Low Incomes Tax Reform Group
A voice for the unrepresented

Draft Finance Bill consultation
Schedule A1: digital reporting and record-keeping:
businesses with profits chargeable to income tax
Response by the Low Incomes Tax Reform Group (LITRG)

1 Executive summary

1.1 Given that this Schedule introduces the biggest change to the tax system since self-assessment in the mid-1990s, it is remarkable that so much that ought to be carefully scrutinised is left to regulations that will be subject to the barest minimum of parliamentary debate, and so little to primary legislation. Besides, self-assessment, and other changes to the tax system of similar importance (for example the powers review in the mid-2000s), were enacted gradually over a period of several years and subject to careful consultation, whereas this Schedule is to be enacted after a consultation period of a mere 28 days, and implemented less than a year after enactment.

1.2 We would strongly recommend that the primary legislation be expanded to include matters such as the procedure governing the making and withdrawing of elections, appeals, administration, costs of compliance, what kinds of electronic communications may or may not be enforced and at what cost to the taxpayer, what kind of information is to be provided to HMRC, time limits for submissions, and other matters in which parliamentarians will take an interest on behalf of their constituents (including those listed in para 4.1 below).

1.3 We also recommend that draft regulations be made available to parliamentarians considering the detail of the clauses in Committee, so that they are able to see the whole picture and can frame their contributions accordingly.

1.4 Finally, where the primary legislation contains no substantive provision but proceeds entirely by enabling clauses, yet ushers in changes to the tax system of such magnitude as these, we strongly recommend that the resulting regulations be subject to the affirmative resolution procedure, not allowed to slip through Parliament on the nod, as it were, without any scrutiny or debate.

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2 Introduction

2.1 It is a generally accepted principle of constitutional law that subordinate legislation (statutory instruments and other delegated legislation) is appropriate for matters of detail whereas matters of general principle should always be dealt with by primary legislation where it can be subjected to full parliamentary scrutiny. Where the case for the use of subordinate legislation is established, it must only be exercised within the parameters clearly laid down by Parliament, be subject to effective parliamentary scrutiny, and be subject to effective judicial control if it strays outside its powers.

2.2 This Schedule introduces the biggest change to the tax system, and to the way in which individuals running businesses interact with the taxing authority, since self-assessment in the mid-1990s. Self-assessment entered into force in stages, over a period of three years, during which substantive provisions were set out in primary legislation each year and carefully debated by Parliament. In addition, representatives of business and the tax profession were engaged in full and open consultation with the Inland Revenue in a manner that participants regarded as satisfactory. Again, in the mid- and late-2000s, HMRC ran a consultation on the reform of their powers, and the primary legislation, which contained all the substantive legislation, went through numerous Parliamentary proceedings over a period of five years.

2.3 By contrast, this Schedule contains nothing but a sequence of enabling clauses delegating to HMRC the making of laws on matters which in all taxing statutes hitherto have been contained in primary legislation and debated by Parliament. It prescribes the barest minimum of parameters for the making of the subordinate legislation which it authorises, and the regulations themselves will be subject to the barest minimum of parliamentary scrutiny. Instead of spreading consideration of such a far-reaching set of proposals over a sensible period of years, introducing it in phases as with self-assessment and the powers review, this Schedule is to be consulted on for 28 days, whereupon it is to be brought before Parliament, and the provisions themselves brought into force within one year.

2.4 Given that they will be subject to the negative resolution procedure, the regulations which contain all the substantive matters to do with this major change will in all likelihood be subject to no parliamentary scrutiny at all. Yet the content of these regulations will impose very significant additional administrative burdens on millions of citizens, requiring them to incur extra costs which many would not have had to incur otherwise. Its effect on the lives of small business owners and on the small business environment in this country will be far reaching. If any change to the tax system over the past two decades has merited careful debate by those elected to represent such individuals, this is it. To deny the opportunity for such debate is, in our view, verging on the unconstitutional and a regrettable precedent for future legislation.

2.5 It might be argued that Making Tax Digital (MTD) is largely a mechanistic change, and the proper place to make rules about the mechanisms of tax administration is subordinate legislation. The PAYE regulations are a good example of this approach. Undeniably, the bulk of PAYE legislation is contained in regulations, but there are also nearly 30 pages of mostly substantive primary legislation setting out the basic principles and carefully drawn parameters to define the scope of regulation-making powers.

2.6 We would strongly recommend that the primary legislation be expanded to include matters such as the procedure governing the making and withdrawing of elections, appeals, administration, costs of compliance, what kinds of electronic communications may or may not be enforced and at what cost to the taxpayer, what kind of information is to be provided to HMRC, time limits for submissions, and other matters in which parliamentarians will take an interest on behalf of their constituents. In para 4.1 below we list the matters mentioned in the enabling clauses contained in this Schedule which we believe should more appropriately be dealt with in primary legislation. If more time is needed for debate, then the timetable for the introduction of MTD should be extended to allow for that.

