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## HMRC AND THE PUBLIC: The Case for Reform of Soft Law

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## **Abstract**

There is now almost universal acceptance that tax law is overly complex and indeterminate. A considerable body of literature has built up in consequence analysing alternative structures for the promulgation of law. Much less attention on the other hand has been directed towards HMRC's role in the current arrangement. If the legislation and case law offer few immediate answers to the taxpayer, then HMRC's role as administrator of the system becomes more apparent. General soft law elaborating upon how HMRC will apply the law is thus rendered an indispensable element.

In order for it to perform optimally its important role in supplementing the law, this soft law must be of sufficient quality, accessibility and reliability, in addition to being subjected to robust scrutiny. General HMRC soft law, however, has unfortunately been permitted to develop unchecked and falls short of satisfying these benchmarks. The thesis seeks to set out a package of proposals which should be adopted in order to alleviate these issues.

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## Table of Contents

Abstract	i
Table of Contents	ii
Acknowledgements	x
Table of Abbreviations	xii
Table of Cases	xiii
Table of Statutes and Other Primary Legal Sources	xxiv

### **PART I. INTRODUCTION**

1. Background	1
2. State of the art & justification for study	4
3. Research questions and hypothesis	8
4. Structure of the analysis	9
5. Methodology	10

### **PART II. HMRC'S SOFT LAW ROLE**

1. Outline	13
2. An introduction to HMRC soft law	14
2.1. The constitutional propriety of HMRC soft law	14
2.1.1. The conceptual tenets of discretion	15
2.2.1.1. Constraints	16
2.2.1.2. Freedom to decide	18
2.2.1.3. Interactive concept	20

2.1.2. Understanding HMRC’s managerial discretion	21
2.2. The scope of HMRC soft law and its manifestations	31
2.2.1. Extra-Statutory Concessions	34
2.2.2. Statements of Practice	39
2.2.3. Manuals	42
2.2.4. Codes of Practice	44
2.2.5. Guidance	46
2.2.6. Rulings	48
2.3. The production of soft law	51
2.4. Interim Conclusion	54
3. The case for HMRC soft law	55
3.1. The positives and the negatives of soft law	56
3.1.1 How the rule of law advances the case for soft law	57
3.1.2. How ‘structuring discretion’ advances the case for soft law	65
3.1.3. The counterclaims: six arguments	67
3.2. A normative framework for promulgation	77
3.3. Interim Conclusion	79
4. Conclusion to Part II	80

### **Part III. THE FAILINGS OF HMRC SOFT LAW**

1. Outline	82
2. Investigating the quality of HMRC soft law	83
2.1. The problem of soft law being inconsistent with the law	84
2.2. The problem of soft law being Insufficiently clear	97
2.3. Interim Conclusion	106
3. The accessibility of HMRC soft law	107
3.1. Publication	108
3.2. Retrospective changes to soft law	111
3.3. Mingling of the categories of advice	114
3.4. Interim Conclusion	119
4. Analysis of the scrutiny afforded to HMRC soft law	121
4.1. Treasury Select Committee	123
4.1.1. Ambit of the role	123
4.1.2. Relationship with HMRC	124
4.1.3. Interim Remarks	130
4.2. Comptroller & Auditor General, National Audit Office and Public Accounts Committee	130
4.2.1. Ambit of the roles	130
4.2.2. Relationship with HMRC	133
4.2.3. Interim remarks	136
4.3. The courts' residual role	137
4.3.1. Ambit of the roles	137

4.3.2. Relationship with HMRC	137
4.3.3. Interim remarks	146
4.4. Consultation with taxpayers	147
4.5. Interim Conclusion	152
5. Reliability for taxpayers? The inadequacy of public law protection	153
5.1. The Parameters of the doctrine	155
5.1.1. Legitimate expectation	155
5.1.2. So unfair as to amount to an abuse of power	157
5.2. Inaptness of the doctrine in tax law	158
5.2.1. The doctrine of ultra vires: the Achilles' heel of legitimate expectations?	159
5.2.1.1. The orthodox position	159
5.2.1.2. Mansworth v Jelley and the Guidance affair	161
5.2.1.3. Interim remarks	164
5.2.2. The difficult case of satisfying Bingham's second condition	166
5.2.2.1. The difficulty in establishing requisite clarity	167
5.2.2.2. Is there anything devoid of relevant qualification?	173
5.2.2.3. Interim Remarks	175
5.2.3. HMRC's desire to maintain control	176

5.2.4. Access to Justice	179
5.3. Interim Conclusion	183
6. Cometh the hour, cometh the Ombudsman?	184
6.1. Remit, powers and influence of the Ombudsman	187
6.1.1. Remit	187
6.1.2. Powers	189
6.1.3. Influence	190
6.2. Relationship between the Ombudsman and HMRC	192
6.2.1. Supervision of HMRC soft law	192
6.2.1.1. Inconsistency	192
6.2.1.2. Insufficiency	194
6.2.1.3. Publication	197
6.2.2. Relief for taxpayers: Individual Justice	198
6.2.2.1. Binding HMRC to its soft law	199
6.2.2.2 The non-existence of the Ultra Vires hurdle	201
6.3. The Adjudicator's Office	204
6.3.1. Remit, powers and influence of the Adjudicator's Office	204
6.3.2. Supervision of HMRC soft law and holding the body to its soft law	206
6.4. The possibility of extending the role of the Ombudsman or Adjudicator to fill the gaps	209
6.5. Interim Conclusion	214
7. Conclusion to Part III	216

## **PART IV. A NEW APPROACH FOR HMRC SOFT LAW**

1. Outline	218
2. Deciding upon an alternative approach	219
2.1. Alternative approaches	220
2.1.1. Direct Parliamentary Control	221
2.1.2. Bespoke framework	223
2.1.2.1 Permissibility of Binding advice	224
2.1.2.2. Comparative overview of options	227
2.2. Interim Conclusion	229
3. The Australian Regime	230
3.1. Australian approach to administrative advice	233
3.2. What is a public ruling?	235
3.3. Performance of the public rulings regime	237
3.3.1 Scrutiny	238
3.3.2. Quality	245
3.3.3. Accessibility	255
3.3.4. Reliability	259
3.4. Interim Conclusion	263
4. Proposals in the range: synthesis of the analysis undertaken	264
4.1. Proposal to introduce public rulings in the United Kingdom	267
4.1.1. The mechanics of the rulings regime in	

the UK	267
4.1.1.1. The Framework: From Identification to Post-publication challenges	268
4.1.1.2. Details of the relevant participators in the process	278
4.1.1.3. Legislative amendment	286
4.1.2. The success of the programme: contribution from Parliament, the Government and HMRC	287
4.1.3. A rule to distinguish between soft law and public rulings	296
4.1.4. Interim Remarks	301
4.2. Proposals in respect of soft law not having a 'significant impact'	302
4.2.1. Recommendations in respect of the four normative benchmarks	303
4.2.1.1. Recommendations in respect of scrutiny	303
4.2.1.2. Recommendations in respect of quality	308
4.2.1.3. Recommendations in respect of accessibility	310
4.2.1.4. Recommendations in respect of reliability	318

4.2.2. Interim Remarks	325
4.3. Interim Conclusion	327
5. Conclusion to Part IV	329
<b>PART V. CONCLUSION</b>	<b>331</b>

## **Bibliography**

Articles and Books	333
Australian Governmental Documents	355
Law Commission Documents	360
Newspaper Articles	360
OECD Documents	361
UK Governmental Sources	361
UK Non-departmental Public Body Documents	371
UK Parliamentary Sources	372
UK Theses	389
Other Sources	390

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## Table of Abbreviations

ATO	Australian Tax Office
C & E	Customs and Excise
CAG	Comptroller & Auditor General
DPP	Director of Public Prosecutions
DOTAS	Disclosure of Tax Avoidance Schemes
ECHR	European Convention on Human Rights
ESC	Extra-Statutory Concession
EU	European Union
GAAR	General Anti-Abuse Rule
HM	Her Majesty
HMRC	Her Majesty's Revenue and Customs
HMSO	Her Majesty's Stationary Office
IGT	Inspector-General of Taxation
IR	Inland Revenue
JCPAA	Joint Committee of Public Accounts and Audit
NAO	National Audit Office
OECD	Organisation for Economic Co-operation and Development
PAC	Public Accounts Committee
POTAS	Promoters of Tax Avoidance Schemes
PCA	Parliamentary Commissioner for Administration
PHSO	Parliamentary and Health Service Ombudsman
TAAR	Targeted Anti-Avoidance Rule
TSC	Treasury Select Committee

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*Bellinz Pty Ltd & Ors v Commissioner of Taxation* [1998] FCA 615; (1998) 39 ATR 198 ... 259

*Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* [2007] FCAFC 16 ... 250

*Crestani v FCT* (1998) 98 ATC 2219 ... 258

*David Jones Finance v Commissioner of Taxation* (1990) 12 ATR 1506 ... 232

*MacQuarie Bank v Federal Commissioner of Taxation* [2013] FCAFC 119 ... 257

*Walstern Pty Ltd v Commissioner of Taxation* [2003] FCA 1428 ... 254

### ECHR Case law

*Autronic v Switzerland* (1990) 12 EHRR 485 ... 59

*Huvig v France* (App. 11105/84), 24 April 1990, Series A No 176-B, (1990) 12 EHRR 528, §26 ... 59

*Kruslin v France* (1990) 12 EHRR 547 ... 59

*Leander v Sweden* (1987) 9 EHRR 433 ... 99

*Malone v UK* (1985) 7 EHRR 14 ... 60, 62, 64, 65, 304, 307

*Mersch v Luxembourg* (1985) 43 DR 34 ... 59

*Muller v Switzerland* (1988) 13 EHRR 212 ... 59

*Neftyanay Kopaniya Yukos v Russia* (App. 14902/04), 20 September 2011,  
(2012) 54 EHRR 19 [2011] ECHR 1342 ... 160

*Silver v United Kingdom* (1983) 5 EHRR 347 ... 61, 64, 65, 304

*SW v United Kingdom* (1995) 21 EHRR 363 ... 59

*The Sunday Times v UK* (App. 6538/74), 26 April 1979, Series A No 30,  
(1979-80) 2 EHRR 245 §48 ... 58-59

*X Ltd and Y v United Kingdom* (1982) 28 DR 77 ... 49

## **New Zealand Case law**

*New Zealand Stock Exchange v CIR* [1992] 3 NZLR 1 ... 25

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*A-G v Wilts United Dairies Ltd* (1921) 37 TLR 884 ... 153

*Absalom v Talbot* [1943] 1 All ER 589 ... 84-85

*Accenture Services Ltd v Revenue and Customs* [2009] EWHC 857, [2009]  
STC 1053 ... 275

*Adrian John Wilkinson v The Commissioners of Inland Revenue* [2002]  
EWHC 182, [2002] STC 347 ... 83, 144

*Al-Fayed v Advocate General for Scotland CIR* [2004] ScotCS 112 [2004]  
STC 1703 ... 17, 160

*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947]  
2 All ER 680, (1948) 1 KB 223 ... 108

*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG*  
 [1975] AC 591 ... 58

*Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143 ...  
 159

*British Oxygen v Board of Trade* [1971] AC 610 ... 71

*Customs & Excise Commissioners v Croydon Hotel & Leisure Co Ltd* [1995]  
 STC 855 ... 21

*Carltona Ltd v Works Commissioners* [1943] 2 All ER 560 ... 233

*Commissioners of Customs & Excise v Cure & Deeley Ltd* [1962] QB 340 ...  
 153

*Congreve v Home Office* [1976] QB 629 ... 190

*Corkteck Ltd v HM Revenue & Customs* [2009] EWHC 785, [2009] STC  
 1681 ... 166, 275

*Council of Civil Service Unions and others v Minister for The Civil Service*  
 [1985] AC 374, [1985] ICR 14 ... 188

*Edwards v Bairstow* [1956] AC 14 ... 153

*F & I Services Ltd v Customs and Excise Commissioners* [2001] EWCA Civ.  
 762, [2001] STC 939 ... 177

*Fine Art Developments plc v Customs & Excise Commissioners* [1994] STC  
 668 ... 21

*Fothergill v Monarch Airlines Ltd* [1981] AC 251 ... 59

*HMRC v Hely-Hutchinson* [2017] EWCA Civ 1075, [2017] WLR(D) 517...  
 95, 164, 316

*In re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289 ... 55

*In re Preston* [1985] 2 WLR 836; [1985] STC 282 ... 23, 183, 153, 157, 259

*Inland Revenue Commissioners v Frere* [1964] 3 WLR 1193 ... 72-73

*IRC v Clifforia Investments Ltd* [1963] 1 WLR 396 ... 84

*IRC v National Federation of Self-Employed and Small Businesses Ltd*  
 [1982] AC 617 ... 17, 21, 23-25, 36, 53, 71, 138, 153

*IRC v Nuttall* [1990] STC 194 ... 17, 23

*J Rothschild Holdings v IRC* [1988] STC 645 ... 108

*Laker Airways v Department of Trade* [1977] QB 643 ... 226

*M v Home Office* [1994] 1 AC 377 ... 85

*Mandalia v Secretary of State for the Home Department* [2015] UKSC 59,  
 [2015] WLR (D) 414 ... 108

*Mansworth v Jelley* [2002] EWCA Civ 1829, [2003] STC 53 ... 161-163

*Minister of Agriculture and Fisheries and Food v Matthews* [1950] 1 KB 148  
 ... 115, 154

*O'Brien v Benson's Hosiery (Holdings) Ltd* [1980] AC 562 ... 87

*Oxfam v HMRC* [2009] EWHC 3078, [2010] STC 686 ... 23, 43, 108, 179,  
 180, 320, 323

*Pennine Raceway Ltd v Kirklees Metropolitan Council (No 2)* [1989] STC  
 122 ... 90

*Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3, [1993] AC 593 ... 153

*Privacy International v HMRC* [2014] EWHC 1475, [2015] STC 948 ... 100-  
 106, 305, 312-313

*R (ABCIFER) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003]  
 QB 1397 ... 168

*R (Alconbury Developments Ltd) v Secretary of State for the Environment,  
 Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 ... 66

*R (Bamber) v HMRC* [2005] EWHC 3221, [2006] STC 1035 ... 37, 158

*R (Bampton) v King* [2012] EWCA Civ 1744, [2014] STC 56 ... 32, 175, 294

*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453 ... 156-157

*R (Bhatt Murphy (a firm)) v The Independent Assessor* [2008] EWCA Civ 755, [2008] All ER (D) 127 ... 158

*R (Bibi) v Newham LBC* [2001] EWCA Civ 607, [2002] 1 WLR 237 ... 94

*R (Biffa Waste Services Ltd) v Revenue and Customs* [2016] EWHC 1444 (Admin), [2017] Env LR 10... 3, 167, 171-172

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*R (Cameron) v HMRC* [2012] EWHC 1174, [2012] STC 1691 ... 158, 167-168, 171, 174.

*R (Davies) v HMRC; R (Gaines-Cooper) v HMRC* [2011] UKSC 47, [2012] 1 All ER 1048 ... 1, 23-35, 156-157, 172, 174-176, 184, 278, 295, 321-322

*R (Davies) v HMRC; R (Gaines-Cooper) v HMRC* [2010] EWCA Civ 83, [2010] STC 860 ... 24, 28, 295-296, 308

*R (E) v Nottinghamshire Healthcare NHS Trust* [2009] EWCA Civ 795, [2009] EHRR 1442 ... 71

*R (FDA) v Secretary of State for Work and Pensions* [2012] EWCA Civ 332, [2013] 1 WLR 444 ... 182

*R (Greenwich Property Ltd) v Commissioners of Customs and Excise* [2001] EWHC 230, [2001] STC 618 ... 36, 38, 156, 167, 169-170, 177

*R (Hankinson) v HMRC* [2009] EWHC 1774, [2009] STC 2158 ... 179, 324

*R (Hely-Hutchinson) v HMRC* [2015] EWHC 3261, [2016] STC 962 ... 94-95,  
161, 164, 227, 250, 297, 316

*R (HMRC) v HM Coroner for the City of Liverpool* [2014] EWHC 1586,  
[2015] QB 481 ... 103

*R (Ingenious Media and McKenna) v HMRC* [2013] EWHC 3258, [2014] STC  
673 ... 27, 100, 102-103, 313

*R (Ingenious Media and McKenna) v HMRC* [2015] EWCA Civ 173, [2015]  
STC 1357 ... 99-102, 313

*R (Ingenious Media and McKenna) v HMRC* [2016] UKSC 54, [2016] 1 WLR  
4164 ... 98, 100, 102, 313

*R (Nadarajah and Abdi) v Secretary of State for the Home Department*  
[2005] EWCA Civ 1363 ... 155, 157, 176

*R (On the application of David Edwards) v The Environment Agency,  
Secretary of State & Rugby Ltd* [2004] EWHC 736, [2004] 3 All ER 21 ... 138

*R (on the application of GSTS Pathology LLP and others) v Revenue and  
Customs Commissioners* [2013] EWHC 1801, [2013] STC 2017 ... 167

*R (on the application of Lower Mill Estate Ltd and Conservation Builders) v  
Revenue and Customs Commissioners* [2008] EWHC 2409, [2008] BTC 5743 ...  
155

*R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38,  
[2014] 3 WLR 200 ... 64-66, 104, 304-307

*R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC  
345 ... 62-65, 104-105, 304-307

*R (Thompson) v Fletcher* [2002] EWHC 1448 (Ch.); [2002] STC 1149 ...  
174

*R (Tunbridge Wells BC) v Sevenoaks Magistrates' Court* [2001] EWHC Admin 897 ... 157-158

*R (Wilkinson) v Inland Revenue Commissioners* [2003] EWCA Civ 814, [2003] 1 WLR 2683 ... 84

*R (Wilkinson) v IRC* [2005] UKHL 30; [2006] STC 270 ... 17, 23, 25-27, 35-36, 52, 73, 75, 85, 109, 111, 116-117, 138-146, 306, 317

*R v CICB, ex parte Ince* [1973] 1 WLR 1334 ... 71

*R v CIR, ex p Unilever Plc* [1996] STC 681 ... 3, 8, 153, 155, 157-158, 166-167, 183, 259

*R v CIR, ex parte Fulford-Dobson* [1987] STC 344, [1987] 1 QB 978 ... 35, 83, 175, 294

*R v Customs and Excise Commissioners, ex parte F & I Services Ltd* [2000] STC 364 ... 177

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*R v Department of Education and Employment, ex parte Begbie* [1999] EWCA Civ 2100 ... 94, 155, 157

*R v East Sussex County Council, ex parte Reprotech (Pebsham) Ltd* [2002] UKHL 8, [2002] 4 All ER 58 ... 154

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*R v Hull University Visitor, Ex parte Page* [1993] AC 682 ... 159

*R v Inland Revenue Commissioners, ex parte MFK Underwriting* [1990] 1 WLR 1545 ... 27, 50, 153, 156-157, 159-160, 166, 183

*R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1980] QB 407 ... 24

*R v IRC, ex p Matrix Securities Ltd* [1994] 1 WLR 334 ... 153, 158, 166

*R v Local Commissioner for Administration, ex p Bradford Metropolitan City Council* [1979] QB 287 ... 188

*R v Local Commissioner for Administration, ex p Eastleigh Borough Council* [1988] QB 855 ... 188

*R v North and East Devon Health Authority (ex p Coughlan)* [2001] QB 213, [2000] 3 All ER 850 ... 157, 160

*R v Panel on Take-overs and Mergers, ex parte Datafin* [1987] QB 815 ... 160

*R v Parliamentary Commissioner for Administration, ex parte Balchin* [1998] 1 PLR 1 ... 188

*R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 ... 59

*R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 ... 22

*R v Torquay Licensing Justices, ex parte Brockman* [1951] 2 KB 748 ... 71

*Re an application by JR55 for Judicial Review (Northern Ireland)* [2016] UKSC 22, [2016] All ER (D) 74 ... 202

*RFC 2012 plc (in liquidation) (formerly The Rangers Football Club plc) v Advocate General for Scotland* [2017] UKSC 45, [2017] 1 WLR 2767 ... 30

*Rowland v Environment Agency* [2003] EWCA Civ. 1885, [2005] Ch. 1 ... 115, 159-160

*Secretary of State for Education v Tameside Metropolitan Borough Council* [1977] AC 1014 ... 19-20

*Seifert and Lynch v Pensions Ombudsman* [1997] 1 All ER 214 ... 190

*Sharp v Wakefield* [1891] AC 173 ... 20

*Smedleys Ltd v Breed* [1974] AC 839 ... 62

*St Barbe Green v Inland Revenue Commissioners* [2005] EWHC 14, [2005] STC 288 ... 113

*Stock v Frank Jones (Tipton) Ltd.* [1978] 1 WLR 231 ... 36

*Swayne v IRC* [1899] 1 QB 335 ... 84

*UK Uncut Legal Action v HMRC* [2013] EWHC 1283, [2013] SWTI 1849 ... 18, 71, 138

*Vestey v IRC (no. 1)* [1979] Ch. 177 ... 84, 144, 306

*Vestey v IRC* [1980] AC 1148 ... 83, 84, 145, 306

*Vestey v IRC (no. 2)* [1979] Ch. 198 (HC) ... 39, 70, 86, 144-145, 306

*Vestry of the parish of St. Mary, Islington v Hornsey Urban District Council* [1900] 1 Ch. 695 ... 115, 154

*Walumba Lumba v Secretary of State for the Home Department* [2011] UKSC 12, [2011] 2 WLR 671 ... 59

*Zim Properties v Proctor* [1985] STC 90 ... 87-92

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*B&J Shopfitting Services v HMRC* [2010] UKFTT 78 (TC) ... 174

*Hanover Company Services Ltd v HMRC* [2010] UKFTT 256 (TC) ... 43, 174

*Noor v HMRC* [2013] UKUT 071 (TCC), [2013] STC 998 ... 320

*HMRC v Glyn* [2015] UKUT 551 (TCC), [2016] STC 1020 ... 30

*HMRC v Smith & Williamson* [2015] UKUT 666 (TCC), [2016] STC 1393 ...  
30

*HMRC v Trinity Mirror* [2015] UKUT 0421 (TCC), [2016] STC 352 ... 322

*HOK Limited v The Commissioners for Her Majesty's Revenue and Customs*  
[2011] UKFTT 433 (TC) ... 179, 305

*HSBC Holdings plc and The Bank of New York Mellon Corporation v HMRC*  
[2012] UKFTT 163 (TC) ... 178

*LH Bishop Electrical Co. Ltd v HMRC* [2013] UKFTT 522 (TC), [2013] STI  
3433 ... 108, 111, 319, 321, 322

*Project Blue v HMRC* [2014] UKUT 564 (TCC), [2015] STC 745 ... 96

*R (Capital Accommodation (London)) v HMRC* [2012] UKUT 276 (TCC),  
[2013] STC 303 ... 179, 321

*Revenue and Customs Commissioners v Hok Limited* [2012] UKUT 363  
(TCC), [2013] STC 225 ... 179, 306

*Rotberg v HMRC* [2014] UKFTT 657 (TC) ... 179

*Royal Institute of Navigation v Revenue & Customs Commissioners* [2012]  
UKFTT (472) (TC) ... 306

*Samarkand Film Partnership No 3, Proteus Film Partnership and three  
partners v HMRC* [2015] UKUT 211 (TCC), [2015] STC 2135 ... 175

*Southern Cross Employment Agency Ltd v HMRC* [2014] UKFTT 088 (TC) ...  
177

*Sunset Travel Limited v The Commissioners for HMRC* [2012] UKFTT 471  
(TC) ... 305

*Trinity Mirror v HMRC* [2014] UKFTT 355 (TC) ... 322

*William Bourne v HMRC* [2010] UKFTT 294 (TC) ... 180

## US Case law

*Mayo Foundation for Education and Research v United States* 131 S. Ct. 704

(2011) ... 225

## Table of Statutes and Other Primary Legal Sources

### Australian Legislation

- Excise Act 1901 ... 234
- Income Tax Assessment Act 1936 ... 234
- Income Tax Assessment Act 1997 ... 247
- Superannuation Industry (Supervision) Act 1993 ... 233
- Superannuation Guarantee (Administration) Act 1992 ... 234
- Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2)  
2005 ... 236, 262
- Taxation Administration Act 1953 ... 233, 236, 249, 254, 257, 261, 274,  
286

### UK Primary Legislation

- Income Tax HC Bill (2006-07) ... 73, 140
- Bill of Rights Act 1688/9 ... 2, 22, 28, 165
- Commissioners for Revenue and Customs Act 2005 ... 2, 17, 21, 36, 97, 98,  
121, 124, 286, 293, 313
- Corporation Tax Act 2010 ... 32, 51
- Customs and Excise Management Act 1979 ... 21
- Exchequer and Audit Departments Act 1866 ... 131
- Finance Act 2006 ... 73, 140
- Finance Act 2007 ... 73, 140

Finance Act 2008 ... 73, 98

Finance Act 2013 ... 31, 265, 283

Finance Act 2014 ... 75, 295

Freedom of Information Act 2000 ... 205, 231, 312-314

Income and Corporation Taxes Act 1988 ... 25, 139, 167

Income Tax Act 2007 ... 32, 73, 140

Income Tax (Earnings and Pensions) Act 2003 ... 37, 70, 85-86, 186

Inheritance Tax Act 1984 ... 113

Inland Revenue Regulation Act 1890 ... 21

National Audit Act 1983 ... 131

Parliamentary Commissioner Act 1967 ... 187-190, 211

Statutory Instruments Act 1946 ... 80

Taxation of Chargeable Gains Act 1992 ... 42, 51, 86, 161

Taxes Management Act 1970 ... 21, 197, 314

Tribunals, Courts and Enforcement Act 2007 ... 323

Value Added Tax Act 1994 ... 21, 23, 50, 118-119, 169, 179-180, 186, 274

## **UK Secondary Legislation**

Income and Corporation Taxes (Electronic Communications) Regulations  
2003 (S.I. 2003/282) ... 32

The Enactment of Extra-Statutory Concessions Order 2014 (S.I.  
2014/211) ... 73, 139

The Qualifications for Appointment of Members to the First-tier Tribunal  
and Upper Tribunal Order 2008 ... 180

Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ...	181
Standing Order No. 152, Standing Orders of the House of Commons 2015	... 123
Standing Order No. 148, Standing Orders of the House of Commons 2015	... 124, 132

## **New Zealand Legislation**

Tax Administration Act 1994 ...	228
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## **US Legislation**

Administrative Procedure Act ...	218, 225, 228
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## PART I. INTRODUCTION

### 1. Background

Robert John Davies, Michael John James and Robert Gaines-Cooper claimed for tax purposes to be non-resident. Being wealthy individuals who had sought to base themselves outside the UK, the matter was of some significance. Before the Supreme Court in the 2011 case of *Gaines-Cooper*,<sup>1</sup> the trio sought to rely upon Guidance produced by Her Majesty's Revenue and Customs ('HMRC') to support the non-residence claim. The argument was rejected by a majority of the highest court in the land. The merits of this decision are not of concern for present purposes. But it does beg broader questions about the status of HMRC Guidance, its place within the legal structure, the means by which it is brought into being, and who ultimately controls it. The inquiry of this thesis takes its inspiration from these questions: it investigates general 'soft law' promulgated by HMRC.

Soft law is a set of norms that lacks formal legal consequences,<sup>2</sup> but which nevertheless seeks to guide the actions of those to whom it is addressed<sup>3</sup> and

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<sup>1</sup> *R (Davies) v HMRC; R (Gaines-Cooper) v HMRC* [2011] UKSC 47, [2012] 1 All ER 1048.

<sup>2</sup> Robin Creyke and John McMillan, 'Soft Law versus Hard Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart 2008) 377, 378; Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart 2016) 1.

<sup>3</sup> Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', in Terenth Daintith (ed) *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (John Wiley & Sons, 1995) 64.

may produce some legal effects.<sup>4</sup> This thesis is concerned with soft law which is the product of the exercise of a domestic statutory power other than a power to make rules,<sup>5</sup> and thus which elaborates upon legal rights and obligations, thereby contrasting with other forms of soft law which have no relationship with statute as for instance in International Law.<sup>6</sup> More precisely, this thesis is concerned with HMRC soft law which is produced pursuant to HMRC's managerial discretion, based now in section 5 of the Commissioners for Revenue and Customs Act 2005. This does not provide a statutory power to make rules, but rather empowers HMRC to take measures necessary for the collection and management of taxes and credits.<sup>7</sup> The promulgation of soft law is permitted by virtue of the fact that it assists in the collection and management function. However, this discretion is constrained by an array of legal rules. First, it must not be used to act expressly in defiance of legislation and case law. Secondly, the discretion is bounded by fundamental constitutional principles such as those found in the Bill of Rights Act 1688/9. Article 1 provides that the suspension of laws without consent of Parliament is illegal, whilst Article 4 proscribes the levying of taxes without Parliamentary approval. Thirdly, the discretion may not conflict with standards which are implied into its use.

To this end, sources of soft law include those instruments promulgated by HMRC in which the body elaborates upon how it will apply the law, whether that is legislation (secondary or primary) or case law, to a general class of people.

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<sup>4</sup> See for instance Part III. 5. Reliability for taxpayers? The inadequacy of public law protection. See also: Robert Baldwin, *Rules and Government* (Clarendon Press 1995) 86-106.

<sup>5</sup> Peter Cane, *Controlling Administrative Power: An Historical Comparison* (CUP 2016) 204.

<sup>6</sup> Part I. 2. State of the art & justification for study, see text at n 15 and sources cited therein.

<sup>7</sup> See below Part II. 2.1. The constitutional propriety of HMRC soft law.

HMRC soft law of this variety is in bountiful supply between the multitudes of Extra-statutory Concessions, Statements of Practice, Manuals, Codes of Practice and Guidance that are issued on an almost daily basis.<sup>8</sup> Soft law may also arise from HMRC conduct, such as where the taxpayer has an expectation as to particular treatment.<sup>9</sup> Through soft law the body elaborates upon how it will apply the law to taxpayers and thus give guidance on taxpayers' rights and obligations.

Even individual communications between taxpayers and HMRC may be understood as a form of soft law given that in particular, advice can be generalized to apply to more than that particular taxpayer (and indeed may be the first iteration of what will later become a generalised policy).<sup>10</sup> However, this thesis does not seek to engage with such individualised soft law, but rather with more general forms. To this end, the thesis is concerned with instruments of soft law which are intended to elaborate upon the rights and obligations of a generality of taxpayers and are so directed to elaborating upon these rights and obligations, rather than being directed to a single entity or individual. The thesis will nevertheless briefly set out the history of individualised advice which are known as 'rulings'<sup>11</sup> in order to contrast these informal arrangements and limited statutory provisions with the more comprehensive proposals to be set forward in Part IV of the thesis. Further, it should be noted that where the term 'soft law' is used in this thesis, it is seeking to refer to a source of soft law rather

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<sup>8</sup> See: HMRC, *Latest Documents*, available at: <<https://www.gov.uk/government/latest?departments%5B%5D=hm-revenue-customs>> accessed 31 September 2017.

<sup>9</sup> *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681.

<sup>10</sup> See for instance *R (Biffa Waste Services Ltd) v Revenue and Customs* [2016] EWHC 1444 (Admin) [21]-[63], [2017] Env LR 10, [21]-[63].

<sup>11</sup> See below Part II. 2.2.6. Rulings.

than the norms themselves; just as where there is reference to tax law, it is to the source of tax law rather than the norms.

Bringing all of this together, HMRC soft law for the purposes of this thesis refers to those soft law sources that encapsulate norms, which are produced pursuant to HMRC's managerial discretion and seek to elaborate upon legal rights and obligations of taxpayers in order to guide actions. The particular inquiry of the thesis is in to those soft law instruments which are directed to elaborating upon the legal rights and obligations of a generality of taxpayers ('forms of general HMRC soft law').

On a general level, the objective of the research is to contribute in a scholarly manner to a debate about the position of HMRC with regards to public law. More specifically however, this thesis seeks to provide a package of realistically achievable reforms for general HMRC soft law. The investigation will reveal that these are necessitated by general HMRC soft law's myriad inadequacies with respect to normative benchmarks adopted for the thesis. This, in brief, shall be the significant and substantial contribution that the research will make.

## **2. State of the art & justification for study**

The legal study of soft law generally has been largely characterised by *ad hoc* study. Public lawyers have generally focused upon the broader issue of administrative discretion,<sup>12</sup> with some notable exceptions focusing specifically

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<sup>12</sup> CK Allen, *Law and Orders* (3rd edn. Stevens & Sons 1965); Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (2nd edn, Baton Rouge 1971); Jeffrey Jowell, *Law and Bureaucracy:*

upon the legal effects of soft law at a national level.<sup>13</sup> Although scholarship in EU Law<sup>14</sup> and International Law<sup>15</sup> has also focused upon 'soft law', its applicability is limited due to the fact that such instruments serve differing ends. Soft International Law may be used as a means of introducing a political rather than legal commitment,<sup>16</sup> or to create a norm which can then harden into law, either through becoming customary law or by virtue of the process of formalization into a binding treaty.<sup>17</sup> Soft EU Law similarly serves as a stepping-stone towards development of hard law,<sup>18</sup> and as a means of furthering integration.<sup>19</sup> Thus, due to differing rationales for promulgation, EU Law and International Law scholarship on soft law is of limited applicability in a domestic setting. Tangentially, studies of regulation and regulatory theory have made important contributions,<sup>20</sup> but their focus has been on the reactions of the regulators and

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*Administrative Discretion and the Limits of Legal Action* (Associated Press, 1975); Robert Baldwin and Keith Hawkins, 'Discretionary Justice, Davis Reconsidered' [1984] PL 570.

<sup>13</sup> Robert E. Megarry 'Administrative Quasi-Legislation' (1944) 60 LQR 125; Stanley A. de Smith, 'Sub-delegation and circulars' (1949) 12 MLR 37; Michael Asimow, 'Nonlegislative rulemaking and regulatory reform' (1985) *Duke Law Journal* 381; Robert Baldwin and John Houghton 'Circular Arguments: The Status and Legitimacy of Administrative Rules' (1986) PL 239; Gabriele Ganz, *Quasi-legislation: recent developments in secondary legislation* (Sweet & Maxwell, 1987); Robert Baldwin, *Rules and Government* (n 4); Weeks (n 2).

<sup>14</sup> See for instance Jan Klabbers, 'Informal instruments before the European Court of Justice' (1994) 31 *Common Market Law Review* 997; Linda Senden, *Soft Law in European Community Law* (Hart Publishing, 2004).

<sup>15</sup> For instance Jan Klabbers, 'The Redundancy of Soft law' (1996) 65 *Nordic Journal of International Law* 167; Jan Klabbers 'The Undesirability of Soft Law' (1998) 67 *Nordic Journal of International Law* 381; Christine M. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *ICLQ* 850.

<sup>16</sup> Oscar Schachter, 'Towards a theory of international obligation' in Stephen Schwebel (ed.), *The effectiveness of International Decisions* (Sijthoff 1971) 13

<sup>17</sup> Malcolm Shaw, *International Law* (7th edn., CUP 2014) 83-84.

<sup>18</sup> Karel Wellens and Gustaaf Borchartd, 'Soft law in European Community law' (1989) 14 *EL Rev.* 267, 314-317.

<sup>19</sup> *ibid* 309-310; Linda Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where do they meet?' (2005) 9(1) *Electronic Journal of Comparative Law*.

<sup>20</sup> Robert Baldwin, Colin Scott, and Christopher Hood, *A Reader on Regulation* (OUP 1998); Julia Black, *Rules and Regulators* (OUP 1997); Christine Parker, Colin Scott, Nicola Lacey, and John Braithwaite (eds.), *Regulating Law* (OUP 2004); John Braithwaite, Tony Makkai and Valerie Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar 2007).

the regulated, rather than upon the *legal* consequences of regulatory instruments.<sup>21</sup> In other words, the regulation literature is more broadly concerned with the impact and effectiveness of particular rules rather than with the legal consequences flowing from them. As such, while the studies of regulation, EU soft law and International soft law have focused on the use of soft law for a particular end, rather than analysing soft law from a legal vantage point, there is undoubtedly a place in the literature to develop upon the legal study of soft law.

As to why the study should focus on HMRC soft law, several reasons emerge. First, tax law is an area which has been relatively isolated from public law analysis. It has been noted that there is much yet to be explored as regards the interaction between public law and tax law,<sup>22</sup> although there have been several notable contributions to this area in recent years which have laid the foundations for further development.<sup>23</sup> More pertinently, however, there is ample material available for this study, both historic<sup>24</sup> and current.<sup>25</sup> In part, this is due to consistent pressure from professional bodies to publish material that, *inter alia*, explains the parameters of the law.<sup>26</sup> The material is also broad in

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<sup>21</sup> Christine Parker, Colin Scott, Nicola Lacey, and John Braithwaite, 'Introduction' 3-4 and Julia Black, 'Law and Regulation: The Case of Finance' 33-40 in Parker, Scott, Lacey and Braithwaite (eds.), *Regulating Law* (n 20).

<sup>22</sup> Glen Loutzenhiser, *Tiley's Revenue Law* (8th edn. Bloomsbury 2016) 30.

<sup>23</sup> For instance Chris Evans, Judith Freedman, Richard Krever, *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD: Amsterdam 2011); Stanley Alexander De Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet and Maxwell, 1995) Ch. 23.

<sup>24</sup> For instance, see: Inland Revenue, *A List of Extra Statutory Wartime Concessions given in the Administration of Inland Revenue Duties* (October 1944) Cmd. 6559.

<sup>25</sup> See n 8 above.

<sup>26</sup> On this, see: Inland Revenue, *Tax Bulletin Issue 32* ('A Hundred Years of Inland Revenue Extra Statutory Concessions') (available at: <http://webarchive.nationalarchives.gov.uk/+http://www.hmrc.gov.uk/bulletins/tb32.htm#AHundredYearsofInlandRevenue>> accessed 31 September 2017).

scope encompassing many forms of soft law, whether substantive, concessionary, interpretative, advisory, explanatory or administrative, which have varying practical effects.<sup>27</sup> Finally, commentators in this area note that tax legislation has become increasingly complex and indeterminate,<sup>28</sup> and in consequence, there is a considerable body of literature analysing alternative structures for the promulgation of law.<sup>29</sup> Much less attention on the other hand has been directed towards HMRC's role in the *current* arrangement.<sup>30</sup> If the primary statute offers few answers to the taxpayer, then HMRC's role as administrator of the system becomes more apparent. Soft law elaborating upon how HMRC will apply the legislation and case law is rendered an indispensable element.<sup>31</sup> The lack of direct focus on HMRC's role within the current framework thus further justifies the study of HMRC soft law.

A final question arises then as to why the inquiry of this thesis is in to forms of general HMRC soft law rather than also including soft law which is directed towards individuals. Whilst it is impossible to completely ignore advice given to individuals or conduct, given that soft law instruments directed at a general class of taxpayers have the same genesis and purpose in seeking to guide

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<sup>27</sup> See below Part II. 2.2. The scope of HMRC soft law and its manifestations.

<sup>28</sup> Christopher John Wales and Christopher Peter Wales, 'Structures, processes and governance in tax policy-making: an initial report' (OUCBT, December 2012), at pp. 35, 65, 115; Treasury Committee, *Principles of Tax Policy* (HC 2010-11, 753) [47]-[49]; Leonard Hoffmann, 'Tax Avoidance' (2005) BTR 197.

<sup>29</sup> Judith Freedman, Geoffrey Loomer, John Vella, 'Corporate tax risk and tax avoidance: new approaches' (2009) BTR 74; Richard Krever, 'Plain English Drafting, Purposive Drafting, Principles-based Drafting: Does Any of it Matter?' in Judith Freedman (ed.), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (OUCBT 2008); Judith Freedman, 'Improving (not perfecting) tax legislation: rules and principles revisited' (2010) BTR 717.

<sup>30</sup> The groundwork has been laid in Judith Freedman and John Vella, 'HMRC's Management of the U.K. Tax System: The Boundaries of Legitimate Discretion' (n 23) 108-117.

<sup>31</sup> Commonwealth of Australian, *Review of Aspects of Income Tax Self Assessment* (August 2004) 7.

actions and indeed the thesis will engage briefly with soft law which arises through conduct<sup>32</sup> and individual rulings,<sup>33</sup> the justification for focusing primarily upon forms of general soft law is threefold. First, space does not permit the detailed analysis of the causes and solutions to the many issues which arise in respect of soft law, in the form of individual rulings, conduct and more forms of general soft law. Secondly, the author's view is that the solution to issues in respect of individual rulings and conduct lies in the establishment of a comprehensive, formal individual rulings regime, which has been comprehensively set out elsewhere already.<sup>34</sup> Whilst those proposals do not look at conduct *per se*, it follows that taxpayers when presented with such a regime would seek further written assurance from the tax authority that previous practice or conduct could be relied upon.

### 3. Research questions and hypothesis

This thesis is structured around three primary questions, to which the three substantive Parts (Parts II-IV) of the thesis correlate. The first is: what is HMRC's role in respect of general soft law? It is understood that forms of general soft law arise. But is it constitutionally permissible for HMRC to promulgate such soft law? Even then, is it normatively desirable that such soft law should be produced? If the latter part of this question is answered in the affirmative, then normative benchmarks can be derived as a means of adjudging whether HMRC

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<sup>32</sup> See *Unilever* (n 9).

<sup>33</sup> See below Part II. 2.2.6. Rulings.

<sup>34</sup> Andrew Taylor, 'Proposing a tax rulings system' (2017) 4605 *Taxation* 8; Winnie Chan, 'Binding Rulings' (1997) 18(2) *Fiscal Studies* 189; Daniel Sandler, *A Request for Rulings* (Institute of Taxation, 1994).

soft law is performing its desired role. That brings the inquiry to the second research question, namely, whether forms of general HMRC soft law in practice sufficiently satisfy these normative benchmarks? If not, the final question is what can be adopted as a means of shoring up these inadequacies? The broad hypothesis accordingly is that there is a need for reforms, which will be proposed in this thesis, in relation to forms of general HMRC soft law.

#### **4. Structure of the analysis**

Part I of the thesis sets out the scope of the research and introduces the topic against the background of the previous literature. It proceeds to summarise the research questions and main hypothesis, presenting the key areas the thesis will assess. Part II analyses both the constitutionality and desirability of general HMRC soft law, the interrogation of which helps to produce four key normative benchmarks which will be used throughout the thesis to assess the performance of general soft law regimes, namely quality, accessibility, scrutiny and reliability. Part III discusses the degree to which general HMRC soft law satisfies the four normative requirements of quality, accessibility, scrutiny and reliability. Part IV seeks to set out a package of reforms which can be adopted in light of the issues identified in Part III. Part V then briefly reflects upon the study undertaken, highlighting in particular the goals of the thesis and the manner in which it significantly and substantially contributes to the literature.

It should be highlighted at this juncture that the thesis makes several notable stylistic choices. The first is to refer to HMRC in the singular. More importantly, although the body only formally came into being in 2005 through

the merger of the Inland Revenue and Customs & Excise, HMRC is used throughout the thesis to refer even to actions undertaken by either of the predecessor bodies for ease of readership. At times, it will be necessary to refer specifically to either the Inland Revenue or Customs & Excise, but for the most part, HMRC will be used. Finally, the thesis adopts the female pronoun to refer to individual taxpayers, except where the person's identity is known, such as when referring to a case.

## **5. Methodology**

The thesis is purely legal, thereby eschewing an integrated approach, with the use of methodologies from other disciplines, and adopts two primary methodologies, namely doctrinal, and comparative. These are then deployed across the theoretical, descriptive and normative components of the work.

The thesis begins in Part II by attempting to formulate the normative underpinnings of general HMRC soft law by reference to the rule of law. In order to advance this case, the thesis examines both the jurisprudential literature and case law from the European Court of Human Rights. Reliance upon the latter is justified on the basis that the ECHR formulation of the rule of law is both facially unobjectionable, and unambiguously aligned with the general philosophical principle that a basic tenet of the rule of law is that laws ought to act as guidance. Through distillation of this principle then, and consideration of other important components, four benchmarks are derived: quality, accessibility, scrutiny and reliability. Forms of general HMRC soft law and Australian public rulings are in Parts III and IV of the thesis tested against these benchmarks.

After establishing a theoretical framework, Part III delves into traditional doctrinal, black letter analysis and discusses whether forms of general HMRC soft law adequately satisfy the rule of law, using the benchmarks from Part II as proxies for this consideration. Part III relies upon primary sources such as UK case law and governmental documents, in addition to commentary in secondary sources such as books, articles, and newspaper pieces.

The comparative element of this thesis is to be found in Part IV, wherein the system for the promulgation of public rulings in Australia is compared to the system for the production of general HMRC soft law. This is not a side-by-side analysis, whereby both systems are compared intra chapter. Instead, the thesis takes the approach of comparing the systems by the use of the same indicia, namely, quality, accessibility, scrutiny and reliability. Comparative research is justified in this thesis for two primary reasons: the first is that it critically highlights<sup>35</sup> the strengths and weaknesses of the UK system for forms of general HMRC soft law,<sup>36</sup> and the second is that it contributes ideas that can be transported to the UK.<sup>37</sup> The decision on which jurisdiction outside of the UK ought to be examined is discussion in Part IV,<sup>38</sup> with the thesis settling upon Australia by reason primarily of its symmetry with the UK in terms of the approach to administrative advice in tax and its interposition of an expert oversight body. Care is taken to ensure that the Australian system is not viewed uncritically and the comparative research benefitted in particular from informal

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<sup>35</sup> Pierre Legrand, 'Comparative Legal Studies and Commitment to Theory' (1995) 58(2) MLR 262, 264.

