

Managing tax complexity: the institutional framework for tax policy-making and oversight

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CHAPTER 16

Managing Tax Complexity: The Institutional Framework for Tax Policy-Making and Oversight

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§16.01 INTRODUCTION: THE INEVITABILITY OF COMPLEXITY

The title of this volume is *Tax Simplification*. There is a widespread view that tax systems are too complex and that simplification would be a desirable outcome. The length of legislation is often cited in support of this observation, as is the method of drafting. Compliance costs are another factor; uncertainty in genuine commercial or personal situations coupled with the ease with which taxpayers can exploit ‘loopholes’ is a further characteristic often related to complexity.¹ There may also be a more fundamental objection to complexity: that people should understand the financial rules that govern their lives and upon which they are required to act and take decisions and also upon which, in a democratic society, they need to make decisions about voting for a political party. There is a point at which complexity becomes so great and unmanageable that it begins to undermine the rule of law, because it does not enable individuals to regulate their affairs properly.²

This chapter will not take issue with the view that complexity described in these terms is undesirable, but accepts that it is, to some extent, inevitable. The trade-off for a very

* Some parts of this chapter build on an editorial by the author published in the *British Tax Review: Creating new UK institutions for tax governance and policy making: progress or confusion?*, [2013] 4 Brit. Tax Rev. 373.

¹ These factors are discussed in a systematic way in the chapter by David Ulph, *Measuring Tax Complexity*, this volume, §4.02. See also Chris Evans, ‘Taxation in the UK – Commentary’, in Stuart Adam, Tim Besley, Richard Blundell, Steve Bond, Robert Chote, Malcolm Gammie, Paul Johnson, Gareth Myles & James Poterba (eds) for the Institute for Fiscal Studies, *Dimensions of Tax Design: The Mirrlees Review* 78 (Oxford University Press, 2010) (hereinafter *Mirrlees Review* (2010)).

² As defined by Joseph Raz and others, the rule of law requires that the law should be clear enough to allow individuals to regulate their affairs in advance: see Joseph Raz, *The Authority of Law: Essays on Law and Morality*, ch. 11 (‘The Rule of Law and Its Virtue’) (2nd ed., Oxford University Press, 2009).

simple tax system would be loss of equity and the inability to use the tax system for purposes such as redistribution and the provision of incentives, which many believe to be important functions. This author has argued elsewhere for more care in the use of tax incentives and reliefs and her view has not changed.³ However, this chapter will focus rather more on administrative techniques and institutions for the management of some inevitable complexity on the basis that there is a need to enable taxpayers to manage their affairs in advance and, if that can be done then, despite the complications, the basic requirements of the rule of law may be satisfied. Thus, the thesis here is that complexity should be reduced wherever possible, but where that cannot be achieved consistently with other objectives, there should be mechanisms to help taxpayers and revenue authorities to navigate through the remaining intricacies. Improved institutions could assist in providing ways of managing uncertainty and increasing understanding, as well as leading to improvements in the tax system. In the UK, however, lack of clear thought about the operation of our relevant institutions means that they do not play the part they should do in improving tax law. Whilst this chapter focuses on the UK and its institutions, many of the problems encountered will be seen to be similar to those in other jurisdictions.⁴ In some cases, the institutions utilized to deal with the problems encountered in providing oversight, policy input and planning in the tax system in the UK have emerged and apparently shaped themselves, rather than being designed. It may well be time for a ‘root and branch’ review of how we manage these matters.⁵

This chapter will deal (in §16.02) with the question of simplicity as a driver for reform in the UK and the political background to this debate. It will then turn (§16.03) to the value of an institutional approach to this problem. Section 16.04 will examine recent approaches in the UK. There is a proliferation of institutional approaches and, in particular, the Office of Tax Simplification (OTS) was created specifically to tackle the issue of complexity, but new institutions need to tackle the problems at root and it is not clear that the

³ See, e.g., Claire Crawford & Judith Freedman, ‘Small Business Taxation’, in *Mirrlees Review* 1028 (2010).

⁴ For a comparative survey see Christopher John Wales & Christopher Peter Wales, *Structures, processes and governance in tax policy-making: an initial report*, Oxford University Centre for Business Taxation (December 2012), available at:

http://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/structures-and-processes-in-tax-policy-making.pdf.

⁵ The Labour party in the UK has announced its intention to set up a review of certain aspects of HMRC should it be elected in the General Election in 2015. This will be a review focusing on treatment of avoidance and evasion and not a root and branch review as is needed. It will also take only three months, which casts doubt over its thoroughness. See UK Labour Party, ‘Miliband promises to shine a light into Britain’s tax system’, *Press Release* (14 February 2015), available at:

<http://press.labour.org.uk/post/110986640489/miliband-promises-to-shine-a-light-into-britains>.

OTS or any of the other new institutions created over recent years have been able to do that. Section 16.05 concludes that there remains a need for institutional reform.

§16.02 SIMPLIFICATION OF TAX SYSTEMS

[A] Simplification Cannot Be the Only, or Even the Main, Driver of Reform

Modern taxation systems in most jurisdictions are complex and this complexity is not confined to large business dealings or the very wealthy taxpayer. Even those of modest means and with relatively straightforward financial affairs can experience confusion and obscure provisions in everyday life: what expenses are deductible from their salaries, how are pensions taxed, is VAT/GST payable on a certain type of confectionery or not?

It is elementary that a fundamental cause of tax complexity lies in flawed underlying policy. The ideal starting point for removing complexity would be to simplify tax philosophy and legislate in accordance with clear, coherent tax principles. However, given the intensely political nature of taxation and the complexity of the law that governs property, contract and commercial law, corporate law and other relationships that underlie taxation, it is unrealistic to expect that any jurisdiction will manage to set up completely coherent tax policies and tax legislation. The tensions between the characteristics of a good tax system mean that the search for an optimal tax system will always be an imperfect balancing act.⁶ The technical requirements of good tax system design and political pressures that increase complexity are all too evident in everyday discussion of taxation. The immediate reaction of politicians to a problem is often to create a tax relief. It is only subsequently that they realize that they have also created an opportunity for tax minimization, which then requires further legislation to prevent it from creating too much leakage of revenue.

Against this background, simplification can be one driver of reform efforts, but it will always be a mistake to make it a sole or overriding objective. To show the dangers of promoting simplicity above all else, consider what might theoretically appear to be the simplest kind of tax - a flat tax levied per head (or 'poll' tax). Conceptually this is a

⁶ James Mirrlees, Stuart Adam, Tim Besley, Richard Blundell, Steve Bond, Robert Chote, Malcolm Gammie, Paul Johnson, Gareth Myles & James Poterba, *Tax by Design: The Mirrlees Review*, 39-45 (Oxford University Press, 2011).

straightforward idea that can be easily embodied in legislation, but a problem arises due to the lack of any relationship to ability to pay. The reaction to this fundamental problem, the lack of fairness that will be perceived by many observers of such a tax, will lead to pressure for exemptions and modifications. The resultant attempts to make an unfair tax fairer will introduce complexity.⁷ So, an attempt to create a conceptually simple tax will either be defeated due to the failure to consider other factors necessary for a good tax, or will become complex due to attempts to incorporate those other characteristics. This does not mean that simplification should not be considered, but it should only ever be one factor amongst many.

