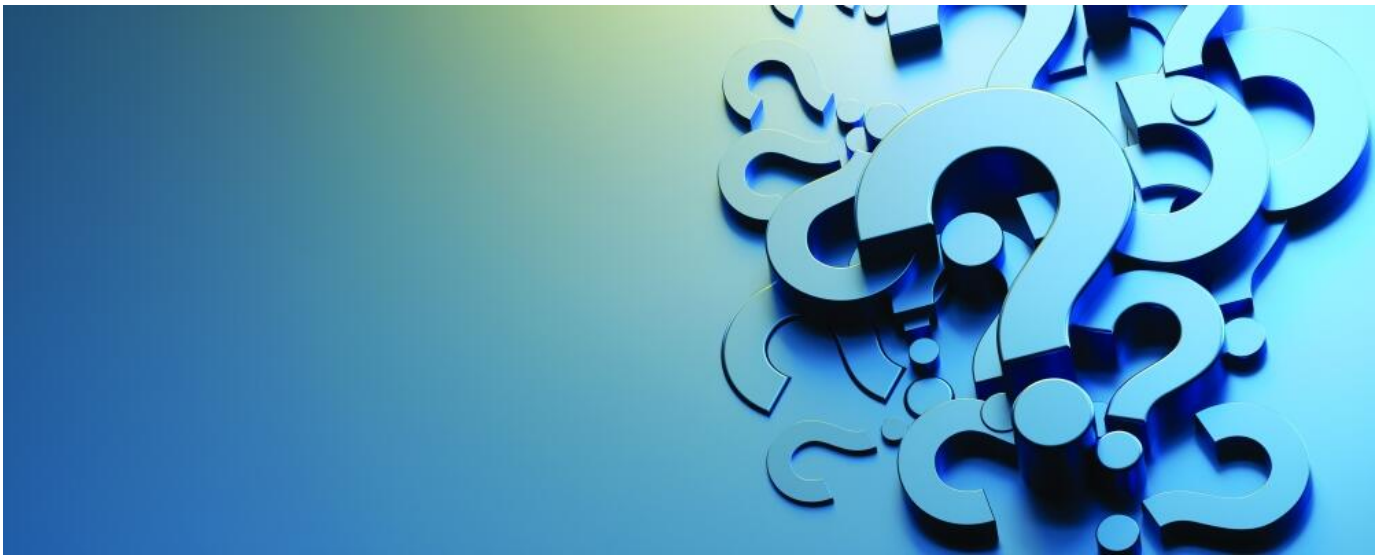
A search for solutions

Management of taxes | Professional standards



29 September 2020

Alistair Cliff reviews the responses to the government's 'Call for evidence', which seeks to raise standards in the tax advice market

Key Points

What is the issue?

On 19 March, HM Government issued a 'Call for evidence: raising standards in the tax advice market'. This is a consultation the government committ ed to in its response to the report by Sir Amyas Morse, following the issues arising from the loan charge.

What does it mean for me?

At its heart, the call for evidence is a search for solutions to perceived problems in a services market that seeks to support, in a wide variety of ways, one of the closest areas of interaction between the state and the majority of its citizens.

What can I take away?

The 2008 financial crash and the worldwide response to the Covid-19 pandemic are cited as changing public attitudes to tax, which may be premature. However, the government's response is comprehensive, and the calls for evidence and consultation can be taken as evidence that the debate has moved to a new level.

On 19 March, HM Government issued a 'Call for evidence: raising standards in the tax advice market'. This is a consultation the government committ ed to in its response to the report by Sir Amyas Morse, following the issues arising from the loan charge, introduced in 2016 to tackle disguised remunerati on loan arrangements.

The Morse report includes a summary of tax avoidance arrangements that have sought to take employment income out of the charge to tax, the counter-measures taken, and the impact they had on people and public revenues. It should be of interest to anyone interested in standards of behaviour in relati on to tax. It reviewed behaviours of advisers, salespeople, taxpayers, legislators and HMRC. On the subject of behaviours in the supply side of the tax advice market, it concluded that while welcome changes had been made as a result of the 2017 update to the standards in Professional Conduct in Relation to Taxation (PCRT) there remains a market of unscrupulous tax advisers, outside the professional bodies, where change is still needed.

On 21 July, HMRC issued a consultation on tackling promoters of tax avoidance, and a specific call for evidence on tackling disguised remunerati on tax avoidance.

This article looks at some of the public responses to the 19 March call for evidence, and the 21 July initiatives, in overview.

The 19 March call for evidence

The call for evidence asks for views and evidence on a range of issues, including:

- the scope of the market for tax advice and services;
- the characteristi cs of good and bad practice;
- current government interventions;
- international examples of how good standards might be achieved; and
- possible approaches to raising standards.