<sup>36</sup> Walter J Kamba 'Comparative Law: A Theoretical Framework' (1974) 233 ICLQ 485, 492.

<sup>37</sup> Denis Tallon, 'Comparative Law: Expanding Horizons' (1969) 10 Journal of the Society of Public Teachers of Law 265, 266 as cited in Kamba *ibid* 496.

<sup>38</sup> Part IV. 2. Deciding upon an alternative approach.

conversations with members of the Australian Tax Office, leading Australian tax academics and practitioners during a two-week researchship at the University of New South Wales, Australia.

## PART II. HMRC'S SOFT LAW ROLE

### 1. Outline

It is a great understatement to say that UK tax law today is complex. That complexity should arise is one consequence of the desire to secure equity in the tax laws,<sup>1</sup> in addition to pursuing other objectives.<sup>2</sup> In practice, complexity arises for myriad other reasons also such as the need to establish what the provision seeks to charge and identify whether taxpayer actions fit within the tax charge. If the legislation and case law offer few immediate answers to the taxpayer, then HMRC's role as administrator of the system becomes more apparent. To this end, HMRC continually produces a vast quantity of publications which seek to translate for taxpayers this ever more elaborate law.

But who controls HMRC when it acts in such a capacity? Are these publications desirable? Do they cross the constitutional Rubicon? HMRC's actions in respect of producing publications are yet to be thoroughly analysed. The purpose of Part II is to do so. This pursuit will be split into two sections. The first shall deal with the constitutional aspect; the second shall assess the normative desirability.

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<sup>1</sup> Robert Ewing, Annual report 1923–24 – 1924–25, 3 as cited in Leigh Edmonds, *Working for all Australians 1910-2010: A brief history of the Australian Taxation Office* (ATO 2010) 75.

<sup>2</sup> See for instance Glen Loutzenhiser, *Tiley's Revenue Law* (8th edn. Bloomsbury 2016) 7-10; Meade Report, *The Structure and Reform of Direct Taxation* (Allen & Unwin 1978) 12; James Mirrlees, *Tax by Design: the Mirrlees Review* (OUP 2011) 23-33 and 35-38.

## 2. An introduction to HMRC soft law

*The European Parliament...[s]tresses that the expression of soft law, as well as its invocation, should be avoided at all times in any official documents of the European institutions<sup>3</sup>*

HMRC soft law refers to those soft law sources that encapsulate norms, which are produced pursuant to HMRC's managerial discretion and seek to elaborate upon legal rights and obligations of taxpayers in order to guide actions. The particular inquiry of the thesis is in to general HMRC soft law, namely, those pieces of soft law which are directed to elaborating upon the legal rights and obligations of a generality of taxpayers.

The purpose of this section is to give an overview of general HMRC soft law and how it fits within our constitutional machinery. The first segment accordingly will assess the constitutional propriety of HMRC producing forms of general soft law, whilst the second details the scope and substance of HMRC soft law, in addition to the procedures for its production.

### 2.1. The constitutional propriety of HMRC soft law

There is a tension between the promulgation of general soft law by HMRC and the legislative supremacy of Parliament. How can it be constitutionally legitimate for a public authority to produce rules when that is usually the domain of the legislature? In order to answer this question, it is necessary to revisit the fundamental tenets of 'discretion' and thereafter elaborate upon how the production of forms of general soft law comes within HMRC's managerial

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<sup>3</sup> European Parliament Resolution 2007/2028(INI) of 4 September 2007 on institutional and legal implications of the use of 'soft law', [19].

discretion. It shall further be demonstrated that HMRC's managerial discretion is actually aligned with Parliamentary sovereignty.

### 2.1.1. The conceptual tenets of discretion

Galligan traces the etymological roots of 'discretion' to the idea of 'good judgment'.<sup>4</sup> Indeed, the *Oxford Dictionary of Law* confirms this to be an accepted interpretation.<sup>5</sup> In modern legal usage, however, the term has come to ascribe 'autonomy within which one's decisions are in some *degree* a matter of personal judgment and assessment.'<sup>6</sup> This broad definition captures the essential elements of discretion: that of *freedom to decide* (to a *degree*) within *boundaries*, such restrictions being axiomatic to the concept of autonomy.<sup>7</sup> The idea that discretion comprises these three elements has been accepted albeit subject to semantic divergence by commentators.<sup>8</sup> With this, Dworkin once likened the concept of discretion to a 'hole in a doughnut',<sup>9</sup> the area left open by a surrounding belt of constraint.

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<sup>4</sup> Denis Galligan, *Discretionary Powers: A Legal Study of official Discretion* (Clarendon 1986) 8.

<sup>5</sup> 'discretion', Jonathan Law (ed), *Oxford Dictionary of Law* (8th edn., OUP 2015).

<sup>6</sup> Galligan (n 4) 8 (emphasis added).

<sup>7</sup> Bernard Schwartz and HWR Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (OUP 1972) 255.

<sup>8</sup> Galligan (n 4) ch. 1; KC Davis, *Discretionary Justice: A Preliminary Inquiry* (2nd edn, Baton Rouge 1971) 4; Jeffrey Jowell, 'The Legal Control of Administrative Discretion' (1973) PL 179; Keith Hawkins (ed.), *Uses of Discretion* (OUP 1992) 11; Gabrielle Ganz, 'Allocation of Decision-Making Functions' [1972] LP 215, 215.

<sup>9</sup> Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) 31.

### 2.1.1.1 Constraints

Discretion is a contextual term which must be construed in terms of its background.<sup>10</sup> Discretion arises then when ‘someone is in general charged with making decisions subject to standards set by a particular authority’.<sup>11</sup> Although legal standards provide the most obvious constraints on authority vis-à-vis discretion, the literature is replete with examples of other non-legal factors which constrain autonomy such as historical, institutional, bureaucratic and organizational norms, as well as broader political, social and economic pressures.<sup>12</sup>

It is axiomatic that constraints will weigh against each other and thus vary by degree of intensity. This is perhaps best captured by the discussion of judicial decision-making in a hard case to which the standards do not provide a clear answer. In these circumstances, it will be necessary for a judge to extrapolate the relevant standards, legal or otherwise, and weigh them against each other.<sup>13</sup> These legal standards take a variety of forms, vary as regards clarity and crystallize in effect at different times. Thus, legal standards<sup>14</sup> may be international,<sup>15</sup> regional,<sup>16</sup> constitutional,<sup>17</sup> or legislative; may be open-

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<sup>10</sup> Dworkin (n 9) 31; HLA Hart, *The Concept of Law* (OUP 1961) 128; Ganz ‘Allocation of Decision-Making Functions’ (n 8) 216.

<sup>11</sup> Dworkin (n 9) 31.

<sup>12</sup> Galligan (n 4) ch. 1; Hawkins (n 8); Julia Black ‘Which Arrow: Rule Type and Regulatory Policy’ (1997) PL 94.

<sup>13</sup> See generally Dworkin (n 9).

<sup>14</sup> On the variety of forms of rules, see Hart (n 10) Chs. II, III and V.

<sup>15</sup> Hart (n 10) Ch X

<sup>16</sup> See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2015) and in particular chs 5, 7, 9, 17 and 29.

<sup>17</sup> For instance, Bill of Rights 1688/9, Article 4.

textured<sup>18</sup> or self-effectuating and may arise before a decision is reached or have pre-emptive effect.<sup>19</sup>

In the context of an administrative body of Government which is created by Parliament, the logical first port of call with regard to legal standards will be the primary legislation which creates a power,<sup>20</sup> for instance, to collect and manage taxes.<sup>21</sup> A central task of the administrative body then is to translate this grant of power to a specific decision.<sup>22</sup> To this end, the body itself may have internal rules which specify the procedure for arriving at a decision, thereby incorporating a policy decision as to the ends to be achieved and the actions thusly to be pursued according to the grant of power.<sup>23</sup>

In the case of HMRC, the Litigation and Settlement Strategy ('LSS')<sup>24</sup> provides a clear example of such internal rules. It is an attempt to translate the parliamentary intention that HMRC should collect and manage taxes through a workable procedure. Generally, HMRC has considerable freedom in arriving at settlements with taxpayers<sup>25</sup>, but the LSS provides a framework through which HMRC may arrive at such settlements. For instance, wherever HMRC and a taxpayer disagree about tax due, each issue must be resolved on its own merits

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<sup>18</sup> Hart (n 10) 135

<sup>19</sup> On which see: Dworkin (n 9) 31-39, MacCormick, *Legal Reasoning and Legal Theory* (OUP 1978) 246-255; Joseph Raz, 'Dworkin: A New Link in the Chain' (1986) CLR 1103-1119.

<sup>20</sup> Galligan (n 4) 208.

<sup>21</sup> Commissioners for Revenue and Customs Act, 2005 ('CRCA 2005'), s. 5.

<sup>22</sup> Gabriele Ganz, *Quasi Legislation: recent developments in secondary legislation* (Sweet & Maxwell, 1987) 213; Galligan, 'The nature and function of policies within discretionary power' (1976) PL 332, 332

<sup>23</sup> Galligan, 'The nature and function of policies' (n 22) 322; Michael Adler and Stewart Asquith, *Discretion and Welfare* (Heinemann 1981).

<sup>24</sup> HMRC, *Litigation and Settlement Strategy* (July 2011).

<sup>25</sup> See for instance: *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 637 (Lord Diplock) ('*Fleet Street Casuals*'); *R (Wilkinson) v IRC* [2005] UKHL 30, [2006] STC 270 [20] (Lord Hoffmann); *Al-Fayed v IRC* [2004] ScotCS 112, [2004] STC 1703 [107] (Clerk LJ); *IRC v Nuttall* [1990] STC 194, 203a-b (Ralph Gibson LJ).

and not as part of any overall ‘package deal’.<sup>26</sup> If a dispute is of an ‘all or nothing’ nature, HMRC will not settle out of court for less than 100% of the tax, interest and penalties due where it is believed that HMRC will likely succeed in litigation.<sup>27</sup> Conversely, where HMRC is unlikely to succeed in litigation, there must not be any attempt to ‘split the difference’.<sup>28</sup> Nevertheless, these internal procedural constraints are themselves not entirely clear and thus are open to interpretation.<sup>29</sup>

#### **2.1.1.2 Freedom to decide**

Over the course of a decision, *freedom to decide* broadly manifests itself at three stages:<sup>30</sup> there are findings of fact to be made; there are standards to be interpreted; and, there is application of the standards to the facts. The first stage will incorporate not only how the decision maker determines which facts are relevant but also how she determines which evidence should be regarded as facts.<sup>31</sup> In the second stage, where the standards are clear, there is little capacity to choose. The scope for interpretation can vary considerably, from this paradigm case to an instance where the rules are so ambiguous that the scope for interpretation is considerable.<sup>32</sup> The final stage of the decision making

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<sup>26</sup> *Litigation and Settlement Strategy* (n 24) 4.

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

<sup>29</sup> See: Jason Collins, ‘Analysis—The tax assurance commissioner’s first annual report’ (2013) 1181 *Tax Journal* 22, 23; Dominic de Cogan, ‘UK *Uncut Legal Action v HMRC*: legal inaction and a return to Fleet Street’ (2013) 4 *BTR* 552, 562 (note).

<sup>30</sup> Galligan (n 4) 9; Davis (n 8) 4. cf Ganz, ‘Allocation of Decision-Making Functions’ (n 8) 215.

<sup>31</sup> Galligan (n 4) 33-37. See also: Timothy Endicott, *Vagueness in Law* (OUP 2000) 22-29.

<sup>32</sup> Ganz, ‘Allocation of Decision-Making Functions’ (n 8) 215; Timothy Endicott, ‘Are there any Rules?’ (2005) 5 *JE* 199, 211-216.

process amalgamates both prior steps, providing a resulting decision.<sup>33</sup> Such a simplistic description however overlooks the fact that to fall properly within this category there must be some autonomy, as in ‘a right to choose between more than one possible course of action’.<sup>34</sup> This occurs in two respects. First, there is discretion in the manner of applying the standards to the facts, the degree of which can vary significantly.<sup>35</sup> At one end of the spectrum, there can be wide discretion in the sense that even the settled standards do not provide a clear answer to the case at hand.<sup>36</sup> At the other end of the spectrum, the facts can fall so perfectly within the settled standards that the scope for judgment is necessarily narrow, denoting a much weaker discretion.<sup>37</sup> Second, there is a decision as to what course of action is pragmatic in the circumstances, thus again realigning discretion with the need for *good judgment*.<sup>38</sup>

Importantly, it is clear that autonomy of judgment varies at each stage of a decision and the presence of discretion at each stage will be influenced by its effectuation in the other stages.<sup>39</sup> Discretion does not arise singularly in the decision-making process but rather ‘occurs at a variety of points within any

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<sup>33</sup> See Davis (n 8) 4; Galligan (n 4) 9.

<sup>34</sup> *Secretary of State for Education v Tameside Metropolitan Borough Council* [1977] AC 1014, 1064 (Lord Diplock).

<sup>35</sup> Etienne Mureinik, ‘The Application of Rules: Law or Fact?’ (1982) 98 LQR 587; Galligan (n 4) 35.

<sup>36</sup> Dworkin (n 9) 32. To be clear, this section is not suggesting that tax officials have strong discretion over the interpretation of law (which is a function of the courts). This section is simply seeking to elaborate upon the broad tenets of discretion in a general sense, rather than in the sense that it arises in the hands of tax authorities.

<sup>37</sup> *ibid.*

<sup>38</sup> Davis (n 8) 4

<sup>39</sup> Dworkin (n 9) 31-33; Davis (n 8) 5; Galligan (n 4) 8-14.

exercise of power...[and] the extent of discretion will always vary in emphasis and degree'.<sup>40</sup>

Finally, although discretion is often characterized as the freedom to choose between alternatives,<sup>41</sup> discretion does not provide a *carte blanche* to act irrationally, but rather that *reasons* necessarily precipitate the arrival at a decision. A more apposite approach then is to acknowledge that there is autonomy to settle upon a choice for *good reasons*.<sup>42</sup> Accordingly, in this regard we see a convergence between discretion as it stands in modern usage and its etymological roots of *good judgment*. The development of the substantive grounds for judicial review has been founded upon this premise.<sup>43</sup>

### 2.1.1.3. Interactive concept

Discretion is best viewed accordingly as the interaction between constraints and freedom. In this sense, the level of discretion is inversely proportional to the intensity of constraint.<sup>44</sup> However, it is inapposite to discuss discretion simply as arising where the constraints end.<sup>45</sup> Rather the constraints may overlap and protrude whilst simultaneously being indeterminate themselves. Black captures this idea by referring to discretion as arising not only between constraints but also *within* the constraints themselves.<sup>46</sup> In other

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<sup>40</sup> Galligan (n 4) 20

<sup>41</sup> Davis (n 8) 4; Galligan (n 4) 8; *Tameside Metropolitan* (n 34).

<sup>42</sup> *R v Wilkes* (1770) 4 Burr 2527; *Sharp v Wakefield* [1891] AC 173; Schwartz and Wade (n 7), 252; Jowell (n 8) 180.

<sup>43</sup> Schwartz and Wade (n 7) 252; Galligan (n 4) Ch. 5.

<sup>44</sup> Kramer, *Objectivity and the Rule of Law* (2007 OUP) 14; Julia Black, *Rules and Regulators* (OUP 1997) 216.

<sup>45</sup> cf. Davis (n 8) 34.

<sup>46</sup> Julia Black, 'Managing Discretion' (Penalties: Policies, Principles and Practice in Government Regulation conference, Sydney, June 2001) 2

words, the indeterminacy of the language in legal standards or constraints also produces some form of choice.

### 2.1.2. Understanding HMRC's Managerial Discretion

HMRC's legal discretion must be read in light of these basic building blocks. It produces freedom to make authoritative choices within the constraints of legal standards. Legislation giving HMRC duties to perform accordingly produces discretion in its hands as to how it carries out such tasks. Thus, when section 5 of the Commissioners for Revenue and Customs Act 2005 ('CRCA') dictates that HMRC's primary responsibility is for the collection and management<sup>47</sup> of taxes and credits,<sup>48</sup> it places an overarching 'managerial discretion' in the hands of HMRC as to how it carries out these functions.<sup>49</sup>

This discretion is constrained by an array of legal rules. First, it must not be used to act expressly in defiance of legislation and case law. The discretion must not be used to usurp Parliament's role.<sup>50</sup> It is trite to recall that in peacetime only statute can repeal, suspend, amend or dispense with statute.<sup>51</sup> Secondly, the discretion is bounded by fundamental constitutional principles

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<<http://www.lse.ac.uk/collections/law/staff%20publications%20full%20text/black/alrc%20managing%20discretion.pdf>> accessed 31 September 2017.

<sup>47</sup> Prior to 2005, taxes were said to be under the 'care and management' of the Inland Revenue and Customs and Excise. CRCA 2005 s. 51(3) ensures that the references to collection and management are to be understood as meaning 'care and management'. On which see: CRCA 2005, s.5 (2). On which, see: Inland Revenue Regulation Act 1890 ('IRRA 1890'), s. 1(1), s.13(1) and s. 39; Taxes Management Act 1970 ('TMA 1970'), s. 1; Customs and Excise Management Act 1979, ss. 1(1), 6(2); Value Added Tax Act 1994 Sch. 11(1).

<sup>48</sup> CRCA 2005, s. 5.

<sup>49</sup> *Fleet Street Casuals* (n 28). Discretion in the hands of Customs & Excise in this regard was identical to that of the Inland Revenue: *R v Customs and Excise Commissioners, ex p Kay & Co Ltd* [1996] STC 1500 (Keene J); *Fine Art Developments plc v Customs & Excise Commissioners* [1994] STC 668; *Customs & Excise Commissioners v Croydon Hotel & Leisure Co Ltd* [1995] STC 855.

<sup>50</sup> *IRC v Vestey* [1980] AC 1148, 1170 (Lord Wilberforce), 1195 (Lord Edmund Davies).

<sup>51</sup> Lord Judge, 'Ceding Power to the Executive; the Resurrection of Henry VIII' (King's College London, April 2016) 14.

such as those found in the Bill of Rights Act 1688/9. Article 1 provides that the suspension of laws without consent of Parliament is illegal, whilst Article 4 proscribes the levying of taxes without Parliamentary approval. Thirdly, the discretion may not conflict with standards which are implied into its use. As set out above, the reasons underlying a discretionary decision must not be irrational for instance, or as Lord Mustill has explained:

Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances<sup>52</sup>

Whilst it is correct to remember that this discretion is not unbounded, it must be stressed that the legitimacy of HMRC's managerial discretion in fact derives from the fact that Parliament has passed and continues to pass laws which HMRC must administer. Managerial discretion does not conflict with but rather is a product of Parliamentary sovereignty. A striking example of this arises in relation to the apportionment of input tax attributable to taxable supplies. In this case, it was clear that clear that Parliament's intention was to defer to HMRC to assign working rules for the operation of the law. Article 17(2) of the Sixth Council Directive 77/388/EEC (the 'Sixth Directive') provides that input tax may be deducted where goods or services are supplied by another taxable person. In cases where it is unclear whether or not input tax is attributable to taxable supplies, the Sixth Directive leaves it to Member States to arrive at a suitable method of attribution for the purposes of working out what

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<sup>52</sup> *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, 560.

input tax may be deducted.<sup>53</sup> The relevant UK provision accordingly states that input tax shall be apportioned so that only so much as is referable to business purposes is counted as input tax.<sup>54</sup> The question of apportioning between business and non-business purposes however is left open. Thus, the primary legislation leaves it to HMRC and the taxpayer to arrive at an appropriate method of apportionment between taxable and non-taxable supplies.<sup>55</sup> HMRC's elaboration on its approach to attribution is set out accordingly in a general soft law instrument.<sup>56</sup>

It therefore becomes clear why the courts have endorsed the idea that HMRC has a 'wide managerial discretion' as to how it gives effect to this *primary responsibility* for collection and management of taxes and credits.<sup>57</sup> HMRC's managerial discretion is endowed by Parliament and so the courts should not readily interfere with decisions taken pursuant to it. The breadth of the discretion was explained in *Fleet Street Casuals*, wherein the House of Lords endorsed an agreement between HMRC and print workers effectively not to investigate tax evasion. A Federation representing small businesses and self-employed individuals brought an application for judicial review of a Revenue decision to grant an 'amnesty' to a group of 'casual' newspaper workers. The 'amnesty' purported to forego investigation into past tax liabilities of the group

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<sup>53</sup> *Oxfam v HMRC* [2009] EWHC 3078, [2010] STC 686 [11] (Sales J).

<sup>54</sup> Value Added Tax Act 1994, s. 24(5).

<sup>55</sup> *Oxfam* (n 53) [12].

<sup>56</sup> See: HMRC, *VBNB30500 - Apportionment of tax: why is apportionment of tax needed?* <<http://www.hmrc.gov.uk/manuals/vbnbmanual/VBNB30500.htm>> accessed 31 September 2017.

<sup>57</sup> *Fleet Street Casuals* (n 25) 663 (Lord Roskill); 637 (Lord Diplock); 635 (Lord Wilberforce); 654 (Lord Scarman); *R (Davies) v HMRC*; *R (Gaines-Cooper) v HMRC* [2011] UKSC 47 [26] (Lord Wilson), [2012] 1 All ER 1048; *Wilkinson* (n 25) [20]-[23] (Lord Hoffmann); *In Re Preston* [1985] 2 WLR 836, 844 (Lawton LJ); *Nuttall* (n 25) 205 (Bingham LJ).

of casual workers in return for the completion of the two prior years' returns and future compliance.<sup>58</sup> For HMRC, the reason underpinning the agreement to extinguish such past liabilities, which was estimated to cost the exchequer £1mil for each year<sup>59</sup>, derived from the practical inability to obtain the requisite taxing information of the casual workers.<sup>60</sup> For instance, the workers used names such as 'Mickie Mouse of Sunset Boulevard' and 'Sir Gordon Richards of Tattenham Corner'<sup>61</sup> in order to hide their true identities from HMRC. The trade unions however did know the details of the casual workers, but there existed the potential of an industrial strike if the unions gave up the details of these workers.<sup>62</sup>

In the House of Lords hearing of the case, the starting point for the Lords on the issue of HMRC's discretion lay in the 'statutory code',<sup>63</sup> namely the primary statutory responsibility of HMRC, upon which a few points merited elaboration. The first is that there exist two separate responsibilities: that of collection and that of care and management.<sup>64</sup> Secondly, it is plainly impractical to collect *every* part of tax due and it is this impracticality, which necessarily conflicts with the duty of care and management, was accepted as giving rise to managerial discretion.<sup>65</sup> In other words, the effect of the literally read duty to

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<sup>58</sup> *Fleet Street Casuals* (n 25) 634-635.

<sup>59</sup> *ibid* 634.

<sup>60</sup> *ibid*.

<sup>61</sup> *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1980] QB 407, 418 (Court of Appeal)

<sup>62</sup> *Fleet Street Casuals* (n 25) 635.

<sup>63</sup> *ibid* 650 (Lord Scarman).

<sup>64</sup> For instance, see: *Gaines-Cooper* (n 57) [26] (Lord Wilson); *R (Davies) v HMRC*; *R (Gaines-Cooper) v HMRC* [2010] EWCA Civ 83, (2010) STC 860 ('*Gaines-Cooper* (CA)') [111] (Moses LJ).

<sup>65</sup> *Fleet Street Casuals* (n 25) 650 (Lord Scarman); 631-632 (Lord Wilberforce); 636 (Lord Diplock); 659 (Lord Roskill).

collect *every* part of tax is diluted by the duty to care and manage,<sup>66</sup> thereby creating partial autonomy, or *discretion*, for HMRC.<sup>67</sup> Ultimately, their Lordships were satisfied that the arrangement arrived at, between the Revenue and the workers, unions and employers, fell within the Revenue's *wide* managerial discretion.<sup>68</sup> Lord Diplock went further however and explained that:

[T]he board have a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection<sup>69</sup>

This statement has generally been quoted approvingly in all subsequent cases dealing with HMRC's managerial discretion.<sup>70</sup> In the 2005 case of *R (Wilkinson) v IRC ('Wilkinson')*,<sup>71</sup> the House of Lords sought to further elaborate upon the limits of HMRC's managerial discretion. The applicant was a widower, whom, had he been a widow, would have been entitled to a widow's bereavement allowance under section 262 of the Income and Corporation Taxes Act 1988. Mr Wilkinson argued, *inter alia*, that HMRC could utilize its 'managerial discretion'<sup>72</sup> to extend the allowance to widowers. The House of Lords rejected the applicant's claim and held that the managerial discretion endowed upon

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<sup>66</sup> cf *New Zealand Stock Exchange v CIR* [1992] 3 NZLR 1, 3; Shelley Griffiths, "No discretion should be unconstrained": considering the "care and management" of taxes and the settlement of tax disputes in New Zealand and the UK' (2012) 2 BTR 167.

<sup>67</sup> *Fleet Street Casuals* (n 25) 651 (Lord Scarman).

<sup>68</sup> *Fleet Street Casuals* (n 25) 663 (Lord Roskill); 637 (Lord Diplock); 635 (Lord Wilberforce); 654 (Lord Scarman). Lord Fraser declined to comment.

<sup>69</sup> *Fleet Street Casuals* (n 25) 636. This point was not expressly endorsed by the other judges in the case.

<sup>70</sup> See for instance, *Gaines-Cooper* (n 57) [26] (Lord Wilson); *Wilkinson* (n 25) [20]-[23] (Lord Hoffmann).

<sup>71</sup> *Wilkinson* (n 25).

<sup>72</sup> On managerial discretion, see: *Fleet Street Casuals* (n 25) 636 (Lord Diplock).

HMRC cannot be so widely construed as to concede such an allowance which Parliament could have granted but did not grant.<sup>73</sup> Lord Hoffmann issued a partial retreat from a wide reading of Lord Diplock's speech, referring to pragmatism in executing the primary duty rather than only specifically obtaining the greatest net return.<sup>74</sup> Lord Hoffmann additionally added some substance to Lord Diplock's explanation of managerial discretion:<sup>75</sup>

This discretion enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of Parliamentary time

It is noteworthy that the managerial discretion cannot be extended so as to provide a relief which Parliament did not grant even if to refuse to do so would breach the European Convention on Human Rights.<sup>76</sup> Relating this back to what we know about discretion more generally, it becomes clear why the promulgation of general soft law falls properly within HMRC's managerial discretion. HMRC must form a view on how to give effect to laws and must carry out the function of collecting and managing taxes. HMRC has adjudged that the best means of doing this is by assisting taxpayers through the production of forms of general soft law. In other words, it is pragmatic for HMRC to communicate to taxpayers how particular tax laws will apply in practice as a means of reducing the cost of collection and costs to the exchequer. The

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<sup>73</sup> *Wilkinson* (n 25) [20] (Lord Hoffmann).

<sup>74</sup> *ibid* [21].

<sup>75</sup> *ibid* [21].

<sup>76</sup> Tony Prosser, *The Economic Constitution* (OUP 2014) 95.

production of general soft law instruments cuts out the need for taxpayers to informally approach HMRC, or simply to misinterpret the law themselves (resulting in potential loss of revenue for the exchequer or costs in correcting the mistake).<sup>77</sup> The courts meanwhile have long acknowledged and supported this judgement. In *R v IRC, ex p MFK Underwriting Agents Ltd* Judge J eloquently explained it as follows:<sup>78</sup>

The practice [of issuing publications] exists because the revenue has concluded that it is of assistance to the administration of a complex tax system and ultimately to the benefit of the overall tax yield<sup>79</sup>

The High Court in *R (Ingenious Media and McKenna) v HMRC* ('*Ingenious Media*')<sup>80</sup> similarly noted that there is a rational connection between the collection of tax in an efficient, cost-effective way and communicating with the public:<sup>81</sup>

In deciding how to promote the fair, efficient and cost-effective collection of taxes, HMRC are entitled to identify areas of uncertainty and doubt in relation to which they will wish to be rigorous in challenging taxpayer behaviour and areas in relation to which they will wish to deter taxpayers from acting in ways which appear to be outside the spirit of the tax code and may well prove in due course to be outside its letter. This is a proper way for HMRC to seek to pursue their function of collecting taxes, while seeking to keep the costs of doing so to a minimum<sup>82</sup>

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<sup>77</sup> This would equally apply in the case of general HMRC soft law in respect of tax avoidance. Such soft law would be directed towards costs to the exchequer. See for instance HMRC, *Ten things about accelerated payment notices* (September 2015), available at:

<<https://www.gov.uk/government/publications/ten-things-about-accelerated-payment-notices/ten-things-about-accelerated-payment-notices>> accessed 31 September 2017.

<sup>78</sup> *R v Inland Revenue Commissioners, ex parte MFK Underwriting* [1990] 1 WLR 1545.

<sup>79</sup> *ibid* 1572 (Judge J); see also: *Wilkinson* (n 25) [21] (Lord Hoffmann).

<sup>80</sup> *R (Ingenious Media and McKenna) v HMRC* [2013] EWHC 3258, [2014] STC 673.

<sup>81</sup> *Ibid* [39] (Sales J).

<sup>82</sup> *ibid* [47]. See also *Tower MCashback LLP1 v HMRC* [2008] EWHC 2387, [2008] STC 3366 [115] (Henderson J).

Moses LJ put it more forcefully in the Court of Appeal hearing of *Gaines-Cooper*<sup>83</sup> concluding not merely that forms of general soft law were of *assistance* in the collection of tax, but rather that this was the *best way* of collecting tax:

It is trite to recall that it is for the revenue to determine the best way of facilitating collection of the tax it is under a statutory obligation to collect. But it should not be forgotten that the revenue itself has long acknowledged that the best way is by encouraging co-operation between the revenue and the public<sup>84</sup>

The result of this analysis is that the production of forms of general HMRC soft law is not a constitutional aberration. It is rooted in HMRC's managerial discretion and is a function properly executed by the body in pursuance of its responsibilities endowed by Parliament. Nor does this breach the Bill of Rights Act – Parliament is still the lawmaker of the land and it is only with Parliamentary approval that the levying of taxes is sanctioned. HMRC's production of forms of general HMRC soft law simply seeks to give effect to Parliament's intention. At the same time, it should be recalled and stressed that forms of general HMRC soft law in any particular instance must not conflict with the Bill of Rights Act. The point here is that the production of such soft law itself is not a constitutional aberration.

Two final matters should be made here about two concepts which are related to legal discretion, namely 'de facto discretion' and 'epistemic deference'.

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<sup>83</sup> *Gaines-Cooper* (CA) (n 64).

<sup>84</sup> *ibid* [12].

The first relates to use of the word ‘discretion’ by some tax commentators,<sup>85</sup> but which is distinct from the managerial discretion that has a legal basis. HMRC’s legal discretion is the legal authority to decide between a range of choices, which is circumscribed by legal boundaries. In other words, the legal decision is made by HMRC, not by the courts (although the courts will intervene to enforce the legal boundaries by way of judicial review if the decision is tainted for instance by procedural defects or is substantively unreasonable). Above has been discussed HMRC’s managerial discretion which is a type of legal discretion, but specific statutory discretions which allow HMRC to determine for instance whether to allow group relief claims outside the statutory time limits (section 74(2) of Schedule 18 of the Finance Act 1998) are also another manifestation of legal discretion. Legal discretion should be distinguished from what can be referred to as ‘de facto discretion’: situations where HMRC can make determinations which have an effect, but this is not a legal effect in the sense that the courts ultimately retain the legal authority on the matter. For instance, where an anti-avoidance provision is broadly worded, this provides HMRC the opportunity to make a determination as to how that law should apply in practice. Taxpayers in effect will have to follow HMRC’s determination (and indeed this is prescribed by HMRC),<sup>86</sup> although it is open to them to apply to the courts for a

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<sup>85</sup> See for instance John Braithwaite, ‘Making tax law more certain: A theory’ (2003) 31(2) Australian Business Law Review 72, 77. David Fernandes and Kerrie Sadiq, ‘A principled framework for assessing general anti-avoidance regimes’ (2016) BTR 172, in particular 190-191.

<sup>86</sup> See HMRC, *Statement of Practice 1/06* (January 2006), available at: <https://www.gov.uk/government/publications/statement-of-practice-1-2006/statement-of-practice-1-2006> accessed 31 September 2017: “Taxpayers who adopt a different view of the law from that published as the HMRC view can protect against a discovery assessment after the enquiry period. The Return would have to indicate that a different view had been adopted by entering in the Additional Information space comments to the effect that they have not followed HMRC guidance on the issue or that no adjustment has been made to take account of it.”

legal determination on the matter and the courts have the ultimate authority to determine what the law means.<sup>87</sup> What HMRC says the law is does not have a legal bearing.

That brings us to the second concept. The above should not be read as meaning that HMRC's view has absolutely no bearing. This relates to what Paul Daly calls 'epistemic deference', the idea that a decision-maker gives weight to a particular view expressed by some entity that is respected.<sup>88</sup> Thus, should HMRC express a view on a matter, then the courts can give some weight to that view when making the legal determination. It is a factor that is taken into account in the decision-making process. The legal determination is still made by the courts, and in that way HMRC's view would have no legal bearing, but it is still something which bears some weight. In this way, if HMRC's view is set out in soft law and ultimately influences the court's decision, then this could be regarded as an 'effect' of general soft law.<sup>89</sup> For instance, the Upper Tribunal in *HMRC v Smith & Williamson*<sup>90</sup> and *HMRC v Glyn*<sup>91</sup> noted that the First-tier Tribunal in both instances had placed weight, albeit erroneously so, on the relevant HMRC guidance. HMRC's guidance on the General Anti-Abuse Rule ('GAAR'), as approved by the GAAR advisory panel, is unique in that it is a factor that *must* be

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<sup>87</sup> On this, see the reference to Lord Neuberger's interjection in the case *RFC 2012 plc (in liquidation) v Advocate General for Scotland* [2017] UKSC 45, [2017] 1 WLR 2767 noted in Malcolm Gammie, 'Shooting the messenger: the proposed enabler penalty' (2017) BTR 142, 142.

<sup>88</sup> Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (CUP 2012) 7-9.

<sup>89</sup> See Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart 2016) 1-2; Judith Freedman and John Vella, 'HMRC's Management of the UK Tax System: The Boundaries of Legitimate Discretion', 112-115 in Chris Evans, Judith Freedman and Richard Krever (eds.), *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD 2011).

<sup>90</sup> *HMRC v Smith & Williamson* [2015] UKUT 666 (TCC), [2016] STC 1393, [107].

<sup>91</sup> *HMRC v Glyn* [2015] UKUT 551 (TCC), [2016] STC 1020, [101].

taken into account by the court or tribunal in proceedings in connection with the GAAR.<sup>92</sup>

From the taxpayer's perspective, a significant risk arises where both de facto discretion and epistemic deference combine. Take for instance, an anti-avoidance provision which is broadly drafted thereby giving de facto discretion to HMRC. HMRC sets out its approach in general soft law. If the court later applies epistemic deference to HMRC's approach, then HMRC comes close to acquiring in effect legal discretion to determine the scope of the law. This possibility is far from hypothetical if it is to be believed that the judicial attitude to avoidance has shifted over time<sup>93</sup> and now arises in favour of HMRC.<sup>94</sup> Indeed, it appears that the GAAR specifically envisages such an occurrence, albeit with the safeguard by way of the GAAR advisory panel.

## 2.2. The scope of HMRC soft law and its manifestations

HMRC soft law refers to those soft law sources that encapsulate norms, which are produced pursuant to HMRC's managerial discretion and seek to elaborate upon legal rights and obligations of taxpayers in order to guide actions. This particular inquiry of this thesis is in to those forms of general HMRC soft law. Such soft law is to be contrasted with secondary legislation issued pursuant

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<sup>92</sup> Finance Act 2013, s. 211(2).

<sup>93</sup> The courts previously adopted a strict approach to statutory interpretation before moving towards purposive interpretation with *Ramsay v IRC* [1982] AC 300. See: Stephen Daly, 'Tax Exceptionalism: A UK Perspective' (2017) 3(1) *Journal of Tax Administration* 95, 95-96.

<sup>94</sup> McCarthy and Black have speculated that the UBS case for instance might represent a departure from the previous judicial approach to avoidance cases with the courts now permitted to take a much broader approach in order to strike down tax avoidance schemes. See: Hui Ling McCarthy and Sarah Black, 'UBS and DB Group Services: a departure from the conventional approach?' (2016) *BTR* 257.

to specific legislative mandate, such as statutory instruments<sup>95</sup> or regulations, which is binding.<sup>96</sup> Notwithstanding the lack of express legislative authority, this soft law may nevertheless give rise to legal rights such as through public law remedies.<sup>97</sup>

As a means of guiding taxpayers as to their rights and obligations under the law,<sup>98</sup> general HMRC soft law should only act as a *supplement* rather than as a *substitute for* the law,<sup>99</sup> as will be detailed further below.<sup>100</sup> Of course this justification is undermined where, on the converse, the legislation *is* overreached or if in practice the availability of soft law may negatively impact the legislative process, resulting in broadly drafted legislation.

General HMRC soft law can be found in different forms. Importantly, not all publications and instruments encapsulate soft law, as it is understood in this thesis. For instance, some publications will refer to purely internal, administrative issues such as which person to contact in relation to particular issues. To this end, any examination of HMRC soft law necessarily involves consideration of the different characteristics of the many and varied forms of soft law. For example, ‘substantive’ (i.e. providing the detail of a general legislative provision); ‘concessionary’ (i.e. where the letter of the law will not be

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<sup>95</sup> See, for instance, Directions under Regulations 5(1) of the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (S.I. 2003/282).

<sup>96</sup> See, for instance, The Investment Manager (investment transactions) Regulations 2014 which was issued in exercise of the powers conferred by sections 827(2) and 825S(4) of the Income Tax Act 2007 and section 1150 of the Corporation Tax Act 2010.

<sup>97</sup> Tracey Bowler, ‘HMRC’s Discretion: The Application of the Ultra Vires Rule and the Legitimate Expectation Doctrine’ (Institute for Fiscal Studies 2014); see generally, Part III. 5. Reliability for taxpayers? The inadequacy of public law protection.

<sup>98</sup> Although Manuals are not inherently produced in order to increase taxpayer compliance with the law, but rather as guidance for staff, their subsequent *publication* shifts their object towards also informing taxpayers of their obligations under the law.

<sup>99</sup> See European Parliament Resolution 2007 (n 3).

<sup>100</sup> Part II. 3. The case for HMRC soft law.

followed); 'interpretative' (i.e. setting out HMRC's view of the scope and meaning of the law); 'advisory' (i.e. directed to taxpayers on certain tax positions,); 'explanatory' (i.e. summarising the law or rendering it into 'plain English' even where there is no issue as to its true meaning); and 'administrative' (i.e. how HMRC proposes to administer the law, including matters relating to its general managerial discretion and cases where a specific discretion has been conferred on HMRC in some matter). Of course, these forms are not mutually exclusive and at times may be impossible to distinguish between.

For ease of reading, HMRC publications are herein categorised, as they are promulgated in practice, according to purpose. There are several distinct categories, namely Extra-Statutory Concessions ('ESCs'), Statements of Practice, Manuals and Codes of Practice, and one catchall for miscellaneous types which are published generally as 'Guidance'. The analysis will use their categories in order to elaborate upon and give examples of the different forms of soft law cited above. The analysis will also look at 'Rulings' which are issued in response to taxpayer queries. This is necessary in order to contrast these informal arrangements and limited statutory provisions with the more comprehensive proposals to be set forward in Part IV of the thesis. The thesis does not seek to address the issues which arise however in respect of individualised rulings.

A final issue arises in respect of general HMRC soft law which should be addressed at this juncture and it relates to the scope of soft law. Can something still be called soft law if it incorporates a view which is inconsistent with the underlying law? This shall be called a 'Revenue legal error' for the remainder of the thesis. In answering this question, it is worth recalling that HMRC's managerial discretion cannot be extended so widely as to grant a relief that

Parliament expressly did not grant. Further it is difficult to sustain the justification for general soft law, set out in Part II. 3 below, that it guides actions in respect of rights and obligations under the law if the soft law in fact fails to do so. There is a distinction therefore between legitimate HMRC soft law instruments, which fall properly within the definition of HMRC soft law used in this thesis, and illegitimate soft law instruments which do guide actions, but do not properly reflect the underlying law. The use of the word soft law in the context of illegitimate soft law may sit uneasily, but if it is recalled that soft law in an abstract definition does not actually refer to any legal basis (and in the international sphere is used often in order to achieve political consensus),<sup>101</sup> then it is justified. However, as will be evidenced elsewhere in this thesis, illegitimate general HMRC soft law which incorporates a Revenue legal error is particularly problematic.

### 2.2.1. Extra-Statutory Concessions

One of the most controversial elements of the UK tax system,<sup>102</sup> ESCs give taxpayers a reduction in tax liability to which they would not be entitled under the strict letter of the law.<sup>103</sup> To this end, ESCs are generally a form of concessionary soft law. Given that ESCs grant to taxpayers relief or a reduction in tax liability to which they are not strictly entitled, the fundamental foundation of the definition is accordingly that of relaxation of the strict law. Most concessions

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<sup>101</sup> Part I. 2. State of the art & justification for study, see text at n 15 and sources cited therein.

<sup>102</sup> On ESCs, see Stephen Daly, 'The Life and Times of ESCs: A defence?' in Dominic de Cogan and Peter Harris (eds), *Studies in the History of Tax Law: Volume 8* (Bloomsbury 2017).

<sup>103</sup> HMRC, *Extra-Statutory Concessions: Concessions as at 6 April 2017* (April 2017) 2 available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/646447/170807\\_IR1\\_April\\_2017\\_final\\_clean.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/646447/170807_IR1_April_2017_final_clean.pdf)> accessed 31 September 2017.

are made to deal with what are, on the whole, minor or transitory anomalies under the legislation and to meet cases of hardship at the margins of the code where a statutory remedy would be difficult to devise or would run to a length out of proportion to the intrinsic importance of the matter.<sup>104</sup> This definition of ESCs, traditionally offered by HMRC, is incomplete however. Concessions may also arise where they are necessary for the practical collection and management of taxes.<sup>105</sup> They may also relate to instances in which it would be an abuse of power for HMRC to insist upon the strict application of the law.<sup>106</sup> As ESCs relate to benevolent treatment, they must by definition arise in the taxpayer's favour.<sup>107</sup> Although they are intended to be of general application, 'special circumstances' may arise in a particular case which will need to be taken into account in considering the application of the concession.<sup>108</sup> For instance, a concession will not be given in any case where an attempt is made to use it for tax avoidance.<sup>109</sup> It is also worth noting that since the judgment of Lord Hoffmann in the aforementioned *Wilkinson* case, HMRC has embarked on a process of withdrawing of formalizing ESCs into statute.<sup>110</sup>

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<sup>104</sup> *ibid* 2.

<sup>105</sup> See Daly, 'Life and Times of ESCs' (n 102) 178-179.

<sup>106</sup> *ibid*.

<sup>107</sup> Malcolm Gammie, "'Revenue Practice": A Suitable Case For Treatment' (1979) BTR 304, 306; HC Deb 12 July 1976, vol 915, col 187.

<sup>108</sup> HMRC, *Concessions as at 6 April 2017* (n 103) 2.

<sup>109</sup> See: *Kay* (n 49); *R v CIR, ex parte Fulford-Dobson* [1987] STC 344, [1987] 1 QB 978 (McNeill J); *R (Bampton) v King* [2012] EWCA Civ 1744, [2014] STC 56 [109].

<sup>110</sup> HMRC, *Withdrawal of extra statutory concessions: Technical note and call for evidence* (January 2014) 4 (available at: <<http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/specialist/esc-withdrawal-tech-note.pdf>> accessed 31 September 2017). The author disagrees however that *Wilkinson* is the catalyst for the change to HMRC practice, as expanded upon in Part III. 4.3.2. Relationship with HMRC.

Crucially, concessions may only operate within a narrow mandate. In order to be constitutionally valid, or for the purposes of this thesis to be legitimate sources of general soft law, ESCs must either come within the ambit of HMRC's managerial discretion,<sup>111</sup> or be the result of legitimate (including purposive) interpretation.<sup>112</sup> Thus, if a concession cannot be justified either by legitimate interpretation of the legislation and application to particular scenarios or as coming within the ambit of HMRC's managerial discretion, then the concession will be *ultra vires* HMRC. It will contain a Revenue legal error and be inconsistent with the underlying law. This is often summed up with the phrase that 'one must be taxed by law and not untaxed by concession'.<sup>113</sup> As such, it is important to distinguish between instances in which the law is rough at the penumbra and gives rise to strictly unintended consequences such as failing to give relief or encompassing cases at the fringe,<sup>114</sup> as against instances where the law at its core is deemed to be unfair by HMRC.<sup>115</sup> In the former, but not in the latter, concessions may legitimately apply (subject to coming within the acceptable limits of interpretation), although in the past ESCs have fallen into the latter category.<sup>116</sup> Similarly a concession may be used so as to make the

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<sup>111</sup> *Fleet Street Casuals* (n 25); HC Deb 11 July 1984, vol 63 col 1171; *Wilkinson* (n 25) [21]. see also, in relation to Customs and Excise, *Kay* (n 49).