[B] Attempts at Simplification May Create Complexity

Well-meaning attempts to simplify the law can create complexity: a phenomenon that has been called alternatively ‘complication’,⁸ ‘complex simplification’ and ‘attractive complexity’.⁹ Steven Dean shows how relying on taxpayer preferences to guide simplification efforts may produce forms of deregulation that are not simplifications at all. For example, the US check-the-box entity regime resulted from taxpayer pressure and has been a popular means of reducing tax burdens, but, in addition to simplification for some, it has produced opportunities for arbitrage for others, and created tax avoidance opportunities at a domestic as well as an international level. Other types of small business relief can also be seen to have introduced a host of new rules, thresholds and requirements, the simplification benefits of which can be questioned.¹⁰

The fact that simplification attempts can result in increased complexity underlines the need to consider the essence of simplification. For example, tax legislation rewrite processes have frequently been criticized for increasing the length of legislation, despite (perhaps) using better and clearer drafting techniques. More fundamentally, it has been strongly and

⁷ Thus the UK’s poll tax, the ‘community charge’ of 1989-93, was not only a failure in political terms but also very complex. See David Butler, Andrew Adonis & Tony Travers, *Failure in British Government: The Politics of the Poll Tax*, 102 (Oxford University Press, 1994): ‘[d]rafting the Bill in Scotland turned out to be “something of a nightmare”. The more they got into complexities the more concerned became the Scottish Office at the problems of implementation’.

⁸ A word that has been used by various tax authors; see, e.g., Mike Thexton, ‘Complication’, *Taxation* 14 (19 June 2013), available at: <http://www.taxation.co.uk/taxation/Articles/2013/06/19/309331/complication> (accessed on 1 October 2013).

⁹ Judith Freedman, *Why Taxing the Micro-business is Not Simple - A Cautionary Tale from the ‘Old World’*, 2(1) *J. Australasian Tax Teachers Ass’n* 58 (2006); Steven A. Dean, *Attractive Complexity: Tax Deregulation, the Check-the-Box Election and the Future of Tax Simplification*, 34(2) *Hofstra L. Rev.* 405 (2005).

¹⁰ Freedman, *Why Taxing the Micro-business is Not Simple - A Cautionary Tale from the ‘Old World’*, above n. 9.

convincingly argued that unless the underlying law can be improved, a tax law rewrite is of limited value.¹¹ Others, however, maintain that improvements in drafting can be of value, even without conceptual simplification. It is this debate about the indicators of simplification that has led the UK OTS to produce an index of complexity against which to benchmark the existing legislation and to help prioritize its activities. It might also be used as a measure of the success of the OTS itself. John Whiting, Jeremy Sherwood and Gareth Jones give further details of this index in their chapter in this volume.¹² The range of complexity indicators discussed there shows that simplicity is not a simple idea and that a single driver of ‘simplicity’ does not tell us very much about the appropriate tax reform.

[C] Managing the Tax System

If we accept the inevitability of a certain degree of complexity in the tax system, our thoughts must turn to the way in which it is best to decide on the balance between the different characteristics that might be sought, such as efficient revenue-raising, redistribution, provision of incentives and fiscal management. It will be important to consider each tax in the context of the system as a whole and to look not only at its design and objectives but also at its implementation, impact and efficiency and the way in which it operates in relation to other systems, such as the social security system, pension provisions, financial regulation, the labour market and so on. The management of these taxes and their practical impact will also need to be scrutinized. These are heavy demands that require joined-up and well thought through institutional solutions. In the UK we do have a number of institutions designed to assist with these tasks, but they have sometimes been created as knee-jerk reactions to particular problems or have emerged rather than being designed. There have been many calls for improvement but we have experienced ‘institution creep’ rather than complete overhaul.¹³

¹¹ Adrian Sawyer, *Moving on from the Tax Legislation Rewrite Projects: A Comparison of the New Zealand Tax Working Group/Generic Tax Policy Process and the United Kingdom Office of Tax Simplification*, [2013] 3 Brit. Tax Rev. 321.

¹² See John Whiting, Jeremy Sherwood & Gareth Jones, *The Office of Tax Simplification and its Complexity Index*, this volume; see also David Ulph, *Measuring Tax Complexity*, this volume, §4.05.

¹³ For some significant calls for institutional reform around UK tax policy-making, see Lord Howe of Aberavon, *Simplicity and Stability: The Politics of Tax Policy*, [2001] 2 Brit. Tax Rev. 113; Tax Law Review Committee (Sir Alan Budd, chair), *Making Tax Law: Report of a Working Party on the Institutional Processes for the Parliamentary Scrutiny of Tax Proposals and for the Enactment of Tax Legislation*, Institute for Fiscal Studies TLRC Discussion Paper No. 3 (March 2003), available at <http://www.ifs.org.uk/comms/budd03.pdf>; Tracey Bowler, *Tax Policymaking in the UK*, Institute for Fiscal Studies TLRC Discussion Paper No. 8 (June 2010), <http://www.ifs.org.uk/comms/dp8.pdf>.

§16.03 INSTITUTIONAL APPROACHES

[A] Variety of Institutions Needed

Complex tax systems need a variety of institutions to ensure good management. This cannot negate complexity but it may help to reduce it or alternatively to provide a framework in which the impact of the complexity on administrations and taxpayers is reduced. These institutions need to provide scrutiny and oversight on the one hand and input into tax policy on the other; functions that are different and require diverse skills and approaches. In addition, there need to be institutions or procedures that facilitate communication with taxpayers about the tax system. This can be done by consultation, which may work well in the case of interaction with the professions and with large business and the trade unions, but when it comes to the ordinary taxpayer it is much more difficult to create the environment for these conversations. What is more, consultation will not necessarily lead to simplicity: the more views that are taken into account, the more a policy will need to be qualified, which may lead to more complex legislation.

It is important that these institutions have clear functions that do not overlap and that they do not become rivals, which will itself increase complexity. They also need to be given time to do the work allotted. There is a need for organizations that can react rapidly but also for those that can be deliberative, take evidence and consider issues in a joined-up manner.

[B] Tax Policy-Making

In a parliamentary democracy such as the UK, in theory the controls over tax policy and the making and drafting of tax law will come from the legislature, but the more complex the system the less likely policy input is to be possible at this stage and scrutiny may not be fully effective. Add into this the political dynamic, and it will be seen that enabling parliamentarians to review tax legislation in a thorough manner is problematic. In their review of tax policy-making around the world, Wales and Wales found that there is room for improvement in the way in which scrutiny of taxation issues is handled in most if not all

parliaments.¹⁴ They suggest more qualified support for parliamentary committees involved with taxation issues to help overcome the asymmetry of expertise and information that currently and overwhelmingly favours the executive against the legislature. This is not a new observation, but remains an important one.¹⁵ They go on, however, to recognize that ‘debate in parliament is often highly partisan and the value of scrutiny is significantly diminished by the constraints of political allegiance’.¹⁶ It must be doubtful whether this last observed fact would be entirely counteracted by expert support. In any event, expertise is contested. The idea that there is a pure truth available from experts can be overplayed. Even analysis of data is based on assumptions and, in the end, decisions may need to be based on political judgments. As Peter Riddell has noted, in a comment on the *Mirrlees Review*:

There is certainly a case for greater transparency, auditing and accountability but tax decisions cannot be taken out of politics. They are the stuff of the party battle.¹⁷

But data analysis is important nonetheless and can at least prevent the worst mistakes and encourage deliberation. In the UK at least, politicians seem to spend little time thinking about the implications of tax decisions beyond the immediate headlines. As King and Crew have pointed out:

‘Deliberation’ is not a word one hears very often in connection with British politics – for the good reason that very little deliberation actually takes place. British politicians meet, discuss, debate, manoeuvre, read submissions, read the newspapers, make speeches, answer questions, visit their constituencies, chair meetings and frequently give interviews, but they seldom deliberate.¹⁸

All too often, decisions are rushed and made under political pressure to react to criticism or produce a novel idea. Much of the ‘debate’ takes place in the media at a fairly superficial level. Social media has exacerbated this tendency. This leads to tinkering, badly thought through and ultimately often counter-productive changes, the need for frequent amendment and, of course, complexity. Politicians must make the final decisions, but they need to be better informed and they should think more deeply about the implications of their decisions. Far too often promises are made based on little or no evidence of their likely impact. In the UK this is exacerbated by the annual Budget, which has become a media event and is seen to

¹⁴ Wales & Wales, above n. 4.