At its heart, the call for evidence is a search for solutions to perceived problems in a services market that seeks to support, in a wide variety of ways, one of the closest areas of interaction between the state and the majority of its citizens. Protecting public revenues and providing protecti on to consumers are key themes.

This article highlights some of the common themes that emerge from the published responses, including those of the CIOT, ATT, ICAEW, ICAS, all bodies whose members are required to follow Professional Conduct in Relation to Tax (PCRT), and the Low Income Tax Reform Group (LITRG).

LITRG is a CIOT initiative working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of people on low incomes. I mention this here because the LITRG response highlights some of the particular challenges presented by the fact that the complexities of our tax system are not confined to those with high incomes or wealth. Nor indeed, are the issues raised in the call for evidence confined to the part of the market where tax advice and compliance services are sought from firms of accountants. Indeed, the fact that the UK tax market is not officially regulated, and that anyone can offer tax services without any restriction, comes as a surprise to many.

HMRC evidence

There seems to be wide acceptance that there is a case for change in some sectors. The call for evidence seeks more evidence to build that case, but many respondents highlight that HMRC must have the most extensive body of evidence, and that it would be helpful if ways could be found to share that evidence more widely, while respecting taxpayer confidentiality.

HMRC does, of course, share some evidence. Examples include the complaints HMRC is able to make to professional bodies whose members HMRC considers to have fallen below the PCRT standards (although the bodies report that the volume of such complaints is relati vely low). Critically, there is no equivalent channel to address concerns about tax service providers outside professional bodies, where serious concerns are acknowledged to exist. HMRC also highlights technical areas of concern through its ‘Spotlights’. However, few of the recent problems identi fi ed in the Morse report stem from members of PCRT bodies, and very few of the taxpayers involved, if any, are likely to read HMRC Spotlights or be directed to them.

Professional bodies

The tax services market is diverse and evolving. The responses recognise that this diversity means there is unlikely to be a one-size fits all solution. Indeed, trying to impose one could put a disproportionate burden on the already compliant, without tackling extreme cases of concern. Commonly recognised problems include well-meaning advisers who somehow fail to meet necessary standards of competence, and ‘bad advisers’ who intentionally engage in abusive tax avoidance. Both of these present consumer protection and revenue protection issues.

There is widespread recognition that high standards should be in everyone’s interest. The responses highlight that roughly 70% of tax advisers are members of a professional body (not just the PCRT bodies, but also others, including those regulating lawyers), with 30% not affiliated in this way. The call for evidence acknowledges the value that good agents, who come from both populations, bring to the good administration of the tax system. However, as the CIOT points out, this recognition might come as a surprise to some readers.

Professional bodies provide a disciplinary framework to control the behaviour of their members, strengthened through the 2017 PCRT changes, which were agreed with HMRC, and welcomed by the Morse report. Their rules of professional body membership typically require that members hold professional indemnity insurance and maintain their technical competence through continuing professional development programmes, appropriate to the work their members carry out. This combination addresses both revenue protection and consumer protection.

If the solution to the perceived problems with the tax advice market involves a form of regulati on for all providers, the professional bodies point out that they already offer one, and suggest that ‘option E’, maximising the regulatory/supervisory role of current professional bodies, is the preferred route to improving standards in this market. They also recognise that imposing the same rules and oversight on the entire adviser population overnight would be highly disruptive, and so recognise that a phased transition would be required.

Various respondents suggest requiring all tax advisers and compliance agents to be members of an appropriate professional body in five to ten years’ time, to allow for market adjustment. This has parallels with the approach taken to the reform to the regulation of independent financial advisers in 2012 following the Retail Distributi on Review. The ATT goes so far as to suggest a possible implementation plan.

The possible benefits of a regulator for the professional bodies are recognised, but respondents question whether the costs involved would bring true value for money to all concerned and properly serve the public interest. This is perhaps where the tensions between revenue protection and consumer protection become most pronounced. As the CIOT puts it, the ‘costs of regulation generally fall ultimately on the consumers of regulated services, and there is already a problem of cost and availability of tax advice to some sections of the population’. The LITRG gives some stark examples.

Other issues

Respondents also highlight the increasing importance of technology to the tax services market, already present in the software used to prepare accounts and tax returns, and key to HMRC’s Making Tax Digital agenda. How long might it be before we see software claiming to give tax advice on particular topics? It seems clear that any framework of regulation and protection emerging from the consultation should apply to all channels of tax services, whether provided at point of delivery by a human or a machine.

Two important parts of the call for evidence focus on HMRC powers and penalties: seeking comments on the effectiveness of HMRC’s current powers; and views on the possibility of penalties for advisers, not just taxpayers. Respondents highlight that the law already allows penalties to be levied on advisers under the dishonest conduct rules, enablers and promoters regimes. These are relatively new, and there are consistent calls to see the effects of these regimes before creating more penalties, and for HMRC to make more use of its existing powers before seeking new ones. The 21 July consultation, however, highlights some of the practical problems the existing regimes are running into.