<sup>112</sup> Given that managerial discretion is founded on CRCA 2005, s. 5, it could actually be argued that purposive interpretation must by its nature include giving an interpretation of the law which takes account of managerial discretion. In other words, it could simply be said that ESCs are within HMRC's powers provided that they are the result of legitimate (including purposive) interpretation rather than additionally also having to mention managerial discretion. Indeed, in Daly, 'The Life and Times of ESCs' (n 102) that is precisely what the author did.

<sup>113</sup> *Vestey v IRC (no. 2)* [1979] Ch. 198, 203; *R (Greenwich Property Ltd) v Commissioners of Customs and Excise* [2001] EWHC 230, [2001] STC 618 [13] (Collins J).

<sup>114</sup> Alexander Johnston, *Inland Revenue* (George Allen & Unwin Ltd, 1965) 68.

<sup>115</sup> *Wilkinson* (n 25) [20]; *R (Wilkinson) v Inland Revenue Commissioners* [2003] EWCA Civ 814, [2003] 1 WLR 2683 [46] (Lord Phillips); see also *Stock v Frank Jones (Tipton) Ltd.* [1978] 1 WLR 231, 234 (Viscount Dilhorne).

<sup>116</sup> On which, see: Part III. 2.1. The problem of soft law being inconsistent with the law.

effectuation of the law more workable, but may not be reformulated in such a way as to undermine its very intent.<sup>117</sup> The fact that ESCs by their nature come close to the line of *vires* is a matter which will be subject to further consideration throughout this thesis.<sup>118</sup> In particular, the presence of a Revenue legal error can have a significant impact upon the reliability of a piece of general soft law.<sup>119</sup>

Some examples should help to clarify this distinction. As for the relationship between concessions and managerial discretion, HMRC are not expected to collect every last penny of tax which is due and may make concessions for the purposes of administrative convenience. An apt example arises in relation to Flat Rate Expense Allowances (FREA). These are ‘expenses’ arrangements which HMRC arrives at with particular industries or with particular undertakings within specific industries. Expenses incurred by employees which are incurred ‘wholly, exclusively and necessarily in the performance of’ his or her duties of employment, then the amount so incurred can be deducted from the income of that employee before it is assessed to income tax.<sup>120</sup> Ordinarily, an employee would have to keep all receipts for expenses incurred as a means of proving what the outgoings have amounted to. An agreement on a flat rate to be granted in respect of expenses, as in the case of an FREA on the other hand obviates the need to retain all of the receipts in relation to expenses and for HMRC to analyse all the receipts.<sup>121</sup>

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<sup>117</sup> Finance Bill Deb HC 17 June 2008 cols 754-755 (Philip Hammond).

<sup>118</sup> See principally below Part III. 2.1. The problem of soft law being inconsistent with the law.

<sup>119</sup> See Part III. 5.2.1. The doctrine of ultra vires: the Achilles’ heel of legitimate expectations?

<sup>120</sup> See Income Tax (Earnings and Pension) Act 2003, s 336.

<sup>121</sup> *R (Bamber) v HMRC* [2005] EWHC 3221 (Admin) [2] – [4].

Similarly, HMRC may purposively interpret the legislation in order so that it accords with the underlying legislative intent. This may arise where HMRC attempts to place the law in the context of specific sectors. For instance, the *Greenwich University*<sup>122</sup> case gave rise to such a scenario in relation to the supply of zero-rated goods as regards student accommodation. Under strict legal interpretation, if Universities were to rent out accommodation during summer months to non-students, they would not be entitled to claim the supply of goods was zero-rated. By concession, the Revenue would allow a *de minimis* use of student accommodation for non-students, given that it could not be expected that the legislature would deprive relief in such circumstances. The purpose of the concession, accordingly, was to ‘interpret the law concerning VAT within the higher education context.’<sup>123</sup> It is apparent that the concession is necessary, as its absence would make the relief redundant. An example of purposive interpretation gone awry in a concession resulting in an *ultra vires* concession is that of ESC D33 analysed below.<sup>124</sup> Indeed, historically there have been many concessions issued by HMRC which could not be justified either by virtue of managerial discretion or legitimate interpretation.<sup>125</sup>

It should finally be noted that this definition of ESCs, as understood by HMRC,<sup>126</sup> does not distinguish between concessions which are granted in

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<sup>122</sup> *Greenwich Property* (n 113).

<sup>123</sup> *ibid* [9] (Collins J).

<sup>124</sup> Part III. 2.1. The problem of soft law being inconsistent with the law, see text at n 28.

<sup>125</sup> Part III. 2.1. The problem of soft law being inconsistent with the law, see text at n 16.

<sup>126</sup> On this, see: HMRC, *Withdrawal of extra-statutory concessions* (December 2010), available at: <<http://webarchive.nationalarchives.gov.uk/20140206155224/http://www.hmrc.gov.uk/menus/extra-stat-con-tn.pdf>> accessed 31 September 2017.

*individual cases*, variously described by other authors as remissions<sup>127</sup> or waivers<sup>128</sup>, and those that relate to *classes* of cases. Class concessions are those which are founded on fixed principles of general application affecting classes.<sup>129</sup> For the purposes of this thesis, references to ESCs should be taken as meaning concessions applying to classes of persons rather than individuals. Further, HMRC's definition does not distinguish between class concessions which are *published* and those which are *not* published (of which there still exists a substantial body).<sup>130</sup> This distinction is at times overlooked, as evidenced by Walton J's erroneous assertion in *Vestey (no. 2)* that ESCs represent a 'published code'.<sup>131</sup>

### 2.2.2. Statements of Practice

Statements of Practice ('SPs') set out HMRC's interpretation of law and the way it will be applied in practice.<sup>132</sup> They explain the Department's view of the law where it is unclear; where there may be more than one interpretation or where HMRC considers it would assist taxpayers. SPs similarly may be used to make substantial statements about the way HMRC administers the tax system;

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<sup>127</sup> John Booth, *Stand and Deliver! The Inland Revenue and Non-statutory Taxation* (Waterside Press, 1998) 23.

<sup>128</sup> Freedman and Vella, 'HMRC's Management of the UK Tax System' (n 89) 92.

<sup>129</sup> Johnston (n 114) 68.

<sup>130</sup> See below Part III. 3.1. Publication.

<sup>131</sup> *Vestey (no. 2)* (n 113) 204.

<sup>132</sup> HC Deb 12 July 1976, vol 915, col 187. This is the definition which HMRC supplies also on its website: <<https://www.gov.uk/government/collections/statements-of-practice>> accessed 31 September 2017.

how it will exercise a statutory discretion, or describe a practice which has no statutory foundation but which is not, in essence, concessionary.<sup>133</sup>

Until June 1979 the Inland Revenue Department's views on the practical interpretation of tax law were publicised in a variety of ways, including by way of answers to Parliamentary questions and letters to professional bodies and journals.<sup>134</sup> The Department then consolidated the whole of this information into a list of 88 SPs<sup>135</sup> and the practice of the department thereafter has been to regularly update the list.<sup>136</sup>

Although SPs were fundamentally designed to structure what was until 1979 a messy procedure for communicating HMRC's interpretation of the law to taxpayers, critics have noted that a line between them and ESCs has not in practice been maintained.<sup>137</sup> It is not difficult to see why the distinction between the two has been difficult to preserve. As ESCs rely upon purposive interpretation or flexing of managerial discretion and SPs on the other hand are also interpretations executed by HMRC, both in principle exist on the same spectrum. That is at least in the case of ESCs that are within HMRC's powers rather than *ultra vires* concessions which clearly cannot exist on the same spectrum. Thus, as has been recognised by HMRC, there are times at which it is 'a matter of judgment whether a Statement of Practice reflected some element of

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<sup>133</sup> HMRC, *ADML5100 - Statements of Practice: What is a Statement of Practice?* (March 2016) <<http://www.hmrc.gov.uk/manuals/admlmanual/ADML5100.htm>> accessed 31 September 2017.

<sup>134</sup> HM Treasury, *Appropriation Accounts* (HC 1981-82, 76-IX), page xxi.

<sup>135</sup> *Ibid.*

<sup>136</sup> See here: HMRC, *Statements of Practice* <<https://www.gov.uk/government/collections/statements-of-practice>> accessed 31 September 2017.

<sup>137</sup> Amanda Rowland 'Is the Revenue being Fair? Revenue Statements and Judicial Review' (1995) BTR 115, 117; Gammie, 'Revenue Practice' (n 107) 313; Freedman and Vella 'HMRC's Management of the UK Tax System' (n 89) 116.

concession'.<sup>138</sup> In practice however a defining difference is claimed to be that SPs are less formal than ESCs.<sup>139</sup>

SPs are caveated that they merely set out HMRC's view and as such may not accurately set out the law.<sup>140</sup> Their utility is further undermined by the fact that they are not strictly binding upon HMRC. First, it is only in exceptional circumstances that HMRC will be bound to incorrect statements of the law.<sup>141</sup> Secondly, the initial caveat that they only explain HMRC's interpretation and 'do not affect a taxpayer's right to argue for a different interpretation' may serve to vitiate the possibility of binding HMRC.<sup>142</sup> Generally however HMRC claim that it will not depart from its view expressed in an SP where a taxpayer has, in reliance, irrevocably changed her position.<sup>143</sup>

SPs can incorporate different forms of soft law. As highlighted already, some SPs may incorporate relieving provisions and thus amount to concessionary soft law. SPs may also as noted in the definition above incorporate administrative soft law which sets out how HMRC will exercise a particular statutory discretion. For instance, section 74(2) of Schedule 18 of the Finance Act 1998 provides that group relief claims may be made or withdrawn outside the statutory time limits if HMRC allow it. How HMRC will exercise the discretion

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<sup>138</sup> HM Treasury, *Appropriation Accounts* (HC 1981-82, 76-IX) page xxii.

<sup>139</sup> Loutzenhiser (n 2) 53.

<sup>140</sup> Natalie Lee, *Revenue Law: Principles and Practice* (30th edn., Bloomsbury Professional 2012) 12.

<sup>141</sup> See further Part III. 5.2.1. The doctrine of ultra vires: the Achilles' heel of legitimate expectations?

<sup>142</sup> See Part III. 5.2.2.2. Is there anything devoid of relevant qualification?

<sup>143</sup> See Part III. 5.2.1.2. *Mansworth v Jelley* and the Guidance affair.

is further set out in Statement of Practice 5 (2001).<sup>144</sup> SPs are equally likely to incorporate explanatory soft law. For instance, SP D12 sets out a number of points of general practice which have been agreed in respect of partnerships to which section 59 of the Taxation of Chargeable Gains Act 1992 applies.<sup>145</sup>

### 2.2.3. Manuals

The publication of internal HMRC Manuals is one of the most interesting development in tax law in recent years.<sup>146</sup> Prior to their publication, they were strictly confidential (although the contents were well known to inspectors who left the service for private practice).<sup>147</sup> HMRC's Manuals are now generally available online.<sup>148</sup> However, some information is still treated as confidential and is not published.<sup>149</sup> These Manuals are directed internally to HMRC staff and specify *inter alia* the procedure to be undertaken in relation to issues which arise in the collection and management of taxes. Although internally directed, Manuals are an important and useful resource for tax advisers and taxpayers<sup>150</sup> as these publications may communicate to the world at large how HMRC seeks to apply the law in practice. This utility is evidenced in part by the number of cases in

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<sup>144</sup> See HMRC, *Statement of practice 5/2001* (April 2001), [9]-[12] available at: <<https://www.gov.uk/government/publications/statement-of-practice-5-2001/statement-of-practice-5-2001>> accessed 31 September 2017.

<sup>145</sup> HMRC, *Statement of Practice D12: Partnerships* (September 2015), available at: <<https://www.gov.uk/government/publications/statement-of-practice-d12/statement-of-practice-d12>> accessed 31 September 2017.

<sup>146</sup> Loutzenhiser (n 2) 53.

<sup>147</sup> *ibid.*

<sup>148</sup> HMRC, *HM Revenue & Customs guidance manuals: introduction*, available at: <<http://www.hmrc.gov.uk/manuals/advisory.htm>> accessed 31 September 2017.

<sup>149</sup> Part IV. 4.2.1.3. Recommendations in respect of accessibility, see text at n 360.

<sup>150</sup> Anne Fairpo, 'Tax Research — Online Resources' (2008) 923 *Tax Journal* 17, 17; Freedman and Vella, 'HMRC's Management of the UK Tax System' (n 89) 113; Richard Cory 'The Human Rights Act 1998 and the Treasury consents regime' (2005) *BTR* 412, 427.

which taxpayers have sought to rely upon the information contained in Manuals.<sup>151</sup> In fact, Freedman and Vella report that HMRC is beginning to put certain forms of guidance directly into Manuals on the expectation that taxpayers and advisers will consult them.<sup>152</sup>

As with SPs however, Manuals are qualified that they are not 'comprehensive' nor will they 'provide a definitive answer in every case'.<sup>153</sup> Similarly, the law as stated in the Manuals may be misleading, out of date or incorrect.<sup>154</sup> These factors all serve to attenuate the prospect of reliance on the part of taxpayers.<sup>155</sup>

Not all of the information contained in Manuals can be classified as soft law, such as where the Manuals refer to purely internal administrative tasks for instance such as who to contact in relation to particular inquiries.<sup>156</sup> That which is soft law in the Manuals can take a variety of forms as with SPs. Some of the material in manuals amounts to concessionary soft law for instance,<sup>157</sup> or substantive soft law as in the case of the Alcohol Wholesales Registration Scheme Manual which inter alia sets out the detail on the operation of Part 6A of the Alcoholic Liquor Duties Act 1979,<sup>158</sup> or interpretative soft law as in the case of the Information Disclosure Guidance Manual which inter alia sets out HMRC's

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<sup>151</sup> For instance, *Hanover Company Services Ltd v HMRC* [2010] UKFTT 256; *Oxfam* (n 53).

<sup>152</sup> Freedman and Vella 'HMRC's Management of the UK Tax System' (n 89).

<sup>153</sup> See n 148 above.

<sup>154</sup> *ibid.*

<sup>155</sup> On which, see Part III. 5.2.2.2. Is there anything devoid of relevant qualification?

<sup>156</sup> See for instance HMRC, *Technical Help: How to get more help about topics in the CG Manual* (March 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/capital-gains-manual/cg99998>> accessed 31 September 2017.

<sup>157</sup> Part III. 3.3. Mingling of the categories of advice, see text at n 152.

<sup>158</sup> HMRC, *Alcohol Wholesaler Registration Scheme Manual* (May 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/alcohol-wholesaler-registration-scheme>> accessed 31 September 2017.

view on when it may disclose taxpayer information,<sup>159</sup> or explanatory as in the case of the 'Making and amending claims' section of the Self Assessment Claims Manual,<sup>160</sup> or administrative as with the section of the Admin Law Manual setting out how HMRC will exercise its managerial discretion to refrain from collecting tax.<sup>161</sup>

#### 2.2.4. Codes of Practice

Codes of Practice are soft law instruments which set out how HMRC will carry out its duties. They are authoritative statements on procedure. Only three codes are still exclusively referred to as COPs today,<sup>162</sup> whilst the rest have been replaced with factsheets and leaflets,<sup>163</sup> (thought these will often still refer to the original Codes of Practice).<sup>164</sup> COP 9 is issued in cases where HMRC suspect tax fraud. Although generally where fraud is suspected, HMRC will seek to prosecute, COP 9 specifies that HMRC may offer the accused taxpayer instead the chance to make a full disclosure under a contractual arrangement.<sup>165</sup> COP 8 sets out

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<sup>159</sup> HMRC, *Information Disclosure Guide* (March 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/information-disclosure-guide>> accessed 31 September 2017.

<sup>160</sup> HMRC, *SACM 3000 Making and amending claims* (April 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/self-assessment-claims-manual/sacm3000>> accessed 31 September 2017.

<sup>161</sup> HMRC, *ADML3400: Tests to apply* (March 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/admin-law-manual/adml3400>> accessed 31 September 2017.

<sup>162</sup> HMRC, *Leaflets, factsheets and booklets* <<https://www.gov.uk/government/collections/hm-revenue-and-customs-leaflets-factsheets-and-booklets#codes-of-practice>> accessed 31 September 2017.

<sup>163</sup> HMRC, *TTOG1130 - The guidance: factsheets and codes of practice: use of codes of practice* (March 2016) <<http://www.hmrc.gov.uk/manuals/ttogmanual/TTOG1130.htm>> accessed 31 September 2017.

<sup>164</sup> See for instance HMRC, *What happens if we've paid you too much tax credits (COP 26)* (October 2014) available at: <<https://www.gov.uk/government/publications/tax-credits-what-happens-if-youve-been-paid-too-much-cop26>> accessed 31 September 2017.

<sup>165</sup> HMRC, *Code of Practice 9* (June 2014) <<https://www.gov.uk/government/publications/code-of-practice-9-where-hm-revenue-and-customs-suspect-fraud-cop-9-2012>> accessed 31 September 2017.

HMRC's procedure where fraud is suspected but the contractual disclosure facility available under COP 9 is not utilized.<sup>166</sup> Finally, the 'Code of Practice on the Disclosure of Information' explains the law in relation to disclosure of information under the Anti-Terrorism, Crime and Security Act 2001.<sup>167</sup> It further describes the controls and safeguards that are in place to ensure that these disclosures conform to the law.<sup>168</sup> COPs are caveated that they are intended to act generally as guidance and do not generally have binding force.<sup>169</sup>

Taking COPs as authoritative statements on procedure, one might note that many other soft law publications from HMRC would fall within this definition, such as the Litigation and Settlement Strategy ('LSS'),<sup>170</sup> which is instead categorized as 'Guidance' on HMRC's website. The LSS provides a framework through which HMRC may arrive at settlements on outstanding tax bills with taxpayers.<sup>171</sup> Given that COPs are authoritative statements on procedure, they often incorporate forms of administrative soft law such as in the case of COPs 8 and 9 which set out how HMRC will exercise its discretion not to seek prosecution and instead settle the matter civilly. What is still referred to as COP 10 sets out the process for the issuance of an informal ruling by HMRC, a

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<sup>166</sup> HMRC, *COP 8* (August 2014)

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/366578/cop8.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366578/cop8.pdf)> accessed 31 September 2017.

<sup>167</sup> HMRC, *Anti-terrorism, Crime and Security Act 2001: Code of practice on the disclosure of information*

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397106/anti-terrorism\\_COP.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397106/anti-terrorism_COP.pdf)> accessed 31 September 2017.

<sup>168</sup> *ibid* 1.

<sup>169</sup> See for instance HMRC, *COP 8* (n 166) 13; Cabinet Office, *Guide to Making Legislation* (July 2015) 106.

<sup>170</sup> *Litigation and Settlement Strategy* (n 24).

<sup>171</sup> Part II. 2.1.1.1 Constraints, see text at n 24.

matter which falls squarely within its more general managerial discretion.<sup>172</sup> The Code of Practice on Disclosure of Information meanwhile contains some explanatory soft law in relation to the operation of sections 19 and 20 of the Anti-Terrorism, Crime and Security Act 2001.

### 2.2.5. Guidance

‘Guidance’ is a catchall term for those publications of HMRC which are issued to the general body of taxpayers, but are not published within the above categories.<sup>173</sup> This includes leaflets such as (the now defunct) ‘Tax Bulletins’,<sup>174</sup> Briefs,<sup>175</sup> Factsheets, Series’ and even Consultations.<sup>176</sup> Press Releases from HMRC may also contain important information for taxpayers and, in a time prior to the Internet, were a useful means of publicizing new SPs and ESCs.<sup>177</sup> Guidance on the application of VAT laws on the other hand is generally found in ‘VAT Notices’<sup>178</sup> as with guidance on Excise in ‘Excise Notices’<sup>179</sup> and Tariffs in

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<sup>172</sup> See HMRC, *COP10 - HMRC Code of Practice 10 - information and advice*, available at: <<http://webarchive.nationalarchives.gov.uk/20111005104924/http://www.hmrc.gov.uk/pdfs/cop10.htm>> accessed 31 September 2017. See below Part II. 2.2.6. Rulings.

<sup>173</sup> See: HMRC, *Leaflets, factsheets and booklets* (n 162).

<sup>174</sup> See here:

<<http://webarchive.nationalarchives.gov.uk/20110620155444/hmrc.gov.uk/bulletins/index.htm>> accessed 31 September 2017.

<sup>175</sup> HMRC, *Revenue and Customs Briefs* <<https://www.gov.uk/government/collections/revenue-and-customs-briefs>> accessed 31 September 2017.

<sup>176</sup> HMRC, *Publications: all consultations*

<[https://www.gov.uk/government/publications?departments%5B%5D=hm-revenue-customs&publication\\_filter\\_option=consultations](https://www.gov.uk/government/publications?departments%5B%5D=hm-revenue-customs&publication_filter_option=consultations)> accessed 31 September 2017.

<sup>177</sup> Gammie, ‘Revenue Practice’ (n 107) 307.

<sup>178</sup> See here for a list of all HMRC VAT notices: HMRC, *VAT Notices: numerical order*

<<https://www.gov.uk/government/collections/vat-notice-numerical-order>> accessed 31 September 2017.

<sup>179</sup> See for instance HMRC, *Excise Notice 39: spirits production in the UK* (June 2017), available at: <<https://www.gov.uk/government/publications/excise-notice-39-spirits-production-in-the-uk/excise-notice-39-spirits-production-in-the-uk>> accessed 31 September 2017.

'Tariff Notices'.<sup>180</sup> Revenue and Customs briefs meanwhile announce changes in policy or set out the legal background to an issue and have a 6-month life span.<sup>181</sup>

As with other pieces of soft law, they are generally caveated that they are merely interpretative and by implication are not strictly binding (although some publications, such as VAT notices<sup>182</sup> and the DOTAS Guidance,<sup>183</sup> do have the force of law). This qualification generally appears as some variant of the following:

This Publication gives you information about X, and how HMRC interprets the legislation in the context of applying X to an individual's circumstances.<sup>184</sup>

These instruments describe HMRC's interpretation of the law<sup>185</sup> or the procedure by which it is applied.<sup>186</sup> Some may even contain elements of

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<sup>180</sup> See for instance HMRC, *Tariff Notice 14 (2017): cooking alcohol* (April 2017), available at: <<https://www.gov.uk/government/publications/tariff-notice-14-2017-cooking-alcohols/tariff-notice-14-2017-cooking-alcohols>> accessed 31 September 2017.

<sup>181</sup> <<https://www.gov.uk/government/collections/revenue-and-customs-briefs>> accessed 31 September 2017.

<sup>182</sup> See here for a list of binding VAT notices or provisions within the notices which are binding: HMRC, *VAT Notice 747: VAT notices having the force of law* (June 2003) <<https://www.gov.uk/government/publications/vat-notice-747-vat-notices-having-the-force-of-law/vat-notice-747-vat-notices-having-the-force-of-law>> accessed 31 September 2017.

<sup>183</sup> HMRC, *Guidance: Disclosure of Tax Avoidance Schemes* (November 2013) 15-16 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/341960/dot-as-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/341960/dot-as-guidance.pdf)> accessed 31 September 2017.

<sup>184</sup> HMRC, *Guidance Note: Statutory Residence Test* (August 2016), 6. Available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/381705/rdr3\\_1\\_1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/381705/rdr3_1_1.pdf)> accessed 31 September 2017.

<sup>185</sup> For instance: HMRC, *The Corporate Venturing Scheme*, available at: <<http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/guidance/cvs.htm>> accessed 31 September 2017.

<sup>186</sup> For instance: HMRC, *Compliance checks series – CC/FS1a* (November 2014), available at <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/373446/CC-FS1a\\_11\\_14\\_1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/373446/CC-FS1a_11_14_1.pdf)> accessed 31 September 2017.

concession.<sup>187</sup> To this end, many items published as 'Guidance' could otherwise fit seamlessly within the categories of SP, COP or ESC. To this end, some pieces of Guidance contain concessionary soft law.<sup>188</sup> However, some items are more appropriate for categorization as Guidance, such as advisory soft law which is directed at a class of taxpayers. For instance, settlement opportunities for taxpayers who have engaged in particular schemes are set out in Guidance<sup>189</sup> (although the form of this soft law may also be regarded as administrative).

### 2.2.6. Rulings

Although the thesis is primarily directed towards dealing with soft law which is directed at a general class of persons and intended to be so directed, the definition of soft law itself, encapsulating norms, would mean that soft law is at play even in those scenarios where individual taxpayers approach HMRC for either a formal or informal ruling. Thus, a brief exploration of rulings in this sense is merited but will be necessarily adumbrated given that the thesis is more concerned with general soft law rather than specific advice.<sup>190</sup>

Rulings, both formal and informal, have existed in the United Kingdom for many years. Rulings are pieces of advice issued to individual taxpayers setting out HMRC's view on the tax implications of a specified transaction or

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<sup>187</sup> HMRC News, *Remittance Basis* (4 August 2014), available at: <<http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/news/remittance-basis.htm>> accessed 31 September 2017.

<sup>188</sup> Part III. 3.3. Mingling of the categories of advice, see text at n 164.

<sup>189</sup> HMRC, *Film production and sideways loss relief* (May 2014), available at: <<https://www.gov.uk/government/publications/film-production-and-sideways-loss-relief>> accessed 31 September 2017.

<sup>190</sup> Additionally, it is important to highlight the meaning of the word ruling in a general sense here as in the later parts of this thesis, there will be recommendations in relation to public rulings, which notably are distinct from the rulings analysed in this section.

arrangement. To this end, individual rulings are generally forms of advisory soft law.

Several publications through the years from the UK revenue authorities have set out how taxpayers could receive informal rulings from the UK revenue authorities. For instance, Code of Practice 10<sup>191</sup> (which was originally published in 1995) previously set out how taxpayers could receive non-statutory rulings from HMRC. How non-statutory VAT clearances for non-business customers could be acquired was set out in VAT Notice 700/6.<sup>192</sup> Meanwhile a separate process was in place for business customers seeking non-statutory clearances.<sup>193</sup> These pieces of soft law set out the ‘broad parameters and operation of the system’ for informal individual rulings, and state the ‘conditions in which, and issues with respect to which, advice on the application of tax legislation’ would be given.<sup>194</sup>

Today, a single HMRC document entitled ‘Non-statutory clearance service guidance’ provides information on when, how and on what taxpayers can get an informal ruling from HMRC.<sup>195</sup> HMRC endeavours to respond to any application within 28 days. The taxpayer is free to disagree with an informal HMRC ruling,

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<sup>191</sup> See HMRC, *COP10* (n 172).

<sup>192</sup> HMRC, *VAT rulings: Notice 700/6* (August 2009), available at: <[http://webarchive.nationalarchives.gov.uk/20111005102404tf/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&pageLabel=pageLibrary\\_ShowContent&id=HMCE\\_CL\\_000874&propertyType=document](http://webarchive.nationalarchives.gov.uk/20111005102404tf/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&pageLabel=pageLibrary_ShowContent&id=HMCE_CL_000874&propertyType=document)> accessed 31 September 2017.

<sup>193</sup> HMRC, *Clearance service for businesses - how to get certainty on significant business tax issues*, available at: <<http://webarchive.nationalarchives.gov.uk/20111005095811/http://www.hmrc.gov.uk/cap/links-dec07.htm>> accessed 31 September 2017.

<sup>194</sup> Julia Black, ‘Talking about Regulation’ 251 in Michael Harris and Martin Partington, *Administrative Justice in the 21<sup>st</sup> Century* (Hart 1999).

<sup>195</sup> HMRC, *Non-statutory clearance service guidance* (August 2013), available at: <<https://www.gov.uk/guidance/non-statutory-clearance-service-guidance>> accessed 31 September 2017.

and the ruling has no impact upon statutory deadlines. Further, there is no general right of appeal against advice expressed by HMRC, but in some cases rights to appeal are set out in statute.<sup>196</sup>

However, it is clear that informal rulings predate these publications. For instance, the case of *MFK Underwriting* concerned some informal rulings provided by Inland Revenue officials in the mid-1980s.<sup>197</sup> In fact, the practice of taxpayers approaching the revenue authorities goes back much further, at least well into the 19<sup>th</sup> century.<sup>198</sup> Whilst in practice such informal rulings might be perceived as binding by either HMRC or by the relevant taxpayers (although as set out above a taxpayer is still free to depart from an informal ruling), the legal effect of such rulings is governed by remedies such as the doctrine of legitimate expectations and private law remedies such as promissory estoppel. In short, such informal rulings will only have binding force provided that certain conditions are satisfied.<sup>199</sup>

As Loutzenhiser rightly points out, there 'is no general scheme whereby taxpayers can obtain advance rulings on the tax consequences of a particular transaction'.<sup>200</sup> Several commentators over the years have proposed the introduction of a general formalised rulings system.<sup>201</sup> There are however

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<sup>196</sup> For instance, some VAT related decisions are classed as 'appealable decisions' by statute. See generally, VAT Act 1994, s. 83.

<sup>197</sup> *MFK Underwriting* (n 78).

<sup>198</sup> See for instance, Chantal Stebbings, 'The equity of the executive: Fairness in tax law in nineteenth-century England' 280-281 in Peter Turner (ed), *Equity and Administration* (CUP 2016).

<sup>199</sup> See below Part III. 5.1. The Parameters of the doctrine.

<sup>200</sup> Loutzenhiser (n 2) 54.

<sup>201</sup> Andrew Taylor, 'Proposing a tax rulings system' (2017) 4605 *Taxation* 8; Winnie Chan, 'Binding Rulings' (1997) 18(2) *Fiscal Studies* 189; Daniel Sandler, *A Request for Rulings* (Institute of Taxation, 1994). Also, see caution urged in Dominic de Cogan, 'A Changing Role for the Administrative Law of Taxation' (2015) 24(2) *Social & Legal Studies* 251, 263

certain circumstances in which the legislation prescribes a clearance procedure, 'usually as part of broad anti-avoidance legislation'.<sup>202</sup> These more formal rulings are distinct from informal rulings by reason of the fact that they have statutory force *and* are automatically legally binding, without the need to rely upon public or private law remedies, provided that the statutory conditions are fulfilled. HMRC has a 'Clearance and Counteraction Team' which handles requests where advance clearance is required under particular statutory provisions, such as in relation to capital gains tax,<sup>203</sup> purchase of own shares by unquoted trading companies,<sup>204</sup> and demergers.<sup>205</sup>

### 2.3. The production of soft law

Although we can clearly see the different sources of general HMRC soft law and that there must be some internal process by which this is produced, it is not entirely clear how the general pieces of soft law come to be promulgated. Published sources provide some fleeting references to the relevant internal process. For instance, HMRC's Administrative Law Manual contains brief references to where ESCs and Statements of Practice originate from, namely, the Tax Admin Policy Team within Central Policy:

If you think you may need to produce a new Statement of Practice (SP), or an amendment to an existing one, you should first contact the Tax Admin Policy Team.<sup>206</sup>

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<sup>202</sup> Loutzenhiser (n 2) 55.

<sup>203</sup> See for instance, Taxation of Chargeable Gains Act 1992, s. 138(1), s. 139(5), s. 140B and s. 140D.

<sup>204</sup> Corporation Tax Act 2010, s. 1044.

<sup>205</sup> Corporation Tax Act 2010, s. 1091.

<sup>206</sup> HMRC, *ADML5200: Statements of Practice: How to produce new or amended Statements of Practice* (March 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/admin-law-manual/adml5200>> accessed 31 September 2017.

The TAP team in Central Policy owns policy for extra-statutory concessions. You must contact them before you consider a new ESC. For assistance regarding the application of an existing ESC, you should contact the relevant technical advisor or policy owner.<sup>207</sup>

Other HMRC soft law appears to originate in the team which specialises in the particular areas. For instance, the Capital Gains Manual is written by technical advisers in the Capital Gains Technical Group (CGTG), which is part of Business, Asset and Individuals (BAI).<sup>208</sup>

To this end, there is clearly some internal process for the production of general soft law instruments, but it is unclear whether there is a systematic approach or whether the matter is left to the discretion of the teams concerned. In this respect, it is unclear whether the different general soft law instruments are subjected to legal scrutiny within HMRC. There are examples, for instance, of mistakes in HMRC soft law which one would expect would be picked up by a lawyer (or at least an alert lawyer). For instance, in HMRC's Administrative Law Manual there is a section dedicated to the *Wilkinson* case in the context of discussing the scope of HMRC's managerial discretion.<sup>209</sup> However, the discussion not only neglects to mention the judgment of Lord Hoffmann and the seminal paragraphs therein, but rather only looks at Lord Phillips' (then Master of the Rolls) judgment in the Court of Appeal neglecting entirely to even mention

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<sup>207</sup> HMRC, *ADML4400: Extra-statutory concessions: Who to contact before making a new extra-statutory concession* (March 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/admin-law-manual/adml4400>> accessed 31 September 2017.

<sup>208</sup> HMRC, *CG99998: Technical Help: How to get more help about topics in the CG Manual* (March 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/capital-gains-manual/cg99998>> accessed 31 September 2017.

<sup>209</sup> HMRC, *ADML3300: Collection and Management: Case law* (March 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/admin-law-manual/adml3300>> accessed 31 September 2017.

the House of Lords judgment. The Manual notes that Lord Phillips approved of the judgment of Lord Scarman in the *Fleet Street Casuals* case. Lord Phillips did do so, but the Manual incorrectly attributes the famous Lord Diplock quote in respect of the scope of HMRC's managerial discretion to Lord Scarman. It states that:

Lord Scarman said: “..the board are charged by statute with the care, management and collection on behalf of the Crown [of these taxes]. In the exercise of these functions, the board have managerial discretion as to the best means of obtaining for the national exchequer the highest net return that is practicable having regard to the staff available to them and the cost of collection.”

Sometimes, HMRC will involve the public in the promulgation of general soft law as is set out below.<sup>210</sup> For instance, HMRC has previously endeavoured to issue guidance concurrently with legislation and work with large businesses to ensure that the guidance is amended to reflect evolving commercial circumstances.<sup>211</sup> At times, HMRC responds to taxpayer requests for greater clarity by producing soft law setting out HMRC's view of the scope of legislative provisions.<sup>212</sup> Elsewhere it has reconsidered its guidance in light of consultation with taxpayers after being better informed as to the consequences of the guidance in its previous iteration.<sup>213</sup> As with the question of legal scrutiny however, there is no clear framework as to when the public will be involved in

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<sup>210</sup> See below Part III. 4.4. Consultation with taxpayers'.

<sup>211</sup> HMRC, *Making a difference: clarity and certainty. 2006 review of links with large business* (October 2007) 9.

<sup>212</sup> See below Part III. 4.4. Consultation with taxpayers. Note however that this plays in to the moral hazard type risk explored in text at n 324.

<sup>213</sup> *Ibid.*

the promulgation of forms of general HMRC soft law and appears to be done on a purely ad hoc basis.

The sense overall from the admittedly sparse sources is that HMRC does not have a coherent streamlined system for the production of forms of general HMRC soft law. However, this is an area which would benefit from interviews with HMRC's teams in order for a fuller picture to be presented.

#### **2.4. Interim Conclusion**

Skepticism about general soft law is not unfounded, but to seek to eliminate it would be to misconceive the role of discretion. Parliament through prescribing rules introduces discretion. For a body like HMRC endowed with responsibility for managing the tax system, it is axiomatic that the public authority will have administrative discretion as to how that task is carried out. General soft law is merely a manifestation of this discretion in action. Its inherent legitimacy is derived from Parliament and as such it is constitutionally proper for HMRC to produce soft law in its variety of forms. Put bluntly, where there is law, there will be general soft law.

The question about the constitutionality of general soft law however is separate from the question of whether it is normatively desirable, or put another way, why HMRC *ought* to produce forms of general soft law. It is similarly separate entirely from the question of whether general soft law as it arises in practice is problematic, in particular, from the perspective of Parliamentary sovereignty. These and many other issues are to be assessed in the subsequent Sections of this thesis.

### 3. The case for HMRC soft law

*No doubt this kind of near-law will be with us for some years to come; in its benign form, that is to be hoped for, in its malignant form feared*<sup>214</sup>

Description both of the scope and substance of soft law does not normatively justify its proliferation. Just because HMRC can, does not mean that HMRC should. The case of general soft law requires a principled rationale. The traditional arguments that have been advanced in favour of the promulgation of forms of general soft law are essentially derivative of the two broader claims of expertise and efficiency.<sup>215</sup> Such soft law is more efficient than statute in terms of flexibility in that the rules can be changed more easily.<sup>216</sup> Similarly, non-technical language can be used, thereby encouraging speedy drafting in combination with high levels of comprehensibility to lay persons.<sup>217</sup> The efficiency is most visible when general soft law is substituted for hard law so as to persuade rather than command parties to subscribe to norms,<sup>218</sup> thereby avoiding difficult compromises between different political, economic, social and industrial interests to be effected.<sup>219</sup> In terms of expertise on the other hand general soft

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<sup>214</sup> Robert E. Megarry 'Administrative Quasi-Legislation' (1944) 60 LQR 125, 128.

<sup>215</sup> Robert Baldwin, *Rules and Government* (Clarendon Press 1995) 85.

<sup>216</sup> Paul Craig, *Administrative Law* (8th edn., Sweet and Maxwell 2016) 465; Ganz, *Quasi Legislation* (n 22) 96-97; Robert Baldwin and John Houghton 'Circular Arguments: The Status and Legitimacy of Administrative Rules' (1986) PL 239, 240; Peter Cane, *Administrative Law* (5th edn., OUP 2011) 154.

<sup>217</sup> *In re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289 [24] (Lord Steyn); Ganz, *Quasi Legislation* (n 22) 96; Baldwin (n 215) 85.

<sup>218</sup> Ganz, *Quasi Legislation* (n 22) 97-105; Baldwin (n 215) 86.

<sup>219</sup> Ganz, *Quasi Legislation* (n 22) 106; Baldwin (n 215) 86; Cane (n 216) 154; cf: Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67 Nordic Journal of International Law 381, 384.

law promulgation by the executive allows the collective experience of those who actually enforce the rules to be distilled and applied.<sup>220</sup>

These arguments taken to their logical conclusion however prescribe a normative claim that general soft law is to be preferred to hard law. This thesis on the other hand is concerned with the promulgation of forms of general soft law by HMRC which buttresses, *or ought to buttress*, rather than supplant law. Put another way, this thesis does not seek to advance the case that such soft law is to be preferred to legislation as aided by case law, but rather that it deserves a tangential place (although the risk in practice that the availability of soft law may negatively impact the legislative process is accepted). The purpose of this Section accordingly is twofold. The first is to set a positive case for the promulgation of forms of general soft law by HMRC which coexist with the law, rather than being preferred to it. The second is to distill the core components of this case into a normative framework which can be used for the rest of this thesis

### **3.1. The positives and the negatives of soft law**

The positive case for general soft law pivots upon how this soft law promotes the rule of law and is desirable by reason of its capacity to structure administrative discretion. The criticisms leveled at general soft law must also be investigated in this respect, through the course of which it will be highlighted that the arguments against general soft law relate to practice, not principle.

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<sup>220</sup> Baldwin (n 215) 85; Cane (n 216) 154.

### 3.1.1 How the rule of law advances the case for soft law

The rule of law has been described as the overarching principle of constitutional law.<sup>221</sup> Although writers agree as to its importance, it is nevertheless an elusive concept, devoid of universal clarity. Notwithstanding such differences, general agreement can be found in relation to one particular element of the concept. Most writers agree that laws ought to act as guidance.<sup>222</sup> Raz describes this as the 'basic idea' of the rule of law,<sup>223</sup> from which he subsequently deduces eight principles. The first three principles require that the law should conform to standards designed to enable it effectively to guide action.<sup>224</sup> These are that all laws should be prospective, open, clear, relatively stable and that the making of particular laws should be guided by open, stable, clear, and general rules.<sup>225</sup> In the same vein, Lord Bingham's first principle of the rule of law is that the law must be accessible and, so far as possible, intelligible, clear and predictable.<sup>226</sup> Lon Fuller regarded the rule of law as encompassing principles such that laws are not retroactive, but are understandable, consistent, foreseeable and stable.<sup>227</sup> Renowned classical liberal Friedrich Von Hayek meanwhile focused his conception of the rule of law on the coercive powers of the state. Nevertheless, the same principle of the law acting as guidance emerges from his definition:

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<sup>221</sup> Lord Steyn, 'Democracy through law' [2002] EHRLR 723, 727; Paul Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) PL 467, 487.

<sup>222</sup> Endicott (n 31) 185.

<sup>223</sup> Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195, 196.

<sup>224</sup> *ibid* 202.

<sup>225</sup> *ibid* 198-200.

<sup>226</sup> Lord Bingham, 'The Rule of Law' (2007) CLJ 67. See also: Tom Bingham, 'The Rule of Law' (Penguin 2011).

<sup>227</sup> Lon Fuller, *The Morality of Law* revised edn (Yale University Press, 1969) 39, 46-90.

[S]tripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand—*rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge*<sup>228</sup>

The general consensus then is that laws ought to act as guidance for individuals. A citizen should, before committing herself to any course of action, be able to know in advance the legal consequences that will follow.<sup>229</sup> European Convention on Human Rights ('ECHR') jurisprudence has sought to elaborate upon what substantive qualities law must have in order to satisfy this principle. The ECHR requires that intervention with certain rights and freedoms<sup>230</sup> be '*prescribed by law*'.<sup>231</sup> This requires in turn that the substance of law should satisfy certain benchmarks as set out in the seminal judgment of the Strasbourg court in the case of *The Sunday Times v United Kingdom*<sup>232</sup>:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable<sup>233</sup>

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<sup>228</sup> Friedrich A Hayek, *The Road to Serfdom* (Routledge 1944) 54.

<sup>229</sup> *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, 638 (Lord Diplock).

<sup>230</sup> Articles 5, 8-11 of the ECHR.

<sup>231</sup> The convention actually requires that incursion upon such rights either be prescribed by law or in accordance with law. However, for ease of readership, I refer only to 'prescribed by law', as these phrases are synonymous. See: *The Sunday Times v UK* (App. 6538/74), 26 April 1979, Series A No 30, (1979-80) 2 EHRR 245 §48.

<sup>232</sup> *ibid.*

<sup>233</sup> *ibid* 271, §49.

The qualities of accessibility and foreseeability accordingly must be present in order to satisfy the rule of law requirements of the ECHR. The citizen must have access to the law and the law must be formulated with sufficient clarity in order that she may foresee the consequences of not regulating her affairs in accordance with the law. The test is that of *sufficient* precision of foreseeability, as absolute certainty is recognised as unattainable. Some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts.<sup>234</sup> The sufficiency of the clarity required will vary according to the nature of the law in question and accordingly the degree of impact upon an individual.<sup>235</sup> For instance, a greater degree of clarity might be required in relation to State surveillance laws<sup>236</sup> than that of lightly punishable obscenity laws,<sup>237</sup> given the former's significant intrusion on a person's privacy<sup>238</sup> and the latter's need to remain flexible in order to accord to the prevailing views of society.<sup>239</sup>

Since *The Sunday Times v United Kingdom*, the courts have consistently inquired as to the 'quality' of the law which interferes with a convention right.<sup>240</sup> This interrogation of the rule of law elaborates upon the place of general soft law in the machinery of justice. The response has been that it may play a

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<sup>234</sup> *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 [35] (Lord Bingham); *X Ltd and Y v United Kingdom* (1982) 28 DR 77, 81, [9]; *SW v United Kingdom* (1995) 21 EHRR 363, [36].

<sup>235</sup> *Autronic v Switzerland* (1990) 12 EHRR 485, [55] and [59].

<sup>236</sup> *Mersch v Luxembourg* (1985) 43 DR 34, 94, 114 EComm HR; *Leander v Sweden* (1987) 9 EHRR 433. See also: *Walumba Lumba v Secretary of State for the Home Department* [2011] UKSC 12 [34], [2011] 2 WLR 671.

<sup>237</sup> *Muller v Switzerland* (1988) 13 EHRR 212.

<sup>238</sup> *Kruslin v France* (1990) 12 EHRR 547 [17].

<sup>239</sup> *Muller* (n 237) [29].

<sup>240</sup> *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279 (Lord Diplock); *Huvig v France*, (App. 11105/84), 24 April 1990, Series A No 176-B, (1990) 12 EHRR 528, §26 [33]–[35]; *SW v United Kingdom* (n 234); *Rimmington* (n 234) [35] (Lord Bingham).

complementary role in relation to the rule of law, where it furthers the ideals of accessibility and foreseeability. General soft law supplements the law by providing further guidance as to its minutiae, thus rendering the citizen better informed of the legal consequences that will flow from her actions. Several seminal cases concerning ECHR rights serve to demonstrate this utility of general soft law, and thereby underline the broader claim that it is a tool for effectuating the rule of law.

The first case is that of *Malone v UK*,<sup>241</sup> which concerned the law relating to the interception of communications on behalf of the police for the purposes of the prevention and detection of crime. Although the law at issue was ‘somewhat obscure and open to differing interpretations’,<sup>242</sup> the court nevertheless noted the role that administrative publications could play in reducing this ambiguity:

Detailed procedures concerning interception of communications on behalf of the police in England and Wales do exist... The public have been made aware of the applicable arrangements and principles through publication of the Birkett report and the White Paper and through statements by responsible Ministers in Parliament<sup>243</sup>

The court went on to hold that although the soft law in question helped to satisfy the qualitative requirements of the rule of law under the ECHR, it could not be said with any reasonable certainty what elements of the powers to intercept were incorporated in legal rules and what elements remained within the discretion of the executive.<sup>244</sup> To that extent, the minimum degree of legal

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<sup>241</sup> *Malone v UK* (1985) 7 EHRR 14 [79].