¹⁵ See Lord Howe, above n. 13; Tax Law Review Committee (Sir Alan Budd, chair), above n. 13; Bowler, above n. 13.

¹⁶ Wales & Wales, above n. 4, at 8.

¹⁷ Peter Riddell, ‘The Political Economy of Tax Policy - Commentary’, in *Mirrlees Review* 1280 (2010).

¹⁸ Anthony King & Ivor Crewe, *The Blunders of our Governments*, 386 (Oneworld Publications, 2013).

require exciting announcements. This skews the entire tax policy-making timetable. More evidence-based policy-making and the availability of expert analysis would be of value, so that at the very least potential pitfalls could be pointed out.

For the reasons given above, we should abandon the idea (if anyone ever seriously entertained it) that tax policy can be completely turned over to a technical committee. Experts are not guaranteed to get everything right - indeed sometimes there is no 'right' or 'wrong' because no solution is perfect and trade-offs are needed. In the end the decisions must reflect the views of the population. The best way we have so far found to do this in a representative democracy is through our politicians. What could and should be done, however, is to integrate expertise into the policy-making process using better processes than those currently employed.

This problem of integrating expertise with political views and the practical advice of civil servants is one that needs to be tackled through the creation of the right institutions and modes of consultation and proper use of expert civil servants. Bacon and Hope have argued that:

The last thing we need is government by technicians. It is of the first importance to have politically neutral professional administrative civil servants of the highest calibre...¹⁹

The system of government needs to ensure that the 'expertise of the expert' in the area of taxation is absorbed in a way that can be rationalized and understood - and that its proper relationship to policy can be analysed successfully.²⁰ Expertise must be harnessed but subjected to scrutiny itself. No one source of expertise should be taken to be infallible. Consultation must not be permitted to turn into a lobbying exercise or to add unnecessary complexities because consultees are asking for special protections or exemptions that are not really required, just to be on the safe side. To allow this is to permit consultation to increase complexity, rather than to reduce it. To ensure this is achieved, it is important that the civil servants and others engaged in the absorption and relaying of this information to the politicians are well-versed in these issues and able to ask the right questions from an independent stance.

¹⁹ Richard Bacon & Christopher Hope, *Conundrum: Why Every Government Gets Things Wrong – And What We Can Do About It*, 304-312 (Biteback Publishing, 2013).

²⁰ Bacon & Hope, above n. 19, at 304-312.

It is also vital to nurture different sources of information and expertise, both internal and independent, which can feed into these processes. Different standpoints need to be considered but evidence must be subject to scrutiny, even where those making the points purport to have analysed the data. All too often we see a number or a ‘fact’ take hold in the press, following which the ‘fact’ becomes widely accepted and it becomes hard to argue against it. There is a temptation to over-simplify to make a point:

The public, impatient for solutions to its pressing concerns, rewards those who offer simple analyses leading to unequivocal policy recommendations. These incentives make it tempting for researchers to maintain assumptions far stronger than they can persuasively defend, in order to draw strong conclusions.²¹

Being able to ask the right questions of those experts presenting data is an important skill.²²

Finally it is important that a way is found for fully informed scrutiny to be undertaken by politicians in such a way that it does not become bogged down in party politics and point scoring and is not subject to the political pressures of a fixed timetable for action. If there is a need for urgent action this should arise from real necessity and not be manufactured by the media, non-governmental organizations, business, lobby groups or other politicians. Given the nature of politics and politicians, this also requires an institutional approach.

[C] Scrutiny of Implementation and Administration

Policy-making institutions need to be separated from, but retain links to, those tasked with scrutiny of implementation and administration. The policy may be excellent in theory but the implementation could be poor and could create complexities and inequities. In one sense, oversight of administration is beyond the scope of this chapter, yet it cannot be ignored, since reviews of implementation must be fed back into the policy-making process and lessons need to be learned when policy does not work as well as the experts and law-makers thought it would.

²¹ Charles F. Manski, *Identification for Prediction and Decision*, 7 (Harvard University Press, 2007).

²² Charles F. Manski, *Public Policy in an Uncertain World*, 174 (Harvard University Press, 2013).

Once again there is a need for a mix of oversight by politicians, civil servants and external experts. Ultimately politicians must be accountable, but it is important to require separation between politicians and the administration of the affairs of an individual to protect taxpayer confidentiality and to ensure that ministers will not be accused of meddling with the affairs of an individual, either to help or hinder.²³ This can lead to difficult line-drawing when it comes to reviewing administration and learning the lessons of past cases, which are by definition concerned with the affairs of individuals.

A further area where oversight is needed is in relation to the discretion of revenue authorities. These authorities need to be able to use some discretion to make the tax system work, but this discretion must have limits.²⁴ Adding in oversight mechanisms can slow down administration and appear to create complexity, but it is part of the essential management framework for the tax system and a way of making the complexities more acceptable. In addition, revenue authorities can help to provide certainty where the complexity of the law appears to create confusion. This can be done by giving rulings or other forms of guidance, but this discretion to manage complexity also has to be the subject of careful procedures and oversight. This can be provided by the courts to some extent, but administrative frameworks will also be important in ensuring that the complexities are not only managed fairly but are perceived to be so managed. There is considerable concern in many quarters about giving revenue authorities too much discretion and so a careful line must be drawn that enables the revenue authority to exercise reasonable discretion in a way that is subject to controls and operates within the boundaries of a legal framework so that it is a genuine exercise of discretion rather than de facto law-making by the administration.

§16.04 THE UK INSTITUTIONAL APPROACH

[A] Tax Policy-Making in the UK

²³ Christopher Wales, *The Implications of the O'Donnell Review for the Making of Tax Policy in the UK*, [2004] 5 Brit. Tax Rev. 543, 557.

²⁴ These issues are discussed further in Chris Evans, Judith Freedman & Richard Krever (eds), *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD Publications, 2011).

The conduct of tax policy-making in the UK has been the subject of criticism for many years and yet no radical reform of the parliamentary process has resulted.²⁵ However, there has been a gradual change, with new institutions created and old ones developed. In 2010 the new Coalition Government published a paper setting out a new approach to tax policy-making, with a key focus on simplicity.²⁶ This paper introduced the Office of Tax Simplification, a completely new body, with the aim of giving weight to simplicity alongside other policy objectives. The proposals in this paper also included better consultation and a framework for the introduction of new reliefs, given that reliefs are a major cause of complexity.

These promises for improvement came against a background of ever-increasing length of legislation, concerns about lack of proper consultation and relatively recent changes to the revenue authorities and the way policy is made within them.