2.7 We also recommend that draft regulations be made available to parliamentarians considering the detail of the clauses in Committee, so that they are able to see the whole picture and can frame their contributions accordingly.

3 The making of the regulations

3.1 Para 14(6) provides that a statutory instrument containing regulations under the Schedule be subject to annulment in pursuance of a resolution of the House of Commons – the negative resolution procedure. In a case where the primary legislation contains no substantive provision but proceeds entirely by enabling clauses, yet ushers in changes to the tax system of such magnitude as these, it is wholly unacceptable that the resulting regulations should slip through Parliament on the nod, as it were, without any scrutiny or debate. We strongly recommend that these regulations should be subject to the affirmative procedure.

3.2 Para 14(2) provides for regulations to 'provide for matters to be specified by the Commissioners in accordance with the regulations'. If HMRC are to be enabled to make tertiary legislation, as this sub-clause is doing, it should be within very carefully defined parameters. This sub-clause effectively gives HMRC carte blanche to prescribe what they like.

4 Matters left to subordinate legislation which should be included in primary statute

4.1 The following topics, which would normally be included in primary legislation in a taxing statute, are here left to regulations:

- The making and withdrawing of elections – by whom to be made or withdrawn and in what form and manner, and within what time-limits (para 2(4), 4(3)).
- Similarly, the circumstances in which the Commissioners may nominate a partner should be debated by Parliament, not left to regulations, given the potentially onerous duties implicit in the task (para 5(4)).
- Para 7 (periodic updates), 8 (end of period statement) and (9) (partnership end of period statement) give sweeping powers to HMRC to specify what information about the business and its finances must be provided to HMRC, in what form, and when. There are only two constraints on exercise of these powers: (1) such information must be 'relevant

to calculating profits, losses or income of the business, including information about receipts and expenses', and (2) HMRC are precluded from requiring that information is provided to them more frequently than once every three months. In the self-assessment legislation in the mid-1990s, these matters were dealt with in the primary legislation and thoroughly debated by Parliament and the same procedure ought to be adopted on this key change to the tax system.

- Para 10 gives the Commissioners similarly sweeping powers to prescribe what business records should be kept, in what form, and how long for, subject to the one and only constraint that they must be relevant to the information the regulations say must be provided under paras 7 and 8. Given that these impositions are in addition to, and not in place of, existing record-keeping obligations, and are therefore an extra administrative burden on business, the matters which are left to regulations ought rather to be debated by Parliament and we would strongly urge this to be the position.

- Para 11 sets out a whole host of matters for which regulations may make provision, some of which strike us as potentially challenging the rule of law: in particular reg 11(2)(e) (HMRC may treat information as not having been provided, or records not kept, unless conditions are complied with), and 11(3) which could allow HMRC to prescribe 'conclusive and other presumptions' about the burden of proof on whether, when and by whom information transmitted electronically is provided. This latter provision could result in HMRC being the sole arbiter of whether (for example) information, contained in a quarterly return that has been despatched from the taxpayer's systems but not yet arrived with HMRC, has been 'provided' for the purposes of para 7, or not. A taxpayer may be deemed to be in default not through any failure on their part, but because of an electronic malfunction. These are very sweeping powers indeed – to delegate the making of laws on such matters to HMRC with scarcely any Parliamentary oversight is wholly unprecedented in our experience.

- Para 12 – exemption for the digitally excluded – is a sensible provision that permits a person to be exempt from complying with the Schedule if (among other things) it is not reasonably practicable for them to use electronic communications or keep electronic records. But it is still not a substantive provision, merely enabling; and while HMRC are mandated to make regulations creating exemptions in that form, we do not see why the substantive provision should not be contained in the primary statute.

5 Other points

5.1 We have three further observations:

- Para 1(1), opening words: 'This Schedule applies to a person . . . who . . . carries on (or has carried on)'. In what circumstance would a person who has carried on a trade in the past be subject to the provisions of the Schedule, other than where the trade has ceased but the person is required to submit an end-of-year declaration in relation to the time prior to its cessation?

- Para 8(4): 'Regulations under this paragraph may make provision authorising (but not requiring) the statement also to include . . .' information that is not about the business but is relevant for establishing the person's tax liability for the year. Clarity is needed on precisely what information may be included in the end-of-year declaration and what must still be presented on a self-assessment return. It is clearly highly desirable that nobody who is required to submit information electronically under this Schedule should also be required to submit a self-assessment return, as that would be an additional, and in our view unnecessary, administrative burden and cost for taxpayers.

- Para 11(4), opening words: 'The regulations may allow or *require* use to be made of intermediaries . . .' In what circumstance will businesses which do not currently use intermediaries be *required* to use them under this provision?

LITRG

27 February 2017