<sup>242</sup> *ibid.*

<sup>243</sup> *ibid.*

<sup>244</sup> *ibid.*

protection to which citizens are entitled under the rule of law in a democratic society was found to be lacking.<sup>245</sup> The case therefore highlights two features of general soft law: that it can aid in advancing the rule of law in terms of accessibility and foreseeability, but also that its ability to do so is not beyond limitation.<sup>246</sup> This judgment accordingly is in line with my general proposition that general soft law can serve an important role, but that it should not seek to replace the underlying law.

The utility of general soft law is seen to an even greater extent in the second case of *Silver v United Kingdom*.<sup>247</sup> The applicants were convicted prisoners who complained that the control of their mail by prison authorities constituted a breach of their rights to privacy and expression under Articles 8 and 10 of the ECHR. A question arose in the proceedings as to whether the law in this area was of sufficient quality to satisfy the rule of law requirements of Articles 8 and 10. The court found that it is not necessary that the law itself be meticulously precise and cover every possible eventuality.<sup>248</sup> What is important is foreseeability. Thus the substantive law itself can be buttressed by general soft law, especially where general guidance is published, to provide the requisite 'quality' to the law.<sup>249</sup> In this case, the soft law concerned was that of 'Standing Orders' and 'Circular Instructions' issued by the Home Secretary to prison governors, the purpose of which was to provide guidance in relation to the control of prisoner correspondence:

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<sup>245</sup> *ibid.*

<sup>246</sup> In this vein, Endicott has proposed that complete clarity of law is unattainable. See: Endicott (n 31), in particular Ch. 9.

<sup>247</sup> *Silver v United Kingdom* (1983) 5 EHRR 347, [88]-[89].

<sup>248</sup> *ibid* [88].

<sup>249</sup> *ibid.*

[T]he Orders and Instructions established a practice which had to be followed save in exceptional circumstances... In these conditions, the Court considers that although those directives did not themselves have the force of law, they may—to the admittedly limited extent to which those concerned were made sufficiently aware of their contents—be taken into account in assessing whether the criterion of foreseeability was satisfied in the application of the Rules<sup>250</sup>

The court held accordingly that the law was sufficiently expanded upon by the Orders and Instructions so as to protect against any breach of the rule of law requirements of the ECHR. Thus, whilst *Malone* above indicated the rule of law potential of general soft law, this case made the importance of it as a means of guiding persons as to their rights and obligations under the law abundantly clear.

*R (Purdy) v Director of Public Prosecutions*<sup>251</sup> (*'Purdy'*) takes this concept of general soft law supplementing the underlying law to its logical conclusion. Debbie Purdy suffered from primary progressive multiple sclerosis and wished to travel to Dignitas in Switzerland in order to end her life. However, she would need assistance from her husband in order to carry this out. Whilst suicide itself is not a criminal offence in the UK, it is unlawful to assist a person to commit suicide by virtue of section 2(1) of the Suicide Act 1961. The jurisdiction to institute proceedings under s. 2(1) lies with the Director of Public Prosecutions ('DPP'), and it is well established that the DPP has discretion as to whether to take on a case.<sup>252</sup> Chief among the DPP's concerns when exercising this

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<sup>250</sup> *ibid.*

<sup>251</sup> *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345 (HL).

<sup>252</sup> *Smedleys Ltd v Breed* [1974] AC 839, 856 (Viscount Dilhorne).

discretion is whether it is in the public interest to pursue a case.<sup>253</sup> It was argued by the Claimant accordingly that failing to promulgate a clear policy or failing to disclose the criteria that the DPP applies in cases of this kind breached the rule of law requirements of the ECHR for lack of foreseeability. There was insufficient clarity as to the consequences flowing from the law, thereby undermining the ability of herself and her husband to regulate their conduct accordingly.

The Court of Appeal held that this ‘failure’ to promulgate a crime specific policy relating to assisted suicide did not have the effect of undermining the rule of law requirements of the ECHR.<sup>254</sup> The House of Lords unanimously reversed this decision. In the leading speech, Lord Hope elaborated upon the qualitative requirements of accessibility and transparency that the ECHR requires:

Accessibility means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it what acts and omissions will make him criminally liable... The requirement of foreseeability will be satisfied where the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail<sup>255</sup>

The court was of the view that DPP promulgated soft law could have the effect of supplementing these qualitative elements in order to satisfy the ‘rule of law’ requirement:

The Code will normally provide sufficient guidance to Crown Prosecutors and to the public as to how decisions should or are likely to be taken whether or not, in a given case, it will be in the public interest to prosecute. This is a valuable safeguard for the vulnerable, as it enables the prosecutor to take into account the

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<sup>253</sup> *Purdy* (n 251) [46]-[53] (Lord Hope).

<sup>254</sup> *ibid* [79].

<sup>255</sup> *ibid* [41].

whole background of the case. In most cases its application will ensure predictability and consistency of decision-taking, and people will know where they stand<sup>256</sup>

However, the Code issued by the DPP in relation to prosecutions for assisted suicide had not attained such a status.<sup>257</sup> The court accordingly ordered the DPP to promulgate an offence-specific policy identifying the facts and circumstances which the office-holder takes into account when deciding whether or not to consent to a prosecution under s. 2(1) of the 1961 Act.<sup>258</sup> The DPP subsequently obliged and issued a new code.<sup>259</sup> Subsequently however, the Supreme Court in *R (Nicklinson) v Ministry of Justice*<sup>260</sup> (*'Nicklinson'*) held that this new code was still unsatisfactory in that it failed to properly reflect the prosecutorial policy of the DPP and directed the DPP to review it accordingly.<sup>261</sup> The DPP subsequently revised the code so as to align the policy with the publication.<sup>262</sup>

Like *Malone* and *Silver*, general soft law in *Purdy* and *Nicklinson* was seen as a means of supplementing the rule of law and offering further guidance to citizens. The courts however went further than the previous Strasbourg decisions by holding that the rule of law was insufficiently effectuated by the soft law which existed at the time of the case and ordered the public authority to

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<sup>256</sup> Ibid [54].

<sup>257</sup> Ibid [55].

<sup>258</sup> Ibid, [1] (Lord Phillips); [56] (Lord Hope); [64], [67], [69] (Baroness Hale); [86] (Lord Brown); [101] (Lord Neuberger).

<sup>259</sup> The Director of Public Prosecutions, *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (February 2010), available at: <[http://www.cps.gov.uk/publications/prosecution/assisted\\_suicide\\_policy.html](http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html)> accessed 31 September 2017.

<sup>260</sup> *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2014] 3 WLR 200.

<sup>261</sup> Ibid [144], [146] (Lord Neuberger); [195] (Lord Mance); [206] (Lord Wilson); [254] (Lord Sumption); [323] (Lady Hale).

<sup>262</sup> Director of Public Prosecutions (n 259) was revised in October 2014.

reissue more comprehensive guidance. General soft law was then not seen merely as a means of giving effect to the rule of law, but, in the circumstances, was the *only* way of satisfying the qualitative requirements of the ECHR. These cases accordingly build upon the utility of general soft law; from *Malone*, where its use as producing greater certainty, and also its limits, were recognised; to *Silver*, where the soft law actually achieved such a result; to *Purdy* and *Nicklinson* where the court obliged the DPP to issue further general soft law. In essence, these decisions recognise the paramount contribution of general soft law: that it advances the rule of law in tandem with, rather than in the absence of, law by guiding citizens as to the legal consequences which will flow from their actions.

### 3.1.2. How ‘structuring discretion’ advances the case for soft law

It has long been orthodox thought that the promulgation of forms of general soft law by administrative agencies acts as a prudent means of ‘structuring’ administrative discretion or a particular statutory discretion.<sup>263</sup> The argument is that this soft law allows a public body to inject specific policies into the exercise of its discretionary powers,<sup>264</sup> thereby ensuring that discretion is exercised in a consistent manner by officials.<sup>265</sup> Such is the orthodoxy of this proposition that it has come to be recognised as a significant tenet of the

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<sup>263</sup> First proposed in Davis (n 8). See also: Jeffrey Jowell, *Law and Bureaucracy: Administrative Discretion and the Limits of Legal Action* (Associated Press 1975).

<sup>264</sup> See Galligan (n 4) Ch. 1.

<sup>265</sup> Colin Turpin and Adam Tomkins, *British government and the constitution: text and materials* (7th edn. CUP 2011).

constitutional framework.<sup>266</sup> In *Alconbury Developments*,<sup>267</sup> Lord Clyde reflected upon this recognition:

The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions<sup>268</sup>

There are however, two elements to this argument. The first is that the creation of policies within public authorities is a desirable means of structuring discretion, so as to ensure internal consistency in decision-making. Structuring thereby satisfies another aspect of the rule of law, namely, that all persons should be treated equally before the law. The second is the importance that these policies should be communicated to the public as it informs individuals who are affected by the policies, thereby furthering the rule of law,<sup>269</sup> and also opens such policies up to scrutiny and criticism by third parties. This was evidenced above in *Nicklinson* wherein the court directed the DPP to review the published soft law policy so as to reflect the department's own internal approach.

A final note should be made however in relation to the principle that a public body should not bind itself to exercising a discretion in only one particular way, what Perry calls the 'flexibility rule'.<sup>270</sup> Where a public body is granted

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<sup>266</sup> *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719, [2010] 3 WLR 1526 (Sedley LJ).

<sup>267</sup> *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295.

<sup>268</sup> *ibid* [143].

<sup>269</sup> Craig (n 221) 464.

<sup>270</sup> See Adam Perry, 'The Flexibility Rule in Administrative Law' (2017) 76(2) CLJ 375. See also, Henry Molot, 'The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion' (1972) 18 McGill LJ 310; Galligan, 'The nature and function of policies' (n 22); Chris Hilson, 'Judicial Review, Policies and the Fettering of Discretion' (2002) PL 111.

discretion, it implies that it may make a choice. There is nothing to this end contrary to the idea of discretion that the choice that the public body might make would be actually to *not* have any discretion. In other words, to formulate one rule that would apply regardless of circumstances. Discretion requires us to respect the decision made by the discretion holder. However, Perry makes a compelling case that public bodies must not adopt an overly rigid policy because it fails to take into account the value of participation: it refuses a citizen the chance to make her case to the decision-maker, who has rather determined already the decision to be made.<sup>271</sup> Thus, where HMRC seeks to structure a statutory discretion or its managerial discretion as applied to a particular context, it must not do so in a manner which leaves no flexibility.

### 3.1.3. The counterclaims: six arguments

The proposition that the production of general soft law is a positive development has attracted many detractors over the years.<sup>272</sup> Broadly the opposition's arguments can be distilled into six general, although not mutually exclusive, claims. The first is what *others*<sup>273</sup> have deemed as the great advantage of soft law,<sup>274</sup> namely that it may operate so as persuade actors, rather than have them compelled by law.<sup>275</sup> In this sense general soft law is deemed to be preferable to law as it avoids having to arrive at compromises between different

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<sup>271</sup> Perry (n 270) 391-397.

<sup>272</sup> David Williams, 'Extra-Statutory Concessions' (1979) BTR 137; Lord Hewart, *The New Despotism* (Ernest Benn Ltd. 1929).

<sup>273</sup> This italicization is important here as it stresses that the author is not to be found amongst this class.

<sup>274</sup> Christine Parker and John Braithwaite, 'Regulation' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2003); Ganz, *Quasi Legislation* (n 22) 106.

<sup>275</sup> Baldwin (n 215) 86; Cane (n 216) 154; Sue Arrowsmith, 'Quasi-legislation: recent developments in secondary legislation' (1990) PL 144, 144-145.

political, economic, social and industrial interests.<sup>276</sup> Informal European Union Law<sup>277</sup> and International Law<sup>278</sup> have been cited as examples of such a phenomenon. The essential problem with advocating such soft law in preference to hard law then is that legislative powers are effectively exercised without the 'formal legitimation of one-person one-vote election'.<sup>279</sup> This can have the effect of undermining the democratic process<sup>280</sup> as this use of soft law takes the power and accountability away from those empowered but accountable.<sup>281</sup> This argument is compelling, but it can be quickly dismissed for the purposes of this thesis by virtue of the fact that it is not proposed that general soft law is preferable to hard law. This thesis is concerned with the use of general soft law as a means of supplementing hard law, rather than replacing it. In other words, that general soft law merits a place in the framework *with*, and not *instead of*, law.

The second is that there are weak oversight mechanisms in relation to general soft law,<sup>282</sup> which can result in it overreaching the underlying law<sup>283</sup> by virtue of incorporating a Revenue legal error. This is undoubtedly the case in

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<sup>276</sup> Baldwin (n 215) 86; Cane (n 216) 154.

<sup>277</sup> Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004).

<sup>278</sup> Kenneth Abbot and Duncan Sindal, 'Hard and Soft Law in International Governance' (2000) 54(3) *International Organization*; Martha Finnemore and Stephen Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55(3) *International Organization* 743.

<sup>279</sup> Richard Stewart 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1667, 1688.

<sup>280</sup> Kim Brooks, 'A Reasonable Balance: Revenue Authority Discretions and the Rule of Law in Canada' 70 in Evans, Freedman, Krever, *The Delicate Balance* (n 89); Peter Aranson, Ernest Gellhorn, and Glen Robinson, *A Theory of Legislative Delegation* (1982) 68 *Cornell Law Review* 1.

<sup>281</sup> David Schoenbrod, *Power without Responsibility – How congress abuses the people through delegation* (YUP 1993) 23; cf: Peter Schuck 'Delegation and Democracy, Comments on David Schoenbrod' (1999) 20(3) *Cardoza Law Review* 775.

<sup>282</sup> Baldwin (n 215) 119-120.

<sup>283</sup> Craig (n 221) 466; Brooks (n 280) 70; see generally Part III. 2.1. The problem of soft law being inconsistent with the law.

relation to HMRC. Being a non-ministerial body,<sup>284</sup> supervision must come through channels alternative to those traditionally associated with government departments. The Treasury Select Committee exercises Parliamentary control, but in practice has paid little attention to the proliferation of forms of general soft law.<sup>285</sup> Although the Comptroller & Auditor General, National Audit Office and Public Accounts Committee have nominal oversight of concessions, these bodies have not been effective historically in checking ESCs.<sup>286</sup> The expertise of these bodies respectively lies in holding governmental departments to account in relation to spending for instance and not in critically analysing the substance of general soft law instruments.<sup>287</sup> The courts, in spite of the notable dialogue and scrutiny as arose in *Nicklinson* above, are hamstrung by their limited scope for intervention and in practice have had little practical impact.<sup>288</sup>

There is much force in the argument that the oversight mechanisms in relation to forms of general HMRC soft law are weak. That improvements should be made is not in dispute and to that end, should be taken into account when formulating proposals for reform. However, the mere fact that reform is needed so as to produce robust oversight is not a reason for dismissing entirely the use of this soft law. It is an argument not about the principle of general soft law, but rather about the use of it in practice. Indeed, the addition of robust oversight is an argument in *favour* of general soft law. This soft law which supplements the

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<sup>284</sup> HMRC, *Our Governance*, available at: <<https://www.gov.uk/government/organisations/hm-revenue-customs/about/our-governance#change-delivery-committee>> accessed 31 September 2017.

<sup>285</sup> See below: Part III. 4.1. Treasury Select Committee.

<sup>286</sup> See below Part III. 4.2. Comptroller & Auditor General, National Audit Office and Public Accounts Committee.

<sup>287</sup> See below Part III. 4.5. Interim Conclusion.

<sup>288</sup> See below Part III. 4.3. The courts' residual role.

underlying law is owed a unique place in the constitutional machinery. A properly functioning oversight mechanism would serve to further legitimize its promulgation in the same manner that Parliamentary scrutiny legitimizes legislation.

The third is that strong lobbying and interest groups may exploit the process of promulgation of forms of general HMRC soft law.<sup>289</sup> Certain segments of society can exercise excessive influence over the rules, whilst the general populace may have little input.<sup>290</sup> As has been witnessed in the case of ESCs, this concern is not merely academic. Take the example of the concession granted by HMRC in relation to miner's free coal, which operated from at least World War II<sup>291</sup> until 2003.<sup>292</sup> Benefits in lieu of payment are generally subject to income tax.<sup>293</sup> The effect of this concession however was that coal, given to miners in lieu of payment, would not be subject to income tax.<sup>294</sup> This issue of favouring certain groups is not a problem of substance, necessarily, but rather one of form.<sup>295</sup> Put another way, it is relatively unproblematic that certain groups in society may have special treatment. The issue is that HMRC does not have the authority to arbitrarily discriminate in this way.

As with the oversight argument, this claim of favouring certain classes of people who have influence over the process is not an attack on the principle of

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<sup>289</sup> Schoenbrod (n 281) 21; Stewart (n 279) 1684-1685; Brooks (n 280).

<sup>290</sup> Craig (n 221) 466.

<sup>291</sup> Inland Revenue, *A List of Extra Statutory Wartime Concessions given in the Administration of Inland Revenue Duties* (October 1944) Cmd. 6559.

<sup>292</sup> It was enacted in Income Tax (Earnings and Pensions) Act 2003, s. 306.

<sup>293</sup> See generally *Tax on company benefits* <<https://www.gov.uk/tax-company-benefits/overview>> accessed 31 September 2017.

<sup>294</sup> *Vestey (no. 2)* (n 113) 203 (Walton J).

<sup>295</sup> Megarry (n 214) 126.

promulgating general soft law instruments, but rather about concerns in practice. Further, it is merely a subset of the broader concern in relation to oversight. To this end, discriminating between classes through the exploitation of general soft law instruments is a legitimate concern, but this argument does not serve to undermine the merit of general soft law.

A fourth is that general soft law may conflict with the rule of law in terms of accessibility.<sup>296</sup> Many general soft law rules may fail the rule of law test by virtue of being unpublished, thereby rendering the citizen unable to make themselves aware of rules which affect them. Publication gives general assurance to citizens that there is no discriminatory treatment between those who come within the same rule,<sup>297</sup> thereby increasing confidence in the system by demonstrating that there are 'no favourites and no sacrificial victims'.<sup>298</sup> Publication also ensures greater visibility,<sup>299</sup> thereby supporting the role of oversight bodies, who can analyse the legality of the soft law and also test administrative action against the published policy, to ensure fairness of application. Publication provides a safeguard whereby the material is open to examination by interested parties, consultation and critique.<sup>300</sup> Third, where general soft law rules are unpublished, their legal status 'may be unclear'.<sup>301</sup> The relevant decision-maker will be unsure how much weight to attach to the soft

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<sup>296</sup> Craig (n 221) 466. See also: *R v Torquay Licensing Justices, ex parte Brockman* [1951] 2 KB 748, 488; *R v Holborn Licensing Justices, ex parte Stratford Catering Co Ltd* [1926] All ER 279, (1926) 42 TLR 778; *R v CICB, ex parte Ince* [1973] 1 WLR 1334; *British Oxygen v Board of Trade* [1971] AC 610.

<sup>297</sup> Davis (n 8) 110; *UK Uncut Legal Action v HMRC* [2013] EWHC 1283 (Admin), [2013] SWTI 1849 [65]. See also, *R (E) v Nottinghamshire Healthcare NHS Trust* [2009] EWCA Civ 795 [90], (2009) EHRR 1442.

<sup>298</sup> *Fleet Street Casuals* (n 25) 651 (Lord Scarman).

<sup>299</sup> Craig (n 221) 469.

<sup>300</sup> *ibid* 468.

<sup>301</sup> *ibid* 466.

law at issue. HMRC has historically been guilty of failing to publish its forms of general soft law. For instance, it was once noted that the published ESCs merely represented the 'tip of the iceberg',<sup>302</sup> in that quite a significant proportion of ESCs were not published.<sup>303</sup>

In response to this argument, for the reasons given, it is clear that general soft law in general merits publication, in order to accord with the principles of accessibility and foreseeability. This furthers the point advanced above that there is a distinction between having general soft law itself, which acts as a means of structuring discretion, and such soft law being generally accessible to the public. In other words, there is a need not only for policies and such soft law to be promulgated but also crucially that it be available to those affected and third parties who can effectively scrutinize the publications. As with oversight, this is an issue which must be combatted in this thesis, but it does not serve so as to justify resiling from the process of promulgating forms of general HMRC soft law. Rather, the proper course of action is to prescribe reforms that will ensure that relevant<sup>304</sup> material is published in a timely fashion.

The fifth argument is that forms of general soft law could simply be regularised as hard law through the legislative process. This was put plainly by Lord Radcliffe in *Inland Revenue Commissioners v Frere* in relation to ESCs:

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<sup>302</sup> Gammie, 'Revenue Practice' (n 107) 314.

<sup>303</sup> See also Malcolm Gammie who in turn cites several examples of unpublished concessions: Gammie, 'Revenue Practice' (n 107); John Booth also cites an instance of a statement of practice being later recharacterised as a statutory concessions: Booth, *Stand and Deliver* (n 127) 180.

<sup>304</sup> It is not the case that *all* material should be published. See: Michael Asimow, 'Nonlegislative rulemaking and regulatory reform' (1985) *Duke Law Journal* 381, 426.

I have never understood the procedure of extra-statutory concessions in the case of a body to whom at least the door of Parliament is opened every year for adjustment of the tax code<sup>305</sup>

A variety of practical issues arise in relation to this suggestion however. The first is that there is simply insufficient Parliamentary time to place all such soft law on a statutory footing.<sup>306</sup> This is no more evidenced than by the fact that despite a concerted effort since the *Wilkinson* case in 2005 in which the House of Lords *apparently* clarified the power to grant ESCs,<sup>307</sup> the placing of ESCs in legislation has occurred at a sluggish pace. Where possible, concessions which overreach HMRC's managerial discretion have been put on a statutory footing.<sup>308</sup> However, the Finance Acts of 2006<sup>309</sup> and 2007<sup>310</sup> gave a statutory footing to only one ESC relating to direct tax each respectively. Income Tax Bill 2006-7 (which subsequently became the Income Tax Act 2007) sought to incorporate a modest 4 class concessions, only two of which were listed expressly in the HMRC publications as concessions.<sup>311</sup> Neither ESC was incorporated into the final Act however. Even with the delegated power to legislate concessions by statutory instrument, namely section 160 of the Finance Act 2008, HMRC in 2008 sought only to regularise 19, of which a mere 14 in were classified in HMRC publications

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<sup>305</sup> *Inland Revenue Commissioners v Frere* [1964] 3 WLR 1193, 1209.

<sup>306</sup> Baldwin and Houghton (n 216) 270; Treasury and Civil Service Committee, *Budgetary Reform in the UK* (HC 1981-82; 137-vi) Q 500 (Sir Geoffrey Howe, then Chancellor of the Exchequer).

<sup>307</sup> HMRC, *Withdrawal of extra statutory concessions 2014* (n 110) 4. The author disagrees that *Wilkinson* is the catalyst for the change to HMRC practice, as expanded upon in Part III. 4.3.2. Relationship with HMRC.

<sup>308</sup> See for instance, The Enactment of Extra-Statutory Concessions Order 2014 SI 2014/211.

<sup>309</sup> Finance Act 2006, s. 64.

<sup>310</sup> Finance Act 2007, s. 62.

<sup>311</sup> Explanatory Notes to the Income Tax HC Bill (2006-07), [14].

as ESCs, the others being either unpublished or to be found in HMRC Manuals.<sup>312</sup>

In 2009, the ambition was to legislate 19 concessions, only 15 of which were previously in the concession lists;<sup>313</sup> in 2010, 7 were sought to be legislated, only 4 of which were classed as concessions;<sup>314</sup> and in 2011,<sup>315</sup> 2012<sup>316</sup> and 2014<sup>317</sup>, the goal was to regularise a mere two in each year respectively.<sup>318</sup> This argument is only further strengthened when it is recalled that this is not a modern

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<sup>312</sup> HMRC, *Extra-statutory Concessions – Technical Consultation on draft Legislation* (November 2008) 5-6, available at: [http://webarchive.nationalarchives.gov.uk/20090211090306/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageLibrary\\_ConsultationDocuments&propertyType=document&columns=1&id=HMCE\\_PROD1\\_028967](http://webarchive.nationalarchives.gov.uk/20090211090306/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_028967) accessed 31 September 2017.

<sup>313</sup> See here: HMRC, *Extra-statutory Concessions – Second Technical Consultation on Draft Legislation* (July 2009) 5-6 [http://webarchive.nationalarchives.gov.uk/20091102173035/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageLibrary\\_ConsultationDocuments&propertyType=document&columns=1&id=HMCE\\_PROD1\\_029701](http://webarchive.nationalarchives.gov.uk/20091102173035/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_029701) accessed 31 September 2017 and see here: HMRC, *Extra statutory concessions – third technical consultation on draft legislation* (December 2009) 7 [http://webarchive.nationalarchives.gov.uk/20100202200912/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageLibrary\\_ConsultationDocuments&propertyType=document&columns=1&id=HMCE\\_PROD1\\_029991](http://webarchive.nationalarchives.gov.uk/20100202200912/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_029991) accessed 31 September 2017.

<sup>314</sup> HMRC, *Extra statutory concessions – fourth technical consultation on draft legislation* (December 2010) 6 available at: [http://webarchive.nationalarchives.gov.uk/20110202150218/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageLibrary\\_ConsultationDocuments&propertyType=document&columns=1&id=HMCE\\_PROD1\\_030872](http://webarchive.nationalarchives.gov.uk/20110202150218/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_030872) accessed 31 September 2017.

<sup>315</sup> HMRC, *Extra-statutory concessions – fifth technical consultation on draft legislation* (December 2011) 6 [http://webarchive.nationalarchives.gov.uk/20120207142922/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageLibrary\\_ConsultationDocuments&propertyType=document&columns=1&id=HMCE\\_PROD1\\_031784](http://webarchive.nationalarchives.gov.uk/20120207142922/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_031784) accessed 31 September 2017.

<sup>316</sup> HMRC, *Extra-statutory concessions – sixth technical consultation on draft legislation* (December 2012) 5 [http://webarchive.nationalarchives.gov.uk/20130103030714/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageLibrary\\_ConsultationDocuments&propertyType=document&columns=1&id=HMCE\\_PROD1\\_032505](http://webarchive.nationalarchives.gov.uk/20130103030714/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_032505) accessed 31 September 2017.

<sup>317</sup> HMRC, *Extra-statutory concessions – seventh technical consultation on draft legislation* (October 2014) 5 available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/359867/14\\_1002\\_ESC\\_7th\\_draft\\_legislation\\_condoc\\_v1.0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/359867/14_1002_ESC_7th_draft_legislation_condoc_v1.0.pdf) accessed 31 September 2017.

<sup>318</sup> There was no consultation on draft legislation to regularise concessions in 2013.

phenomenon. It has been HMRC's instruction to regularise ESCs since 1897 and there is even evidence of the existence of class concessions from as early as 1793.<sup>319</sup> Secondly, the particular soft law may be unsuitable for legislation.<sup>320</sup> Again, this is partially evidenced by the fact that despite the effort since *Wilkinson* to reduce the number of ESCs, there remain dozens on HMRC's lists.<sup>321</sup> Some concessions are unsuitable for placement in statute by virtue of triviality, transience or complexity.<sup>322</sup> In relation to this however one could counter that the soft law could merely be placed in an appendix to the Finance Act. It is arguably implausible that additional complexity would be overwhelming, given the current state of the UK tax legislative scheme.<sup>323</sup> It would be a mere drop in an already incredibly complex pond.

To argue on the grounds of pragmatism however, is to entirely miss the point of the arguments advanced here in support of forms of general HMRC soft law. This is namely that this soft law should not be regularised into hard law because *it is not hard law!* It serves a separate purpose, namely to guide

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<sup>319</sup> Public Accounts Committee, *Second report from the committee of public accounts* (HC 1897-98, 261-VIII).

<sup>320</sup> Ganz, *Quasi Legislation* (n 22) 93.

<sup>321</sup> See: HMRC, *Concessions as at 6 April 2017* (n 103) and HMRC, *VAT Notice 48: extra statutory concessions* (September 2017), available at: <<https://www.gov.uk/government/publications/vat-notice-48-extra-statutory-concessions/vat-notice-48-extra-statutory-concessions>> accessed 31 September 2017.

<sup>322</sup> See for instance ESC A94 in HMRC, *Concessions as at 6 April 2017* (n 103) 30-31 and comments made here: Joint Committee on Tax Law Rewrite Bills, *Income Tax (Trading and Other Income) Bill: Evidence* (2004-05, HL 37, HC 285), ev 19. In 2014, HMRC introduced 'Theatre Relief' which provides relief for corporate investors against corporation tax (Finance Act 2014, s. 36, Sch. 4) and in 2016, HMRC announced its intention to withdraw ESC A94 for all new productions from 1 April 2017 (HMRC, *Withdrawal of Extra-Statutory Concession (ESC) A94: Theatre Angels* (September 2016), available at: <<https://www.gov.uk/government/publications/withdrawal-of-extra-statutory-concession-esc-a94-theatre-angels/withdrawal-of-extra-statutory-concession-esc-a94-theatre-angels>> accessed 31 September 2017.). Rather than attempt to incorporate all elements of the concession accordingly, the relief only covers one affected group, namely corporate investors.

<sup>323</sup> For instance, the first 2015 Finance Bill ran to 337 pages, the second ran to 245 pages.

taxpayers as to their obligations and rights *under the law*, and to structure HMRC's discretion. Accordingly, it merits a separate place in the infrastructure to law. The two co-exist in a symbiotic relationship and as such to regularise this soft law would be not only duplicative but also counterproductive.<sup>324</sup>

The final argument to be addressed is the risk that the production of general soft law has a negative impact upon the legislative process, with legislation (whether primary or secondary) being drafted more broadly and in more generalised terms, knowing that the scope can be narrowed down or the legislation explained thereafter by general soft law. Another consequence would be the decision not to use secondary legislation at all, and instead rely upon general HMRC soft law to set out the detail. It can be used as a means of 'moving the complexity from one location – the statutes – to another location – tax authority guidance'.<sup>325</sup> Indeed there has been a trend of drafting anti-avoidance legislation with this precisely in mind.<sup>326</sup> The justification that general soft law should supplement rather than supplant the underlying law still applies to this counterargument as a matter of principle. Put another way, in principle this argument does not undermine the normative case for general soft law, but it is a risk attached to its promulgation in practice. To this end, proposals that might be advanced would thus have to take cognisance of this moral hazard type risk.

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<sup>324</sup> Cornelius Kerwin and Scott Furlong, *Rulemaking: How Government Agencies Write Law and make Policy* (4th edn., CQ Press 2010) 7.

<sup>325</sup> Tracey Bowler, *Countering tax avoidance in the UK: which way forward?* (Institute for Fiscal Studies 2009) 162, available at: <[www.ifs.org.uk/publications/4461](http://www.ifs.org.uk/publications/4461)> accessed 31 September 2017.

<sup>326</sup> See below Part III. 2.1. The problem of soft law being inconsistent with the law, see text at n 55.

### 3.2. A normative framework for promulgation

Aside from the usual arguments made on the basis of expertise and efficiency, this section has presented a positive case for the promulgating forms of general HMRC soft law. As against this, the broad counterclaims do not oppose this soft law in principle, but rather issue legitimate concern as to its operation in practice. To this end, the merits and detractions do not clash, but rather travel in the same direction.<sup>327</sup> As this is the case, the overarching hypothesis of this Part holds: there is a positive case for the promulgation of forms of general HMRC soft law in a manner that supplements rather than supplants the underlying law, but that there are legitimate concerns about its usage in practice.

On the basis of the foregoing analysis, it is posited that there are four key criteria which ought to be present in relation to forms of general soft law, and accordingly, four normative benchmarks against which the system for this soft law can be assessed. The first two relate to the soft law itself whilst the latter two relate to the structure in place for the soft law. There is a considerable degree to which these overlap, and the manner in which this occurs will be highlighted throughout the thesis. They are nevertheless sufficiently distinct so as to warrant their own individual standing.

The first is that substance of the soft law should be of a particular quality, which is manifested in two respects. General soft law crucially should be consistent with the underlying legislation and case law. General soft law should also be sufficiently clear, or foreseeable, so as to enable taxpayers to understand

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<sup>327</sup> Ganz also arrives at the same conclusion: Ganz, *Quasi Legislation* (n 22) 24.

their rights and obligations. The latter element is driven by the analysis that general soft law advances the rule of law.

The second, likewise driven by the rule of law argument, is that the soft law ought to be accessible. In the case of forms of general soft law, not only should it be published where it affects groups of persons, it should also be accessible in respect of taxpayers knowing what general soft law applies at any given time and what may be relied upon.

The third, scrutiny, is a *sine qua non* in a world where it is accepted that general soft law will arise.<sup>328</sup> In the case of forms of general soft law, this should be not merely by an expert regulatory body, but also more generally by the public. It is important not merely from the perspective generally of ‘checking’ HMRC’s administrative behaviour. More specifically, it helps ensure greater participation by those affected by the rules being promulgated. It guards to a degree against exploitation by lobbying groups. Scrutiny additionally helps to ensure that the relevant soft law does not supersede the underlying law. Scrutiny can force HMRC to add greater clarity to its forms of general soft law, by forcing the body to reconsider whether its produced soft law is sufficiently clear so as to guide in relation to taxpayers’ rights and obligations. Scrutiny additionally can place pressure on HMRC to make its general soft law more accessible.

The final criterion is that the soft law should be reliable. Taxpayers to the greatest extent possible ought to be entitled to rely upon general soft law which affects them. Reliability is intimately related to the idea of foreseeability. In order for the soft law to be of utility to a taxpayer, to advance her understanding of her

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<sup>328</sup> Treasury Committee, *Principles of Tax Policy* (HC 2010–11, 753) [43].

obligations and rights, she must be able to rely upon it. Otherwise, its weightlessness undermines its power to provide guidance. Where a taxpayer plans her actions in accordance with general soft law, there must be appropriate mechanisms in place to ensure that HMRC does not renege on the position or interpretation it previously adopted in soft law. In this sense, it is clear that there is overlap between reliability and quality. The emergence of the doctrine of legitimate expectations in public law is recognition that the ordinary citizen should have some recourse against a public body in order to prevent it from renegeing on its previously promised treatment.<sup>329</sup> The need for reliability can also be expressed in the language of trust. It is imperative that we should be able trust our public officials. However, this trust is undermined where an official can break promises gratuitously, without any recourse by which the citizen can hold the official to account: 'it would be monstrous if the executive could freely renege on its undertakings'.<sup>330</sup>

### 3.3. Interim Conclusion

In 1953, Aneurin Bevan stated that there was general agreement about the necessity for delegated legislation, but that the real problem was how this legislation could be reconciled with the processes of democratic consultation, scrutiny and control.<sup>331</sup> As the foregoing has sought to establish, this statement could equally apply to forms of general HMRC soft law. Whilst there is a positive

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<sup>329</sup> On which, see below, Part III. 5 Reliability for taxpayers? The inadequacy of public law protection.

<sup>330</sup> Christopher Forsyth, 'The Provenance and Protection of Legitimate Expectations' (1988) 47 CLJ 238, 239. See also, Christopher Forsyth, 'Wednesbury Protection of Substantive Legitimate Expectations' (1997) PL 375, 375.

<sup>331</sup> Aneurin Bevan at the Select Committee on Delegated Legislation 1953, *Minutes of Evidence*, 144 quoted in CK Allen, *Law and Orders* (3rd edn. Stevens & Sons 1965) 164-65.

case in principle for the existence and production of this soft law by HMRC, there are many practical problems which merit concern. The overarching issue is that this soft law allows a public authority to effectively exercise legislative powers, without being subjected to the usual checks and balances associated with exercising such a power. Whilst reforms have been introduced in response to this issue in the area of secondary legislation,<sup>332</sup> the field of general soft law has been permitted to develop largely without restriction (as the following Part to this thesis will demonstrate).

This thesis seeks to propose solutions to this problem. It is posited that there are four crucial benchmarks which need to be satisfied in respect of forms of general soft law in order to guard its positive characteristics from the malignant problems which arise in practice, namely, quality, accessibility, scrutiny and reliability. These form a normative framework against which the system for general HMRC soft law in the UK (and elsewhere) can be tested.

#### **4. Conclusion to Part II**

The late John Tiley in the 2012 edition of the eminent 'Revenue Law' textbook wrote that:<sup>333</sup>

Although the power to tax has been at the very centre of some of our major constitutional law disputes, including the execution of a King, there is a lack of engagement with public law issues.

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<sup>332</sup> Statutory Instruments Act 1946.

<sup>333</sup> John Tiley and Glen Loutzenhiser, *Revenue Law* (7<sup>th</sup> edn., Hart 2012) 30.

The tone is slightly hyperbolic, but there is a kernel of truth to this statement, although there have been several notable contributions to this area in recent years however which have laid the seeds for further development.<sup>334</sup> Where the provision of forms of general HMRC soft law falls within the framework of public law is precisely one of those issues, which has seen little light. This Part accordingly has sought to elaborate upon both the constitutionality and the desirability of forms of general HMRC soft law. Through this process, a normative framework against which general soft law systems can be judged was developed. In Part III, the provision of general HMRC soft law will be tested against this framework of quality, accessibility, scrutiny and reliability.

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<sup>334</sup> See Evans, Freedman, Krever, *The Delicate Balance* (n 89); John Snape, *The Political Economy of Corporation Tax: Theory, Values and Law Reform* (Hart Publishing 2011); Judith Freedman and John Vella, 'Revenue Guidance: The Limits of Discretion and Legitimate Expectations' (2012) 128 LQR 192; Stanley Alexander De Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet and Maxwell, 1995) Ch. 23.

## PART III. THE FAILINGS OF HMRC SOFT LAW

### 1. Outline

The Donoughmore Committee on Ministers' Powers considered the powers exercised under the direction of Ministers of the Crown by way of delegated legislation.<sup>1</sup> In 1932, the Committee reported that the delegation of legislative powers is legitimate for certain purposes, within certain limits, and under certain safeguards.<sup>2</sup> At the same time however, dangerous tendencies were observed in relation to the delegation due to the absence of a system and lack of direction.<sup>3</sup> If it is to be accepted from Part II however that soft law is itself a means of effectuating the rule of law just as the relevant underlying law seeks to do, it seems arbitrary to draw a line between legislation and forms of general soft law for the purposes of acknowledging the need for a proper framework and for criticizing the 'dangerous tendencies' which can be observed.

Viewed against this background, the nexus between Part II and Part III of this thesis becomes apparent. The purpose of Part II was to set out the broad tenets of the framework within which the system for general HMRC soft law ought to operate. Part III will seek to set out to what extent general HMRC soft law satisfies the normative benchmarks of this framework, namely, quality, accessibility, scrutiny and reliability. Sections 2-5 of this Part accordingly will assess each of these respectively. Section 6 of this Part will be dedicated to

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<sup>1</sup> Committee on Ministers' Powers Report (Cmd. 4060, 1932).

<sup>2</sup> *ibid* 58.

<sup>3</sup> *ibid*.

analysing the contribution which the Parliamentary Ombudsman and the Adjudicator's Office make in relation to general HMRC soft law. It warrants its own section for two primary reasons. First, these bodies contribute both to the scrutiny of general HMRC soft law and its reliability, thereby overlapping with two separate sections. Secondly, and more importantly, the investigation of the contribution of the Ombudsman and the Adjudicator's Office highlights several measures which should be considered in any potential reform to the current system for general HMRC soft law. This is distinct from Sections 2-5 which serve only to set out failings in the current framework. As such, it flows with greater analytical clarity to consider the Ombudsman after Sections 2-5 but immediately prior to Part IV of this thesis.

## 2. Investigating the quality of HMRC soft law

*We may complain of unfairness in the incidence of tax, but that is a complaint against Governments: no one in Britain can complain of unfairness in the administration of tax collection by the Board of Inland Revenue and its officials. The integrity of the inspectorate is a national honour.*<sup>4</sup>

Over the years, many have cited the problems relating to the substance of forms of general HMRC soft law. Most notable is the criticism of David Williams in an influential *British Tax Review* article in 1979.<sup>5</sup> Williams cited various

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<sup>4</sup> JRL Anderson in the Foreword to Basil Sabine, *A History of Income Tax* (1st edn., George Allen & Unwin, 1966) 6

<sup>5</sup> David Williams, 'Extra-Statutory Concessions' [1979] BTR 137. See: *Vestey v IRC* [1980] AC 1148, 1194 (Lord Edmund-Davies). Lord Edmund-Davies speech in turn has been cited by McNeill J in *R v CIR, ex parte Fulford-Dobson* [1987] STC 344, [1987] 1 QB 978, 987-988 (McNeill J); *Adrian John Wilkinson v The Commissioners of Inland Revenue* [2002] EWHC 182 [27], [2002]

opponents from the bench who openly criticised the practice of extra-statutory concessions ('ESCs') in their judgments, such as Wills J in *Swayne v IRC*,<sup>6</sup> Scott LJ in *Absalom v Talbot*,<sup>7</sup> Unged Thomas J in *IRC v Clifforia Investments Ltd*,<sup>8</sup> and Walton J in the series of *Vestey* cases<sup>9</sup> (views which were subsequently endorsed by the House of Lords).<sup>10</sup> There is merit in these criticisms. If forms of general HMRC soft law are to satisfy the normative benchmark of quality, it is necessary that the substance is neither inconsistent with the underlying law and is sufficiently clear as to guide taxpayers as to their rights and obligations under the law. The purpose of this section is to highlight the failure in practice, as expressed by Williams and others, to satisfy first the requirement of consistency and secondly, the requirement of sufficient clarity.

## 2.1. The problem of soft law being inconsistent with the law

Many writers have highlighted the concern that strong lobbying and interest groups may exploit the process of promulgating general soft law,<sup>11</sup> and successfully obtain concessions from the law. The prospect of such exploitation is unsettling for several reasons. There is the potential removal of horizontal equity between taxpayers within the same class. It exposes 'a Revenue official to

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STC 347 (Moses J); *R (Wilkinson) v Inland Revenue Commissioners* [2003] EWCA Civ 814, [2003] 1 WLR 2683, 2696.

<sup>6</sup> *Swayne v IRC* [1899] 1 QB 335, 344.

<sup>7</sup> *Absalom v Talbot* [1943] 1 All ER 589, 598.

<sup>8</sup> *IRC v Clifforia Investments Ltd* [1963] 1 WLR 396, 402.

<sup>9</sup> *Vestey v IRC (no. 1)* [1979] Ch. 177, 197 and *Vestey v IRC (no. 2)* [1979] Ch. 198 (HC) 202, 203-204.

<sup>10</sup> *Vestey v IRC* (n 5) 1170-1173 (Lord Wilberforce) and 1194 (Lord Edmund-Davies).

<sup>11</sup> David Schoenbrod, *Power without Responsibility – How congress abuses the people through delegation* (YUP 1993) 21; Kim Brooks, 'A Reasonable Balance: Revenue Authority Discretions and the Rule of Law in Canada' in Chris Evans, Judith Freedman and Richard Krever (eds.), *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD: Amsterdam, 2011).

temptation'<sup>12</sup> to make *de facto* changes to the law to fit their personal morality. The most troubling issue in this vein is that it may allow general HMRC soft law to undermine the authority of Parliament by reason of inconsistency with the underlying law. Although some flexibility must be given to HMRC as to the effectuation of its role in managing and collecting taxes, Lord Hoffmann surmised that this only 'enables the commissioners to formulate policy *in the interstices of the tax legislation*'<sup>13</sup> but that does not allow the commissioners to concede 'an allowance which Parliament could have granted but did not grant'.<sup>14</sup> The rationale behind this constriction is that it prevents HMRC from playing fast and loose with tax legislation and levying persons, parties or goods as the body sees fit. Such a state of affairs would effectively 'reverse the result of the Civil War'.<sup>15</sup>

There are an array of examples from the history of HMRC and its predecessor bodies of pressure groups extracting benevolent treatment from HMRC which may conflict with the underlying law. The classic example of such favouritism operated from at least World War II<sup>16</sup> until 2003<sup>17</sup> in relation to miners' free coal. Miners were entitled to coal for personal use by virtue of their employment. This is a taxable benefit in kind, namely, something of direct monetary value to an employee, or something that is capable of being converted into money or something of direct monetary value to the employee.<sup>18</sup> During

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<sup>12</sup> *Absalom v Talbot* (n 7) 598 (Scott LJ).

<sup>13</sup> *R (Wilkinson) v IRC* [2005] UKHL 30; [2006] STC 270 [21] (emphasis added).

<sup>14</sup> *ibid.*

<sup>15</sup> *M v Home Office* [1994] 1 AC 377, 395 (Lord Templeman).

<sup>16</sup> Inland Revenue, *A List of Extra Statutory Wartime Concessions given in the Administration of Inland Revenue Duties* (October 1944) Cmd. 6559.

<sup>17</sup> It was enacted in Income Tax (Earnings and Pensions) Act 2003, s. 306.