Drawing this all together, there seems to be a recognition that change is needed, but that the benefits of existing regimes of professional regulation, and HMRC powers and penalties, should be maximised and applied consistently across the tax services market before designing new regimes.

The 21 July call for evidence and consultation

The call for evidence on disguised remuneration and the consultation on tackling promoters of tax avoidance develop specific topics relevant to the 19 March call for evidence. The 21 July call for evidence itself includes many examples of the

behaviours visible in the disguised remuneration market, and the consultation illustrates the situations HMRC encounters when it tries to tackle avoidance. They reveal the store of evidence that HMRC must be able to share with government.

They also illustrate a recognition that specific solutions are needed for particular problems that are distinct from the broader tax advice market.

The consultation on tackling promoters of tax avoidance sets out proposed changes to existing regimes, specifically:

- disclosure of tax avoidance schemes (DOTAS);
- promoters of tax avoidance schemes (POTAS);
- penalties for enablers of defeated tax avoidance;
- general anti abuse rule (GAAR); and
- disclosure of tax avoidance schemes: VAT and other indirect taxes (DASVOIT).

The deadline for responses will have closed by the time this article goes to print, but the document gives examples of situations where these regimes fail to provide effective measures to counter abuses, along with the proposed solutions and illustrations of the intended effects.

As the target is the promoters of tax avoidance, the measures mainly focus on the ‘supply side’ of abusive arrangements. There is also a modification of the GAAR rules to enable GAAR notices to partnerships.

> The call for evidence seeks comments on the effectiveness of HMRC’s current powers and views on the possibility of penalties for advisers.

It is welcome to see the consultation highlight the fact that the changes are not aimed at advisers adhering to high professional standards, and state that the promoters of the target schemes are rarely members of professional bodies. The key changes being consulted on seek to achieve the following:

- Prevent promoters seeking to circumvent the effects of the DOTAS regime, by giving HMRC powers to obtain information on schemes that the promoters argue are not disclosable, and publish details of the scheme as a means of consumer protection.

- Accelerate the ability for HMRC to issue ‘stop notices’, already available under the POTAS regime, to prevent the further promotion of avoidance schemes by lifting the condition for stop notices to follow only once the scheme has been defeated.
- Prevent promoters seeking to sidestep the POTAS regime, by targeting the owners of the businesses used to promote schemes, in cases where the businesses are closed down and the activities moved to a new business.
- Amend HMRC’s third party information powers in connection with enablers of abusive arrangements and make it easier for enablers penalties to be charged.

The call for evidence on disguised remuneration notes that the population using such schemes has changed substantially following the 2011 legislative changes. It highlights that the vast majority of the current users of these arrangements are independent contractors in a range of industries, and in some cases, small and medium sized businesses remunerating directors and employees. This is a shift from the large employers involved in such arrangements prior to the 2011 law.

The call for evidence seeks information that will be held by a wide range of people, as it looks not only at promoters and enablers of disguised remuneration arrangements, but also at employment intermediaries – employment agencies and umbrella companies for contractors, as well as the contractors and engagers of services.

It is somewhat of a conundrum that the disguised remuneration market remains at all. It was December 2004 when the then Paymaster General, Dawn Primarolo, told Parliament that the government would close down the avoidance schemes it knew about and gave ‘notice of our intention to deal with any arrangements that emerge in future designed to frustrate our intention that employers and employees should pay the proper amount of tax and NICs on the rewards of employment’.

This warning that legislative responses might be retrospective received much comment at the time. Following the Morse report, the government accepted the recommendation that the loan charge, which was introduced in 2016 but brought into effect for schemes used since 1999, went too far in its retrospective effect. This was therefore limited to loans made when the 2011 legislation was announced on 9 December 2010, which was taken to be the point when the law was truly clear. Maybe there is a case therefore for a new style of legislation, one that includes clear

statements of purpose before going into the detailed provisions to achieve this?

Changing attitudes?

2004 seems a long time ago, and the 2008 financial crash and the worldwide response to the Covid-19 pandemic are cited as changing public attitudes to tax. However, it would seem premature to assume that the attitudes of every taxpayer and every tax adviser have changed. As Anthony Seely identifies in his House of Commons Library briefing paper from April this year, Denis Healey as Chancellor of the Exchequer in 1978 made a budget statement that struck me as including remarkable parallels to the 2004 statement: '[Tax avoidance] has emerged recently in a new form which involves marketing a succession of highly artificial schemes – when one is detected, the next is immediately sold – and is accompanied by a level of secrecy which amounts almost to conspiracy to mislead. The time has come not only to stop the particular schemes we know about but also to ensure that no schemes of a similar nature can be marketed in future.'

In 1978, the response was aimed at the specific schemes that were causing concern. Today, the government response is more comprehensive, and the calls for evidence and consultation discussed in this article can be taken as evidence that the debate has moved to a new level.