only available in HMRC systems (not third party software). Given the increasing use of third party software it is important that HMRC works with software providers to ensure that successful interventions are available in all systems.

We are also aware that HMRC is now running trials of the UHD in other areas – gift aid claims by charities and ITSA (with the UHD appearing at the top of four online pages in the return). It is also considering targeted digital error prompts, rather than UHDs – initially using data obtained by HMRC via CRS. This clearly has potential to help taxpayers to avoid errors but there have been issues with poor targeting of ‘nudge’ letters arising from CRS data – so careful targeting of digital prompts will be needed.

ICAS supports the use of properly targeted digital prompts to prevent taxpayers making mistakes in the first place and becoming liable to penalties – we also support the use of nudge letters (particularly where the purpose is clearly to educate and assist), for example the recent letters giving information about correctly reporting income and gains from offshore collective investment funds. However, members have reported problems arising from the approach adopted in other nudge letters - recently this has particularly been those relating to CRS data.

HMRC clearly regards it as easy and cost effective to issue letters in bulk, without checking to see whether the taxpayer has included the income in a tax return – we recognise that in the case of CRS data, precise reconciliation may be difficult because the overseas information is often for a calendar year rather than a UK tax year. However, the tone of the poorly targeted letters (suggesting that the taxpayer’s affairs are not in order), issued without any attempt to match the information with the taxpayer’s return causes distress to many taxpayers and can disrupt their relationship with their agent.

There are also consequences for HMRC – more telephone contacts and letters from both clients and agents and damage to trust in HMRC and its systems. It would make sense in cases where an agent is acting – and there is no good reason for bypassing the agent – for HMRC to contact the agent before contacting the taxpayer, which would save at least some time and effort for both parties.

HMRC used to operate a sub-group of the Compliance Reform Forum which discussed proposed campaigns and nudge letters with professional bodies in advance. There was also a protocol for nudge letters. Professional bodies have repeatedly asked for this group to be reinstated – so far without success. It provided a useful forum for discussing how to achieve successful nudge letters – and the problems arising from poor targeting, unhelpful wording and not sending copies to agents. The group should be reinstated without further delay.

4. *Do you have other feedback on HMRC’s implementation of this power, or know of external analysis or evidence that HMRC ought to consider (e.g. as a part of a literature review)? If so, please provide it here:*

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Our comments above relate to how HMRC is using its existing powers. We have also had reports of problems where HMRC seeks to use powers which it does not have – and in doing so bypasses existing safeguards. Examples of this include:

- HMRC approaching firms as part of an 'education exercise', for example, contacting a firm to ask how it prepares CIS refund cases. As part of the exercise HMRC then asks to review sample client files; this may be linked to suggestions from HMRC to amend some returns. There is no legal basis for such activity because no formal enquiry has been opened. As a result, a firm's PII cover may be compromised; the firm also has a professional obligation to maintain client confidentiality.
- Informal enquiries may also arise where HMRC is undertaking an enquiry into one aspect of a client's affairs, such as payroll, but then seeks to extend its enquiries into a different area, such as SA income tax. Again, the lack of any legal basis for such enquiries presents problems.
- Opening letters (in enquiries) which request excessive amounts of information and may amount to fishing expeditions: we have reports of cases where HMRC opening letters include a long list of questions/requested information. Firms report that it is often possible to achieve a 30% reduction in the list by challenging HMRC – suggesting that HMRC was aware that the original list of items could not be justified.

Another issue raised with us, relates to inconsistent approaches adopted by different HMRC officers. A particularly striking example of this arises where a supplier has charged VAT to a business – but the VAT officer dealing with the customer refuses to allow input tax recovery on the basis that VAT should not have been charged. The VAT officer dealing with the supplier supports the supplier's position. The customer's only option appears to be to seek a tribunal hearing, but this involves time and cost to address a problem which should be resolved within HMRC. The customer should have the ability to invoke an 'arbitration' process within HMRC which would consider the conflicting positions adopted by the VAT officers and resolve the issue.

In both direct tax and indirect tax, we have also been given other examples of inconsistency where HMRC reaches different decisions on very similar facts. This inevitably means that some taxpayers are not being treated fairly. There appears to be no oversight mechanism within HMRC to try to ensure that a consistent approach is adopted. Such a mechanism needs to be put in place.

Annex A: the 2005-12 powers and safeguard principles

These principles should be considered with the mandate of the evaluation in mind – i.e. focusing on the elements particularly relevant to the appropriate implementation of a power. These elements are underlined.

Powers and the statutory obligations they impose need to be:

- set within a clear statutory framework,
- easily understood—by taxpayers, their agents and HMRC staff,
- straightforward to comply with,
- proportionate to what HMRC needs to discharge its responsibilities or to protect the Exchequer from the risk assessed,
- used consistently,
- effective in providing the information HMRC needs to assess risk, and
- effective in discovering and dealing with non-compliance and in helping people to return to compliance.

Safeguards for citizens and businesses must be:

- clear,
- publicised,
- accessible,
- effective,
- responsive to the nature and purpose of particular powers and sanctions, and
- conformant with human rights and other relevant non-tax legislation.

Sanctions for non-compliance must be:

- set in statute,
- clear and publicised,
- proportionate to the offence,
- used consistently, and
- effective in deterring non-compliance and returning the non-compliant to compliance.

Annex B: example case studies

These case studies are intended to illustrate how HMRC adapted its approach to reflect the customers' behaviour. We are keen to see similar (ideally more detailed) case studies – drawing on real life examples – to illustrate how HMRC's existing approach took into account a customer's circumstances, reflected the behaviour and/or demonstrates scope for improvement.

Source: No Safe Havens 2019 (available [here](#))

Case study: HMRC recognises those who choose to voluntarily correct their affair

Mrs P and her late husband had been using a complex structure to deliberately hide money overseas for many years. However, Mrs P recognised it was only a matter of time before HMRC detected her evasion. Mrs P came forward to declare her evasion in 2016. HMRC recognised Mrs P had come forward entirely voluntarily to put it right, and accordingly reduced the penalty from potentially around 100% to 30% of the tax owed. Mrs P also paid substantial interest, as she had been evading tax for many years. In total, the tax, interest and penalty amounted to £1.2 million — nearly double the tax due had Mrs P paid the correct tax in the first place. HMRC always recognises voluntary disclosure and will reduce the penalty accordingly.

Case study: HMRC responds robustly those that don't co-operate

Mr W owned a small business selling kitchens in the UK. He diverted some of his business's income to his personal bank account in Spain in an attempt to hide it from HMRC and evade over £277,000 in UK tax. In line with HMRC's criminal investigation policy, we initially opened a civil enquiry after our analysis indicated potential discrepancies. However, Mr W still chose not to come forward to declare and pay the tax he owed. Mr W was given the opportunity to disclose the irregularities and reduce potential penalties, as well as the risk of prosecution, on a number of occasions during HMRC's investigation, but refused to cooperate. As a result, HMRC escalated the enquiry by launching a criminal investigation. Mr W was prosecuted for tax fraud. He now faces a 21 month prison sentence — suspended for two years — and if he fails to pay the tax and penalties he owes within three months of his conviction, he will go to prison for five years.