<sup>18</sup> HMRC, *EIM00530 - Employment income: benefits in kind taxable as earnings: meaning of money's worth* (February 2016), available at: <<http://www.hmrc.gov.uk/manuals/eimanual/eim00530.htm>> accessed 31 September 2017.

World War II however, miners were given cash payments in lieu. By virtue of a concession, the rationale for which the Office of Tax Simplification was unable to ascertain,<sup>19</sup> this cash in lieu payment was not chargeable to tax.<sup>20</sup> The practice continued to operate for either free coal or the payment in lieu until the concession was legislated in section 306 of Income Tax (Earnings and Pensions) Act 2003. Around the middle of the concession's lifetime, at which point it was estimated to be costing circa £30mil per annum,<sup>21</sup> Walton J in *Vestey (no 2)* expressed his bewilderment at the practice:

[U]pon what basis have the commissioners taken it upon themselves to provide that income tax is not to be charged upon a miner's free coal and allowances in lieu thereof ... If this kind of concession can be made, where does it stop; and why are some groups favoured as against others?<sup>22</sup>

It need not necessarily be the case that taxpayers have explicitly sought to extract concessions. Sometimes HMRC can of its own initiative provide relief from the underlying law in a manner going beyond the scope of what is permissible, incorporating a Revenue legal error. ESC D33 is a particularly apt example. This is a class concession relating to Capital Gains Tax ('CGT'). By way of background, CGT is levied<sup>23</sup> on any gain<sup>24</sup> accruing to a chargeable person<sup>25</sup> from the chargeable disposal<sup>26</sup> of a chargeable asset.<sup>27</sup> A chargeable asset in turn

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<sup>19</sup> Office of Tax Simplification, *Review of tax reliefs Final report* (March 2011) 57.

<sup>20</sup> Inland Revenue, *A List of Extra-Statutory Wartime Concessions* (n 16) 248.

<sup>21</sup> HM Treasury, *Appropriation Accounts 1980/81*, (HC 1981-82, 76-IX), xxi.

<sup>22</sup> *Vestey (no. 2)* (n 9) 203.

<sup>23</sup> By virtue of Taxation of Chargeable Gains Act ('TCGA') 1992, s. 1.

<sup>24</sup> TCGA 1992, s. 15.

<sup>25</sup> TCGA 1992, s. 2.

<sup>26</sup> TCGA 1992, ss. 21-27.

<sup>27</sup> TCGA 1992, s. 21(1).

is defined in very broad terms as *any form of property*, whether situated in the UK or not, including:

- (a) options, debts and incorporeal property generally, and
- (b) any currency other than sterling, and
- (c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired.<sup>28</sup>

In *O'Brien v Benson's Hosiery (Holdings) Ltd ('O'Brien')*,<sup>29</sup> a director under a seven-year service contract with the taxpayer, Benson's Hosiery, was released from his obligations in return for payment to the taxpayer of £50,000. The House of Lords held that the £50,000 was subject to CGT on the basis that the contractual right of the taxpayer to the director's services was an asset which could be and had been turned to account. The case of *Zim Properties v Proctor ('Zim Properties')*,<sup>30</sup> which is the catalyst for ESC D33, follows from this case.<sup>31</sup> *Zim Properties* concerned a settlement arrived at between a firm of solicitors and Zim, the taxpayer. Owing to alleged negligence on the part of the solicitors, the sale of three properties fell through. The solicitors settled the matter for £69,000, which the Revenue in turn assessed to tax. In line with *O'Brien*, the court held that a right to bring an action is an 'asset' for the purposes of CGT,<sup>32</sup> provided such action is not vexatious or frivolous.<sup>33</sup> Further, Warner J held that

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<sup>28</sup> TCGA 1992, s. 21(1).

<sup>29</sup> *O'Brien v Benson's Hosiery (Holdings) Ltd* [1980] AC 562.

<sup>30</sup> *Zim Properties v Proctor* [1985] STC 90.

<sup>31</sup> *Ibid*, in particular, 104-108.

<sup>32</sup> See: TCGA 1992, s. 37(1).

<sup>33</sup> *Zim Properties* (n 30) 106.

the capital sum was not derived from any underlying asset, in this case the three properties, but rather from the right of action itself.<sup>34</sup>

For taxpayers generally, this case would have a wide-ranging effect. The 'gain' which is subject to CGT is calculated by deducting the acquisition cost,<sup>35</sup> exemptions,<sup>36</sup> reliefs<sup>37</sup> and losses (where applicable)<sup>38</sup> from the proceeds of the disposal of the asset. As such, rights of action would be assessable to tax in their own right and the acquisition cost, statutory reliefs and exemptions relating to a separate, underlying asset would not be deductible. An anomalous position thus arises whereby, taking Zim Properties as an example, the £69,000 could not be used for any reliefs or exemptions as it arose from a claim of negligence, but if the firm of solicitors had simply smashed up a property, causing £69,000 in damage, then that sum would be subject to the full range of reliefs and exemptions!<sup>39</sup>

ESC D33 was introduced in 1988<sup>40</sup> to combat this anomaly by extending the range to which an *underlying asset* would be engaged. In other words, despite the strict legal position, the Revenue would treat a cause of action relating to an underlying asset as being derived itself from the underlying asset and thus eligible for statutory reliefs and exemptions in connection with the asset. The

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<sup>34</sup> Ibid 108-109.

<sup>35</sup> TCGA 1992, s. 38.

<sup>36</sup> For instance TCGA 1992, s. 3.

<sup>37</sup> For instance TCGA 1992, ss. 169H-V and ss. 222-226).

<sup>38</sup> TCGA 1992, s. 16.

<sup>39</sup> On part disposals, see: TCGA 1992, s. 42.

<sup>40</sup> HMRC, *Legislating Extra Statutory Concession D33* (July 2014) 10 available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/473988/Legislating\\_Extra\\_Statutory\\_Concession\\_D33\\_consultation\\_document.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473988/Legislating_Extra_Statutory_Concession_D33_consultation_document.pdf)> accessed 31 September 2017.

<sup>40</sup> Denis Galligan, *Discretionary Powers: A Legal Study of official Discretion* (Clarendon 1986) 10, 144.

chargeable gain would be significantly reduced by virtue of the ability to deduct the acquisition cost and apply lucrative reliefs. This treatment was explained in paragraphs 8-10 of ESC D33:

#### **8. Relief by concession**

Where a gain arises on the disposal of a right of action, the case may alternatively, by concession, be treated in accordance with the following paragraphs of this statement.

#### **9. Underlying assets**

Where the right of action arises by reason of the total or partial loss or destruction of or damage to a form of property which is an asset for capital gains tax purposes, or because the claimant suffered some loss or disadvantage in connection with such a form of property, any gain or loss on the disposal of the right of action may by concession be computed as if the compensation derived from that asset, and not from the right of action. As a result a proportion of the cost of the asset, determined in accordance with normal part-disposal rules, and indexation allowance, may be deducted in computing the gain. For example if compensation is paid by an estate agent because his negligence led to the sale of a building falling through, an appropriate part of the cost of the building may be deducted in computing any gain on the disposal of the right of action.

The gain may be computed by reference to the original cost of the underlying asset, with time-apportionment if appropriate if the asset was acquired before 6 April 1965, or by reference to its market value on 6 April 1965. For disposals on or after 6 April 1988, the gain may be computed in appropriate cases by reference to the value of the asset on 31 March 1982.

#### **10. Other reliefs and exemptions**

If the relief was or would have been available on the disposal of the relevant underlying asset, it will be available on the disposal of the right of action. For example, if compensation is derived from a cause of action in respect of damage to a building suffered by reason of professional negligence, and the compensation is applied in restoring the building, deferment relief under Section 23, TCGA 1992 will be available as if the compensation derives from the building itself and not from the right of action.

Other reliefs which may become available in this way include private residence relief, retirement relief and roll-over relief. HMRC Board will be prepared to consider extending time limits in cases where because of a delay in obtaining a capital sum in compensation, the normal time limit allowed for a relief has elapsed. If the right of action relates to an asset which is specifically exempt from capital gains tax, such as a motor car, any

gain on the disposal of the right of action may be treated as exempt.

HMRC has claimed that this extension to the range of that which will qualify as an underlying asset is supported by the case of *Pennine Raceway Ltd v Kirklees Metropolitan Council (No 2)*<sup>41</sup> wherein Pennine Raceway held a licence to conduct drag racing on a disused airfield. When Kirklees Metropolitan Council rejected planning permission, the value of the licence dropped. The Council paid compensation to Pennine and the Court of Appeal held that this compensation reflected the loss in value of the licence.<sup>42</sup> But there is a clear distinction between these two instances. There is no doubt that the licence in *Pennine Raceway* represented an underlying asset and the direct consequence of not obtaining planning permission would have been to reduce the value of the licence. To take an example, if I ask you to sell my house and you set fire to it instead, you have caused directly the reduction in value for which I ought to be compensated. However, where it is the markets which change, with subsequent reduction in value to the asset, the direct cause of the reduction is the markets. A separate claim, although with similar qualities, would exist against you not because your action caused a reduction in price, but rather because of your failure to act at a particular time caused me to miss an opportunity in the market. The crucial distinction is between compensation for a poor service as against compensation for action which directly causes loss in value. The example accordingly is of false equivalence and cannot serve as the basis for extending the range to what will qualify as an underlying asset.

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<sup>41</sup> *Pennine Raceway Ltd v Kirklees Metropolitan Council (No 2)* [1989] STC 122.

<sup>42</sup> HMRC, *Legislating Extra Statutory Concession D33* (n 40) 12.

To reiterate Lord Hoffmann's appraisal, a concession may only be granted within the interstices of legislation, but cannot relieve tax which Parliament has prescribed as due. Could the concession here then be characterised as mere purposive interpretation and as such legitimate? The answer to this question must equally be 'no', as the success of that argument hinges on some ambiguity in relation to the meaning of the legislative text. But the High Court in *Zim Properties* clearly set out that the capital sum may derive from the right of action itself and so, this argument must make way for the ultimate conclusion that the concession is *ultra vires* by reason of its ambition to overrule a judicial decision.<sup>43</sup>

Similarly controversially, where a right of action arises that does not involve an underlying form of property, the ESC holds that any gain accruing on the disposal of the right of action would be exempt from CGT. This treatment was explained in para 11 of ESC D33:

### **11. No Underlying Asset**

A right of action may be acquired by a claimant in connection with some matter which does not involve a form of property which is an asset for capital gains tax purposes. This may be the case where professional advisers are said to have given misleading advice in a tax or other financial matter, or to have failed to claim a tax relief within proper time. Actions may be brought in relation to private or domestic matters. Where the action does not concern loss of or damage to or loss in connection with a form of property which is an asset for capital gains tax purposes, the approach in paragraph 9 above of treating the compensation as deriving from the asset itself is not appropriate. In these circumstances any gain accruing on the disposal of the right of action will be exempt from capital gains tax.

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<sup>43</sup> David Southern QC equally holds that the concession in effect overrules *Zim Properties*, David Southern, 'Changes to the taxation of compensation (ESC D33)' (March 2015) 6 available at: <<http://www.chba.org.uk/for-members/library/all-london-seminars/2015-seminars/changes-to-the-taxation-of-compensation-esc-d33>> accessed 31 September 2017.

As with paragraphs 8-10, the argument for purposive interpretation again is moot given that this paragraph cuts entirely against the decisions in *Zim Properties* and in *O'Brien* that a right of action is an asset for CGT purposes. HMRC has argued however that the concession was justified initially on grounds of administrative convenience.<sup>44</sup> That might be persuasive in the case of a negligible amount of compensation. When the concession was introduced in 1988 however, there was no limit to the amount that would be exempt from CGT. In January 2014, HMRC set a limit of £500,000 below which there would be no question of CGT. It is difficult to foresee any circumstance in which the administrative cost and inconvenience of collecting gains of up to £500,000 would outweigh the benefit.

The ultimate problem for HMRC in relation to ESC D33 is that a right of action is recognised as an asset for the purposes of CGT. To this end, the concession seeks to carve out an exception to the general rule and this might go some way to explaining why HMRC are finding it so difficult to legislate ESC D33!<sup>45</sup> In brief then, ESC D33 is an example of HMRC issuing a concession to provide relief contrary to Parliamentary intent.

At other times, general HMRC soft law may be incorrect not by reason of the interposition of a concessionary element, but by reason of a misconception of the true legal position. HMRC's approach to the doctrine of legitimate expectations is an example of this. By way of brief introduction (for Part III,

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<sup>44</sup> HMRC, *Legislating Extra Statutory Concession D33* (n 40) 13.

<sup>45</sup> HMRC in July 2014 released a consultation paper in which it sought responses on a proposal to legislate ESC D33 (see: HMRC, *Legislating Extra Statutory Concession D33* (n 40)). The closing date for submissions was 15 September 2014. At the time of writing, however, HMRC's website merely reads that the consultation has concluded (see <<https://www.gov.uk/government/consultations/legislating-extra-statutory-concession-d33>> accessed 31 September 2017).

Section 5 will deal in greater detail with this issue), the doctrine of legitimate expectations provides a remedy to a citizen against a public authority where that institution has evoked an expectation as to particular treatment but seeks no longer to give effect to that treatment. The Administrative Law manual sets out HMRC's approach as to when it will give effect to a legitimate expectation that a taxpayer will be treated in accordance with incorrect advice:

**Incorrect Advice to Customers: When incorrect advice can be binding**

HMRC is only bound by incorrect advice in circumstances where all<sup>46</sup> of the following tests are met:

- The customer made it plain he or she was seeking fully considered advice and indicated what it would be used for
- The customer provided all information relevant to the query
- The advice given by HMRC was clear, unambiguous and without qualification
- The customer acted in reliance on the advice (i.e. he or she did or refrained from doing something as a direct consequence of the advice)
- *The customer would suffer detriment if the correct statutory position were applied; (e.g. he would be financially worse off than if the correct advice had been given in the first place)*<sup>47</sup>
- To apply the correct statutory position would be so unfair as to constitute an abuse of power (see ADML1400).

A customer can only suffer detriment if he or she is subject to real harm or loss. It is not sufficient to merely suffer disappointment or upset.<sup>48</sup>

HMRC place particular reliance upon the need for the taxpayer to demonstrate detrimental reliance: that the customer would suffer detriment if her expectation of treatment were not upheld. To characterise detrimental

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<sup>46</sup> [emphasis added].

<sup>47</sup> [emphasis added].

<sup>48</sup> HMRC, *ADML 1300 Incorrect Advice to Customers: When incorrect advice can be binding* (March 2016) <<https://www.gov.uk/hmrc-internal-manuals/admin-law-manual/adml1300>> accessed 31 September 2017.

reliance as an *essential* element to a legitimate expectations claim is incorrect however. As set out by Scheimann LJ in *R (Bibi) v Newham LBC*:

To disregard the legitimate expectation because no concrete detriment can be shown would be to place the weakest in society at a particular disadvantage. It would mean that those who have a choice and the means to exercise it in reliance on some official practice or promise would gain a legal toehold inaccessible to those who, lacking any means of escape, are compelled simply to place their trust in what has been represented to them.<sup>49</sup>

Whilst not being a *per se* requirement, the presence of detrimental reliance is generally an indication that a legitimate expectation should be upheld. It would be the exception, rather than the rule, that detrimental reliance will not be present for the court to give effect to the expectation.<sup>50</sup> So the true legal position accordingly, as concisely summarised by Whipple J in *R (Hely-Hutchinson) v HMRC ('Hely-Hutchinson')*<sup>51</sup> is that the circumstances in which HMRC may have to give effect to a legitimate expectation 'can travel beyond cases of detrimental reliance (although the fact that a taxpayer has relied to his or her detriment on the Commissioners' promise is in many cases the source of the complaint of unfairness)'.<sup>52</sup> Perhaps most concerning about the guidance in question is that Whipple J pointed out this misconception in relation to the necessity of detrimental reliance in *Hely-Hutchinson* in October 2015<sup>53</sup> but the

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<sup>49</sup> *R (Bibi) v Newham LBC* [2001] EWCA Civ 607 [55], [2002] 1 WLR 237.

<sup>50</sup> *R v Department of Education and Employment, ex parte Begbie* [1999] EWCA Civ 2100 [48] (Peter Gibson LJ).

<sup>51</sup> *R (Hely-Hutchinson) v HMRC* [2015] EWHC 3261, [2016] STC 962 ('*Hely-Hutchinson* (HC)').

<sup>52</sup> *ibid* [43].

<sup>53</sup> *ibid* [76].

Administrative Law Manual remains uncorrected at the time of writing (31 September 2017).<sup>54</sup>

General HMRC soft law may also be inconsistent with the underlying law where it seeks to reduce the scope of the relevant law. In other words, where the law is much broader than the particular soft law implies. This has arisen particularly in the anti-avoidance context in recent years and is a risk generally when the legislative process responds to the possibility of general soft law: that legislation would be drafted more broadly and in more generalised terms, knowing that the scope can be narrowed down or the legislation explained thereafter by general soft law. Another consequence would be the decision not to use secondary legislation at all, and instead rely upon general HMRC soft law to set out the detail. For instance, section 16A of the Capital Gains Tax Act 1992 is a broadly drafted targeted anti-avoidance rule ('TAAR') which is drafted in very broad terms.<sup>55</sup> S. 16A(1) provides as follows:

For the purposes of this Act, "allowable loss" does not include a loss accruing to a person if— (a) it accrues to the person directly or indirectly in consequence of, or otherwise in connection with, any arrangements, and (b) the main purpose, or one of the main purposes, of the arrangements is to secure a tax advantage.

During the consultation process, professional bodies criticised the breadth of the provision for catching 'objectionable' and 'unobjectionable'

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<sup>54</sup> Although the decision was overturned on appeal, the Court did not reject Whipple J's decision that comparative unfairness in addition to detriment is a relevant consideration. See: *HMRC v Hely-Hutchinson* [2017] EWCA Civ 1075, [2017] WLR(D) 517 [37]-[45] ('*Hely-Hutchinson (CA)*').

<sup>55</sup> See Judith Freedman and John Vella, 'HMRC's Management of the UK Tax System: The Boundaries of Legitimate Discretion', in Evans, Freedman and Krever (n 11) 117. See also: Tracey Bowler, *Countering tax avoidance in the UK: which way forward?* (Institute for Fiscal Studies, 2009) 18-19 available at: <[www.ifs.org.uk/publications/4461](http://www.ifs.org.uk/publications/4461)> accessed 31 September 2017.

transactions alike as Freedman and Vella note.<sup>56</sup> The government and HMRC sought to assure those concerned that the provision only caught objectionable transactions and that guidance to that effect did not seek to cut down on the scope of the provision, but simply reflected their understanding.<sup>57</sup> This interpretation of the provision was rejected by the bodies, with the guidance thus appearing concessionary and inconsistent with the underlying law.<sup>58</sup>

Another example cited by Freedman and Vella is that of the TAAR introduced by s. 75A of the Finance Act 2003 in relation to Stamp Duty Land Tax.<sup>59</sup> Again, the provision is drafted incredibly broadly, with HMRC guidance seeking to cut down its scope.<sup>60</sup> The Upper Tribunal in the case of *Project Blue v HMRC*<sup>61</sup> was far from convinced that this was satisfactory. Morgan J noted that the HMRC's guidance provided that the body would not seek to apply the provision to transactions it considered to have already been taxed appropriately, but that this was not the way that the provision operated as a matter of law.<sup>62</sup> The provision applies in a mandatory way whenever the facts of the case come within the words of the section.<sup>63</sup>

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<sup>56</sup> Freedman and Vella (n 55) 117.

<sup>57</sup> See the footnote in Freedman and Vella, 'HMRC's Management of the UK Tax System' (n 55) 117 where the following are cited: Chartered Institute of Taxation, 'Draft TAAR – Chartered Institute of Taxation Comments' (9 February 2007), Chartered Institute of Taxation, 'Targeted Anti-Avoidance Rule (TAAR) for Capital Losses Comments of the Chartered Institute of Taxation' (1 June 2007), and The Tax Faculty of the Institute of Chartered Accountants in England and Wales, 'Avoidance through the creation and use of capital losses' (8 February 2007) Taxrep 07/07.

<sup>58</sup> Freedman and Vella, 'HMRC's Management of the UK Tax System' (n 55) 117.

<sup>59</sup> *Ibid.*

<sup>60</sup> See Patrick Cannon, 'New SDLT general anti-avoidance rule' (2007) 874 Tax Journal 6.

<sup>61</sup> *Project Blue v HMRC* [2014] UKUT 564 (TCC), [2015] STC 745.

<sup>62</sup> *Ibid* [50].

<sup>63</sup> *Ibid.*

## 2.2. The problem of soft law being Insufficiently clear

From a rule of law perspective, the justification for soft law is that it supplements the underlying law by providing further guidance as to its minutiae, thus rendering the citizen better informed of the legal consequences that will flow from her actions. That contention is however thwarted where the citizen is denuded of the ability to rely upon the soft law. Put another way, this deprives the soft law of the very integrity it requires to render it complementary to the underlying law. This may arise in several scenarios. The first is where the taxpayer is deprived of an avenue of redress against HMRC where it seeks to resile from its written position, and the thesis in Part III, Section 5 argues that this is precisely the case in relation to tax law. It secondly arises where the law is insufficiently clear. Evidence of insufficiency can be gleaned from Section 5 which sets out that general HMRC soft law is rarely clear, unambiguous and devoid of relevant qualification.<sup>64</sup> A more forceful manifestation of insufficiency is where the soft law is so vague as to be open to conflicting interpretations. This is precisely what has arisen in the case of HMRC's soft law publication on the scope of its duty of confidentiality, an example which illustrates the problems which can develop from insufficiently clear general soft law.

By way of background, the function of collecting taxes, bestowed upon HMRC by virtue of section 5 of the Commissioners for Revenue and Customs Act 2005 ('CRCA 2005'), would be a difficult task if it were not for an array of wide-ranging powers which allow HMRC to extract and hold significant amounts of

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<sup>64</sup> See Part III. 5.2.2. The difficult case of satisfying Bingham's second condition.

information about taxpayers.<sup>65</sup> Owing to this position of responsibility in relation to individuals' private information, HMRC is bound by a duty of confidentiality, 'a well established principle of the law of confidentiality',<sup>66</sup> enshrined in section 18 of the CRCA 2005, which provides that 'officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs'. The duty is not unrestricted however and exceptions for instance may be made 'for the purposes of a function of the Revenue and Customs'.<sup>67</sup> HMRC elaborates on the limited circumstances in which disclosure of taxpayer information may be made 'for the purpose of a[n] [HMRC] function' to persons outside HMRC in its Internal Manual 'Information Disclosure Guide'<sup>68</sup>. Information may be disclosed for the purpose of an HMRC function, such as the collection of tax for instance, where the following requirements are satisfied:

- Failing to do so would result in HMRC being significantly less effective or efficient in carrying out its functions;<sup>69</sup>
- Any detrimental impacts on individuals or legal entities that may result from the disclosure are proportionate to the expected benefits;<sup>70</sup> and
- There are no viable alternatives that could achieve the same outcome without the same (or a similar) level of disclosure.<sup>71</sup>

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<sup>65</sup> See for instance Finance Act 2008, Schedule 36.

<sup>66</sup> *R (Ingenious Media and McKenna) v HMRC* [2016] UKSC 54 [17], [2016] 1 WLR 4164 ('*Ingenious Media (SC)*').

<sup>67</sup> Commissioners for Revenue and Customs Act 2005 ('CRCA 2005'), s. 18(2)(a)(i). More exceptions are found at s. 18(b)-(h).

<sup>68</sup> HMRC, *Information Disclosure Guide* (March 2016), available at: <<http://www.hmrc.gov.uk/manuals/idgmanual/Index.htm>> accessed 31 September 2017.

<sup>69</sup> HMRC, *IDG40415* (March 2016), available at: <<http://www.hmrc.gov.uk/manuals/idgmanual/idg40415.htm>> accessed 31 September 2017.

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid.*

An example of such a situation, as provided in the Information Disclosure Guide, would be where a tax enquiry could be concluded more quickly by revealing information obtained from a third party. In this instance, it might be judged that disclosure of the information ahead of being required to reveal it by an order in court proceedings would render it likely for the taxpayer to recognise and agree to their true tax liability. This early disclosure would therefore be more resource efficient for both HMRC and the customer.<sup>72</sup>

The previously available incarnation of the Manual, in particular the section IDG40430,<sup>73</sup> set out HMRC's position in essentially the same terms. It was stated therein that disclosure of information was lawful where:

- Only the minimum level of information about the customer would be disclosed to allow the function to be carried out,<sup>74</sup> and
- The making of the disclosure is necessary for the exercise of HMRC's functions.<sup>75</sup>

IDG40430 defined 'necessary' as pivoting upon whether making disclosure would enable an official to carry out the functions of the department.<sup>76</sup>

As should have become apparent, this Manual is quite bare and other than the specific example cited does not make entirely clear under what circumstances HMRC may breach its duty of confidentiality. Whilst it is true that

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<sup>72</sup> *ibid.*

<sup>73</sup> This is the iteration which was used by the taxpayers in the *Ingenious* case, referred to later in this Section. See: *R (Ingenious Media and McKenna) v HMRC* [2015] EWCA Civ 173 [35], [2015] STC 1357 (*Ingenious Media (CA)*).

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

some tolerance in respect of ambiguous soft law must be afforded, the ambiguity in relation to this Manual is insufficient for the reason that it gives rise to contradictory positions within HMRC. This state of affairs has become clear in light of the conflicting approaches adopted by HMRC in relation to confidentiality, as revealed by the cases of *R (Ingenious Media and McKenna) v HMRC* ('*Ingenious Media*')<sup>77</sup> and *Privacy International v HMRC* ('*Privacy International*').<sup>78</sup>

*Privacy International* concerned the power of HMRC to disclose information about its export control functions to an NGO, namely, Privacy International. The NGO alleged that a UK company, Gamma International, had supplied 'malware' to repressive regimes in countries such as Bahrain and Ethiopia. It was claimed that Gamma International supplied the equipment illegally to those states in breach of export regulations. Accordingly, Privacy International inquired of HMRC, who enforces export regulations, whether such equipment had been supplied. HMRC responded that it had no power to provide information about its investigations, by virtue of section 18 of the CRCA 2005, and that the provision imposed strict controls on the disclosure of information:<sup>79</sup>

[T]he starting point of this legislation is that without specific legal authority officials of HMRC may not disclose any information held by HMRC in connection with its functions... and it is a criminal offence to reveal any information from which persons... might be identified. Consequently HMRC cannot comment on individual cases, and in particular we will be unable to keep you or other third parties informed of the progress of any investigations.<sup>80</sup>

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<sup>77</sup> *R (Ingenious Media and McKenna) v HMRC* [2013] EWHC 3258, [2014] STC 673 (*Ingenious Media* (HC)); *Ingenious Media* (CA) (n 73) *Ingenious Media* (SC) (n 66).

<sup>78</sup> *Privacy International v HMRC* [2014] EWHC 1475, [2015] STC 948.

<sup>79</sup> *ibid* [17].

<sup>80</sup> *ibid* [17].

The tenor of the letter indicated that HMRC's view was that there were no exceptions that could apply to authorise HMRC to disclose information.<sup>81</sup> This blanket refusal, the judge pointed out, was misconceived and served as one of the reasons the judge remitted the decision to HMRC to be considered again.<sup>82</sup> Green J cited Sales J's judgment in *Ingenious Media* from which he extrapolated four separate policy considerations that HMRC could utilise as justifying its decision to disclose taxpayer information in that case:<sup>83</sup>

- i. The maintenance of good and cooperative relations with the press;
- ii. Maintaining confidence in the tax system;
- iii. Encouraging the provision of information by taxpayers and the press;
- iv. Deterrence

*Ingenious Media* concerned an 'off the record' disclosure by David Hartnett, then Permanent Secretary for tax at HMRC, to journalists from *The Times*. The substance of the conversation was of tax avoidance schemes, which were taking advantage of the 'Film Partnership' legislative provisions. Over the course of the meeting, Hartnett referred specifically to the appellants, Ingenious Media and Patrick McKenna, as marketers of such avoidance schemes;<sup>84</sup> expanded that the appellants had contributed to depriving the public purse of circa £5bn;<sup>85</sup> that McKenna had personally used such schemes<sup>86</sup> and pronounced

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<sup>81</sup> *ibid* [18].

<sup>82</sup> *ibid* [63]-[73].

<sup>83</sup> *ibid* [58].

<sup>84</sup> *Ingenious Media (CA)* (n 73) [9].

<sup>85</sup> *ibid* [10].

<sup>86</sup> *ibid* [11].

such schemes as ‘scams for scumbags’.<sup>87</sup> Some of these comments were later quoted, albeit with anonymity attached, in articles published by the journalists on the 21st June 2012.<sup>88</sup>

HMRC’s justification for the disclosure, with which both the High Court and Court of Appeal agreed,<sup>89</sup> and which was encouraged by the Public Accounts Committee,<sup>90</sup> was that the disclosure was necessary for the purpose of tax collection.<sup>91</sup> In both the High Court and Court of Appeal, it was held that the disclosures by HMRC were in accordance with HMRC’s Manual.<sup>92</sup> It is notable accordingly that in *Ingenious Media*, HMRC contested that it had a relatively wide power to disclose information, whilst in *Privacy International*, the body sought to refuse a request to disclose information on the basis that it had absolutely no power to do so. Such a conflict was not lost on Green J:

The irony of the *Ingenious Holdings* [sic] case as applied in the present case is that in that case the HMRC was arguing for a broad power to disclose information based upon a relatively loose nexus between the information disclosed and the functions of the HMRC and in circumstances where they could be indiscrete and in fact disparaging about both a company (*Ingenious Holdings*) and an individual who promoted tax avoidance schemes. In the present case however HMRC has moved to the absolute other end of the spectrum and in the Decision letter and in subsequent correspondence denied that it has any power at all to disclose information and has adopted a narrow approach towards

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<sup>87</sup> *ibid.*

<sup>88</sup> Alexi Mostrous, Fay Schlesinger and Roland Watson, ‘Screen play: how movie millions are moved offshore’ *The Times* (London, 21 June 2012); Fay Schlesinger, “World of glitz and glamour that’s on the Revenue’s radar”, *The Times* (London, 21 June 2012).

<sup>89</sup> *Ingenious Media* (HC) (n 77) [38]-[51]; *Ingenious Media* (CA) (n 73) [26]-[30], [37]-[47].

<sup>90</sup> Public Accounts Committee, *HM Revenue & Customs 2010-11 Accounts: tax disputes* (HC 2010-12, 1531) 9, [6] and [7].

<sup>91</sup> The Supreme Court unanimously disagreed however with the lower courts’ reasoning, see: *Ingenious Media* (SC) (n 66). That does not take away from the argument here which concerns HMRC’s justifications for disclosures of information

<sup>92</sup> *Ingenious Media* (HC) (n 77) [23]-[28]; *Ingenious Media* (CA) (n 73) [34]-[47]. The Supreme Court’s judgment however made no mention of the Manual.

disclosure which ostensibly contradicts its own arguments in *Ingenious Media*.<sup>93</sup>

Even more disconcerting is the fact that HMRC's standpoint on disclosure in *Ingenious Media* contradicted the previous position advocated by Hartnett before the Public Accounts Committee in 2011. Hartnett's response to questioning around the scope of the duty of confidentiality was that disclosure of taxpayer information might in fact *hinder* the efficient collection of tax, thereby somewhat undermining the argument adopted in *Ingenious Media*.<sup>94</sup> Meanwhile, one month after the High Court decision in *Ingenious Media* was handed down, HMRC's policy on disclosure of taxpayer information in the case of work deaths changed.<sup>95</sup> By reason of its duty of confidentiality, HMRC would no longer provide work history information to a requesting coroner. These apparent conflicting interpretations of the law relating to breaches of confidentiality seem to be guided by expediency and not principle,<sup>96</sup> as HMRC shifts the goal posts according to the exigencies of the particular predicament. The inconsistent approach is the outward manifestation of the vague, ambiguous directions: the inexorable outcome of insufficient soft law guidance. In sum, the problem with this piece of soft law is that it can produce conflicting approaches to an area of law which is particularly sensitive for taxpayers.

A further note is worth making about the case at this juncture in relation to the courts lack of enthusiasm for intervening in relation to general HMRC soft

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<sup>93</sup> *Privacy International* (n 78) [60].

<sup>94</sup> PAC, *HM Revenue & Customs 2010–11 Accounts: tax disputes* (n 90) Ev 67; see: Andrew Goodall, 'Taxpayer Confidentiality: Hartnett sets out HMRC view for MPs' (2011) 1098 Tax Journal 2.

<sup>95</sup> *R (HMRC) v HM Coroner for the City of Liverpool* [2014] EWHC 1586 (Admin) [7], [2015] QB 481.

<sup>96</sup> Gideon Sanitt, 'Ingenious Media and HMRC's duty of confidentiality' (2015) 1256 Tax Journal 8, 9.

law. This will be further highlighted in below in Section 4 and to a degree in Section 5. The issue will be more formally revisited when considering proposals for reform in Part IV.<sup>97</sup> In light of the ambiguity of the guidance on the permissible derogations from HMRC's duty of confidentiality, counsel for Privacy International invited the Court to direct HMRC, in a fashion similar to that imposed upon the DPP in *R (Purdy) v Director of Public Prosecutions*<sup>98</sup> ('Purdy') and *R (Nicklinson) v Ministry of Justice*,<sup>99</sup> ('Nicklinson') to provide sufficiently clear guidance on when disclosure of taxpayer information may be made. This would force HMRC to address itself in a deliberate manner on the issue of disclosure and then to make public its position.<sup>100</sup>

Although citing the obvious appeal of such a suggestion, the Court rejected the invitation for two reasons. First, the Court noted that there had only been two cases which have grappled heretofore with the issue.<sup>101</sup> Accordingly, this was not an especially solid platform upon which to intervene.<sup>102</sup> Secondly, for the pragmatic reason that HMRC would have to consult the CPS and their views on the issues arising are not before the Court.<sup>103</sup>

It is suggested that Green J's refusal to direct HMRC to update its Guidance to the public is misconceived. First, the reasons given by Green J do not hold up to scrutiny. The fact that there is paucity of law is not a sufficient excuse in this case, for the simple reason that in spite of such paucity, HMRC still

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<sup>97</sup> Part IV. 4.2.1.1. Recommendations in respect of scrutiny, see text at n 326.

<sup>98</sup> *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345 (HL).

<sup>99</sup> *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2014] 3 WLR 200.

<sup>100</sup> *Privacy International* (n 78) [180].

<sup>101</sup> *ibid* [185].

<sup>102</sup> *Ibid*.

<sup>103</sup> *ibid*.

manages to apparently contradict itself! Indeed, Green J acknowledged this incongruity:

The present case does convey the impression that HMRC lacks a consistent and considered position in this area and that its policy has been dictated more by the exigencies, course and speed of litigation than by premeditation.<sup>104</sup>

The argument is further undermined by the fact that Green J deliberated at length in the case on the variety of factors that may be relevant to a decision to disclose taxpayer information, dedicating 106 paragraphs to the discussion.<sup>105</sup> In other words, the analysis is an indication of Green J's acknowledgement that the soft law is deficient in respect of sufficiency of foreseeability and accessibility, as those terms were used in *Purdy*, and his judgment sought to add the needed clarity. As for the alternative reason proffered by Green J, the invitation to direct HMRC does not require HMRC at that moment to provide detailed guidance, but rather merely invites the body to consider its position and put it more firmly in detail available to the public at a later date. Accordingly, the fact that HMRC would have to consult the CPS could have been readily accommodated in the direction.

Secondly, and more profoundly, the reason that HMRC ought to produce sufficiently clear guidance in this instance is precisely *because* the law is unclear. When faced with an area of law which was insufficiently foreseeable and accessible in *Purdy*, the Court thought the only correct route available was to

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<sup>104</sup> *ibid.*

<sup>105</sup> *ibid* [74]-[179]; see also [61].

direct the public authority to issue guidance as a means of reducing such insufficiency.

### 2.3. Interim Conclusion

Disagreement is no cause for dismissal and should not form the basis for dismissing the central thesis of David Williams and others, namely, that there are often problems with the substance of forms of general HMRC soft law. HMRC have been found on occasion to favour particular classes of persons and produce soft law instruments inconsistent with the underlying law. To go beyond the boundaries of the power to issue soft law is a matter of constitutional impropriety regardless of whether concessions to particular classes of taxpayers might be defensible for non-legal reasons. Meanwhile, unduly ambiguous publications serve to undermine the justification for soft law's very existence. Aside from the primary focus of the case studies in this Section on issues of consistency and sufficiency, a further matter highlighted is the judicial malaise towards intervening in matters of general HMRC soft law evidenced by the approach of Green J in *Privacy International*.

The problems identified herein in relation to quality are not limited to this benchmark alone. The benchmarks of the normative framework for this thesis are not mutually exclusive. Where general HMRC soft law is ambiguous, it becomes almost impossible for a taxpayer to place any reliance upon it. Where soft law is inconsistent with the underlying law, reliability is similarly hampered by reason of the fact that binding HMRC to incorrect soft law is generally not

permitted.<sup>106</sup> At the same time, how these issues intrinsic to the substance of HMRC soft law are permitted to go unchecked will become clear when the mechanisms for scrutiny are analysed. Quality is therefore an important segment of the larger picture Part III of this thesis is seeking to present.

### 3. The accessibility of HMRC soft law

*What fate lies ahead for those unfortunate taxpayers who, while swerving to miss the potholes on a narrow road through the hills, crash into the guardrail on a wet and dark night? The likelihood is that rather than have the yellow flashing lights of 'tax assist' greet them, they are more likely to be met by dark suited gentlemen alighting from an unmarked car, with pens poised and charge sheets opened<sup>107</sup>*

Minor errors on the part of taxpayers can have significant consequences. It is of utmost importance accordingly that those who are affected by tax law or HMRC interpretations and policies in pursuance of that law should have the ability to know the extent of their liability. Those persons who are affected by forms of general HMRC soft law ought to be able to access them. There are three strands to accessibility in turn. The first is that the taxpayer should have the ability to physically access general HMRC soft law which affects her. Clearly, where HMRC operates internal policies that affect classes of taxpayer but these policies are unpublished, this objective is undermined. The second strand to accessibility is the ability to know how the general HMRC soft law applies at any

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<sup>106</sup> See below Part III. 5.2.1. The doctrine of ultra vires: the Achilles' heel of legitimate expectations?

<sup>107</sup> Martin Crowe, 'National Decisions', 'More Signposts Needed on Rocky Tax Road', National Australia Bank Limited, November 1992, 19 noted in Joint Committee of Public Accounts, *Report No. 326, An Assessment of Tax – A Report on an Inquiry into the Australian Taxation Office* (1993), 225.

given time. Retrospective changes to guidance hinder this capability. The third strand is the ability to know which parts of the relevant soft law the taxpayer can rely upon. Where pieces of general HMRC soft law contain concessionary elements, the taxpayer will be unwittingly placed in a precarious position. This section will consider how HMRC soft law performs in respect of each of these in turn.

### 3.1. Publication

A strong argument has already been made to the effect that pertinent general HMRC soft law ought to be published.<sup>108</sup> In theory, this should not be necessary, as HMRC is required to tax a person in accordance with a particular practice even if the taxpayer is unaware of the practice,<sup>109</sup> provided that the practice is within HMRC's powers. However, this theoretical basis only holds in reality where a taxpayer approaches HMRC who in turn then applies the treatment. Apart from such an exceptional circumstance, the taxpayer will fail to obtain the relief to which she or he is entitled.<sup>110</sup>

Nevertheless, as regards publishing general soft law and, in particular, concessions, the history of the Inland Revenue merits criticism. Practitioners have written about many instances where HMRC has offered class concessions

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<sup>108</sup> Part II. 3.1.3. The counterclaims: six arguments, see text at n 296. See also: Amanda Rowland, 'Is the Revenue being Fair? Revenue Statements and Judicial Review' (1995) BTR 115, 121.

<sup>109</sup> *J Rothschild Holdings v IRC* [1988] STC 645, 665g; *Oxfam v HMRC* [2009] EWHC 3078, [2010] STC 686 [54]; *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] WLR (D) 414 [29]-[30] (Lord Wilson). On this, see: Rebecca Williams, 'The Multiple Doctrines of Legitimate Expectations' (2016) 132(4) LQR 639, 659-662.

<sup>110</sup> Edward Troup, 'Unacceptable Discretion: Countering Tax Avoidance and Preserving the Rights of the Individual' (1992) 13(4) Fiscal Studies 128, 134-135. On this, see also *LH Bishop Electrical Co. Ltd v HMRC* [2013] UKFTT 522 (TC), [2013] STI 3433 where Judge Mosedale held that non-publication could be *Wednesbury* unreasonable. See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, (1948) 1 KB 223; *Council of Civil Service Unions and others v Minister for The Civil Service* [1985] AC 374, [1985] ICR 14.

which are not published. Michael Nolan in 1981 wrote about the profit of a company being taxed as if it were the income of the shareholders unless it could be proved that the profits were needed for 'company purposes'.<sup>111</sup> This practice which was well known by the bar prior to 1966, was revealed in a letter from the Revenue in 1966 to a professional accountancy body, but was not explicitly published in a Press Release until 1973.<sup>112</sup> Similarly, the Inland Revenue went through a process of reviewing all ESCs in the mid 1980s and published dozens of previously unpublished extra-statutory class concessions.<sup>113</sup> For this reason, the number of active Inland Revenue listed ESCs grew from 122 in 1980<sup>114</sup> to 169 by 1987.<sup>115</sup> Similarly, the review of concessions in the aftermath of *R (Wilkinson) v IRC* ('*Wilkinson*')<sup>116</sup> has served to bring to light a number of concessions which were previously unpublished.<sup>117</sup> A consultation paper on draft legislation was produced in November 2008,<sup>118</sup> which sought to place a number of concessions on a statutory footing. Three of these concessions

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<sup>111</sup> Michael Nolan, 'The Unsatisfactory State of Current Tax Law' (1981) Statute L. Rev. 148.

<sup>112</sup> See also John Booth, *Stand and Deliver! The Inland Revenue and Non-statutory Taxation* (Waterside Press, 1998) 180.

<sup>113</sup> Inland Revenue, *Tax Bulletin Issue 32* ('A Hundred Years of Inland Revenue Extra Statutory Concessions') (available at: <http://webarchive.nationalarchives.gov.uk/+http://www.hmrc.gov.uk/bulletins/tb32.htm#AHundredYearsofInlandRevenue> accessed 31 September 2017)..

<sup>114</sup> Board of Inland Revenue, *Extra-statutory concessions in operation at 8 August 1980* (IR1 (1980)).

<sup>115</sup> See: Board of Inland Revenue, *Inland Revenue extra-statutory concessions as at June 1985* (IR1 (1985)) and Board of Inland Revenue, *Extra-Statutory Concessions Supplement* (IR1 (Supp) (1987)).

<sup>116</sup> *Wilkinson* (n 13).

<sup>117</sup> See, for instance, HMRC, *Withdrawal of extra statutory concessions – Technical Note* (December 2009), 13, for an unpublished concession which allowed VAT to be charged on school inspections supplied under contract to Ofsted.

<sup>118</sup> HMRC, *Extra-statutory Concessions – Technical Consultation on draft Legislation* (November 2008) 35-36 available at: [http://webarchive.nationalarchives.gov.uk/20090211090306/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageLibrary\\_ConsultationDocuments&propertyType=document&columns=1&id=HMCE\\_PROD1\\_028967](http://webarchive.nationalarchives.gov.uk/20090211090306/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_028967) accessed 31 September 2017.

however were previously unpublished.<sup>119</sup> For instance, the paper enlisted a concession allowing modest expenses for travel and subsistence by self-employed persons.<sup>120</sup> Although this departed from the strict position otherwise outlined in HMRC's Manual,<sup>121</sup> it can be traced back to a written answer in the House of Commons in 1976. Robert Sheldon, then Financial Secretary to the Treasury, wrote that a self-employed person 'may be allowed a deduction for modest expenditure on meals consumed in the course of a travelling occupation or an occasional business journey outside the normal pattern'.<sup>122</sup> As such, although the concession has existed since 1976, it had nevertheless not been formally published and indeed departed from HMRC's published manual which still prescribes that expenses with an 'intrinsic duality of purpose', such as food for sustenance, are not deductible.<sup>123</sup> The other two unpublished concessions listed in this document related to an extra statutory exemption from duty of spirits-based flavourings<sup>124</sup> and a concession relieving goods supplied for consumption during EU rail journeys departing from VAT, dating to the opening of the Channel tunnel in 1994.<sup>125</sup> In a document from April 2009, HMRC further sought comments on its proposal to remove two other unpublished concessions.<sup>126</sup> One related to grants provided by the Highlands and Islands

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<sup>119</sup> *ibid* 5-6. Although there are five unlisted concessions in this document, two of these were previously to be found in HMRC manuals.

<sup>120</sup> *ibid* 31.

<sup>121</sup> HMRC, *BIM37900 - Wholly and exclusively: expenditure having an intrinsic duality of purpose: contents* (February 2016), available at: <<http://www.hmrc.gov.uk/manuals/bimmanual/BIM37900.htm>> accessed 31 September 2017.

<sup>122</sup> HC Deb 6 December 1976, vol 922, cols 66-67W.

<sup>123</sup> HMRC, *BIM37900* (n 121).