[1] *The Revenue Authorities: Role, Experience, ‘Absorption’ of Advice and Consultation*

The employees of the revenue authorities (the civil servants) have a vital role to play in the absorption and analysis of the ‘expertise of the experts’.²⁷ In the UK, the civil service has a proud history of talking truth unto ministers. The Civil Service Code requires civil servants to provide information and advice on the basis of the evidence, and take due account of expert and professional advice.²⁸ The difficulty is that the same Code requires that once decisions have been taken the civil servant must not frustrate the implementation of those decided policies. Whilst this must be correct, ultimately, there does need to be an opportunity for analysis and discussion before minds are made up, but it seems this does not always happen. The less experienced the civil servant, the less likely that person is to be able to deter the making and announcement of the decision before due deliberation has taken place. All too often at consultation meetings, civil servants state that ministers are ‘keen’ on an idea, despite evident problems, and so the civil servants take the view that it is unlikely that they will be able to reshape the policy. The consultation process is thus relegated to the level of detail rather than fundamentals. Despite the fact that the consultation process has improved, and

²⁵ See references cited at n. 13, above.

²⁶ HMT & HMRC, *Tax policy making: a new approach* (June 2010), available at http://old.tax.org.uk/attach.pl/9358/10987/tax_policy_making%20discussdoc.pdf.

²⁷ Bacon & Hope, above n. 19.

²⁸ Civil Service Code, paras 10 and 11 (version laid in Parliament on 11 November 2010), available at: <http://civilservicecommission.independent.gov.uk/wp-content/uploads/2012/03/Civil%20Service%20Code.pdf>.

draft legislation for the Finance Bill is published earlier since 2011,²⁹ there are still cases where legislation comes as a surprise,³⁰ and even where there is consultation, it is not always open to consultees to question the fundamentals of the policy. Furthermore, the majority of consultees tend to be professional bodies, because they have the committee structures, mechanisms and knowledge to respond, and the larger professional firms and businesses. Comments from small business, academics and even NGOs, are much less frequent. Attempts are made to reach these groups through workshops and meetings, but once again the workshops are generally held in London, take several hours and are usually populated by representatives of professional firms and representative groups who have the resources to staff this. These consultees frequently make important and well-informed comments, but the consultation process can be limited in this way. Follow-up publications are sometimes circulated only to those who have attended the working groups, and this can act to cut down wider consultation also. There can be a perception of lobbying rather than consultation, despite the fact that the consultation is open to all. In addition, there are private meetings between various groups and the revenue authorities. These have an important part to play but there is little doubt that they could amount to lobbying rather than consulting if not managed carefully by expert and knowledgeable civil servants.³¹

So, consultation is only useful if well handled. Some consultations become very bogged down in detail. Attempts to adopt simpler forms of drafting are particularly prone to being hijacked by objections that a case needs an exemption or should be covered for the avoidance of doubt.³² Where a relief or exemption is being made available, there can be pressure to increase the thresholds for the relief or extend it in some other way.³³ This takes

²⁹ See HMT & HMRC, *Tax Consultation Framework*, published by the Coalition Government in March 2011, arising from its *Tax policy making* paper (HMT & HMRC, above n. 26) stating that the Government will engage interested parties on changes to tax policy and legislation at each key stage of developing and implementing the policy: see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/89261/tax-consultation-framework.pdf. This does not mean that there will be consultation about what the policy should be.

³⁰ For example, the highly complex diverted profits tax introduced in the 2015 Budget, just months before the May 2015 General Election, with very little opportunity for debate and no possibility of questioning the underlying policy.

³¹ *Court rulings and lobbying help big firms pay less tax*, The Guardian (10 February 2009), <http://www.theguardian.com/business/2009/feb/10/firms-lobbying-tax>; Vanessa Houlder, *UK Treasury unveils avoidance reforms*, Financial Times (30 June 2011), <http://www.ft.com/cms/s/0/f4068508-a298-11e0-83fc-00144feabdc0.html#axzz3VV0rrVnk>. This covers the period of the Coalition Government and the Labour Government that preceded it, so is not a party-political point.

³² See Judith Freedman, *Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited*, [2010] 6 Brit. Tax Rev. 717, discussing the disguised interest legislation, which was initially intended to be principles-based legislation but became more complex following consultation.

³³ See the discussion of the OTS below (§16.04[A][2]).

us back to the need for the civil servants to be well equipped to act as a bridge between the experts, other consultees and the politicians; otherwise consultation can be a cause of complexity.

The problems of tax policy-making have been exacerbated by the reorganization of the revenue departments following the recommendations of the O'Donnell Report which reviewed those departments,³⁴ as well as by a program of cuts to the civil service as a result of budgetary constraints. An important aspect of this review was the decision that Her Majesty's Treasury (HMT) should have responsibility for all the policy work related to taxation, with Her Majesty's Revenue and Customs (HMRC), as a non-ministerial government department taking responsibility for operational work, including operational policy.³⁵ This part of the reorganization has been criticized as resulting in a single source approach to strategic policy advice, losing an important perspective from those with operational knowledge.³⁶ There is cooperation between HMRC and HMT on policy initiatives, but the lead is generally taken by HMT staff who, although very able, may have little experience of tax, will have no operational knowledge because of the need for operational detail to be confined to HMRC on confidentiality grounds, and may have moved from other parts of HMT or even other government departments. There is a culture of frequent movement in the UK civil service which is designed to bring new thinking to bear on problems, but which can lead to the importance of operational experience and knowledge being overlooked. This reorganization, combined with deep cuts to staffing for budgetary reasons, has seen a loss of many experienced staff and much of the institutional memory of those involved in tax policy-making has gone.³⁷ This may encourage 'blue-sky thinking' but that does not necessarily result in simplicity - on the contrary, it can result in legislation which contains predictable flaws that then need to be remedied by amendments. Even before the O'Donnell restructuring, there were problems with the revenue department staff having,

³⁴ O'Donnell Review (Gus O'Donnell, chair), *Financing Britain's Future: Review of the Revenue Departments*, Cm 6163 (March 2004). For further discussion, see Tony Prosser, *The Economic Constitution*, 41ff and 90ff (Oxford University Press, 2014); Bowler, above n. 13.

³⁵ This is designed to prevent intervention by ministers in decisions on the affairs of individual taxpayers: Prosser, above n. 34, 41ff and 90ff.

³⁶ Wales, *The Implications of the O'Donnell Review for the Making of Tax Policy in the UK*, above n. 23, at 556.

³⁷ Evidence on the loss of experienced staff was given by the unions and others to the Treasury Select Committee and published in their Sixteenth Report, *Administration and Effectiveness of HM Revenue and Customs*, HC 731 (July 2011), and see recommendation in section 2, at para. 27. See also James Alt, Ian Preston & Luke Sibieta, 'The Political Economy of Tax Policy', in *Mirrlees Review* 1204 (2010).

as Lord Howe put it, ‘unequalled but necessarily one sided experience’.³⁸ This has not been improved by the reorganization.

The situation following the O’Donnell reorganization makes the need for external expertise very great. This could be achieved, at least partially, through consultation, subject to the concerns discussed above. Secondments from the private sector and academia could also bring in expertise, although secondments from the ‘Big Four’ accountancy firms have attracted considerable criticism from the Public Accounts Committee (PAC) and others on the basis that they can create ‘cosiness’.³⁹ To some extent this is unfair, and this expertise does need to be harnessed, but perceptions have to be taken seriously and the process handled with care. Thus, external expertise and experience need to be brought into tax policy-making, but the problems of lobbying and influence need to be dealt with by handling the ‘expertise of the expert’ with understanding and insight. This expertise needs to be absorbed and translated for use by government ministers, other politicians and the public. Pressures to create exemptions, reliefs and special cases need to be resisted unless a good case can be made out. Complexity in legislation can be resisted best by those with a clear sense of the objectives of that legislation and the fundamental underlying principles. Sensible use of expertise and removal of complexity go hand in hand. Only a well-trained, well-resourced and experienced civil service will be able to manage that process. They need the ability not only to absorb and translate the expert evidence and arguments in order to convey them to their political masters, but also to act as a buffer between Ministers on the one hand and the lobbyists on the other.

[2] Office of Tax Simplification (OTS)

The failings in the system of leaving tax policy-making advice to the revenue authorities led to various proposals for setting up new bodies to engage in tax reform. Proposals have included a Parliamentary Select Committee on Taxation and a Tax Structure Review Programme answerable to Parliament.⁴⁰

³⁸ Lord Howe, above n. 13, at 119.

³⁹ Gavin Hinks, *HMRC and Big Four Secondments*, *Economia* (15 March 2013), <http://economia.icaew.com/business/march2013/the-big-four-secondments>. One problem with secondments is the cost to the business or organisation making the secondment. Inevitably it will fall to large firms to do this because smaller ones will not be able to afford this expense.

⁴⁰ See Lord Howe, above n. 13; Tax Law Review Committee (Sir Alan Budd, chair), above n. 13.

The response of the Coalition Government to these concerns when it came to power was to create the OTS.⁴¹ It is unclear at the time of writing whether the OTS will continue following the 2015 General Election, but many hope that it will do so in some form, although most consider that it will require greater resources and some reconfiguring to be of ongoing and sustainable value. It is rather soon to judge just how valuable the work of the OTS has been. It has commenced a debate and made some useful changes and proposals, but it has not been able to progress that debate as far as many would have liked.⁴²

The first error was undoubtedly to call this organization the Office of Tax Simplification; an oversimplification of the problems in itself. Lord Howe has stated that a simplification banner would not be enough and he was correct.⁴³ In its very first project on small business taxation,⁴⁴ the OTS did go further than a pure simplification brief and recommended that the Chancellor should consider merger of tax and National Insurance contributions.⁴⁵ This has not been achieved, but the recommendation has been repeated in subsequent papers,⁴⁶ and a level of administrative merger is being pursued, which might lay the ground for bigger changes at some point. To an extent, the OTS has skilfully manoeuvred its way around the limitations under which it has had to work and has not refrained from referring to the need for fundamental changes, but on the whole these have not been within its remit.⁴⁷

Such success as the OTS had had has been largely due to its personnel, including its Director, John Whiting, an experienced and widely supported appointment. But from the start

⁴¹ For more detail of its structure, see John Whiting, Jeremy Sherwood & Gareth Jones, *The Office of Tax Simplification and its Complexity Index*, this volume, §15.01. For critiques, see Sawyer, above n. 12; Judith Freedman, *Creating new UK institutions for tax governance and policy making: progress or confusion?*, [2013] 4 Brit. Tax Rev. 373.

⁴² For the OTS's own report of its achievements during the Coalition Government, see the summary issued on 27 March 2015, *OTS list of recommendations*, <https://www.gov.uk/government/publications/ots-list-of-recommendations>.

⁴³ Lord Howe, above n. 13, at 123.

⁴⁴ *OTS Framework Document* (2010), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193545/ots_framework_document_jul10.pdf.

⁴⁵ *OTS small business tax review: Final report, HMRC administration*, paras 7.35-7.37 (28 February 2012), <https://www.gov.uk/government/publications/small-business-tax-review>. The author was a member of a consultative committee advising the OTS on this project.

⁴⁶ *OTS Employment Status report*, paras 10.47-10.50 (March 2015), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408608/OTS_Employment_Status_report.pdf.

⁴⁷ *OTS Framework Document*, above n. 44; OTS Blog, 'Readout from the Office of Tax Simplification Workshop' (18 July 2013), <https://taxsimplificationblog.files.wordpress.com/2013/07/workshop-readout1.pdf>.

there has been a lack of staff and funding, as pointed out by the PAC.⁴⁸ Much reliance is placed on secondees from HMRC and HM Treasury as well as from the tax professions. Perhaps more important is the fact that, although described as an ‘independent office of the Treasury’,⁴⁹ the OTS is stated on its website to be part of HM Treasury. It has no formal constitution but is a creature of the Coalition agreement: nothing is to be found in statute. It can only investigate matters with agreement from the Chancellor. In these circumstances, it is not surprising to find the OTS looking for ‘quick wins’ in its reports, in order to persuade politicians that it should be supported as a continuing body. The OTS staff has had little option but to go along with this, but it has resulted in a good deal of ‘tweaking’ rather than fundamental change, although some useful changes have been made.

Two areas can be given as examples.⁵⁰ Having been unable to achieve a major review of small business taxation, the OTS proposed some relatively minor changes to the basis on which small unincorporated firms maintain their accounts and the way in which they can calculate tax deductible expenses.⁵¹ A survey of small businesses suggested that they found some difficulty with expenses and accruals accounting, but the responses were far from convincing regarding the need for a reform of the law. The OTS proposed a limited provision for very small businesses, to relieve them from the burdens of accruals accounting as strictly required, even though many probably did not use accruals in any event. The problem was that by the time this reform had been processed by HMRC and HMT, the size limits for the cash basis had been increased as a result of various pressures, meaning that a number of anti-avoidance provisions and other complexities were seen to be necessary. Instead of seeing the cash basis as a simple change to reporting requirements, the HMRC and HM Treasury legislation went much further, actually using the scheme to change the basis of taxation, for example with limits on interest relief deductions.⁵² The result was ‘complication’: 24 pages of new legislation, with unadvised taxpayers, who may have been using a cash basis anyway,

⁴⁸ PAC, *Tax avoidance: the role of large accountancy firms*, HC 870 (26 April 2013), available at: <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpublic/870/870.pdf>.

See also the response of the OTS of 1 May 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/199769/Letter_from_Rt_Hon_Michael_Jack_to_Margaret_Hodge_MP_Chairman_of_PAC.pdf.

⁴⁹ *OTS Framework Document*, above n. 44.

⁵⁰ These are not the only projects undertaken by the OTS. See *OTS list of recommendations*, above n. 42.

⁵¹ *OTS Small business tax review: Final report - Simpler income tax for the smallest businesses* (February 2012), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/199180/02_ots_small_business_tax_review_simpler_income_tax_280212.pdf.

⁵² *Finance Act 2013*, Sch. 4 amending *Income Tax (Trading and Other Income) Act 2005*, in particular s. 51A.

now worse off because of the limitations introduced and with businesses which do have professional advice exposed to additional costs incurred as their advisers must advise which route is best for them.