<sup>124</sup> HMRC, *Extra-statutory Concessions – Technical Consultation on draft Legislation* (n 118) 30.

<sup>125</sup> *ibid* 42.

<sup>126</sup> HMRC, *Withdrawal of Extra-statutory Concessions – Technical Note* (April 2009).

Enterprise (HIE).<sup>127</sup> Some of these grants were strictly taxable as revenue receipts, but by concession from HMRC, were treated as capital receipts. The other related to the longstanding unpublished concession entitled 'Equitable Liability'.<sup>128</sup> This concession concerned the acceptance of time-barred returns in instances where there was never a legal right to adjust the liability. This concession can be traced back to 1897 wherein the Revenue acknowledged that it remitted tax debts on grounds of equity.<sup>129</sup> Nevertheless, the concession was not published until 1995.<sup>130</sup> Even today, post-*Wilkinson*, there is evidence of unpublished concessions issued to classes of taxpayers.<sup>131</sup> Indeed, John Avery Jones recently noted that '[i]t is sad to have to relate that unpublished concessions still exist'.<sup>132</sup>

### 3.2. Retrospective changes to soft law

HMRC's general approach to forms of general soft law is that it will not make retrospective changes. This is obviated however where it materializes that the relevant soft law is in fact incorrect in law. Accordingly, where there is a change in general HMRC soft law and additional tax can be recovered from a taxpayer the starting point is that any tax due should be collected unless there is

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<sup>127</sup> *ibid* 14.

<sup>128</sup> *ibid* 15.

<sup>129</sup> Public Accounts Committee, *Second report from the committee of public accounts* (HC 1897-98, 261-VIII).

<sup>130</sup> Inland Revenue, *Tax Bulletin: Issue 18* (August 1995), available at: <<http://webarchive.nationalarchives.gov.uk/20050302035920/http://inlandrevenue.gov.uk/bulletins/tb18.htm>> accessed 31 September 2017

<sup>131</sup> See for instance Malcolm James, *Taxation of Small Businesses 2016-2017* (9<sup>th</sup> edn., Spiramus Press 2016) 42.

<sup>132</sup> John Avery Jones, 'The equity of the executive: A commentary', 294 in Peter Turner (ed), *Equity and Administration* (CUP 2016) referring to *LH Bishop* (n 110) [510].

an overwhelming reason not to.<sup>133</sup> The exceptional circumstances in which HMRC will not retroactively change its general soft law which contain a Revenue legal error are set out later in Part III. 5.<sup>134</sup> This approach undermines the ability of taxpayers to know what relevant general soft law applies at any given time, thereby hindering accessibility on the part of taxpayers to the general HMRC soft law that affects them.

There are a series of examples which evidence this approach in practice. For instance, HMRC released guidance in 2005 which concerned Inheritance Tax (IHT). Finance Act 2004 introduced provisions which sought to limit the efficacy of IHT avoidance schemes. Prior to 2005, a variety of approaches were adopted to circumvent the IHT charge.<sup>135</sup> Sometimes, this would involve the asset owner (the 'settlor') setting up 2 trusts; selling the assets, financed by a loan from the settlor, to one trust (in which s/he had an interest); and placing the loan thereafter in the 2nd trust (in which s/he had no interest or derived no benefit whatsoever).<sup>136</sup> The scheme would have the effect of, on the death of the settlor, reducing the IHT charge on the assets in the 1st trust to nil as the loan would cancel out the value of the assets (assuming the assets did not appreciate in

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<sup>133</sup> Institute of Chartered Accountants in England and Wales, *Legitimate Expectation and Reliance on HMRC Guidance* (Technical Release 06/13), 14. See also: HMRC, *ADML1200 Incorrect Advice to Customers: Collection and management* (March 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/admin-law-manual/adml1200>> accessed 31 September 2017; and HMRC, *ADML1605 What this means in practice: Incorrect Advice to Customers* (March 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/admin-law-manual/adml1605>> accessed 31 September 2017.

<sup>134</sup> See below Part III. 5.2.1. The doctrine of ultra vires: the Achilles' heel of legitimate expectations?

<sup>135</sup> Emma Chamberlain and Chris Whitehouse, 'HMRC debacle? The efficacy of home loan schemes is in question.' (2011) 167(4290) *Taxation* 15, 16.

<sup>136</sup> *ibid* 15-16.

value).<sup>137</sup> As for the transfer of the debt to the 2nd trust, lifetime transfers of assets are charged to IHT if the transferor dies within seven years of the transfer.<sup>138</sup> Accordingly, if the settlor survives seven years, then the transfer of the debt to the 2nd trust also escapes tax.

Finance Act 2004 had the effect of seriously curtailing the efficacy of these schemes. By reason of Schedule 15 paragraphs 11(6) and (7), the loan would be an 'excluded liability' and so would not be taken into account when calculating the IHT charge. Crucially for present purposes, HMRC's guidance in 2005 provided that it would challenge those schemes in which the loan was repayable on demand, but would accept those schemes where the debt was repayable only after the death of the asset owner who settled the trusts.<sup>139</sup> In 2010 however HMRC amended the guidance to state that it would no longer accept as valid those schemes<sup>140</sup> and issued guidance in 2011 setting out in full the new approach.<sup>141</sup> Cases closed prior to the change in guidance would remain closed, but those where there was an open enquiry would be subject to the new interpretation.<sup>142</sup> This has the effect of retrospectively changing the tax

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<sup>137</sup> *ibid* 16. Inheritance Tax Act 1984, s. 49(1) provides that interest in possession trusts are subject to IHT on the value of the assets. As per *St Barbe Green v Inland Revenue Commissioners* [2005] EWHC 14, [2005] STC 288, liabilities against the assets are deductible in deducing the relevant value.

<sup>138</sup> Inheritance Tax Act 1984, s. 3A.

<sup>139</sup> Emma Chamberlain, 'Home loans: an update on common Inheritance Tax mitigation schemes' (April 2013) *Step Journal* 26, 27-28.

<sup>140</sup> Toby Harris, Mark McLaughlin, Iris Wunschmann-Lyall, Chris Erwood, *Core Tax Annual: Inheritance Tax 2011/12* (Bloomsbury Professional 2011) 427.

<sup>141</sup> Chamberlain, 'Home loans' (n 139) 28.

<sup>142</sup> Mark McLaughlin, Iris Wunschmann-Lyall, Chris Erwood, *Core Tax Annuals: Inheritance Tax 2015/16* (Bloomsbury Professional 2015)

treatment afforded to those who are unlucky enough still to have enquiries open.<sup>143</sup>

This approach to retrospective changes in forms of general HMRC soft law was equally applied in relation to ‘specialty debts’ (a debt recorded in a deed) whereby HMRC changed the view it had adopted in its Manual. Previously, HMRC treated the debts as being situated in the jurisdiction ‘where the instrument happens to be’ (where the debt was created ‘under seal’) but from January 2013 would treat the debt as being situated in the jurisdiction where the debtor resides.<sup>144</sup> Similarly, HMRC in March 2009 amended its approach to share option schemes. Since 2003, HMRC had allowed taxpayers, when calculating CGT liability on the sale of shares to include in the base cost of the share (the amount to be subtracted from the sale price) both the market value of the shares *and* any amount charged to income tax on the exercise. From 2009, HMRC’s approach was that only the market value of the shares could be deducted. The change applied retrospectively for those persons who had open enquiries.<sup>145</sup>

### 3.3. Mingling of the categories of advice

The description of the various forms of soft law in Part II. 2. lends itself immediately to the conclusion that the categorisation process has not been consistent. Some publications are labeled as Guidance when they are more aligned with CPs, SPs or ESCs and so on. The sense overall from the admittedly

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<sup>143</sup> See also below Part III. 5.2.1.2. *Mansworth v Jelley* and the Guidance affair,

<sup>144</sup> HMRC, *IHTM27079 ‘Foreign property: specialty debts: bonds and debentures under seal’* (March 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/inheritance-tax-manual/ihtm27079>> accessed 31 September 2017.

<sup>145</sup> See below Part III. 5.2.1.2. *Mansworth v Jelley* and the Guidance affair.

sparse sources is that HMRC does not have a coherent streamlined system for the production of general HMRC soft law.<sup>146</sup> Where there is no framework for decisions as to whether soft law should be produced, how this should occur and in what category of publication the soft law should be placed, there will be inevitably be miscategorisation of forms of general HMRC soft law.

This miscategorisation can have profound consequences. Firstly, it leads to incoherency in that the underlying text does not accord with the definition proposed at the beginning of the publication. If one of the purposes of soft law is to inform taxpayers as to their rights and obligations under the law, then this objective will be somewhat undermined by this confusing presentation. Secondly, and more worryingly, it can be a trap for the unwary taxpayer who had assumed, for instance in the case of Guidance, that the publication contained merely a description of the law rather than some concessionary element. As stressed above, concessions by their nature come close to the line of *vires*. An issue of protection arises for the taxpayer where the concession breaches this line, as it is the orthodox position that there can be no legitimate expectation<sup>147</sup> or estoppel<sup>148</sup> where effectuating the assurance would require a public body to act *ultra vires*.<sup>149</sup> A prudent taxpayer would be wary of relying upon concessions accordingly but might nevertheless unwittingly fall into the trap of doing so, and thereafter have her protection rescinded, by virtue of the initial miscategorisation. Finally, miscategorisation undermines supervision of soft law,

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<sup>146</sup> See above Part II. 2.3. The production of soft law.

<sup>147</sup> *Rowland v Environment Agency* [2003] EWCA Civ. 1885; [2005] Ch. 1.

<sup>148</sup> *Minister of Agriculture and Fisheries and Food v Matthews* [1950] 1 K.B. 148, 153 (Cassels J); *Vestry of the parish of St. Mary, Islington v Hornsey Urban District Council* [1900] 1 Ch. 695, 704-705 (Lord Lindley MR); Paul Craig, *Administrative Law* (8th edn., Sweet and Maxwell 2016) 697.

<sup>149</sup> See generally below Part III. 5.2.1. The doctrine of ultra vires: the Achilles' heel of legitimate expectations?

as it directs attention away from issues where oversight is more stringently warranted. This is particularly notable in the case of ESCs which are miscategorised, as these instruments require more intense scrutiny to ensure that the concessions do not overreach their proper boundaries and hence undermine Parliament. ESCs as a result of such issues are, at least in theory, supposed to be scrutinized by the National Audit Office & the Public Accounts Committee.<sup>150</sup> This issue will be further analysed below.<sup>151</sup>

There is much evidence of this issue of miscategorisation unfortunately having arisen in practice. In the wake of *Wilkinson*, HMRC acknowledged the existence of a number of ESCs which were incorrectly categorised in Manuals. For instance, if a taxpayer incurs capital expenditure on replacing plant or machinery, the taxpayer can claim by concession a revenue deduction for the replacement expenditure (a “renewals allowance”) for the purposes of income tax or corporation tax.<sup>152</sup> This concessionary treatment was previously not acknowledged and the treatment was to be found in a Revenue Manual, rather than in the list of published ESCs.<sup>153</sup> Similarly, disabled individuals without disabled persons’ badges could previously calculate the private use benefit of their automatic company car based on the price and emissions of the equivalent

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<sup>150</sup> Though see below Part III. 4.2. Comptroller & Auditor General, National Audit Office and Public Accounts Committee.

<sup>151</sup> *ibid.*

<sup>152</sup> HMRC, *Withdrawal of Extra-statutory Concessions - Technical note and call for evidence* (December 2011) available at: [http://webarchive.nationalarchives.gov.uk/20120207142922/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageLibrary\\_ConsultationDocuments&propertyType=document&columns=1&id=HMCE\\_PROD1\\_031784](http://webarchive.nationalarchives.gov.uk/20120207142922/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_031784) accessed 31 September 2017.

<sup>153</sup> See: HMRC, *BIM46935: Renewals allowances for capital expenditure on plant and machinery*

manual car. This was acknowledged by HMRC as a concession post-*Wilkinson*<sup>154</sup> but had previously been found in a Revenue Manual.<sup>155</sup> On the 4th of August 2014, HMRC announced a change in practice in relation to the treatment of the use of unremitted foreign income or gains as collateral for a loan enjoyed in the UK.<sup>156</sup> It was remarked that the practice was concessionary, whilst the previous incarnation of the publication in a Revenue Manual however made no mention of any ‘concession’.<sup>157</sup> Other examples of concessions erroneously located in Manuals related to persons who were in concurrent Class 1 and Class 2 employment (in which case they did not need to pay Class 2 National Insurance contributions)<sup>158</sup> and catering contractors, who did not need to charge VAT on catering staff wages.<sup>159</sup> Other ESCs previously found in Manuals which emerged from the *Wilkinson* review include concessions relating to sports testimonials,<sup>160</sup> grave maintenance,<sup>161</sup> student housing<sup>162</sup> and National Heritage sales.<sup>163</sup>

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<sup>154</sup> HMRC, *Withdrawal of Extra-statutory Concessions* (n 152)

<sup>155</sup> HMRC, *EIM24900 PAYE: Company cars for disabled drivers without blue badges*

<sup>156</sup> HMRC News, *Remittance Basis* (4 August 2014)

<<http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/news/remittance-basis.htm>> accessed 31 September 2017.

<sup>157</sup> HMRC, *Remittance Basis: Identifying Remittances: Conditions A and B: Condition B - collateral in respect of relevant debt* (8 October 2010)

<<http://webarchive.nationalarchives.gov.uk/20101008224449/http://www.hmrc.gov.uk/manuals/rdrmmanual/RDRM33170.htm>> accessed 31 September 2017. 15 October 2015, it was announced that the concessionary treatment would not be withdrawn retrospectively, see: HMRC, *Revenue and Customs Brief 16* (October 2015), available at: <<https://www.gov.uk/government/publications/revenue-and-customs-brief-16-2015-remittance-basis-treatment-of-foreign-income-and-gains-used-for-loan-collateral/revenue-and-customs-brief-16-2015-remittance-basis-treatment-of-foreign-income-and-gains-used-for-loan-collateral>> accessed 31 September 2017.

<sup>158</sup> HMRC, *NIM20800 - Class 2 National Insurance contributions liability* (April 2016)

<<http://www.hmrc.gov.uk/manuals/nimmanual/NIM20800.htm>> accessed 31 September 2017.

<sup>159</sup> HMRC, *VFOOD5040 - Excepted items* (March 2016)

<<http://www.hmrc.gov.uk/manuals/vfoodmanual/VFOOD5040.htm>> accessed 31 September 2017.. For other concessions which were previously found in manuals, see: HMRC, *Extra-statutory Concessions – Technical Consultation on draft Legislation* (n 118) 33-36.

<sup>160</sup> HMRC, *Withdrawal of extra statutory concessions: Technical note and call for evidence* (October 2014) 8, available at:

Concessions have also been found in HMRC Guidance, rather than in the published list of ESCs. For instance, it was previously prescribed<sup>164</sup> that HMRC would not issue penalties for late filing of certain returns provided they were received by 19 July following the end of the tax year (i.e. 5 April).<sup>165</sup> A similar concession operated in HMRC Guidance to the effect that a motor vehicle would be treated as a zero-rated supply if it were supplied to a disabled wheelchair user and shortly after adapted for their specifications.<sup>166</sup> Ordinarily, this treatment was reserved for supplies of vehicles *already* adapted for use by a disabled person.<sup>167</sup> A previous concession found in VAT Guidance allowed dining rooms and kitchens to be zero-rated as residential accommodation for students and school pupils if they were used 'predominantly' by the students.<sup>168</sup> Strictly, zero-rating would only apply where the buildings were used 'solely' for a relevant residential purpose.<sup>169</sup> Finally, an ESC once operated to allow hotels, inns, boarding houses and similar establishments to apply the 'reduced value rule' where a long term resident had vacated the accommodation with no continuing right to the accommodation during their absence.<sup>170</sup> The provision of

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<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/362505/14\\_1002\\_withdrawing\\_ESCs\\_con\\_doc\\_v4.0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/362505/14_1002_withdrawing_ESCs_con_doc_v4.0.pdf)> accessed 31 September 2017.

<sup>161</sup> HMRC, *Withdrawal of extra statutory concessions – Technical note* (December 2010) 13.

<sup>162</sup> HMRC, *Withdrawal of extra statutory concessions – Technical note and call for evidence* (January 2014), 7.

<sup>163</sup> HMRC, *Extra-statutory Concessions – Technical Consultation on draft Legislation* (n 118) 35-36.

<sup>164</sup> HMRC, *CWG5 Class 1A National Insurance contributions on benefits in kind – A guide for employers* [25].

<sup>165</sup> HMRC, *Withdrawal of extra statutory concessions – Technical note and call for evidence* (n 152)

<sup>166</sup> HMRC, *Withdrawal of extra statutory concessions – Technical note* (December 2010) (n 161) 11.

<sup>167</sup> VAT Act 1994, Items 2(f), 2A and Note 5L, Group 12, Schedule 8.

<sup>168</sup> HMRC, *Technical note and call for evidence* (January 2014) (n 162), 9-10.

<sup>169</sup> VAT Act 1994, Items 1 and 2, Group 5, Schedule 8.

<sup>170</sup> HMRC, *Technical note and call for evidence* (January 2014) (n 162) 11.

sleeping accommodation in a hotel, inn, boarding house or similar establishment is standard rated for VAT purposes.<sup>171</sup> However where accommodation is provided to an individual for a period of over 28 days, VAT need only be charged on that part of the payment that is not for accommodation. This is the ‘reduced value rule’.<sup>172</sup> Strictly, the rule would cease to apply if there were *any* break in the residence, such as even a weekend away.<sup>173</sup> By concession published in HMRC Public Notice 709/3, the rule would continue to apply if a long-term resident left for an occasional holiday; or if a student left during vacation and returned to the same accommodation the following term.<sup>174</sup>

### 3.4. Interim Conclusion

For Lord Bingham, a fundamental component of the rule of law was that it must be accessible.<sup>175</sup> Where mistakes resulting in minor transgressions of the tax code have inordinate consequences and where soft law is a necessary extension and translator of the law, the need for taxpayers to be able to access forms of general HMRC soft law becomes inevitably apparent. It is clear from the foregoing investigation however that general HMRC soft law falls short of being properly accessible. At times, it is simply unpublished, as has happened numerous times over the history of HMRC and its predecessor bodies. Critically also, HMRC’s approach to soft law is that it will make retrospective changes if it

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<sup>171</sup> VAT Act 1994, para (d), Item 1, Group 1, Schedule 9

<sup>172</sup> VAT Act 1994, para 9, Schedule 6.

<sup>173</sup> HMRC, *Technical note and call for evidence* (January 2014) (n 162) 11.

<sup>174</sup> See now, HMRC, *VAT Notice 709/3: hotels and holiday accommodation* (June 2013), available at: <<https://www.gov.uk/government/publications/vat-notice-7093-hotels-and-holiday-accommodation/vat-notice-7093-hotels-and-holiday-accommodation>> accessed 31 September 2017.

<sup>175</sup> Lord Bingham, ‘The Rule of Law’ (2007) CLJ 67.

turns out that its advice has been incorrect unless there is an exceptional reason not to do so. Taxpayers are left in the invidious position of being unaware as to whether the soft law in question which would otherwise fit their circumstances will be later rescinded with retrospective effect. In other instances, the general HMRC soft law mingles different pieces of advice, including publications with concessionary elements, thereby tricking the taxpayer unwarily into taking a more risky position than she might expect. That miscategorisation should occur is an obvious consequence of the lack of such a framework for the production of general HMRC soft law instruments generally.

Accessibility, as was noted in relation to quality in the previous Section, cannot be viewed in a vacuum. Lord Bingham's first principle of the rule of law, that it must be accessible and so far as practicable intelligible, clear and predictable,<sup>176</sup> combines together the elements of quality and accessibility. Forms of general HMRC soft law which are indecipherable are inaccessible also; whilst such soft law which can be retrospectively removed lacks the clarity necessary to allow a citizen to plan her life in accordance with the law. Problems of reliability which follow from a taxpayer not having a clear remedy against HMRC where the body seeks to rescind previously promised treatment were likewise highlighted in this Section but will be analysed in greater detail below in Part III. 5. The most immediate and pressing question which should follow from a reading of this and the previous Section must be however: how are these problems, which are intrinsic to general HMRC soft law, permitted to propagate?

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<sup>176</sup> *ibid.*

Analysis of the mechanisms for scrutiny to be undertaken in the proceeding Section will be illuminating in this regard.

#### 4. Analysis of the scrutiny afforded to HMRC soft law

*However beautiful the strategy, you should occasionally look at the results.*<sup>177</sup>

HMRC occupies a curious space in the state. As a non-ministerial body,<sup>178</sup> the traditional elements of individual ministerial responsibility are eschewed.<sup>179</sup> At the same time however, the body must comply with any directions of a general nature given to them by the Treasury.<sup>180</sup> Thus, whilst ministers may be at arm's length from the everyday activities of HMRC, there is nevertheless a nexus such as to make them at least politically responsible for indiscretions of the body.<sup>181</sup> The Treasury Select Committee has highlighted the resulting paradox:

It is regrettable that the HMRC's relationship with HM Treasury can give rise to a situation where a Minister can recognise publicly that a problem exists in a department which is within his remit,

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<sup>177</sup> This quote was attributed to Winston Churchill by Sir Ian Gilmour during a cabinet meeting in 1981, see: Norman Lowe, *Mastering Modern British History* (4th edn., Palgrave Macmillan 2009), 731.

<sup>178</sup> HMRC, *Our Governance*, available at: <<https://www.gov.uk/government/organisations/hm-revenue-customs/about/our-governance#change-delivery-committee>> accessed 31 September 2017.

<sup>179</sup> On individual responsibility, see: Colin Turpin and Adam Tomkins, *British government and the constitution: text and materials* (7th edn., CUP 2011) 573-591. On issues of accountability, see: Matthew Flinders, *Delegated Governance and the British State* (OUP 2008), ch. 6; Jill Rutter, *The Strange Case of Non-Ministerial Departments* (Institute for Government, October 2013), 7-11.

<sup>180</sup> CRCA 2005, s. 11.

<sup>181</sup> For instance, George Osborne came in for a lot of criticism in relation to HMRC's settlement with Google of its past tax affairs in the first half of 2016. See George Parker and Vanessa Houlder 'Backlash builds against Google tax deal' *The Financial Times* (London, 25 January 2016); Judith Freedman, 'UK institutions for tax governance: reviewing tax settlements' (2016) BTR 7, 8.

but tell Parliament that he is powerless to take action to bring about improvement.<sup>182</sup>

Control of HMRC accordingly does not arise at a ministerial level, but rather by senior civil servants,<sup>183</sup> and accountability must be sought through alternative avenues. The most powerful of these channels are the select committees, the formal vehicles through which scrutiny of HMRC is to take place. An independent body meanwhile performs external audits and the courts undertake indirect regulation. This Section will demonstrate that in practice these entities incommensurately examine both the quality and accessibility of forms of general HMRC soft law. The supervision afforded by these bodies will be analysed separately by first setting out the role of the relevant body generally vis-à-vis HMRC and thereafter assessing the scrutiny each body exercises in relation to general HMRC soft law.

It is not necessary for scrutiny to take place only in such lofty locations as Portcullis House or the Royal Courts of Justice however. Taxpayers, and organisations representing taxpayers, can play an important role in the scrutinising process too. This Section thus will proceed, after analysing the more formal supervision channels, to consider the degree to which taxpayers are afforded the opportunity to scrutinize general HMRC soft law.

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<sup>182</sup> Treasury Select Committee, *Closing the Tax Gap: HMRC's Record at Ensuring Tax Compliance* (HC 2010-12, 1371) [90].

<sup>183</sup> In HMRC, the Chief Executive and Permanent Secretary is responsible to Parliament for the department's expenditure and performance. See: HMRC, *Chief Executive and Permanent Secretary*, available at: <<https://www.gov.uk/government/people/jon-thompson--3>> accessed 31 September 2017.

## 4.1. Treasury Select Committee

### 4.1.1. Ambit of the role

The Treasury Select Committee ('TSC')<sup>184</sup> is appointed by the House of Commons to examine the expenditure, administration and policy of HM Treasury, HMRC, and associated public bodies.<sup>185</sup> In order to perform its primary function of examining expenditure, administration and policy, the committee has the power to 'send for persons, papers and records'.<sup>186</sup> Its power to summon witnesses, not merely from public institutions but also from industry and academia,<sup>187</sup> is unqualified 'except to the extent that it conflicts with the privileges of the Crown and of the Members of the House of Lords, or with the rights of Members of the House of Commons'.<sup>188</sup> Although the TSC itself cannot enforce its order, a refusal to comply can be reported to the House, which might thereafter treat the refusal as contempt.<sup>189</sup> In practice however, the formal power is rarely used and the committees prefer to proceed by invitation rather than by command.<sup>190</sup> How exactly this power interacts with other legal provisions is also not entirely clear. During the 'Settlements' scandal,<sup>191</sup> senior

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<sup>184</sup> Formally, the 'House of Commons Treasury Committee'.

<sup>185</sup> For statutory authority, see Standing Order No.152, Standing Orders of the House of Commons 2015.

<sup>186</sup> Standing Order No. 152(4)(a), Standing Orders of the House of Commons 2015.

<sup>187</sup> Standing Order No. 152(4)(a), Standing Orders of the House of Commons 2015; John McFall, 'The Treasury Select Committee: its reach and its role in the financial crisis' (2009) 29(3) *Economic Affairs* 53, 53.

<sup>188</sup> William McKay, Mark Hutton, Alan Sandall (eds), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (23rd edn., Butterworths Law 2004) 647, noted in Osita Mba, 'Transparency and accountability of tax administration in the UK: the nature and scope of taxpayer confidentiality' (2012) *BTR* 187, 193.

<sup>189</sup> Turpin and Tomkins (n 179) 620.

<sup>190</sup> *Ibid.*

<sup>191</sup> See: National Audit Office, *Settling large tax disputes* (June 2012).

members of HMRC refused to answer questions from another select committee, namely the Public Accounts Committee, which has the same power to send for ‘persons, papers and records’.<sup>192</sup> The refusal was based on an assertion that employees of HMRC were proscribed from relinquishing taxpayer information on the basis of the duty of confidentiality<sup>193</sup> enshrined in CRCA 2005.<sup>194</sup>

#### 4.1.2. Relationship with HMRC

From this cursory overview of the TSC’s remit, it would appear that the body is concerned more broadly with aspects of administration, policies undertaken and value-for-money, than the scrutiny of forms of general HMRC soft law. Analysis of the TSC’s<sup>195</sup> relationship with HMRC, through examination of the reports undertaken by the body relating to HMRC, reveals this to be precisely the case.

During the short 2015-17 parliamentary session, the TSC reported on the appointment of various figures in HMRC,<sup>196</sup> and HMRC proposals in respect of ‘Making Tax Digital’.<sup>197</sup> In respect of the latter, the Committee did at several times recommend that HMRC should produce ‘clear guidance’ so as to smooth the transition to digitalisation,<sup>198</sup> but left it to HMRC to tease out what in substance such guidance should look like. This focus by the TSC upon the need

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<sup>192</sup> Standing Order No. 148, Standing Orders of the House of Commons 2015.

<sup>193</sup> PAC, *HM Revenue & Customs 2010–11 Accounts: tax disputes* (n 90) 9-12; Ev 3, Q25, Q33 (David Hartnett); Ev 113, Q84 (Lesley Strathie).

<sup>194</sup> CRCA 2005, s. 18.

<sup>195</sup> It should be noted that this analysis also includes TSC’s sub-committee.

<sup>196</sup> See Treasury Select Committee, *Appointment of Jon Thompson as Chief Executive of HMRC* (HC 2016/17, 232) and Treasury Select Committee, *Appointment of Edward Troup as Executive Chair of HMRC* (HC 2016/17, 498).

<sup>197</sup> Treasury Select Committee, *Making Tax Digital* (HC 2016/17, 927).

<sup>198</sup> *Ibid* 23, 30, 40-41.

for general HMRC soft law instruments stands out in contrast to the concerns the body more routinely focuses upon.

During the 2010-15 parliamentary session, the TSC concerned itself with the (ca.) 6million under and overpayments of tax revealed in September 2010,<sup>199</sup> the tax gap<sup>200</sup> (including questioning of David Hartnett, then Permanent Secretary for tax at HMRC over the Goldman Sachs revelations)<sup>201</sup> and the operation of the PAYE system.<sup>202</sup> Additionally, Lin Homer (former Chief Executive of HMRC) produced a letter for the TSC with information concerning the publication of HMRC's Business Plan 2014-16,<sup>203</sup> whilst the TSC also held an inquiry into revelations that a significant number of UK residents had secret Swiss bank accounts possibly being used to evade UK taxes.<sup>204</sup>

Over the course of the 2005-2010 session, the TSC inquired of the closure and movement of offices, relationship with Mapeley,<sup>205</sup> staff morale,<sup>206</sup> child trust funds,<sup>207</sup> administration issues (such as data security<sup>208</sup> and tax credits<sup>209</sup>),

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<sup>199</sup> Treasury Select Committee, *16th Report: Administration and effectiveness of HM Revenue and Customs* (HC 2010/12, 731).

<sup>200</sup> Treasury Select Committee, *29th Report - Closing the Tax Gap: HMRC's record at ensuring tax compliance* (HC 2010/12, 1371).

<sup>201</sup> *ibid* 20.

<sup>202</sup> Treasury Select Committee, *HMRC's operation of the PAYE system* (HC 2010/12, 479-I)

<sup>203</sup> Lin Homer, *Letter to Andrew Tyrie, Chair of the Treasury Select Committee* (3 July 2014), available at: <<http://www.parliament.uk/documents/commons-committees/treasury/140703-Lin-Homer-Business-Plan-2014-16.pdf>> accessed 31 September 2017.

<sup>204</sup> Treasury Select Committee, *HM Revenue and Customs and HSBC* (HC 2014/15, 1071).

<sup>205</sup> Mapeley STEPS is a private sector consortium to which the ownership and management of the estates of the Inland Revenue and Customs and Excise were transferred.

<sup>206</sup> Treasury Select Committee, *Minutes of Evidence for 25 June 2008* (HC 2007/08, 852-I).

<sup>207</sup> Treasury Select Committee, *Child Trust Funds follow up* (HC 2007/08, 537-I); Treasury Select Committee, *Minutes of Evidence for 30 November 2005* (HC 2005/06, 738-I).

<sup>208</sup> Treasury Select Committee, *Minutes of Evidence for 29 October 2008* (HC 2007/08, 1097-III).

<sup>209</sup> Treasury Select Committee, *Minutes of Evidence for 14 March 2007* (HC 2006/07, 382-I); Treasury Select Committee, *6th Report: The administration of tax credits* (HC 2010/12, 811).

expenditure,<sup>210</sup> and the merger of the Inland Revenue and Customs and Excise departments.<sup>211</sup>

For the 2001-2005 session, the TSC probed the Spring Departmental Reports (which investigates policies, strategies, expenditure and organisational matters),<sup>212</sup> fraud relating to excise duty<sup>213</sup> and alcohol duty,<sup>214</sup> the merger of the Inland Revenue and Customs and Excise,<sup>215</sup> the transfer of the management of their estates to Mapeley STEPS,<sup>216</sup> the working family tax credit,<sup>217</sup> and the administrative costs of tax compliance.<sup>218</sup> The TSC further reported on the performance of the Self-Assessment system,<sup>219</sup> on restricting the use of offshore tax structures, the implementation of tax credits, and the suspension of National Insurance Contributions Deficiency Notices (which essentially state that one owes National Insurance).<sup>220</sup>

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<sup>210</sup> Treasury Select Committee, *Minutes of Evidence for 22 November 2006* (HC 2006/07, 51-I); Treasury Select Committee, *Minutes of Evidence for 26 and 12 October 2005* (HC 2005/06, 524-I, II).

<sup>211</sup> Treasury Select Committee, *Minutes of Evidence for 24 January 2007* (HC 2006/07, 192-I).

<sup>212</sup> Treasury Select Committee, *Minutes of Evidence for 30 June 2004* (HC 2003/04, 908-I); Treasury Select Committee, *Minutes of Evidence for 21st July 2004* (HC 2003/04, 835-I); Treasury Select Committee, *Minutes of Evidence for Wednesday 4 June 2003* (HC 2002/03, 746-I). In addition to further organisational matters analysed by the body: Treasury Select Committee, *Minutes of Evidence for Wednesday 26th June 2002* (HC 2001/02, 1011).

<sup>213</sup> Treasury Select Committee, *Minutes of Evidence for 17 November 2004* (HC 2003/04, 1281-I).

<sup>214</sup> Treasury Select Committee, *Minutes of Evidence for Wednesday 14 November 2001* (HC 2001/02, 371-I).

<sup>215</sup> Treasury Select Committee, *Ninth Report: The Merger of Customs & Excise and the Inland Revenue* (HC 2003/04, 556).

<sup>216</sup> Treasury Select Committee, *Fourth Report: The Handling of the Joint Inland Revenue/Customs and Excise Steps PFI Project* (HC 2002/03, 184).

<sup>217</sup> Treasury Select Committee, *Minutes of Evidence for Wednesday 19th June 2002* (HC 2001/02, 975).

<sup>218</sup> Treasury Select Committee, *7th Report: The Administrative Costs of Tax Compliance* (HC 2003/04, 269).

<sup>219</sup> Treasury Select Committee, *Inland Revenue: Self Assessment Systems* (HC 2001/02, 681); see also: Treasury Select Committee, *Minutes of Evidence for Wednesday 6th March 2002* (HC 2001/02, 681-I).

<sup>220</sup> Treasury Select Committee, *Tenth Report: Inland Revenue Matters* (HC 2002/03, 834)

Between 1997-2001, the TSC reported on matters relating to Customs and Excise such as the body's success in achieving compliance;<sup>221</sup> tackling the shadow economy;<sup>222</sup> the impact of non-compliance on compliant businesses;<sup>223</sup> the potential for closer working with the Inland Revenue;<sup>224</sup> the collection of excise duties.<sup>225</sup> Customs and Excise also gave evidence on updates in connection with recommendations from previous reports.<sup>226</sup> Meanwhile, the TSC conducted a significant report into the Inland Revenue's approach to compliance.<sup>227</sup> From 1992-1997, the Inland Revenue and Customs and Excise were mentioned in a series of ancillary reports.<sup>228</sup> Furthermore, during the 1994/95 session, following significant losses in revenue as a result of an exponential increase in personal imports of beer, wine and tobacco following the opening of the European Single Market in 1993, the TSC undertook an extensive report into cross border shopping.<sup>229</sup>

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<sup>221</sup> Treasury Select Committee, *Second Report* (HC 1999/00, 53).

<sup>222</sup> *ibid.*

<sup>223</sup> *ibid.*

<sup>224</sup> *ibid.*

<sup>225</sup> Treasury Select Committee, *Sixth Report* (HC 2000/01, 237).

<sup>226</sup> Treasury Select Committee, Minutes of Evidence for Wednesday 1 November 2000 (HC 1999/00, 953).

<sup>227</sup> Treasury Select Committee, *Sixth Report* (HC 1998/99, 199).

<sup>228</sup> Treasury Select Committee, *Third Report: the 1996 Budget* (HC 1996/97, 129); Treasury Select Committee, *Third report: the 1995 budget* (HC 1995/96, 79); Treasury Select Committee, *First report: the cross border market in excise products* (HC 1995/96, 24); Treasury and Civil Service Committee, *Fourth report: Simplified estimates and resource accounting together with the proceedings of the committee, minutes of evidence and appendices* (HC 1994/95, 212); Treasury and Civil Service Committee, *The city research project: Minutes of evidence* (HC 1994/95, 533); Treasury and Civil Service Committee, *Financial Services Regulation: Minutes of evidence* (HC 1994/95, 187-I); Treasury and Civil Service Committee Sub-Committee, *The role of the Civil Service* (HC 1993/94, 27-I); Treasury and Civil Service Committee Sub-Committee, *The role of the Civil Service* (HC 1993/94, 27-VIII); Treasury and Civil Service Committee sub-committee, *The role of the Civil Service: minutes of evidence* (HC 1992/93, 390-VIII); Treasury and Civil Service Committee, *Sixth report: The role of the Civil Service (Interim report)* (HC 1992/93, 390); Treasury and Civil Service Committee Sub-Committee, *The role of the Civil Service: minutes of evidence* (HC 1992/93, 390-VII).

<sup>229</sup> Treasury and Civil Service Committee, *First report: Cross border shopping* (HC 1994/95, 35).

During the 1987-1992 sitting of Parliament, both bodies were mentioned in ancillary reports,<sup>230</sup> provided information for reports on general matters not pertaining specifically to the work of either body<sup>231</sup> and submitted evidence for the (then) recently introduced system of departmental reports.<sup>232</sup> The TSC commissioned a report compiling the effect of manpower losses at both departments<sup>233</sup> and elsewhere made a number of recommendations on the use of economic statistics.<sup>234</sup>

From 1983-1987, as with the previous sitting, both bodies were referred to in ancillary reports,<sup>235</sup> provided evidence for reports on general matters<sup>236</sup>

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<sup>230</sup> Treasury and Civil Service Committee, *Eighth report: Progress in the next steps initiative* (HC 1989/90, 481); Treasury and Civil Service Committee, *Sixth report: The presentation of information on public expenditure* (HC 1988/89, 217); Treasury and Civil Service Committee, *Fifth report: Developments in the Next Steps Programme* (HC 1988/89, 348); Treasury and Civil Service Committee Sub-Committee, *The civil service management reform: the next steps* (HC 1987/88, 494-I); Treasury and Civil Service Committee, *Seventh report: Public expenditure and estimates* (HC 1987/88, 506); Treasury and Civil Service Committee, *Second report: The government's public expenditure plans 1988-89 to 1990-91* (HC 1987/88, 292). The Inland Revenue was additionally mentioned in a report on the 1988 budget, see: Treasury and Civil Service Committee, *Fourth report: The 1988 budget* (HC 1987/88, 400).

<sup>231</sup> Treasury and Civil Service Committee, *First report: The 1990 autumn statement* (HC 1990/91, 41); Treasury and Civil Service Committee, *Sixth report: Public expenditure* (HC 1989/90, 466); Treasury and Civil Service Committee, *Second report: The work of the valuation office* (HC 1989/90, 223); Treasury and Civil Service Committee, *Third report: International debt strategy* (HC 1989/90, 138); Treasury and Civil Service Committee, *Third report the European Commission's proposals on the approximation of indirect taxation* (HC 1987/88, 248).

<sup>232</sup> Treasury and Civil Service Committee, *Fifth report: The new system of departmental reports* (HC 1990/91, 290).

<sup>233</sup> Treasury and Civil Service Committee, *Manpower losses in the revenue departments* (1988/89, 155-I).

<sup>234</sup> Treasury and Civil Service Committee, *Official economic statistics* (HC 1989/90, 671); Treasury and Civil Service Committee, *Official economic statistics* (HC 1988/89, 181-I); Treasury and Civil Service Committee, *Official economic statistics* (HC 1988/89, 181-II).

<sup>235</sup> Treasury and Civil Service Committee, *Fifth report* (HC 1986/87, 84); Treasury and Civil Service Committee, *Third report* (HC 1986/87, 153); Treasury and Civil Service Committee, *International credit and capital markets* (1985/86 HC 464-I); Treasury and Civil Service Committee, *Sixth report: The government's expenditure plans 1985-86 to 1987-88* (HC 1984/85, 213); Treasury and Civil Service Committee, *Sixth Report: Estimates 1984-85* (HC 1983/84, 516); Treasury and Civil Service Committee, *Fourth report: The 1984 budget* (HC 1983/84, 341); Treasury and Civil Service Committee, *Second report: The structure and form of financial documents presented to Parliament* (HC 1984/85, 110).

<sup>236</sup> Treasury and Civil Service Select Committee, *Civil service recruitment, training & career management & public service manpower* (HC 1986/87, 358-I); Treasury and Civil Service Committee, *The financial and economic consequences of UK membership of the European*

and supplied information on expenditure.<sup>237</sup> The TSC specifically reported on the monitoring of corporate tax receipts;<sup>238</sup> VAT;<sup>239</sup> tax office delays at the Inland Revenue;<sup>240</sup> and organisational issues (such as systems for preventing the illicit drug trade and deferment guarantees on warehoused goods) at Customs and Excise.<sup>241</sup>

Finally, during the 1979-1983 parliamentary session, both bodies were cited in tangential reports,<sup>242</sup> provided evidence for general reports<sup>243</sup> and submitted information for a report on the structure of income taxation.<sup>244</sup>

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*communities* (HC 1984/85, 57-II); Treasury and Civil Service Committee Sub-Committee, *Acceptance of outside appointments by Crown servants* (HC 1983/84, 302); Treasury and Civil Service Committee Sub-Committee, *The financial and economic consequences of UK membership of the European communities* (HC 1984/85, 57-I).

<sup>237</sup> Treasury and Civil Service Committee, *Supply estimates 1987-88* (HC 1986/87, 332-I); Treasury and Civil Service Committee, *Supply estimates 1987-88* (HC 1986/87, 332-I); Treasury and Civil Service Committee, *Supply estimates* (HC 1985/86, 38-i); Treasury and Civil Service Committee, *Memoranda on long-term trends in resources and public expenditure* (HC 1984/85, 141); Treasury and Civil Service Committee, *Supply estimates 1985-86* (HC 1984/85, 369-I).

<sup>238</sup> Treasury and Civil Service Committee, *Sixth report* (HC 1986/87, 293).

<sup>239</sup> Treasury and Civil Service Committee, *Fourth report* (HC 1986/87, 45).

<sup>240</sup> Treasury and Civil Service Committee, *Inland revenue: tax office delays* (HC 1985/86, 165-I)

<sup>241</sup> Treasury and Civil Service Committee, *Sixth Report: Estimates 1984-85* (HC 1983/84, 487-I); Treasury and Civil Service Committee, *Sixth Report: Estimates 1984-85* (HC 1983/84, 516).

<sup>242</sup> Treasury and Civil Service Committee, *Memorandum on efficiency and effectiveness in the civil service* (HC 1982/83, 118); Treasury and Civil Service Committee, *First special report* (HC 1982/83, 46); Treasury and Civil Service Committee, *Fourth report: International monetary arrangements: international lending by banks* (HC 1982/83, 21); Treasury and Civil Service Committee, *Civil service pay* (HC 1982/83, 19-I); Treasury and Civil Service Committee Sub-Committee, *Efficiency and effectiveness in the Civil Service* (HC 1980/81, 360-III); Treasury and Civil Service Committee, *Seventh report: Civil service manpower reductions* (HC 1980/81, 423); Treasury and Civil Service Committee, *Fifth report: The 1981 budget and the government's expenditure plans 1981-82 to 1983-84* (HC 1980/81, 232); Treasury and Civil Service Committee Sub-Committee, *Efficiency and effectiveness in the Civil Service* (HC 1980/81, 360-II); Treasury and Civil Service Committee, *Fourth report* (HC 1979/80, 712)

<sup>243</sup> Treasury and Civil Service Committee, *Third report: Efficiency and Effectiveness of the Civil Service* (HC 1981/82, 236); Treasury and Civil Service Committee, *Budgetary reform in the UK* (HC 1981/82, 137); Treasury and Civil Service Committee, *The 1981 budget and the government's expenditure plans 1981-82 to 1983-84* (HC 1980/81, 232-I); Treasury and Civil Service Committee, *First report: The future of the Civil Service Department* (HC 1980/81, 54); Treasury and Civil Service Committee, *Fifth report: The 1981 budget* (n 242); Treasury and Civil Service Committee Sub-Committee, *Tax changes in the March 1980 Budget* (HC 1979/80, 554-I, II and III); Treasury and Civil Service Committee, *Second report: The budget and the government's expenditure plans 1980-81 to 1983-84* (HC 1979/80, 584); Treasury and Civil Service Committee, *Efficiency of the Civil Service* (HC 1979/80, 333-II, IV, V and VII); Treasury and Civil Service Committee, *Fourth report: Civil Service manpower reductions* (HC 1979/80, 712)

### 4.1.3. Interim Remarks

It is not doubted that the TSC provides a ‘vital link in the British democratic system’<sup>245</sup> by examining the expenditure, administration and policy of HMRC. The case for the involvement of the TSC is fortified by the fact that HMRC is a non-ministerial departmental body. Nevertheless, the TSC is most at home when crunching figures, asking hard-hitting questions of HMRC’s internal inefficiencies and assessing its policies for tackling emerging issues. The investigation undertaken in this Section reveals that it focuses broadly on aspects of administration, policies undertaken and value-for-money, and not, importantly, the scrutiny of forms of general HMRC soft law.

## 4.2. Comptroller & Auditor General, National Audit Office and Public Accounts Committee

### 4.2.1. Ambit of the roles

The Comptroller & Auditor General (‘CAG’), National Audit Office (‘NAO’), and Public Accounts Committee (‘PAC’)<sup>246</sup> operate an interrelated supervisory role over HMRC. The CAG carries out examinations into the economy, efficiency and effectiveness with which governmental departments have used their

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<sup>244</sup> Treasury and Civil Service Committee Sub-Committee, *The structure of personal income taxation and income support* (HC 1981/82, 331); Treasury and Civil Service Committee, *Third special report: The Structure of Personal Income Taxation and Income Support* (HC 1982/83, 386); Treasury and Civil Service Committee Sub-Committee, *The structure of personal income taxation and income support* (HC 1982/83, 20-I); Treasury and Civil Service Committee Sub-Committee, *The structure of personal income taxation and income support* (HC 1982/83, 20-II).