The responsibility for this failure of the cash basis to simplify has been placed firmly at the door of HM Treasury and HMRC by commentators,⁵³ and implementation does seem to have gone awry. It is also the case, however, that the original idea was misconceived. Reforms proposed for micro-businesses are often hijacked by larger businesses in a form of threshold creep, and this was not unpredictable.⁵⁴ But the more fundamental problem is that this was a fiddling around the edges that should not have been attempted without being set firmly in the context of wider and more basic review. With no clear overarching design, there was a strong chance of something going wrong. As one ex-Parliamentary draftsman has put it:

You start off designing a rowing boat and you end up trying to fly a Concorde and wonder why you have oars sticking out half way.⁵⁵

This reform should not have been rushed to fit in with the political cycle. There was no particular need for quick reform other than the need to show something was being done for small businesses, because it was hard to do anything more fundamental. There was also a lack of accountability: the OTS felt that the implementation by HMT and HMRC was to blame, while the Government claimed to be following the advice of the OTS. Even had more fundamental change been proposed by the OTS, however, this would not have been successful without the political will to see it through. The overall result of this exercise was not simplification.

A second important example relates to tax reliefs. Despite a stated determination to reduce the number of reliefs, the Coalition Government ended its five-year term with more reliefs than when it started.⁵⁶ As the PAC stated:

⁵³ For example, Institute of Chartered Accountants in England & Wales (ICAEW), 'Cash Basis for Small Business: Comments submitted in February 2013 to HMRC', TAXREP 16/13 (ICAEWREP 20/13), <http://www.icaew.com/en/technical/tax/tax-faculty/tax-faculty-representations/2013-tax-representations>.

⁵⁴ Freedman, *Why Taxing the Micro-business is Not Simple - A Cautionary Tale from the 'Old World'*, above n. 9.

⁵⁵ Unpublished talk at Institute of Advanced Legal Studies, *Business Law Reform* conference, London 1992.

⁵⁶ The *OTS final list of recommendations*, n. 42 above, states that there were 1042 tax reliefs in November 2010 and 1140 in August 2014.

The [OTS] is grossly understaffed and has focused on abolishing tax rules that are no longer necessary, rather than more radical simplification. HM Treasury and HMRC should work together to make more radical progress in simplifying the UK's tax code, and should equip the [OTS] with the resources and influence it needs to help them do so.⁵⁷

The management and scrutiny of tax reliefs is a topic which straddles the realm of tax policy-making and implementation scrutiny. At the moment it is being treated as a topic for scrutiny by the PAC,⁵⁸ but each relief needs to be considered in context as part of wider tax policy-making if any progress is to be made. Any exercise to cut down the number of reliefs from a list of all reliefs is bound to focus on those which have become unnecessary and unused. It is useful to tidy up the statute book, but this is not fundamental tax reform.

[3] *An Office of Tax Policy and New Joint Parliamentary Select Committee on Taxation?*

Real change requires that the OTS or its equivalent is given greater powers, more independence and resources. Hopefully the OTS can evolve into a stronger and more independent institution, but this will require some bravery from politicians and more funding. The Office for Budget Responsibility (OBR) set up by the Coalition Government in 2010⁵⁹ shows that independence can be given even in areas of high sensitivity. An 'Office of Tax Policy' (OTP) would be a possibility.⁶⁰ It could not replace the political process, but it could act as a support for the civil servants whose everyday work takes them away from thinking about the structural issues of taxation. It would be a way of using expertise and absorbing it into political thinking. Such a body could perform a number of functions: investigating the

⁵⁷ PAC, above n. 48, at 5.

⁵⁸ PAC, *The effective management of tax reliefs*, HC892 (26 March 2015), <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmpublic/892/892.pdf>.

⁵⁹ For further details on the role of the Office for Budget Responsibility, see HMT, *Charter for Budget Responsibility* (April 2011), <https://www.gov.uk/government/publications/charter-for-budget-responsibility>. The OBR scrutinizes HM Treasury's costing of tax measures but does not have any direct responsibility for tax design, though ideally comment on costing would feed into the design process. Suggestions that the OBR should also cost tax proposals from the Opposition parties in the run up to the General Election were discussed in 2014. The Chairman of the OBR, Robert Chote, did not consider this impossible but set out the difficulties in a letter to Andrew Tyrie MP, Chair of the Treasury Select Committee, on 15 January 2014. http://budgetresponsibility.org.uk/wordpress/docs/TSC_pre_election_costings1.pdf. The Labour party subsequently pressed for such costing but this was not agreed for the practical reasons set out in Chote's letter. It might be possible in a future election, but would require parties to put forward tax proposals very much earlier than usually done in an election: a positive advantage in the author's view, but one which might give the parties some campaigning difficulties.

⁶⁰ Proposed by the author in *Creating new UK institutions for tax governance and policy making: progress or confusion?*, above n. 41, at 375-376.

structure of the tax system, proposing major reforms, taking up proposals from the revenue authorities and politicians (both government and opposition) and costing ideas put forward before they became too embedded in the political debate to change or dismiss them should that be necessary. It could also oversee drafting to ensure that the ideas were translated clearly into legislation. Politicians would be suspicious that such a body would interfere with the fact that tax is an essential part of the political debate, but the suggestion is not that the OTP would make policy, only that it would advise on policy. The ultimate decisions would always remain those of the politicians - the government of the day.

An Office of Taxpayer Responsibility has been proposed by Lord Gus O'Donnell, although in his version this would focus on vetting new policies put forward by government and perhaps the opposition.⁶¹ The OTP proposed in this chapter would have wider powers than this because it would need to be able to initiate reforms, but the fact that Gus O'Donnell has proposed something not too far away from this should prevent it from being considered completely unviable.⁶²

Staffing of such a body would need to come in part from secondments from the revenue authorities and private sector, since their expertise and experience will be needed, but there should also be staff qualified in other areas as necessary, with understanding of groups not always reached by consultation, including those with experience in various sectors of the taxpaying community such as those in the lower income tax group (where interaction with benefits must be considered), employee groups, the self-employed and small businesses. Academic expertise should also be engaged. It would be important, of course, to continue to have alternative academic and policy groupings that could express views that could be discussed by the OTP.⁶³

⁶¹ Lord Gus O'Donnell, *UCL Inaugural Lecture: Building a Better Government*, 6 (April 2013), https://www.ucl.ac.uk/constitution-unit/events/inaugural_lecture_24042013.

⁶² Lord O'Donnell was the author of the O'Donnell Review (see above, n. 34) in his capacity as Cabinet Secretary, the most senior UK civil servant. This proposal has also been supported by the Association of Revenue and Customs, the trade union for senior tax officials: see <http://blogs.mazars.com/letstalktax/files/2014/07/Tax-Transparency-The-Tax-Landscape-discussion-paper.pdf>. Some note could also be taken of the New Zealand Generic Tax Policy Process and Tax Working Group, described in Sawyer, n. 11, above. An 'Office of Tax Responsibility' has been proposed by activist Richard Murphy, but the focus of his institution is rather more on the Tax Gap than proposing fundamental reform and he would not permit secondments from the private sector. <http://www.taxresearch.org.uk/Blog/2014/10/21/why-havent-we-got-an-office-for-tax-responsibility/>.