<sup>245</sup> McFall (n 187) 54.

<sup>246</sup> Formally, ‘House of Commons Public Accounts Committee’.

resources in discharging their functions.<sup>247</sup> The officeholder accordingly has considerable discretion to decide what areas of tax administration to examine,<sup>248</sup> although the primary function has, since the office's inception in 1866,<sup>249</sup> been to examine accounts on behalf of the House of Commons.<sup>250</sup> The CAG is head of the NAO,<sup>251</sup> which has approximately 800 staff,<sup>252</sup> and an officer of the House of Commons.<sup>253</sup> Being an auditor, the NAO's primary function is executed by way of auditing the financial statements of government departments and evaluating value-for-money of public spending.<sup>254</sup> The NAO also carries out investigations into areas of concern,<sup>255</sup> such as the report into the settling of large tax disputes by HMRC.<sup>256</sup> Additionally, the body acts on an international level,<sup>257</sup> for instance carrying out external audits for other international organisations.<sup>258</sup> The NAO also supports the services of Parliament<sup>259</sup> by presenting its reports to the PAC<sup>260</sup> which, like the TSC, is a select committee of the House of Commons. Most reports of the NAO and CAG are used as the basis of PAC hearings.<sup>261</sup>

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<sup>247</sup> National Audit Act 1983, s. 6(1).

<sup>248</sup> National Audit Act 1983, s. 1(3); National Audit Office, *Increasing the effectiveness of tax collection: a stocktake of progress since 2010* (February 2015) (HC 2014/15, 1029-I).

<sup>249</sup> Exchequer and Audit Departments Act 1866 created the post.

<sup>250</sup> John McEldowney, 'Public Expenditure and the Control of Public Finance' in Jeffrey Jowell and Dawn Oliver, *The Changing Constitution* (7th edn., OUP 2011) 357.

<sup>251</sup> National Audit Act 1983, s. 3(1)(a).

<sup>252</sup> National Audit Office, *About us*, available at: <<https://www.nao.org.uk/about-us/>> accessed 31 September 2017.

<sup>253</sup> National Audit Act 1983, s. 1(2).

<sup>254</sup> NAO, *About Us* (n 252).

<sup>255</sup> *ibid.*

<sup>256</sup> NAO, *Settling large tax disputes* (n 191).

<sup>257</sup> NAO, *About Us* (n 252).

<sup>258</sup> Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (OUP 1999) 194.

<sup>259</sup> NAO, *About Us* (n 252).

<sup>260</sup> Daintith and Page (n 258) 197.

<sup>261</sup> NAO, *About Us* (n 252); NAO, *Increasing the effectiveness of tax collection* (n 248) 5; McEldowney (n 250) 356.

The PAC was established in 1861 by a resolution of the House of Commons.<sup>262</sup> It is appointed to examine ‘the accounts showing the appropriation of the sums granted to Parliament to meet the public expenditure, and of such other accounts laid before Parliament as the Committee may think fit’.<sup>263</sup> Together with the NAO and CAG accordingly, the committee is provided with the authority to scrutinise HMRC and hold it to account for its administration of the tax system.<sup>264</sup> The bodies’ main method of affecting change is through recommendations to government<sup>265</sup>, but at times they choose to heighten awareness of the underlying issues by courting publicity.<sup>266</sup> For this reason, although the constitutional importance is not in dispute here,<sup>267</sup> the bodies may stir up ill feelings.<sup>268</sup>

By way of powers, the PAC has the same power to send for ‘persons, papers and records’<sup>269</sup> as the TSC.<sup>270</sup> The CAG meanwhile has right of access to all such documents as may be reasonably required for executing its functions.<sup>271</sup>

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<sup>262</sup> HC Deb 31 March 1862, vol 166, cols 329-30. See now: Standing Order No. 148, Standing Orders of the House of Commons 2015.

<sup>263</sup> Standing Order No. 148(1), Standing Orders of the House of Commons 2015.

<sup>264</sup> NAO, *Increasing the effectiveness of tax collection* (n 248) 5.

<sup>265</sup> NAO, *Increasing the effectiveness of tax collection* (n 248) 5.

<sup>266</sup> Daintith and Page (n 258) 198.

<sup>267</sup> McEldowney (n 250) 356. See generally Gavin Drewry (ed), *The New Select Committees* (2nd edn., OUP 1989).

<sup>268</sup> See: ‘Public accounts committee ‘theatrical exercise in public humiliation’’, *The Guardian* (London, 9 March 2012), available at: <<http://www.theguardian.com/public-leaders-network/2012/mar/09/margaret-hodge-gus-odonnell-row>> accessed 31 September 2017.

<sup>269</sup> Standing Order No. 148, Standing Orders of the House of Commons 2015.

<sup>270</sup> Treasury Select Committee: Ambit of the role, see text at n 184.

<sup>271</sup> National Audits Act 1983, s.8.

#### 4.2.2. Relationship with HMRC

Unlike the TSC, the three entities have a distinct mandate apropos soft law, specifically ESCs, traceable back to a Treasury Minute from 1897.<sup>272</sup> The Bank of England held part of the estate of Alexander III of Russia and this concession attempted to exempt this segment from death duty.<sup>273</sup> The PAC, perturbed by such gratuitous relaxations of the law by the Inland Revenue, put in place a process for overseeing individual and class concessions. Individual concessions above £50 would be furnished yearly to the CAG, together with the reasons for the dispensations.<sup>274</sup> The CAG would thereafter use his or her ‘discretion with care and tact’ and report to the PAC any particular concession that it was considered ought to be brought to their attention.<sup>275</sup> It was stressed that class concessions, meanwhile, should be put on a statutory footing at the earliest opportunity.<sup>276</sup> Although the PAC was clearly concerned with the use of concessions, it is notable that their cessation was not suggested.

Accordingly, and distinct from the case of the TSC, it is not necessary to comprehensively analyse the bodies’ relationship with HMRC in order to understand the capacity of the trio of the PAC, CAG and NAO and their ability to supervise forms of general HMRC soft law. This can be extrapolated by analysing the level of scrutiny afforded by the triumvirate to HMRC class concessions. An examination highlights however that the three bodies are compromised in

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<sup>272</sup> PAC, *Second report from the committee of public accounts* (n 129) 147-148.

<sup>273</sup> David Tallon, Ian Young, Paul Elliott, Dinesh Dave, *Inland Revenue Practices and Concessions: 1984/85 Bound Volume* (Oyez Longman 1984) 11

<sup>274</sup> PAC, *Second report from the committee of public accounts* (n 129) 148.

<sup>275</sup> *ibid.*

<sup>276</sup> *ibid.*

respect of their ability to properly scrutinize ESCs. Since 1897, PACs and CAGs have regularly asserted that class concessions ought to be regularised by statute at the earliest practicable opportunity. In this regard however, the bodies' have demonstrated their own limitations vis-à-vis legal analysis. The bodies have concerned themselves historically with simply questioning why concessions have not been put on a statutory footing. They have not been concerned with issues of quality or accessibility, such as whether the concessions were consistent with the underlying law; whether they were sufficiently clear or whether certain practices should have been published. For instance, the CAG in the report for the year ending 31st March 1953 noted the following:

As the remissions still without statutory cover had become rather numerous I asked for information as to the principal concessions which continued in force, and the intentions of the Department with regard to seeking such cover.<sup>277</sup>

In the report for the year ended 31st March 1968, the CAG similarly directed the Revenue towards regularising concessions, rather than analysing the substance:

The Committee of Public Accounts of Session 1966-67 endorsed the view expressed in Treasury Minute of 31 December 1897 that statutory cover should be sought for remissions applicable to classes at the earliest opportunity.<sup>278</sup>

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<sup>277</sup> Comptroller & Auditor General, *Appropriation accounts of the sums granted by Parliament for revenue departments for the year ended 31st March 1953* (HC 1953/54, 12-XXIV), x.

<sup>278</sup> Comptroller & Auditor General, *Appropriation accounts of the sums granted by Parliament for civil services, classes I-V, for the year ended 31st March 1968* (HC 1968/69, 53-LI), x.

Likewise, in the report for the year ended 31st March 1981, the CAG reiterated the focus of the bodies on placing concessions in legislation, and not on expending time reviewing the interstices of ESCs:

Over the years successive Committees of Public Accounts have endorsed the view, first expressed by the Treasury in 1897, that wherever possible extra-statutory class concessions should be placed on a statutory footing at the earliest opportunity.<sup>279</sup>

In 1991, the PAC intimated again its unease with published ESCs, but did not apply any scrutiny to the corpus of the existing class concessions:

We learnt that three concessions which were suitable for legislation were over 50 years old and that one concession which had been classified as temporary was also 50 years old<sup>280</sup>

Finally, the practice of the CAG, NAO and PAC submitting ESCs to scrutiny appears to have completely lapsed, with no mention of the issue by either body since 1998.<sup>281</sup>

What these examples serve to demonstrate is that although the PAC and CAG have been given a specific mandate to scrutinise ESCs, and although the bodies have nominally noted this in the reports (at least up until 1998), the bodies have failed to interrogate the relevant ESCs for consistency with the law or clarity. As for the issue of the need for pieces of relevant soft law to be published, the matter appears to have gone unnoticed by the bodies. It was the Chancellor of the Exchequer who conducted a review in the mid-80s into the

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<sup>279</sup> Comptroller & Auditor General, *Appropriation accounts on the sums granted by Parliament for classes XIII-XIV for the year ended 31st March 1981* (HC 1981/82, 76-IX), xi.

<sup>280</sup> Public Accounts Committee, *Second report: Inland Revenue Department* (HC 1990/91, 71), x.

<sup>281</sup> Comptroller & Auditor General, *General report* (HC 1997/98, 251-XIX) 31.

publication of ESCs, and specified thereafter that administrative practices would be subject to a regular biannual review to identify any which should properly be classified as ESCs.<sup>282</sup> In this regard, the issue of publication does not appear to have been considered by the NAO, CAG and PAC to be a matter for scrutiny, much less issues surrounding retrospectivity and mingling.

Freedman elsewhere has noted that the shortcomings in terms of tax expertise of the offices of the CAG and NAO were highlighted in particular by the fact that retired tax judge Sir Andrew Park had to be drafted in to conduct a report into *Settling Large Tax Disputes*.<sup>283</sup> The report concerned apparent ‘Sweetheart deals’ that HMRC had entered into with large businesses. This further exemplifies the fact that the expertise of the department is limited to the extent that it deals with facts and figures but not the intricacies of tax law.

#### 4.2.3. Interim remarks

The general merit of the CAG, NAO and PAC is not at issue here. However, the three bodies were delegated a specific duty in relation to the surveillance of general HMRC soft law and have not fulfilled this function. That this is the case should come as little surprise. A perfunctory glance at the bodies reveals that their particular expertise lies in holding governmental departments to account over spending. Indeed, a revisit to the 1897 Treasury minute helps to explain why the bodies were initially considered appropriate to supervise ESCs. The emphasis in the minute was on individual, rather than class, concessions,

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<sup>282</sup> HC Deb 16 May 1985, vol 79, cols 188-9.

<sup>283</sup> Judith Freedman, ‘Managing Tax Complexity: The Institutional Framework for Tax Policy-Making and Oversight’, 277 in Chris Evans, Richard Krever and Peter Mellor, *Series on International Taxation, Vol 53: Tax Simplification* (Kluwer Law International 2013).

unsurprising given that the individual concession granted to the estate of Alexander III of Russia was the catalyst for the meeting. In other words, at the time the mandate was set out, the role revolved around scrutinising specific dispensations, thereby falling neatly into the expertise of the trio. The CAG, NAO and PAC were never equipped to regulate class concessions and as the issue grew over the proceeding decades, it should have been entirely predictable that the bodies would fail to grasp the resulting problems.<sup>284</sup>

### 4.3. The courts' residual role

#### 4.3.1. Ambit of the role

Whilst traversing the delicate separation of powers, the courts can play an important constitutional role in 'checking' administrative discretion,<sup>285</sup> mindful to protect individuals' liberty from any unjustified encroachments by the executive.<sup>286</sup> Given that it is promulgated under HMRC's managerial discretion, there is no reason in principle why the courts should not also undertake a residual supervisory function in respect of forms of general HMRC soft law.

#### 4.3.2. Relationship with HMRC

Supervision of general HMRC soft law by the courts is weak in practice however for two primary reasons. First, the opportunity for intervention is

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<sup>284</sup> See for instance HC Deb. 12 July 1976 vol 915, col 187 and Judith Freedman, 'Creating new UK institutions for tax governance and policy making: progress or confusion?' (2013) 4 BTR 373, 381.

<sup>285</sup> KC Davis 'Judicial Control of Administrative Action' (1966) 66(4) *Columbia Law Review* 635; KC Davis, *Discretionary Justice: A Preliminary Inquiry* (2nd edn, Baton Rouge 1971).

<sup>286</sup> *R v Secretary of State for the Home Department, ex parte Simms* [1999] 3 WLR 328, [2000] 2 AC 115, 131-132.

severely limited, given the necessary prerequisite that actions actually be brought before the courts. Those that are directly affected by the soft law are unlikely to bring challenges where it operates in their interest.<sup>287</sup> Indirectly interested third parties meanwhile will face the issue of *locus standi*.<sup>288</sup> The prevailing trend in tax cases however is to allow ‘public-spirited’<sup>289</sup> taxpayers to bring challenges before the courts, even where there is no direct interest in a case.<sup>290</sup> The real impediment to the courts involvement is that there is little appetite amongst concerned citizens to bring proceedings. There is to date just one case in which third parties have challenged the use of soft law material by HMRC. In *UK Uncut v HMRC*,<sup>291</sup> an action from an advocacy group contesting, *inter alia*, that HMRC had failed to comply with its own internal guidance when settling an outstanding tax bill with Goldman Sachs was allowed to proceed to full hearing.<sup>292</sup>

Secondly, assuming judicial willingness to intervene, the evidence suggests that the approach adopted by the courts in respect of general HMRC soft law, namely ‘nudging’ HMRC to take action, has little impact upon HMRC’s handling of soft law. The fallout from *Wilkinson*<sup>293</sup> is generally held out as an example of the courts’ impact as regards general HMRC soft law. It has largely

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<sup>287</sup> A serious problem as highlighted in the scholarship on ESCs over the years: Williams (n 5); Malcolm Gammie, ‘Extra-Statutory Concessions’ [1980] BTR 308.

<sup>288</sup> See for instance *R (On the application of David Edwards) v The Environment Agency, Secretary of State & Rugby Ltd* [2004] EWHC 736, [2004] 3 All ER 21.

<sup>289</sup> William Wade and Christopher Forsyth, *Administrative Law* (11th edn., OUP 2014) 590-592.

<sup>290</sup> *UK Uncut Legal Action Ltd v HM Revenue and Customs* [2013] EWHC 1283, [11], [2013] SWTI 1849; *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (*‘Fleet Street Casuals’*).

<sup>291</sup> *UK Uncut Legal Action* (n 290).

<sup>292</sup> On which, see Dominic de Cogan, *‘UK Uncut Legal Action v HMRC: legal inaction and a return to Fleet Street’* (2013) BTR 552, fn 26.

<sup>293</sup> *Wilkinson* (n 13).

become received wisdom that HMRC's recent restriction on the use of ESCs is a direct result of Lord Hoffmann's criticism of their use in *Wilkinson*.<sup>294</sup> However, further analysis of the period proceeding the decision, closer scrutiny of the judgment and comparison with the events following the *Vestey* series of cases serve to undermine this argument and highlight the relative anemia of the court's influence.

Before embarking on the substantive analysis of this section, it is necessary to briefly revisit the facts and judgment in *Wilkinson*. The applicant was a widower who, had he been a widow, would have been entitled to a widow's bereavement allowance under section 262 of the Income and Corporation Taxes Act 1988. Mr Wilkinson argued, *inter alia*, that HMRC could utilize their 'managerial discretion' to extend the allowance to widowers. The House of Lords rejected the applicant's claim and held that the managerial discretion endowed upon HMRC cannot be so widely construed as to concede such an allowance which Parliament could have granted but did not grant.<sup>295</sup>

Subsequent to this judgment, HMRC engaged in a process of reviewing all existing ESCs. Where possible, concessions which overreached the discretion were put on a statutory footing.<sup>296</sup> Elsewhere, HMRC found concessions which in reality were not concessionary and were withdrawn.<sup>297</sup> Some concessions were found to be dormant as few taxpayers, and in some cases no taxpayers, had

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<sup>294</sup> ICAEW, *Legitimate Expectation and Reliance on HMRC Guidance* (n 133) 16; Judith Freedman and John Vella, 'Revenue Guidance: The Limits of Discretion and Legitimate Expectations' (2012) 128 LQR 192, 194.

<sup>295</sup> *Wilkinson* (n 13) [20] (Lord Hoffmann).

<sup>296</sup> See for instance, The Enactment of Extra-Statutory Concessions Order 2014 (SI 2014/211).

<sup>297</sup> For instance, 'F18 Treatment of income tax in Canada on capital gains deemed to arise on a person's death'. See: HMRC, *Technical note and call for evidence* (January 2014) (n 162) 18.

sought their application for many years.<sup>298</sup> For instance, HMRC could not trace a single occasion when concessionary treatment of Roman Catholic religious communities, which dated back to at least 1921, had been invoked. Further however, HMRC has not added a single concession to the list of published ESCs which relate to taxes previously under the management of the Inland Revenue.<sup>299</sup> Whilst the review itself, along with the regularization or removal of unlawful concessions, is certainly merited, it is advanced for several reasons that *Wilkinson* is not the impetus for these actions.

First, the initial reaction post-*Wilkinson* can more aptly be characterised as one of inertia than one of urgency, on the part of the Treasury, HMRC and NAO. The Finance Acts of 2006<sup>300</sup> and 2007<sup>301</sup> gave a statutory footing to only one ESC relating to direct tax each respectively. Income Tax Bill 2006-7 (which subsequently became the Income Tax Act 2007) sought to incorporate a modest 4 class concessions, only two of which were listed expressly in the HMRC publications as concessions.<sup>302</sup> Neither ESC however was incorporated into the final Act. The NAO in their annual accounts from 2005-6<sup>303</sup> and 2006-7<sup>304</sup> noted

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<sup>298</sup> HMRC, *Withdrawal of extra statutory concessions: Technical Note* (December 2009) (n 117) 12.

<sup>299</sup> Compare the list of ESCs as at 31 August 2005 ((HMRC, *Extra-Statutory Concessions* (31 August 2005), available at: <<http://webarchive.nationalarchives.gov.uk/20060213221903/http://www.hmrc.gov.uk/specialist/esc.pdf>> accessed 31 September 2017) to that as at 6 April 2017 (HMRC, *Extra-Statutory Concessions: Concessions as at 6 April 2017* (April 2017) 2 available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/646447/170807\\_IR1\\_April\\_2017\\_final\\_clean.pdf.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/646447/170807_IR1_April_2017_final_clean.pdf.pdf)> accessed 31 September 2017).

<sup>300</sup> Finance Act 2006, s. 64.

<sup>301</sup> Finance Act 2007, s. 62.

<sup>302</sup> Explanatory Notes to the Income Tax HC Bill (2006-07) [14].

<sup>303</sup> National Audit Office, *HM Revenue & Customs 2005-06 Accounts: The Comptroller and Auditor General's Standard Report* (7 July 2006), available at: <<http://www.nao.org.uk/wp-content/uploads/2006/07/05061159.pdf>> accessed 31 September 2017.

<sup>304</sup> National Audit Office, *HM Revenue & Customs 2006-07 Accounts: The Comptroller and Auditor General's Standard Report* (6 July 2007), available at: <<http://www.nao.org.uk/wp-content/uploads/2007/07/0607626.pdf>> accessed 31 September 2017.

the continuing use of concessions,<sup>305</sup> but made no comment on their legality post-*Wilkinson*. Similarly, the relevant Treasury officials were unconcerned about the continued use of concessions after *Wilkinson*. On 2 May 2006, opposition MPs expressed concern about the legal standing of concessions post-*Wilkinson*. Julia Goldsworthy (at the time Liberal Democrat MP for Falmouth and Camborne) proposed an amendment to legislation which sought to abolish the corporation tax starting rate and non-corporate distribution rate. The amendment was tabled amid concerns that many small clubs and societies would once again have to pay corporation tax on very small amounts of income as a result of the abolition of the nil-rate corporation tax band.<sup>306</sup> Julia Goldsworthy was unconvinced that this problem could be remedied by concession alone, given the judgment in *Wilkinson*.<sup>307</sup> Mark Hoban (then Conservative MP for Fareham) similarly relayed the concern of Professional bodies who, although having been assured by HMRC that the issue would be tackled with a concession, were anxious that such a concession would lack legal standing.<sup>308</sup> John Healey (then Financial Secretary to the Treasury) swiftly rebutted their concerns, without substantive recourse to the decision in *Wilkinson*:

For many years, the Inland Revenue and, latterly, HMRC have not sought corporation tax returns from clubs and unincorporated associations with very small tax liabilities. That practice was established before the introduction of the starting rate of corporation tax, and it will not be affected by the changes in clause 26 [of the incoming legislation]. Any club or society that is unclear about its tax position should ask its local HMRC office for advice...

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<sup>305</sup> See National Audit Office, *HMRC 2005-06 Accounts* (n 303) [3.46] and National Audit Office, *HMRC 2006-07 Accounts* (n 304) [3.19].

<sup>306</sup> HC Deb 2 May 2006 vol 445, col 924.

<sup>307</sup> HC Deb 2 May 2006 vol 445, col 925.

<sup>308</sup> HC Deb 2 May 2006 vol 445, col 924.

Sensible practices are already in force within HMRC to ensure that the corporation tax regime is applied reasonably in respect of clubs and unincorporated associations<sup>309</sup>

With such an assurance accordingly that HMRC would continue to operate its 'sensible' concessionary practice, Julia Goldsworthy withdrew her amendment.<sup>310</sup> On 26 June 2007, Theresa Villiers (then Conservative MP for Chipping Barnet) expressed concern about the implications of *Wilkinson* as regards widely drafted 'Targeted Anti Avoidance Rules', which were to be combatted by concessions.<sup>311</sup> The Chief Secretary to the Treasury (Mr. Stephen Timms), in a manner similar to John Healey, rebutted this concern in swift fashion:

The hon. Member for Chipping Barnet referred to a famous comment...that "[a] taxpayer should be taxed by law not untaxed by concession". I see the sense in that comment, but in circumstances such as those I described an innocent taxpayer might have to pay tax in situations that we did not expect when we drafted the legislation. I suspect that a reference to the words of Mr. Justice Walton, or indeed Lord Upjohn, would probably not satisfy someone who found themselves in that position<sup>312</sup>

In other words, it was the Treasury's view that such a concession to the professional bodies would be within the powers of HMRC, without actually substantiating why, or how, such would be consistent with *Wilkinson*.

Secondly, it does not appear from the case that HMRC *had* misconceived the scope of its managerial discretion before *Wilkinson*. The speech of Lord Hoffmann did little more than reiterate the definition which is given to ESCs at

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<sup>309</sup> *ibid.*

<sup>310</sup> HC Deb 2 May 2006 vol 445, col 925.

<sup>311</sup> HC Deb 26 June 2007 vol 462, col 248.

<sup>312</sup> HC Deb 26 June 2007 vol 462, cols 250-251.

the beginning of HMRC's relevant publication. This definition, *unchanged* from its first appearance in 1987,<sup>313</sup> is as follows:

An Extra-Statutory Concession is a relaxation which gives taxpayers a reduction in tax liability to which they would not be entitled under the strict letter of the law. Most concessions are made to deal with what are, on the whole, minor or transitory anomalies under the legislation and to meet cases of hardship at the margins of the code where a statutory remedy would be difficult to devise or would run to a length out of proportion to the intrinsic importance of the matter<sup>314</sup>

Lord Hoffmann, in almost perfect symmetry, defined the discretion to issue ESCs as follows:

This discretion enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of Parliamentary time.<sup>315</sup>

What Lord Hoffmann added in his speech was that HMRC's discretion to grant ESCs may not be construed 'so widely as to enable the commissioners to concede...an allowance which Parliament could have granted but did not grant'.<sup>316</sup> It appears from the history of the case however that this was precisely HMRC's thinking on the issue at the time. At no stage in the litigation did HMRC appear to misconceive the boundaries of its discretion. Rather, it was the applicant widower who sought to have concessionary treatment extended.

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<sup>313</sup> Inland Revenue, *Press Release*, 25 September 1987, [1987] *Simon's Tax Intelligence* 724, [5].

<sup>314</sup> HMRC, *Concessions as at 6 April 2017* (n 299) 2.

<sup>315</sup> *Wilkinson* (n 13) [21].

<sup>316</sup> *ibid.*

HMRC, on the other hand, had argued throughout the case, at the High Court,<sup>317</sup> Court of Appeal<sup>318</sup> and House of Lords<sup>319</sup> respectively, that its managerial discretion could not be extended so as to grant an ESC to the widower, as it would contradict Parliament's intention.

Thirdly, that *Wilkinson* could alone be the catalyst is unconvincing when contrasted with the non-reaction of the Commissioners to the judicial denunciations of ESCs by the Courts in the series of *Vestey* cases some 25 years earlier. The (then) Inland Revenue had argued in the *Vestey* cases that it was entitled to arrive at a working solution to incredibly complex and problematic legislation such that in any given case the Revenue would divvy up the tax payable on income arising in trusts, as it considered prudent.<sup>320</sup> The courts in turn concerned themselves more broadly with concessions. In somewhat caged language in *Vestey v IRC*, Walton J questioned their legal basis:

I am quite unable to understand upon what principle of law the Crown... feels itself entitled to mitigate [the monstrous results of the legislation] by such concessions as it chooses to make. One should be taxed by law, and not be untaxed by concession.<sup>321</sup>

Walton J was less equivocal in *Vestey v IRC (no. 2)*:

In the first place, I, in company with many other judges before me, am totally unable to understand upon what basis the Inland Revenue Commissioners are entitled to make extra-statutory concessions... This is not a simple matter of tax law. What is happening is that, in effect, despite the words of *Maitland, The Constitutional History of England* (1909), p. 305, commenting on

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<sup>317</sup> *Wilkinson* [2002] EWHC 182 (n 5) [28].

<sup>318</sup> *Wilkinson* [2003] EWCA Civ 814 (n 5) 2687.

<sup>319</sup> *Wilkinson* (n 13) [8].

<sup>320</sup> *Vestey (no. 1)* (n 9) 194-195; *Vestey (no. 2)* (n 9); *Vestey v IRC* (n 5) 1169.

<sup>321</sup> *Vestey (no. 1)* (n 9) 197.

the Bill of Rights, 'This is the last of the dispensing power,' the Crown is now claiming just such a power.<sup>322</sup>

The House of Lords in *Vestey v IRC*<sup>323</sup> echoed the sentiments of Walton J. Lord Wilberforce held that the Revenue's 'frightening'<sup>324</sup> and 'remarkable'<sup>325</sup> claim to a discretionary power in the case did not involve a process 'of construction, even one of strained construction, but is one of rewriting the enactment'.<sup>326</sup> This would give rise to a course of interpretation 'which Parliament might certainly have taken, but which it has manifestly avoided'.<sup>327</sup> The courts, 'acting on constitutional principles, not only should not, but cannot, validate'<sup>328</sup> the Revenue's proposition as it would give rise to 'taxation by self-asserted administrative discretion and not by law'.<sup>329</sup> Lord Edmund-Davies similarly stated 'it is surely high time to consider the basis of this claim by the executive to make such extra-statutory concessions'.<sup>330</sup>

Despite the clear denunciations by the justices in the *Vestey* cases of the use of HMRC's managerial discretion to effect concessions, the practice was not discontinued. In fact, the number of active Inland Revenue listed ESCs grew from 122 in 1980<sup>331</sup> to 169 by 1987,<sup>332</sup> reaching a peak of 179 by 1993.<sup>333</sup>

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<sup>322</sup> *Vestey (no. 2)* (n 9) 203.

<sup>323</sup> *Vestey v IRC* (n 5).

<sup>324</sup> *ibid* 1172.

<sup>325</sup> *ibid* 1171.

<sup>326</sup> *ibid* 1170.

<sup>327</sup> *ibid*.

<sup>328</sup> *ibid* 1172.

<sup>329</sup> *ibid* 1173.

<sup>330</sup> *ibid* 1194.

<sup>331</sup> Board of Inland Revenue, *Extra-statutory concessions in operation at 8 August 1980* (n 114).

<sup>332</sup> See n 115 above.

<sup>333</sup> Board of Inland Revenue, *Extra-statutory concessions in operation at 31 December 1993* (IR1 (1994)).

Accordingly, the *Vestey* series of cases and the House of Lords *Wilkinson* judgment diverge at two distinct points. First in respect of the level of criticism afforded to the Revenue in the former as against the brief two-paragraph dissection by Lord Hoffmann in the latter. Secondly, in that the Revenue was arguing for a wide discretionary power in the former (which it lost), but expressly contended against such jurisdiction in the latter (which it won), some 25 years subsequently. On the basis of this contrast and the fact that the Revenue's understanding of discretion clearly matured in the interim two decades, one would have logically expected the Revenue to have reviewed the existing concessions post-*Vestey* and not post-*Wilkinson*. But the idea that *Wilkinson* could spur the review process alone, given the striking contrast with the continued use of ESCs following severe criticism in the *Vestey* cases, does not hold water.

#### 4.3.3. Interim remarks

The courts have residual supervisory function over rules promulgated by public authorities. Nevertheless, the foregoing has demonstrated in two respects why, in the case of general HMRC soft law, the courts role is quite feeble: limited scope for intervention and lack of impact. Although *Wilkinson* has been assumed to contradict the latter, initial enervation on the part of the relevant stakeholders, the lack of evidence of a prior misconception on the part of HMRC, and the striking contrast with the fallout from the *Vestey* cases, suggest it is an implausibility that the House of Lords' judgment in *Wilkinson* alone is the reason for the review and cessation of ESCs.

#### 4.4. Consultation with taxpayers

Aside from the formal channels of supervision, individual taxpayers and representative bodies can play an important role in relation to general HMRC soft law. This has been acknowledged by HMRC and the government generally in respect of the contribution taxpayers can make to the process of tax-policy formation.<sup>334</sup> As set out in the *Tax Consultation Framework*, the government and HMRC endeavour to engage interested parties on changes to tax policy and legislation at each key stage of developing and implementing the policy.<sup>335</sup> This includes:

- making clear at what stage the engagement is taking place so that its scope is clear;
- carrying out at least one formal, written, public consultation in areas of significant reform;
- setting out, as the policy develops, its strategy for stakeholder engagement including planned formal consultation periods, informal discussions, working groups and workshops;
- consulting, where possible, on the policy design, draft legislation and implementation of anti-avoidance and other revenue protection measures, provided this does not present additional risk to the Exchequer;
- minimising the occasions on which it consults only on a confidential basis. Where confidential consultation has been necessary the Government will be as transparent as possible about its outcome and consult openly if pursuing the policy change further;

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<sup>334</sup> HM Treasury and HMRC, *Tax Consultation Framework* (March 2011) 2, available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/89261/tax-consultation-framework.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/89261/tax-consultation-framework.pdf)> accessed 31 September 2017; HM Treasury and HMRC, *Tax policy making: a new approach* (June 2010) 3, available at: <[http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/d/junebudget\\_tax\\_policy\\_making.pdf](http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/d/junebudget_tax_policy_making.pdf)> accessed 31 September 2017; HMRC, *Making a difference: clarity and certainty. 2006 review of links with large business* (October 2007) 9.

<sup>335</sup> See: HM Treasury and HMRC, *Tax Consultation Framework* (n 334) 4-5.

- providing feedback which sets out the Government's response to the views received and makes clear what changes, if any, have been made to the planned approach as a result of those views.<sup>336</sup>

Furthermore, consultation with the taxpayers who are affected by the relevant policy serves another distinct purpose. As highlighted previously, it is of utmost importance that general HMRC soft law which affects classes of taxpayers be published.<sup>337</sup> The reasons for consultation are an extension of the reasons underpinning the desirability of publication. Consultation gives parties a chance to have a say in those policies and rules which affect them.<sup>338</sup> It thereby allows participation by all citizens in the formulation and debating of policy, inside and outside the tight confines of election campaigns.<sup>339</sup> This is an important democratic function. Democracy is about much more than the occasional vote.<sup>340</sup> It entails engagement with citizens and turns on citizens participating in the political process.<sup>341</sup>

Consultation on tax policy may arise in a variety of ways and settings. There may be formal public consultation; written consultation; consultation forums; open days/road shows; deliberative research events; workshops; focus groups; user panels; meetings with representative bodies and business experts

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<sup>336</sup> *ibid* 3.

<sup>337</sup> Part II. 3.1.3. The counterclaims: six arguments, see text at n 296.

<sup>338</sup> Craig (n 148) 450.

<sup>339</sup> Paul Daly, 'Administrative Law: A Values-Based Approach', 29 in John Bell, Mark Elliott, Jason Varuhas and Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2015).

<sup>340</sup> Richard Kirkham, 'The Constitutional Role of the Ombudsman' (2006) 10 *The International Ombudsman Yearbook* 120, 128.

<sup>341</sup> Denis Galligan, *Due Process and Fair Procedures* (OUP 1994) 128. See also: Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984) 151-152.

or confidential discussions.<sup>342</sup> The choice of route will vary according to the subject of consultation. For instance, in areas where major change is planned which will have a significant impact on customers, HMRC will undertake a formal public consultation.<sup>343</sup> Meanwhile, in areas of significant change where Budget, legislative or operational timetables prevent a full 12 week consultation, a public written consultation with a shorter period will be considered in preference to less formal routes.<sup>344</sup>

The commitment to open consultation on tax-policy is supported by the practical evidence.<sup>345</sup> At the time of writing (31 September 2017) there were four publications out for consultation.<sup>346</sup> Between 20 April and 18 July 2013, there were 124 publications on which there was consultation.<sup>347</sup> Between 14 February 2013 and 22 February 2010, HMRC put out and finalised consultation on 106 publications.<sup>348</sup> Between 11 February 2010 and March 2005, the number of publications produced for consultation was 136.<sup>349</sup>

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<sup>342</sup> HMRC, *HMRC Consultation Framework*, 1, available at: <<http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/large-business/consultation-framework.pdf>> accessed 31 September 2017.

<sup>343</sup> *ibid* 2.

<sup>344</sup> *ibid*.

<sup>345</sup> However, the commitment to open policy-making does not guarantee effective consultation. See, for instance, House of Lords Select Committee on Economic Affairs, *The Finance Bill 2008: Volume 1 Report* (HL 2007-08, 117-I) [12]-[39], noted in Tony Prosser, *The Economic Constitution* (OUP 2014) 98.

<sup>346</sup> This information was taken from the gov.uk website on 31 September 2017. See: <[https://www.gov.uk/government/publications?departments%5B%5D=hm-revenue-customs&publication\\_filter\\_option=consultations](https://www.gov.uk/government/publications?departments%5B%5D=hm-revenue-customs&publication_filter_option=consultations)> accessed 31 September 2017.

<sup>347</sup> *ibid*.

<sup>348</sup> This information was taken from the webarchive.nationalarchives.gov.uk website on 31 October 2016 which displayed a snapshot of the HMRC website at 2 October 2013. See: <[http://webarchive.nationalarchives.gov.uk/+http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&pageLabel=pageLibrary\\_ConsultationDocuments&columns=1&id=PREVIOUS\\_HMRC\\_CONSULTATIONS](http://webarchive.nationalarchives.gov.uk/+http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&pageLabel=pageLibrary_ConsultationDocuments&columns=1&id=PREVIOUS_HMRC_CONSULTATIONS)> accessed 31 September 2017.

<sup>349</sup> This information was taken from the webarchive.nationalarchives.gov.uk website on 31 October 2016 which displayed a snapshot of the HMRC website at 2 October 2013. See: <<http://webarchive.nationalarchives.gov.uk/20100711235311/http://customs.hmrc.gov.uk/ch>

The foregoing however has been concerned with the engagement of taxpayers in policy-making generally. What about the specific case of the promulgation of forms of general HMRC soft law? In this regard, HMRC has previously endeavoured to issue guidance concurrently with legislation and work with large businesses to ensure that the guidance is amended to reflect evolving commercial circumstances.<sup>350</sup> In other instances, consultation on tax-policy matters can serve as the catalyst for the production of general HMRC soft law. For instance, in November 2010, the Coalition government announced plans to introduce a 'Patent Box', a preferential regime for profits arising from patents.<sup>351</sup> Further to this, HM Treasury and HMRC put out a consultative document in June 2011 seeking responses to government proposals. Responses indicated that detailed soft law would additionally be required<sup>352</sup> and HMRC accordingly followed suit. A similar timeline arose in the case of the Summer Budget 2015 wherein it was announced that there would be reforms to the way dividend income is taxed. A consultation document was produced in December 2015,<sup>353</sup> and owing to concerns raised in the responses to the document, HMRC agreed to introduce guidance to clarify the scope of the new provisions and to

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[annelsPortalWebApp/channelsPortalWebApp.portal? nfpb=true& pageLabel=pageLibrary ConsultationDocuments&columns=1&id=PREVIOUS\\_HMRC\\_CONSULTATIONS](https://www.gov.uk/guidance/corporation-tax-the-patent-box)> accessed 31 September 2017.

<sup>350</sup> HMRC, *Making a difference: clarity and certainty. 2006 review of links with large business* (October 2007) 9.

<sup>351</sup> See HMRC, *Corporation Tax: the Patent Box* (January 2007), available at: <<https://www.gov.uk/guidance/corporation-tax-the-patent-box>> accessed 31 September 2017.

<sup>352</sup> HM Treasury and HMRC, *The Patent Box: December 2011 response to consultation* (December 2011) 12, 18 and 23 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/190176/condoc\\_responses\\_patent\\_box.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190176/condoc_responses_patent_box.pdf)> accessed 31 September 2017.

<sup>353</sup> HMRC, *Company distributions: Consultation Document* (December 2015).

give practical examples as to how the new regime will operate.<sup>354</sup> Most pertinently, consultation has led to HMRC amending its soft law after considering the views of taxpayers. On the 4th of August 2014, HMRC announced a change in practice set out in its soft law in relation to the treatment of unremitted foreign income or gains used as collateral for a loan enjoyed in the UK.<sup>355</sup> A transitional period to 5 April 2016 was to take place in order to allow taxpayers to make necessary arrangements in their affairs so that they would align with the soft law change. Representative bodies voiced their concerns at the new arrangements, highlighting that many taxpayers had entered into arrangements prior to August 2014 in reliance on HMRC's soft law, which would be very difficult to unwind. In light of the responses from the taxpaying community, HMRC agreed to amend its soft law so that its change would only take effect prospectively, thereby catching only those arrangements entered into *after* August 2014.<sup>356</sup>

In sum, HMRC clearly demonstrates a commitment to consultation with taxpayers on policy matters, and importantly for our matters, this takes account of the views of taxpayers on the necessity for general soft law at times to supplement the underlying law and in turn a willingness to amend the soft law following critique by the community. A criticism however which can be leveled is the *ad hoc* nature of the current regime in relation specifically to the

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<sup>354</sup> HMRC, *Company distributions: Summary of Responses* (March 2016) 10, 14, 16 and 17.

<sup>355</sup> HMRC News, *Remittance Basis* (4 August 2014) <<http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/news/remittance-basis.htm>> accessed 31 September 2017.

<sup>356</sup> HMRC, *Revenue and Customs Brief 16 (2015): remittance basis treatment of foreign income and gains used for loan collateral* (October 2015), available at: <<https://www.gov.uk/government/publications/revenue-and-customs-brief-16-2015-remittance-basis-treatment-of-foreign-income-and-gains-used-for-loan-collateral/revenue-and-customs-brief-16-2015-remittance-basis-treatment-of-foreign-income-and-gains-used-for-loan-collateral>> accessed 31 September 2017.

promulgation and amendment of general HMRC soft law. Thus, whilst the Tax Consultation Framework determines HMRC's engagement with taxpayers on policy matters, there is silence on when HMRC will decide to promulgate or amend soft law following consultation on policy.

#### 4.5. Interim Conclusion

Non-ministerial bodies are generally utilised in OECD countries for the purpose of tax collection in order to prevent politicians from 'getting their hands in the till' or interfering in individual tax decisions. Such merit however must be weighed against the disadvantage of accountability having to be ensured through channels alternate to the traditional tenets of ministerial responsibility. As a result, oversight of HMRC is left to a number of bodies. An examination of the process for supervising forms of general HMRC soft law undertaken by these bodies reveals why myriad issues of quality and accessibility arise in practice. They are generally neither equipped, nor in practice attuned to providing sufficient checks and balances. The TSC tends to focus broadly on aspects of administration, policy and prudence, but not the scrutiny of the substance of general HMRC soft law. The expertise of the NAO, CAG and PAC respectively lies in holding governmental departments to account over spending. Finally the courts are hampered by the twin handicaps of limited scope for intervention and lack of impact. Given the lack of a formal scrutinising agent accordingly, it should come as little surprise that consequently practical problems arise in relation to quality and accessibility.

The current framework for scrutiny however is not entirely without merit. Consultation with taxpayers, albeit in an *ad hoc* fashion, has been

demonstrated to be both something that HMRC is willing to engage in and to have demonstrable benefits. The fact that it serves an important democratic function should likewise not be underappreciated, although this is not the core concern of this thesis. There is room accordingly to build upon the advances made in terms of public engagement. Whilst this meritorious aspect of the current regime does not in itself overcome the deficiencies in formal scrutiny, any amendments which will be proposed in terms of the latter must also take account of the important role played by the former.

## 5. Reliability for taxpayers? The inadequacy of public law protection

*But public servants are human, and it is human to err. They are not immune from the weaknesses which afflict the rest of mankind. They may, by words or conduct, arouse expectations which are later dashed*<sup>357</sup>

There is a case to be made that tax cases have played a significant role in the development of public law. Landmark cases on issues of standing,<sup>358</sup> delegated legislation,<sup>359</sup> abuse of power,<sup>360</sup> legitimate expectations,<sup>361</sup> the scope of an appeal on a point of law<sup>362</sup> and use of parliamentary material in statutory interpretation<sup>363</sup> adorn the pages of public law textbooks. Against this

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<sup>357</sup> Lord Bingham, Foreword to Richard Moules, *Actions against Public Officials: Legitimate Expectations, Misstatements and Misconduct* (Sweet & Maxwell, 2009).

<sup>358</sup> *Fleet Street Casuals* (n 290).

<sup>359</sup> *Commissioners of Customs & Excise v Cure & Deeley Ltd* [1962] QB 340; *A-G v Wilts United Dairies Ltd* (1921) 37 TLR 884.

<sup>360</sup> *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681; *In re Preston* [1985] 2 WLR 836; [1985] STC 282.

<sup>361</sup> *Matrix Securities Ltd v Inland Revenue Commissioners* [1994] 1 WLR 334; *R v Inland Revenue Commissioners, ex parte MFK Underwriting* [1990] 1 WLR 1545.

<sup>362</sup> *Edwards v Bairstow* [1956] AC 14.

<sup>363</sup> *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3; [1993] AC 593.

background, logic would dictate that public law has developed sophisticated, robust protections for taxpayers. Unfortunately, this supposition does not hold in the case of general HMRC soft law. Critically, this undermines the reliability of general HMRC soft law from the perspective of taxpayers.

Where HMRC produces general soft law upon which the taxpayer seeks to rely, the question is whether the taxpayer is afforded any substantive protection, or conversely whether the taxpayer is granted a remedy against HMRC where it seeks to resile from its previously disclosed position. In such an instance, public law provides relief in the form of the doctrine of 'legitimate expectations'. It is argued herein however that the remedy is inapt for this specific purpose ('the hypothesis'), although this is not a criticism of the doctrine itself. The Section will proceed first to set out the parameters of the doctrine as it applies in tax law, before thereafter defending this hypothesis by reference to four primary arguments.

For the sake of completeness, it should be noted there is also a remedy in private law of estoppel. This provides broadly that a public authority can be estopped from resiling from an earlier commitment to a citizen, the non-effectuation of which would cause detriment to the person concerned.<sup>364</sup> However this is much narrower and less developed than the legitimate expectation doctrine<sup>365</sup> and as such the Section will focus on the latter.

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<sup>364</sup> See generally Moules (n 357).

<sup>365</sup> As noted, for instance, by Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart 2016) 195. On estoppel, see generally: Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2000) Ch. 6. On the limitations of estoppel, see: *R v East Sussex County Council, ex parte Reprotech (Pebsham) Ltd* [2002] UKHL 8; [2002] 4 All ER 58, 66 (Lord Hoffmann); *Matthews* (n 148) 153 (Cassels J); *Hornsey Urban District Council* (n 148) 704-705; *Craig* (n 148) 697.