⁶³ Sir Gus referred in his lecture (n. 61, above, at 6) to the Institute for Fiscal Studies, saying that its conclusions on tax are accepted. This is rightly so, since it has an excellent track record, but a purely academic institution cannot have the level of responsibility and access to data that is required by an Office of Tax Policy. It would be

The OTP would have to report to the Chancellor, since it is not possible for firm proposals for law reform to be dealt with in any other way, but both its proposals and any reports on the proposals of others could also be presented to a new Joint Parliamentary Select Committee on Taxation with membership drawn from both Houses, a suggestion with its origins in a possible reform put forward by Lord Howe and developed in the Budd report.⁶⁴ This would replace the current arrangement whereby the Parliamentary scrutiny that is given to tax reform comes only after the publication of proposals from the Economic Affairs Finance Bill Sub-Committee of the House of Lords. This Sub-Committee does good work but has very limited powers. The House of Commons Finance Bill Committee also reviews the Finance Bill but this debate is generally political rather than technical and there is very little time for proper discussion within the schedule of this Committee and no technical back-up or advice for non-ministerial members.⁶⁵

[B] Scrutiny of Implementation and Administration in the UK

Various institutions exist in the UK for the scrutiny of implementation and tax administration, as opposed to tax policy-making. These might seem irrelevant in an article on tax simplification, and they will not all be catalogued here. However, the recent activities of the PAC cannot go unmentioned, since this committee has extended its reach considerably over the Coalition period and has pushed the boundaries of scrutiny to their limits and into areas that might be thought of as touching on policy. In addition, new institutions are being created which, to some extent, confuse the line between tax policy-making and governance, such as the panel established to assist in the application of the General Anti-abuse Rule (GAAR), the Assurance Commissioner appointed to monitor HMRC settlements with taxpayers and the independent reviewer set up to monitor aspects of the application of the Bank Code.

[1] *Parliamentary Committees*

healthy for the IFS to have an official counterpart in relation to tax design (the OBR already costs Government tax proposals, as previously explained in greater detail in n. 59, above).

⁶⁴ Lord Howe, above n.13, at 120; Tax Law Review Committee (Sir Alan Budd, chair), above n. 13, at 1 (para. 7); Bowler, above n.13, Executive Summary bullet point 2.

⁶⁵ In an extreme version of this, the Finance Bill 2015 was passed in one afternoon in March 2015 with the May 2015 General Election imminent.

The PAC's terms of reference are to examine 'the accounts showing the appropriation of the sums granted to Parliament to meet the public expenditure'.⁶⁶ Under this head it must receive the accounts of HMRC via the Comptroller and Auditor General (C&AG),⁶⁷ to ascertain that adequate regulations and procedure have been framed to secure an effective check on the assessment, collection and proper allocation of revenue, and that they are being duly carried out.⁶⁸ The C&AG must examine the correctness of the sums brought to account and to report the results to the House of Commons. This is done through reports to the PAC⁶⁹ by the National Audit Office (NAO), a Parliamentary agency, of which the C&AG is the head.⁷⁰ The PAC can also commission the NAO to investigate and report to it on matters relating to whether expenditure has been properly incurred and its value for money.⁷¹ Over the period of the Coalition Parliament it has done so on a variety of matters concerned with HMRC, including alleged 'sweetheart' deals with large business, tax avoidance and evasion and tax reliefs.⁷² These investigations of whether HMRC is administering the tax system properly soon take the PAC into questions of whether the tax system is well-designed. It is hard to consider whether tax reliefs are being applied and monitored properly, for example, without discussing the question of whether those reliefs are desirable, because the examination involves consideration of the objectives of the relief. Similarly, discussions of whether cases of evasion and avoidance are being pursued with enough vigour bring further comments on the policy relating to the offences available, prosecutions and litigation. The PAC's report, marking the end of the 2010-15 Coalition Parliament, recommends that HMRC should find new ways to tackle tax avoidance by multinational companies 'rather than waiting for the OECD's work to bear fruit', and that the number of tax reliefs should be 'radically'

⁶⁶ See Government Communication Service, 'Parliamentary committees', <https://gcn.civilservice.gov.uk/guidance/how-to-guides/working-with-parliament/parliamentary-committees/>.

⁶⁷ An Officer of the House of Commons: *National Audit Act 1983*, s. 1(2).

⁶⁸ *Exchequer and Audit Departments Act 1921*, s. 2.

⁶⁹ See, for example, the PAC's inquiry of 2013-14 drawing on the National Audit Office report, *Her Majesty's Revenue and Customs 2013-14 Accounts: Report by the Comptroller and Auditor General* (25 June 2014), <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/inquiries/parliament-2010/hm-revenue--customs-accounts-2013-14/>.

For further information, see Patrick Dunleavy, Christopher Gilson, Simon Bastow & Jane Tinkler, *The National Audit Office, the Public Accounts Committee and the Risk Landscape in UK Public Policy*, Risk and Regulation Advisory Council Discussion Paper (October 2009), available at: <http://eprints.lse.ac.uk/25785/>.

⁷⁰ http://www.nao.org.uk/about_us.aspx.

⁷¹ Prosser, above n. 34, at 53.

⁷² In the NAO report, *Settling large tax disputes*, HC 188, 6-10, 18-26 (14 June 2012) (<http://www.nao.org.uk/report/settling-large-tax-disputes/>), the head of the NAO concluded, on the basis of a report by Sir Andrew Park, a retired High Court judge, that the settlements reached by HMRC in five cases investigated were all 'reasonable' and successfully 'resolved multiple, long-outstanding tax issues'. However his report also confirmed the NAO's 'concerns about the processes by which the settlements were reached', and over poor communication with staff, which were considered to have undermined confidence in the settlements. The full list of NAO reports on HMRC can be found at <http://www.nao.org.uk/search/hmrc/>.

reduced.⁷³ The PAC has no power to make binding recommendations, but it has influence and prestige and the support of the NAO, which gives it further weight.⁷⁴

A further Parliamentary body that may assess the use of discretion by HMRC is the Treasury Select Committee.⁷⁵ This Committee is appointed by the House of Commons to examine the expenditure, administration and policy of a number of bodies, including HMRC. The Committee chooses its own subjects of inquiry, including the administration and effectiveness of HMRC.

There is a clear overlap between these two Committees and they have been engaged in noticeable territorial skirmishes during the period of the Coalition Government. In 2010 the House of Commons Standing Orders were amended to provide for election of select committee chairs⁷⁶ and this appears to have enhanced the authority of the chairs and made each of the posts a sought-after ‘power base’. The Chair of the PAC, Margaret Hodge, has become a household name in the UK and beyond by pursuing tax issues and calling in the heads of global companies to appear before her Committee.⁷⁷ This, together with skilful use of the media and the current media and popular interest in taxation, has given the PAC considerable influence and there is little doubt that some of the recent developments in terms of tackling tax avoidance and evasion from the UK Government have been spurred on by this pressure. In this way, the strengthened parliamentary committee, although designed as a scrutiny body, can play a part in tax policy-making.

One difficulty with this is that the PAC covers a very wide range of topics besides taxation and has no formal advisers on taxation. It is advised by the NAO, which does important work on accounts and value for money audits, but which is not staffed as an expert tax advisory body. The NAO recognized this itself when it appointed Sir Andrew Park to assist on its work on settlements, since it did not have the expertise to do this.⁷⁸ Another

⁷³ House of Commons PAC, *Improving tax collection*, HC 974, 5-6 (26 March 2015).

⁷⁴ Prosser, above n. 34, at 132.

⁷⁵ <http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/>.

⁷⁶ Standing Orders of the House of Commons, Orders 122A-122C,

<http://www.publications.parliament.uk/pa/cm/cmstords.htm>; cited in John Snape, *The Political Economy of Corporation Tax: Theory, Values and Law Reform*, 217 (Hart Publishing, 2011).

⁷⁷ For further discussion of the rising importance of parliamentary committees, see Tom Shakespeare, *A Point of View: Do parliament's select committees wield too much power?*, BBC News Magazine (22 March 2015),

<http://www.bbc.co.uk/news/magazine-31961356>.

⁷⁸ See n. 72, above.

limitation is that HMRC is (rightly) restricted from sharing information regarding the affairs of individual taxpayers with Members of Parliament and this leads to many tensions between the parliamentary committees and the HMRC officials, since they sometimes draw the line in different places.⁷⁹

The parliamentary committees have an important part to play in scrutiny, but are not equipped to provide input into tax policy-making, nor should that be their role. If there was a properly advised and constituted Joint Committee of Parliament on Taxation Policy, working with an Office of Tax Policy, as suggested above, the PAC might feel it less necessary to expand its role to fill this vacuum and the NAO could focus on its role of assessing the accounts and value for money issues. Adding yet another institution might not seem to be a simplification, but streamlining the functions of the committees and allowing them to specialize could only be beneficial and would reduce complexity in the long run by promoting fundamental rather than reactive reform.

[2] *The GAAR Panel and Other New Institutions*

In addition to these parliamentary committees, the period of the Coalition Government has seen the creation of the GAAR Advisory Panel,⁸⁰ a new Tax Assurance Commissioner and Tax Disputes Resolution Board to oversee settlements, in response to the PAC's criticisms of HMRC governance in this area,⁸¹ and an independent reviewer for issues associated with the application of the Bank Code.⁸² In each case, these institutions have a very specific role, which is not a policy-making function, but there is a sense in which they are exercising discretion in such a way as to overlap with the tax policy-making function. In addition, none of these institutions is truly independent of HMRC and yet each one is supposed to be adding to public confidence and each one has a function that could have important policy implications. All three of these institutions are attempts to solve problems that would not

⁷⁹ Osita Mba, *Transparency and Accountability of Tax Administration in the UK: The Nature and Scope of Taxpayer Confidentiality*, [2012] 2 Brit. Tax Rev. 187.

⁸⁰ Discussed further in Freedman, *Creating new UK institutions for tax governance and policy making: progress or confusion?*, above n. 41, at 378-380.

⁸¹ See HMRC, *How we resolve Tax Disputes: The Tax Assurance Commissioner's annual report 2012-13*, 4-5 (2 July 2013),

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210246/3741_Tax_Assurance_AR_accessible.pdf. See also n. 72, above.

⁸² Space prevents a thorough examination of the curious Bank Code and the independent reviewer here - for further details and discussion see Richard Collier, *Intentions, Banks, Politics and the Law: The UK Code of Practice on Taxation for Banks*, [2014] 4 Brit. Tax Rev. 478 at 496ff.

arise were tax laws less complex and if fewer grey areas existed. The complexity of the law results, therefore, in proliferation of institutions. It may be that the institutions improve management and accountability in these cases, but the institutions themselves can also add to the costs and burdens of the system on taxpayers unless well designed.

The Tax Assurance Commissioner and Tax Disputes Resolution Board (TDRB) oversee settlements with taxpayers in sensitive cases and those with more than GBP 100 million in tax under consideration.⁸³ Given that the Litigation and Settlements Strategy governing whether there can be a settlement with a taxpayer⁸⁴ states that a dispute can only be resolved by settlement on a basis that is consistent with the law, it is clear that whether there can be a settlement is going to be an issue only where there is uncertainty. In deciding whether an agreement is acceptable or not, therefore, the Commissioners and the TDRB are, of necessity, involved in determining whether they believe there is uncertainty about the view of the law initially taken by HMRC. This new system of governance provides some protection to taxpayers and to the public generally that arrangements are not being reached without good reason, but there are questions about the fact that the system is operated entirely by HMRC Commissioners and employees and not by a genuinely independent body. As this involves individual taxpayers, the settlements are not subject to scrutiny by the PAC other than in general terms.⁸⁵ In addition, the need for this scrutiny may delay valid settlements and complicate the law in that sense.

The GAAR Panel is another example of an institution that has emerged to provide a framework to manage lack of certainty in tax law, but which might itself have become problematic. It was proposed by the Aaronson Study Group⁸⁶ on the GAAR as a forum for discussion to help mark out the place where the line should be drawn at which the GAAR should apply: the line between abuse and non-abusive transactions.⁸⁷ The Panel has now

⁸³ HMRC, *How we resolve Tax Disputes*, n. 81, above.

⁸⁴ HMRC, *Resolving tax disputes: Commentary on the litigation and settlement strategy*, 9 (November 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387770/Commentary_on_litigation.pdf.

⁸⁵ Although the NAO may review cases in more detail: see n. 72, above.

⁸⁶ For discussion by the Aaronson Study Group on the GAAR (of which the author was a member) on this issue, see *GAAR Study: Report by Graham Aaronson QC*, paras 6.8-6.9 (11 November 2011), http://webarchive.nationalarchives.gov.uk/20130321041222/http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf.

⁸⁷ *GAAR Study: Report by Graham Aaronson QC*, above n. 86, at para. 1.7 (vii).

changed in membership form⁸⁸ and is being expected to take on tasks it was not initially intended to manage. In addition its composition has changed: in a bid to make the GAAR more acceptable to practitioners, the original design of the Panel, which involved having HMRC representation on it, was changed so that the body became a panel of external experts. This was the result of informal consultation which distorted the original intention.

The Panel has two functions. First, it opines on the non-statutory guidance around the GAAR - guidance that is recognized by statute but not given the force of statute and so is not binding. In practice this gives the Panel enormous influence over where the relevant lines are drawn, although the final say remains with the courts. This was initially intended to be undertaken together with HMRC: removal of the HMRC member appears on the surface to affect this function significantly, although HMRC can be expected to have their say informally.

The other function of the Panel is to give its opinion on the reasonableness of transactions (as defined in the GAAR legislation). This opinion is not binding on a court but must be taken into account by the court under the GAAR legislation. The Panel's role is not intended to be judicial, and the members are appointed by HMRC, so are not truly independent. Nevertheless, the removal of the HMRC member from this Panel during the translation of the proposal into legislation confuses the picture and emphasis on the decision of Panel members for the purposes of new provisions in some circumstances places a great strain on this new institution.⁸⁹ The resulting institution lies somewhere between a tax law-making body, a scrutiny body and, some would argue, despite HMRC denials, a judicial body.

The emergence of the institutions referred to in this section was the result of ad hoc reaction to problems rather than arising from full consideration and design. Institutions can offer a solution to tax policy and tax governance issues, but only if they are planned and conceptually coherent. It is not clear that the recent emergence and development of institutions in the UK tax arena have fully satisfied these criteria.

⁸⁸ *Finance Act 2013*, Part 5 and Sch. 43.

⁸⁹ The *Finance Act 2014*, Part 4 provides for accelerated payments by taxpayers where two members of the Panel consider the transaction unreasonable within the terms of the GAAR.

§16.05 CONCLUSION

Simplification of the tax system can never be the sole driver of reform. Some complexity will always be necessary in a complex world. Institutions have a role to play in helping to manage this complexity. Institutions can also improve tax systems and sometimes reduce complexity, but this simplification will only be achieved if the institutions are conceptually coherent with clear objectives.

It has been argued in this chapter that the formulation of tax policy objectives is a matter for politicians. Expertise is important but cannot be treated as uncontested, and policy-makers need an institutional structure which facilitates interrogation of the experts and absorption of their advice, as well as a wide range of other views. Scrutiny bodies and other institutions facilitating management are important but need a clear role. Like tax policy itself, institutions must be carefully designed. A proliferation of institutions can create their own complexity.

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