## 5.1. The Parameters of the doctrine

Although the doctrine of legitimate expectations is one which is in constant flux,<sup>366</sup> the broad tenets of a claim under this doctrine in tax cases are relatively set. The first is that there must exist a 'legitimate expectation' and the second is that frustrating this expectation would be so unfair as to amount to an abuse of power. Of course, one might note that, from a cursory glance, these are such broad concepts that within them there is significant room for flux and demonstrate that not much in fact is set at all. Putting this observation to one side (for now), it is sufficient to note for now that it hints at the arguments to be furthered later in this Section.<sup>367</sup>

### 5.1.1. Legitimate expectation

The doctrine of legitimate expectations is only truly useful where, but for a representation of HMRC, tax would otherwise have been due.<sup>368</sup> The legitimacy of a claim *prima facie* hinges upon HMRC's representation coming within its managerial discretion, as it is only within the interstices of this discretion that HMRC is justified in not collecting all tax that is due. This proposition is in line with the consistently repeated starting point for a claim, namely, that the taxpayer's only legitimate expectation is that she will be taxed in accordance

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<sup>366</sup> *Unilever* (n 360) 695 (Simon Brown LJ); *Begbie* (n 50) 1130 (Laws LJ); *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [69] (Laws LJ).

<sup>367</sup> See below Part III. 5.2. Inaptness of the doctrine in tax law.

<sup>368</sup> *R (on the application of Lower Mill Estate Ltd and Conservation Builders) v Revenue and Customs Commissioners* [2008] EWHC 2409 [22], [2008] BTC 5743 (Blake J).

with the law.<sup>369</sup> As such, the first hurdle in relation to a legitimate expectation claim is the doctrine of *ultra vires*.<sup>370</sup>

Beyond this preliminary stumbling block, the courts have generally stuck to the initial pronouncement of the law in the case of *MFK Underwriting*.<sup>371</sup> Therein Lord Bingham<sup>372</sup> set out two conditions necessary for an expectation to be legitimate in tax, from which there has been little subsequent divergence.<sup>373</sup> The first is that the taxpayer placed all her cards face upwards on the table.<sup>374</sup> This condition is applicable only where an individual taxpayer has sought out a ruling from HMRC.<sup>375</sup> In such an instance, she must give full details of the specific transaction on which she seeks the ruling; she must indicate the purpose of the ruling sought, in other words, that she seeks to rely upon it.<sup>376</sup> The second condition is that the taxpayer received an assurance, representation or promise which was clear, unambiguous and devoid of relevant qualification.<sup>377</sup> Although Bingham LJ had posited that this condition would not apply to communications directed at taxpayers generally,<sup>378</sup> it has later come to be accepted that it does.<sup>379</sup> In the case, he remarked that a statement formally published by HMRC to the

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<sup>369</sup> *MFK Underwriting* (n 361) 1569; *R (Greenwich Property Ltd) v Commissioners of Customs and Excise* [2001] EWHC 230 [13], [2001] STC 618 (Collins J); *R (Davies) v HMRC*; *R (Gaines-Cooper) v HMRC* [2011] UKSC 47 [28] (Lord Wilson), [2012] 1 All ER 1048; HMRC, *ADML1200 Incorrect Advice* (n 133).

<sup>370</sup> See below.

<sup>371</sup> This dicta was affirmed in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453 [60] (Lord Hoffmann).

<sup>372</sup> Although at the time he was a Court of Appeal judge, I use 'Lord Bingham' as the reference for ease of readership.

<sup>373</sup> The most recent tax case on legitimate expectations to reach the Supreme Court was that of *Gaines-Cooper* (n 369) [28] wherein the court based its analysis on Bingham LJ's formula.

<sup>374</sup> *MFK Underwriting* (n 361) 1569.

<sup>375</sup> *ibid.*

<sup>376</sup> *ibid.*

<sup>377</sup> *ibid.*

<sup>378</sup> *ibid.*

<sup>379</sup> *Bancoult* (n 371) [60]; *Gaines-Cooper* (n 369) [29].

world 'might safely be regarded as binding, *subject to its terms*, in any case falling clearly within them'.<sup>380</sup> Logically, however, a case would fall clearly within the scope of a publication *only* if the terms were clear and unambiguous.<sup>381</sup> Similarly, 'its terms' would need to be unqualified as a condition precedent to creating an expectation upon which there could be any reliance.<sup>382</sup>

### 5.1.2. So unfair as to amount to an abuse of power

The second limb of the doctrine is that frustrating the expectation must be so unfair as to amount to an abuse of power.<sup>383</sup> This limb is borne out of the development of the doctrine, which finds its roots in 'fairness'.<sup>384</sup> This limb essentially invites a balancing exercise between on the one hand detriment to the private interest of the individual in frustrating an expectation as against the detriment to the public interest on the other hand in giving effect to it.<sup>385</sup> Mere unfairness as such, which could be characterised as 'a bit rich' but nevertheless understandable, will not suffice.<sup>386</sup> It is necessary that the decision by HMRC to renege on its earlier communication is so outrageously unfair that it should not be permitted to stand.<sup>387</sup> An example of conspicuous unfairness would be HMRC

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<sup>380</sup> [emphasis added].

<sup>381</sup> See: *R (Tunbridge Wells BC) v Sevenoaks Magistrates' Court* [2001] EWHC Admin 897, [41] (Sullivan J); *Unilever* (n 360) (Simon Brown LJ).

<sup>382</sup> See: *Bancoult* (n 371) [60] (Lord Hoffmann); *Gaines-Cooper* (n 369) [29] (Lord Wilson).

<sup>383</sup> *Nadarajah* (n 366) [51]; *R v North and East Devon Health Authority (ex p Coughlan)* [2001] QB 213 [57], [2000] 3 All ER 850 (Lord Woolf); *In re Preston* (n 360) 846 (Lawton LJ).

<sup>384</sup> *MFK Underwriting* (n 361) 1570.

<sup>385</sup> This is due to the fact that the remedy in this area is substantive. In other words, taxpayers require substantive protection for substantive expectations. See: *Coughlan* (n 385) [57] (Lord Woolf). See also: *Begbie* (n 50); cf *Bancoult* (n 371) [182] (Lord Mance).

<sup>386</sup> *Unilever* (n 360) 697 (Simon Brown LJ).

<sup>387</sup> *ibid*; *R v Inland Revenue Commissioners, ex parte Unilever plc* [1994] STC 841, 849 (Macpherson of Cluny J).

reneging on an earlier agreement with immediate effect.<sup>388</sup> Giving the taxpayer a reasonable transitional period in which to rearrange her affairs, on the other hand, would qualify as mere unfairness.<sup>389</sup>

Finally, it should be noted that these two limbs to the doctrine of legitimate expectations in tax law are not mutually exclusive. Satisfaction of the first limb is not wholly distinct from satisfaction of the second. For instance, the clarity of a representation will have a bearing upon whether resiling from it would be so unfair as to amount to an abuse of power.<sup>390</sup> By this standard, a bespoke representation to an individual is likely to be much more targeted than a generalised publication, thus by its nature making it more unfair to resile from the former.<sup>391</sup> On the other hand, if a taxpayer were to have concealed material information in the request for a ruling, HMRC would not be acting improperly in refusing to give effect to it.<sup>392</sup>

## 5.2. Inaptness of the doctrine in tax law

Having set out the initial framework within which legitimate expectation claims are assessed, it is now possible to move onto the substantive hypothesis of this Section, namely, that the doctrine of legitimate expectations provides inapt protection for persons seeking to rely upon forms of general HMRC soft law. Four arguments are advanced in support of this hypothesis. The first is that

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<sup>388</sup> For instance, *Unilever* (n 360).

<sup>389</sup> *R (Cameron) v HMRC* [2012] EWHC 1174 [70]-[71], [2012] STC 1691. See also: *R (Bamber) v HMRC* [2005] EWHC 3221, [2006] STC 1035 [59] (Lindsay J).

<sup>390</sup> See: *Tunbridge Wells BC* (n 381) [41] (Sullivan J); *Unilever (n 360)* (Simon Brown LJ).

<sup>391</sup> *R (Bhatt Murphy (a firm)) v The Independent Assessor* [2008] EWCA Civ 755, [2008] All ER (D) 127 [46]-[47].

<sup>392</sup> *Matrix Securities* (n 361).

the principle of *ultra vires* significantly hinders the utility of the doctrine. Thereafter it is argued that the satisfaction of Lord Bingham's second condition in the *MFK Underwriting* formulation is acutely difficult. It will become apparent that these are the doctrine's most prominent hurdles. Thirdly, the usefulness of legitimate expectations as a protection is constrained by HMRC's desire to maintain control over the application of its general soft law. Finally, restrictions on access to justice unduly limit the doctrine's potency.

### 5.2.1. The doctrine of *ultra vires*: the Achilles' heel of legitimate expectations?

#### 5.2.1.1. The orthodox position

A major constriction of the legitimate expectations doctrine is the *ultra vires* principle: that an expectation lacks legitimacy where it requires a public body to act outside its statutory powers.<sup>393</sup> Put another way, HMRC cannot be bound by a representation that it will act beyond its powers. In order to understand this proposition, it is necessary to revisit the fundamentals of the concept. The doctrine of *ultra vires* is one of the cornerstones of the UK's constitutional framework and in broad terms forms the basis for judicial intervention.<sup>394</sup> Put briefly, the judiciary may only intervene in the running of the

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<sup>393</sup> Craig (n 148) 694; Wade and Forsyth (n 289) 454-455; Rowland (n 147). See further: Tracey Bowler, 'HMRC's Discretion: The Application of the *Ultra Vires* Rule and the Legitimate Expectation Doctrine' (IFS, 2014), available at: <<http://www.ifs.org.uk/publications/7475>> accessed 31 September 2017.

<sup>394</sup> *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143, 171 (Lord Steyn); *R v Hull University Visitor, Ex parte Page* [1993] AC 682, 701 (Lord Browne-Wilkinson). For

executive where it has exceeded its powers. It immediately becomes apparent then why it is the orthodox position that an unlawful representation cannot give rise to a legitimate expectation.<sup>395</sup> The courts are authorised to police the perimeter of a public authority's powers, but *do not* have authority to force a public body beyond those boundaries. The courts have consistently reiterated this. In *MFK Underwriting*, Bingham LJ stated that a taxpayer's only legitimate expectation is *prima facie* that she will be taxed according to statute, not concession or a wrong view of the law.<sup>396</sup> In *Coughlan*, the court likewise noted that, when construing the legitimacy of expectations, it must take account of the fact that a public authority, whose existence and powers are derived from statute, cannot validly act outside those powers.<sup>397</sup> Lord Cullen pronounced the issue squarely in *Al-Fayed*<sup>398</sup>:

[U]nder our domestic law a legitimate expectation can only arise on the basis of a lawful promise, representation or practice. There can be no legitimate expectation that a public body will continue to implement an agreement when it has no power to do so.

The end result of the *ultra vires* constraint on the doctrine of legitimate expectations is that, in general, where HMRC has produced general soft law upon which a taxpayer relies, but later discovers the publication to be based on an incorrect interpretation of the law (thus incorporating a Revenue legal error),

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prerogative powers and non-statutory bodies, see for instance, *R v Panel on Take-overs and Mergers, ex parte Datafin* [1987] QB 815.

<sup>395</sup> Although Article 1 protocol 1 of the European Convention on Human Rights may serve to temper the orthodox position (see *Rowland* (n 147), this is not relevant here, as Art 1 Protocol 1(2) specifically exempts the application to tax. cf *Oao Neftyanay Kopaniya Yukos v Russia* (App. 14902/04), 20 September 2011, (2012) 54 EHRR 19 [2011] ECHR 1342 on an infringement of Article 1 Protocol 1 by virtue of the imposition and calculation of tax penalties.

<sup>396</sup> *MFK Underwriting* (n 361) 1569.

<sup>397</sup> *Coughlan* (n 385) 243.

<sup>398</sup> *Al-Fayed v Advocate General for Scotland CIR* [2004] ScotCS 112, [2004] STC 1703, [119].

the taxpayer is precluded from relying upon the initial representation in the HMRC publication.<sup>399</sup> This is subject to two exceptions in practice exercised by HMRC (and a further exception introduced by the High Court in *Hely-Hutchinson*). The first arises if a significant fairness threshold has been surpassed, such as where a taxpayer has suffered by reason of detrimental reliance,<sup>400</sup> and the second is where the taxpayer's case has been closed.<sup>401</sup> Both of these exceptions are best explained by way of example, with examination of the *Mansworth v Jelley*<sup>402</sup> saga being prudent at this juncture.

#### **5.2.1.2. *Mansworth v Jelley and the Guidance affair***

*Mansworth v Jelley* concerned an assessment to CGT. By way of background, the relevant figure for CGT purposes is to be calculated by taking the 'base cost' of an asset (and reliefs, where appropriate) from the proceeds of the disposal of the asset.<sup>403</sup> The taxpayer in this case was granted options to purchase shares in JP Morgan at the market price of those shares. He duly exercised the options and thereafter, promptly sold the shares. The issue in dispute was whether the 'base cost' to be deducted from the proceeds of the sale would be (a) the market value of the options when originally *granted* (which was nil) or (b) the market value of the options when *exercised*. The Court of Appeal

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<sup>399</sup> On this, see also: HMRC, *ADML1200 Incorrect Advice* (n 133).

<sup>400</sup> For an explanation as to why there is an exception to the orthodox position, see: Stephen Daly, 'Recent developments in tax law: vires revisited' (2016) 2 PL 190.

<sup>401</sup> For the legal basis of this derogation, see: ESC A19 in HMRC, *Concessions as at 6 April 2017* (n 299).

<sup>402</sup> *Mansworth v Jelley* [2002] EWCA Civ 1829, [2003] STC 53.

<sup>403</sup> See generally TGCA 1992, Part II.

ultimately agreed with the latter construction and correspondingly held in favour of the taxpayer.

Following the case, HMRC published guidance ('2003 guidance') to the effect that 'base cost' of shares in such circumstances should be calculated by reference to both:

the market value of the shares at the time the option was exercised; **and**  
any amount chargeable to income tax on the exercise of that option.<sup>404</sup>

HMRC in 2009,<sup>405</sup> following advice from leading counsel to the effect that the 2003 guidance was wrong,<sup>406</sup> issued revised guidance ('2009 guidance') setting out that only the market price of the shares would be deductible and *not*, additionally, the income tax that would be paid.

The question ultimately arises then as to the consequence for taxpayers who had relied upon the 2003 guidance. As regards closed cases, HMRC's understanding was that the revised 2009 guidance could not be applied and thus that the 2003 guidance was still applicable. As for open cases, it was HMRC's contention that it was outwith their managerial discretion to give effect to the expectation that a taxpayer would be treated in accordance with the 2003 guidance.<sup>407</sup> As this is the case, giving effect to the expectation would be *ultra*

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<sup>404</sup> Inland Revenue, *Technical Note* (January 2003), available at: <[http://webarchive.nationalarchives.gov.uk/20060715225608/http://www.hmrc.gov.uk/cgt/manworth\\_jelley.pdf](http://webarchive.nationalarchives.gov.uk/20060715225608/http://www.hmrc.gov.uk/cgt/manworth_jelley.pdf)> accessed 31 September 2017.

<sup>405</sup> HMRC, *HMRC Brief 30/09: Shares acquired before 10 April 2003 by exercising employee share options — allowable deductions* (March 2016), available at: <<http://www.hmrc.gov.uk/manuals/cgmanual/cg56321b.htm>> accessed 31 September 2017.

<sup>406</sup> David Hartnett, 'CGT Treatment of Employee Share Options - Letter to the Editor' (2009) 1000 *Tax Journal* 4, 4.

<sup>407</sup> *ibid.*

*vires* as it produces a result which is outside the remit of their powers. However, HMRC has conceded that there could still be legitimate expectations, contrary to our aforementioned understanding of the orthodox position:

There may however be instances where 'legitimate expectation' exists because the taxpayer can show that they acted in reliance upon the old guidance and suffered detriment. In these circumstances HMRC will be bound by its previous guidance<sup>408</sup>

In a more general discussion with the representative bodies, in other words not confined to the *Mansworth v Jelley* saga, HMRC expanded upon this curious statement. It was explained that HMRC *could* act beyond its *vires* where a significant fairness threshold is surpassed and where the taxpayer has suffered significant detrimental reliance:

Where the terms of a concession or statement made exceeds HMRC's discretion, HMRC will generally not accept that legitimate expectation can apply. A very high fairness hurdle has to be met before HMRC will accept that it should not pursue the tax. From an HMRC perspective significant detrimental reliance will be required for the taxpayer to have any chance of HMRC accepting that legitimate expectation could apply in such circumstances<sup>409</sup>

The final part of the *Mansworth v Jelley* episode concerns the eventual outcome to individuals in open cases who sought to rely upon the 2003 guidance. By 13 June 2014, 3 open cases were closed in favour of the taxpayers on the basis that significant detriment was demonstrated and so these taxpayers

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<sup>408</sup> Ibid 4.

<sup>409</sup> ICAEW, *Legitimate Expectation and Reliance on HMRC Guidance* (n 133) 14. Note that HMRC agreed to the publication of the minutes of this meeting.

were granted the treatment set out in the 2003 guidance.<sup>410</sup> Further, in the recent case of *Hely-Hutchinson*,<sup>411</sup> a taxpayer challenged HMRC's restriction of the 2003 treatment in open cases to those persons who could demonstrate detrimental reliance. Whipple J upheld the taxpayer's complaint on the basis that HMRC should also take into account the comparative unfairness of treating taxpayers with open cases differently from persons whose cases are closed.<sup>412</sup> Although the decision was overturned by the Court of Appeal, the Court therein did not reject Whipple J's decision that comparative unfairness in addition to detriment is a relevant consideration.<sup>413</sup> This accordingly provides a further exception to general rule that HMRC cannot give effect to a representation which is incorrect in law.

#### 5.2.1.3. *Interim remarks*

The doctrine of *ultra vires* undoubtedly provides an impediment for taxpayers seeking to rely upon HMRC publications. Although it is not insurmountable, it should be borne in mind the significance as it stands of the threshold which must be overcome in relation to open cases, namely that the taxpayer shows significant detrimental reliance such as having to sell assets or obtain a loan in order to pay the tax due,<sup>414</sup> or comparative unfairness. Beyond such exceptional circumstances, the orthodox position that one cannot rely upon

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<sup>410</sup> Ross Martin Tax Consultancy, 'Mansworth v Jelly loss claims' (13 June 2014), available at: <<http://www.rossmartin.co.uk/private-client-a-estate-planning/1362-mansworth-v-jelly-loss-claims>> accessed 31 September 2017.

<sup>411</sup> *Hely-Hutchinson* (HC) (n 51).

<sup>412</sup> *ibid* [71].

<sup>413</sup> *Hely-Hutchinson* (CA) (n 54) [37]-[45].

<sup>414</sup> ICAEW, *Legitimate Expectation and Reliance on HMRC Guidance* (n 133) 15.

a legally incorrect representation holds and a taxpayer's only legitimate expectation is that she will be taxed in accordance with the law. The taxpayer accordingly is severely hindered by both an inability to rely upon publications which contain information which is incorrect in law and by a second order concern of uncertainty as to whether HMRC should discover this at a later date and rescind the previous treatment.<sup>415</sup>

It might be countered that, although this might be an unfortunate result, there are compelling reasons for having the *ultra vires* rule. It has strong constitutional roots in the rule of law, Parliamentary sovereignty, and, particularly in the case of tax, the Bill of Rights Act 1688/9. This is to be conceded for now,<sup>416</sup> for this Section is only concerned with advancing the case that the status quo, in which general HMRC soft law as promulgated cannot be reasonably relied upon by taxpayers, should not be permitted to continue. If the circumstances were changed and general soft law were to be promulgated in an alternative manner and subject to stricter scrutiny and oversight, then the matter might be approached differently. That issue is to be dealt with in Part IV of this thesis.<sup>417</sup>

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<sup>415</sup> See above Part III. 3.2. Retrospective changes to soft law.

<sup>416</sup> Although see: Daly, 'Recent developments in tax law: *vires* revisited' (n 400).

<sup>417</sup> See Part IV. 2.1.2.1 Permissibility of Binding advice.

### 5.2.2. The difficult case of satisfying Bingham's second condition

Bingham LJ's second condition sets out that a legitimate expectation can only arise on the basis of a promise, representation, assurance or practice<sup>418</sup> which is clear, unambiguous and devoid of relevant qualification. Two primary issues arise as a result of this condition, the first relating to the requisite level of clarity required in order for a representation to be clear and unambiguous, the second being the requirement that it be absent any qualification. As for the first, the manner in which this condition has been interpreted in terms of the requisite clarity of general HMRC soft law<sup>419</sup> opens it up to two alternate criticisms: that fulfilling the condition is exceedingly difficult; or that the requirements are so malleable as to deprive general HMRC soft law of its normative, rule of law utility. Recalling that soft law is justified on the basis that it advances the rule of law by generating greater clarity treatment for taxpayers, this justification is undermined by the reality that Bingham's second condition is open to considerable interpretation. As for the second, the sheer ubiquity of qualifications in general HMRC soft law aggravates the difficulty in surpassing the legal test, and by extension, likewise frustrates the rule of law rationale.

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<sup>418</sup> For ease of readership, I shall heretofore use the term 'representation' to connote all such indicia, with the exception of explicit discussion of *Unilever* which concerned an HMRC 'practice'.

<sup>419</sup> Jolyon Maugham, 'What can you legitimately expect?' (2013) 1114 Tax Journal 13, 13; Kevin Smith and Richard Doran 'GSTS Pathology LLP: When do legitimate expectations end?' (2013) 1177 Tax Journal 16, 16. Many cases falter at this hurdle. For instance, *R (Corkteck) v HMRC* [2009] EWHC 785, [2009] STC 1681; *Matrix Securities* (n 361); *MFK Underwriting* (n 361).

### 5.2.2.1. The difficulty in establishing requisite clarity

The assertions that surpassing the threshold for sufficient clarity in the jurisprudence on legitimate expectations is incredibly difficult or that the concept of clarity itself is open to significant interpretation are best illustrated by examining the successful legitimate expectation cases,<sup>420</sup> namely *R v Inland Revenue Commissioners, ex parte Unilever plc* ('Unilever'),<sup>421</sup> *R (Cameron) v HMRC* ('Cameron'),<sup>422</sup> *R (Greenwich Property Ltd) v Commissioners of Customs and Excise* ('Greenwich'),<sup>423</sup> *R v Customs and Excise Commissioners, ex parte Kay* ('Kay'),<sup>424</sup> and *R (Biffa Waste) v Revenue and Customs* ('Biffa Waste')<sup>425</sup> thereafter contrasting them with unsuccessful cases wherein conditions were implied into the publications.

In *Unilever*, the question was whether HMRC could resile from its previous conduct, wherein over the course of 20 years it had accepted forms for tax relief from the taxpayer outside the statutorily prescribed period.<sup>426</sup> The Court of Appeal held that HMRC breached its duty of fairness by resiling from this trend, enforcing the time-bar and denying Unilever £17mil in tax relief. The conduct on the part of HMRC had given rise to an unequivocal expectation that

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<sup>420</sup> There is one more case in which the taxpayer was successful in invoking the doctrine, namely, *R (on the application of GSTS Pathology LLP and others) v Revenue and Customs Commissioners* [2013] EWHC 1801, [2013] STC 2017. However, as the applicant in that case was applying for an injunction, and as such was a short hearing *not* on the merits of the case, I have not included it here.

<sup>421</sup> *Unilever* (n 360).

<sup>422</sup> *Cameron* (n 389).

<sup>423</sup> *Greenwich Property* (n 369).

<sup>424</sup> *R v Customs and Excise Commissioners, ex parte Kay & Co Ltd* [1996] STC 1500 (QBD) (Keene J).

<sup>425</sup> *R (Biffa Waste Services Ltd) v Revenue and Customs* [2016] EWHC 1444 (Admin), [2017] Env LR 10.

<sup>426</sup> Income and Corporation Taxes Act 1988, s. 393(11)(2).

relief claims would be accepted beyond the statutory time period.<sup>427</sup> The case of *Cameron* concerned two seafarers who successfully contended that they were entitled to the seafarer's deduction from their earnings because they had relied upon a form of general HMRC soft law. The 'eligible period' for seafarer's deduction was calculated by reference to days of absence from the United Kingdom,<sup>428</sup> which in turn pivoted upon whether a person was absent the UK at midnight.<sup>429</sup> However, determining whether a seafarer was in or outside the UK, defined by a 12-mile radius, at midnight would be incredibly difficult and onerous to prove. To this end, a concession was issued in the form of guidance published to seafarers whereby if the boat upon which the seafarer was present left its berth or anchorage prior to midnight, the seafarer would be taken to have left the UK.<sup>430</sup> HMRC contended that this concession would only apply where the ship was destined for another country.<sup>431</sup> The taxpayers' understanding was that this concession would apply regardless of whether the ship was ultimately destined for another country, but would be satisfied simply if it left the UK.<sup>432</sup>

The guidance upon which they sought to rely read as follows:

A day of absence from the UK is any day when you are outside the UK at the end of that day (midnight). We normally treat a vessel as having left the UK at the moment it leaves berth or anchorage, on a voyage which will take it outside UK territorial waters. Arrival times are treated in a similar way<sup>433</sup>

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<sup>427</sup> See also *R (ABCIFER) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] Q.B. 1397, [72]; cf Philip Sales and Karen Steyn, 'Legitimate expectations in English public law: an analysis' [2004] PL 564, 575.

<sup>428</sup> Income Tax (Earnings and Pensions) Act 2003, s. 378 ('ITEPA 2003').

<sup>429</sup> ITEPA 2003, s. 378(4).

<sup>430</sup> *Cameron* (n 389) [22].

<sup>431</sup> *ibid* [34].

<sup>432</sup> *ibid* [42], [53].

<sup>433</sup> *ibid* [22].

Wyn Williams J found that this wording unequivocally<sup>434</sup> provided that, once outside at midnight, the seafarer would be treated as being absent the UK. It is difficult, from a reading of the text, to arrive at any other conclusion, and HMRC did not press this point. HMRC's case, in reality, pivoted upon whether this 'concession' was superseded by a subsequent, narrower concession.<sup>435</sup> In *Greenwich*, the University of Greenwich had decided to create a new student residence. Half had been completed with the University's own funds, with the other half funded through a Private Finance Initiative ('PFI'). The PFI agreement prescribed that the accommodation would be let privately during the summer months. The applicant sought to rely upon a published concession<sup>436</sup> from HMRC to the effect that the building would be zero rated,<sup>437</sup> notwithstanding the fact that students would not be the sole inhabitants of the residential accommodation. This published concession read as follows:

Higher education institutions are in a peculiar position as they know that some use is likely to be made of student accommodation for non-qualifying purposes during vacations but such use is difficult to quantify. In the circumstances, because in any event tax will be collected in respect of this non-qualifying vacation use and provided that the new building is clearly intended primarily for use as student accommodation for ten years from the date of its completion, then we are content for higher education institutions to disregard the 10% de minimis rule and to issue a certificate for the construction or acquisition of such a building as "relevant residential" building under Group 8 of the zero-rated schedule.

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<sup>434</sup> *ibid* [78].

<sup>435</sup> *ibid* [23]-[33], [63], [73]-[74], [82].

<sup>436</sup> Although not in the list of published ESCs *Greenwich Property* (n 369) [9].

<sup>437</sup> VAT Act 1994, Schedule 8.

The thrust of the concession was that HMRC would treat the building as zero-rated if the University could demonstrate its primary use for ten years would be student accommodation.<sup>438</sup> HMRC contended that to fall properly within the terms of the concession, it was necessary for the University itself to rent out the property during the summer months and not the PFI provider.<sup>439</sup> Collins J rejected this on the basis that there could be no logical distinction between such an activity being undertaken by the University itself or a third party and that both instances fell squarely within the terms of the concession.<sup>440</sup> Therein, however, Collins J highlighted the severity of the threshold facing an applicant in a legitimate expectation claim. The taxable person must demonstrate that she has acted strictly in accordance with what the concession permits and has complied with all the conditions necessary to obtain the relief.<sup>441</sup> There can be *no ambiguity*:

*Any doubt* should be resolved in favour of the tax being payable according to the statutory provision since, if there is doubt, or the language of the concession is ambiguous, the taxpayer should inquire of the Commissioners whether what he intends to do falls within the concession.<sup>442</sup>

Collins J allowed the concession to be relied upon given that there was *no doubt* as to the applicability of its terms in this case. There was no mention in the concession as to whether it was necessary or not for the University itself to rent out the accommodation in the summer months. It is difficult, from a reading of

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<sup>438</sup> *Greenwich Property* (n 369) [9].

<sup>439</sup> *ibid* [21].

<sup>440</sup> *ibid* [23].

<sup>441</sup> *ibid*.

<sup>442</sup> *ibid* [23] [emphasis added].

the text, to arrive at any other conclusion, and HMRC's argument in reality did not seek to challenge this point, as with the case of *Cameron*. Rather, HMRC's overarching claim was that the concession was being utilized as a tool for tax avoidance.<sup>443</sup>

*Kay* meanwhile concerned the recovery of overpaid VAT by opticians. HMRC had made representations in a Business Brief<sup>444</sup> to the relevant taxpayers which stated that they were entitled to repayment of overpaid VAT:

Any claims for repayment with statutory interest which date back to 1 September 1988 should now be submitted by opticians to their local VAT office, together with details of the apportionment used, where that is still to be agreed with the local office.

It was subsequently identified in the brief that any such claims should be made before 12 March 2001.<sup>445</sup> The court held that this amounted to a clear representation upon which the taxpayers were entitled to rely.<sup>446</sup> As with *Cameron* and *Greenwich*, HMRC's contention that they were not bound by an expectation did not revolve around the terms of the publication, but on this occasion was based upon an understanding that legislation would later be introduced retrospectively to counter the repayment duties and as such ought not to be bound by the publication.<sup>447</sup> Similarly in *Biffa Waste*, the main issue of the proceedings was not the clarity of the ruling which was given to the taxpayer, but whether that ruling applied only to the specific facts on which it was given or

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<sup>443</sup> *ibid* [21]-[25]. Although generally provisos in HMRC publications ensure that they cannot be utilised for tax avoidance purposes, the Concordat to the CVCP contained no such qualification, see *ibid* [25].

<sup>444</sup> Customs and Excise, *Business Brief 8/95* (May 1995).

<sup>445</sup> *ibid*; *Kay* (n 424) 1524.

<sup>446</sup> *Kay* (n 424) 1527.

<sup>447</sup> *ibid* 1515.

whether it could be applied to analogous situations (which the Administrative Court accepted it could).<sup>448</sup>

These cases are very much the exception to the rule: the latter being that most cases will not overcome the ‘no ambiguity’ bar. This can be demonstrated by cases such as *Gaines-Cooper*<sup>449</sup> wherein HMRC and the courts interpreted implied conditions or provisions into the relevant pieces of soft law that were not apparent on first reading. In *Gaines-Cooper*, the need for a ‘distinct break’ was read into HMRC’s published material. The taxpayers claimed that HMRC guidance gave rise to a legitimate expectation that non-resident status would be acquired if the residence day count were satisfied (i.e. less than six months in any year were spent in the UK).<sup>450</sup> HMRC on the other hand contended that the taxpayers additionally needed to demonstrate a ‘distinct break’ with the UK.<sup>451</sup> The majority of the court (Lord Mance dissenting) agreed with HMRC, notwithstanding that in actuality the guidance itself made no explicit reference to the concept.<sup>452</sup> Lord Wilson gave the leading speech and is seen in this following paragraph to interpolate such a meaning into the words of the guidance:

[The] paragraphs [in the Guidance] must be read compendiously. They shared one important feature: they all referred to “visits” on the part of the individual to the UK. If he usually resides in the UK, he will go abroad as a visitor but, if he has left the UK and has adopted a usual residence abroad, he will come to the UK as a visitor: we are not visitors in the country of our usual residence. The reference to visits to the UK therefore underlined the need for

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<sup>448</sup> *Biffa Waste* (n 425) [85]-[129].

<sup>449</sup> *Gaines-Cooper* (n 369).

<sup>450</sup> *Ibid* [30].

<sup>451</sup> *ibid* [79].

<sup>452</sup> *ibid* [30].

a change in the individual's usual residence and therefore, by ready inference, for a distinct break in the pattern of his life in the UK.<sup>453</sup>

Freedman and Vella described the majority's approach to the construction of HMRC's guidance in this case as 'questionable',<sup>454</sup> in its departure from the plain language of the text. The forced reasoning of Lord Wilson in the extracted piece supports this conclusion. It requires a double leap in logic: first, to imply that the reference to visits brings to mind the idea that one cannot be a visitor in the country of one's usual residence and secondly, to imply that this, 'by ready inference', requires a 'distinct break' from the UK.

#### **5.2.2.2. Is there anything devoid of relevant qualification?**

Secondly, Bingham LJ's condition also requires that any representation be 'devoid of relevant qualification'. This is especially burdensome given the near ubiquity of 'health warnings' and 'provisos' in HMRC publications which can ultimately have the effect of vitiating legitimacy. The former can be found most in publications of HMRC and appear as some variant of the following:

This Publication gives you information about X, and how HMRC interprets the legislation in the context of applying X to an individual's circumstances.<sup>455</sup>

There is a clear trend of courts being inclined to find that such health warnings undermine the prospect of a legitimate expectation from arising. In the

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<sup>453</sup> *ibid* [42].

<sup>454</sup> Freedman and Vella, 'Revenue Guidance' (n 294) 192.

<sup>455</sup> HMRC, *Guidance Note: Statutory Residence Test* (December 2013) 6. Available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/381705/rdr3\\_1\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/381705/rdr3_1_.pdf)> accessed 31 September 2017.

case of *Hanover*, the First-tier Tribunal noted *obiter* that such a health warning precluded the creation of a legitimate expectation.<sup>456</sup> Collins J in *Thompson v Fletcher*<sup>457</sup> put it forcefully that a ‘health warning’ can serve to vitiate the possibility of an expectation arising, as it makes it ‘absolutely clear that readers should not be [sic] assume that the guidance is comprehensive’.<sup>458</sup> The issue of health warnings also came to bear in *Gaines-Cooper*. The majority of the Supreme Court was minded that the applicant’s claim to a legitimate expectation could not be made out by virtue of this health warning (and the previously discussed failure to satisfy the implied ‘distinct break’ test). The guidance upon which the applicant sought to rely was prefaced as follows:

The notes in this booklet reflect the law and practice at October 1999. They are not binding in law and do not affect rights of appeal about your own tax. You should bear in mind that the booklet offers general guidance on how the rules apply, but whether the guidance is appropriate in a particular case will depend on all the facts of that case. *If you have any difficulty in applying the rules in your own case, you should consult an Inland Revenue Tax Office*<sup>459</sup>

This qualification that the soft law offered general guidance and that in a case of difficulty one ought to consult HMRC gave room to the majority of the court to interpolate into the relevant soft law requirements which were not apparent at first glance.<sup>460</sup>

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<sup>456</sup> *Hanover Company Services Ltd v HMRC* [2010] UKFTT 256 (TC) [49]. This appears to be incorrect as it conflicts with prior and subsequent cases. See: *Cameron* (n 389); *B&J Shopfitting Services v HMRC* [2010] UKFTT 78 (TC); *Kay* (n 424).

<sup>457</sup> *R (Thompson) v Fletcher* [2002] EWHC 1448, [2002] STC 1149.

<sup>458</sup> *ibid* [47].

<sup>459</sup> *Gaines-Cooper* (n 369) [32] [emphasis added].

<sup>460</sup> *ibid* [32] (Lord Wilson); [64] (Lord Hope); [66] (Lord Walker).

Provisos to HMRC materials can provide much the same effect. These are found, for instance, attached to HMRC's publication of ESCs providing that concessions will not be given in any case where an attempt is made to use them for tax avoidance.<sup>461</sup> This proviso resulted in an ESC not applying to a taxpayer in the case of *R v Inspector of Taxes, ex parte Fulford-Dobson*<sup>462</sup> as the court held that the taxpayer was attempting to use the concession for avoidance purposes.<sup>463</sup> In dismissing the taxpayers contention that a legitimate expectation arose on the basis of representations in an HMRC Manual, the Upper Tribunal in *Samarkand*<sup>464</sup> placed significant weight on a caveat precluding reliance where 'there is, or may be, avoidance of tax'.<sup>465</sup> It followed that the taxpayers had to take the Manual in its entirety and could not 'take out the plums they liked and ignore the duff they did not'.<sup>466</sup>

### 5.2.2.3. Interim Remarks

In order to come within the parameters of Bingham LJ's second test, as noted by Collins J in *Greenwich*, there must not be *any ambiguity* present. For the courts in the cases where the taxpayers were successful, the representations contained no ambiguity, thereby underlining the significance of the clarity threshold which must be overcome. The case of *Gaines-Cooper*, by contrast,

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<sup>461</sup> HMRC, *Concessions as at 6 April 2017* (n 299) 2.

<sup>462</sup> *Fulford-Dobson* (n 5). See also: *R (Bampton) v King* [2012] EWCA Civ 1744, [2014] STC 56 [109].

<sup>463</sup> *Fulford-Dobson* (n 5) 991-992.

<sup>464</sup> *Samarkand Film Partnership No 3, Proteus Film Partnership and three partners v HMRC* [2015] UKUT 211 (TCC), [2015] STC 2135.

<sup>465</sup> *ibid* [154].

<sup>466</sup> *ibid* [172].

highlights the interpretative flexibility which corresponds with such a standard, further exemplifying the difficulty in establishing the requisite exactness of the representation. An alternative reading is that the standard is so malleable<sup>467</sup> as to deprive general HMRC soft law of its normative utility. The ubiquitous health warnings and provisos in general HMRC soft law also contribute to augmenting the struggle to satisfy Bingham's second condition on the basis that the publications cannot be said to be 'devoid of relevant qualification'.

### 5.2.3. HMRC's desire to maintain control

A bolder proposition is that the doctrine of legitimate expectations is hampered by HMRC's desire to maintain control over use of its general soft law, so as to counteract unforeseen advantages being gained by taxpayers. Several arguments are advanced in support of this contention, drawing upon the prevalence of 'qualifications' and HMRC's approach to changes of interpretation. In the first instance, the assertion is borne out by the very insertion of 'qualifications' such as health warnings and provisos. In *Gaines-Cooper*, HMRC argued successfully that the insertion of the 'health warning' encouraging contact with HMRC in any case of difficulty in applying the relevant guidance, prevented HMRC from being bound *ab initio*.<sup>468</sup> This indicates that the purpose of attaching 'health warnings' to general soft law is to reserve decision about its application to HMRC and *ex hypothesi* to preserve control over the use of

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<sup>467</sup> The generality of the criteria for establishing a legitimate expectation has also been highlighted by the courts, see: *Nadarajah* (n 366) [67] (Laws LJ). See also Williams, 'The Multiple Doctrines of Legitimate Expectations' (n 109).

<sup>468</sup> *Gaines-Cooper* (n 369) [32] (Lord Wilson); [64] (Lord Hope); [66] (Lord Walker).

published material. By extension, the inclusion of provisos precluding reliance in a case of 'tax avoidance' similarly seeks to endow broad discretion upon HMRC. The word 'avoidance' is not given a definition, nor is it possible to extract any from the case law.<sup>469</sup> This empowers HMRC to take a wide approach as to what it might define as 'avoidance', essentially allowing it to counteract any use of the material by the taxpayer which it dislikes.<sup>470</sup>

Secondly, the approach to changes in legal advice with an effect on general soft law reinforces the contention that HMRC seeks to reserve discretion to counteract benefits it perceives to be undue. HMRC's position in such an instance, namely that it *is generally bound to follow the new legal interpretation*,<sup>471</sup> does not hold up to scrutiny. The most proximate legal authority for this conjecture is an *obiter* comment from Carnwath J in *F&I Services Ltd*.<sup>472</sup> The High Court noted that a 'bona fide change of legal opinion within the commissioners *might* be expected' to preclude the previous advice from being binding prospectively.<sup>473</sup> Crucially, in that case, an HMRC Manual stated that a court or tribunal ruling changes the tax position prospectively.<sup>474</sup> Carnwath J was referring simply to the fact that by inference, a bona fide change of opinion might be expected to have the same result. The comment was evidently specific to the guidance at hand and not intended as a general

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<sup>469</sup> See for instance, Edwin Simpson, 'The Ramsay principle: a curious incident of judicial reticence?' (2004) BTR 358; see also: Michael Devereux, Judith Freedman & John Vella, *Tax Avoidance*, OCBT December 2012, 3-9.

<sup>470</sup> The insertion is crucial, as noted by Collins J in *Greenwich Property* (n 369), [24]-[25] as such a proviso must be expressed and cannot merely be implied into communicated material.

<sup>471</sup> ICAEW, *Legitimate Expectation and Reliance on HMRC Guidance* (n 133) 14; *Southern Cross Employment Agency Ltd v HMRC* [2014] UKFTT 088 (TC), [21].

<sup>472</sup> *R v Customs and Excise Commissioners, ex parte F & I Services Ltd* [2000] STC 364 (HC).

<sup>473</sup> *ibid* 377 [emphasis added]; affirmed by Robert Walker LJ in the Court of Appeal: *F & I Services Ltd v Customs and Excise Commissioners* [2001] EWCA Civ. 762, [2001] STC 939 [66].

<sup>474</sup> *F & I Services Ltd* (n 472) 377.

pronunciation. Beyond lack of strict precedence, the position is moreover entirely incongruous with HMRC's approach to tribunal decisions. Take the case of *HSBC Holdings*,<sup>475</sup> in which the First-tier Tribunal held that holders of the American Depositary Receipts ('ADRs') issued under New York law did not hold a beneficial interest in the underlying shares. Notwithstanding this decision, HMRC issued a brief in defiance of the tribunal's conclusion, confirming that a holder of ADRs would continue to be treated as the beneficial owner of the underlying shares.<sup>476</sup> HMRC reasoned that it was entitled not to follow the decision on the basis that tribunal decisions are not binding in relation to other cases which come before the First-tier Tribunal.<sup>477</sup> By contrast then, HMRC considers itself bound by internal legal opinion, but not so by external expert adjudication. The distinction drawn between these does not hold water. If one is bound by advice, then one must be bound by the tribunal; or, more importantly, not bound by the advice and not bound by the tribunal.<sup>478</sup> There is no a la carte option.

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<sup>475</sup> *HSBC Holdings plc and The Bank of New York Mellon Corporation v HMRC* [2012] UKFTT 163 (TC)

<sup>476</sup> See: Tracey Bowler (n 393) [3.1].

<sup>477</sup> HMRC, *Revenue and Customs Brief 14/12* (May 2012) <<http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/briefs/cgt/brief1412.htm>> accessed 31 September 2017.

<sup>478</sup> See: Christopher Harrison and David Stainer, 'Back to basics: When can you rely on HMRC statements?' (2014) 1235 *Tax Journal* 12, 13.

#### 5.2.4. Access to Justice

Access to judicial review is also an obstacle to the protection of taxpayers from HMRC reneging on written representations.<sup>479</sup> Access is circumscribed by the objectionable requirement that a claim based on legitimate expectations be brought in the High Court rather than the First-tier Tribunal,<sup>480</sup> and by other deterring factors.

For a time, there was considerable uncertainty as to the scope of the tribunal's power to hear issues of public law.<sup>481</sup> In *Oxfam v HMRC* ('*Oxfam*'),<sup>482</sup> Sales J embarked on an analysis of analogous case law relating to the jurisdiction of similar tribunals and also the statutory wording of the relevant act, and concluded that the First-tier Tribunal had jurisdiction to hear public law matters. However, this judgment has been later refined as only relating to the determination of input tax for the purposes of Value Added Tax Act 1994, s. 83(c).<sup>483</sup> The result now is that a taxpayer will have to commence judicial review proceedings in the Administrative Court, as well as pursue the substantive case

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<sup>479</sup> On the importance of access to judicial review, see: Peter Cane, *Controlling Administrative Power: An Historical Comparison* (CUP 2016) 318.

<sup>480</sup> It should be noted that where it is 'just and convenient' to so do, the Administrative Court may transfer the case to the Upper Tribunal, as occurred for instance in *R (Capital Accommodation (London)) v HMRC* [2012] UKUT 276 (TCC), [2013] STC 303, but was refused in *R (Hankinson) v HMRC* [2009] EHC 1774, [2009] STC 2158.

<sup>481</sup> Differently constituted tribunals arrived at differing conclusions upon this matter. See: *HOK Limited v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 433 (TC). Cf *Revenue and Customs Commissioners v Hok Limited* [2012] UKUT 363 (TCC); [2013] STC 225.

<sup>482</sup> *Oxfam* (n 109).

<sup>483</sup> *Rotberg v HMRC* [2014] UKFTT 657 (TC).

in the tax tribunal.<sup>484</sup> This resulting duplication has been criticised by John Avery Jones<sup>485</sup>:

I do not see this as a matter of principle. The High Court certainly has power to review all exercises of discretions by Customs for those who can afford to go there; why should not the Tribunal if they are qualified to decide the more difficult substantive part of the appeal?<sup>486</sup>

It is certainly questionable why an expert tribunal cannot determine all the issues surrounding a case which comes before it.<sup>487</sup> One could counter that it is necessary to ensure that public law issues are dealt with at a higher level due to the fact that the First-tier tribunal is not constituted wholly by judges.<sup>488</sup> However, there is a certain air of ‘fig leaf’<sup>489</sup> logic to the argument, considering that in the case of some taxing provisions, the tribunal does in effect decide upon public law issues. For instance, the tribunal will take account of excess of jurisdiction, unlawfulness or impropriety on the part of HMRC when evaluating the reasonableness of a taxpayer’s excuse for avoiding a penalty.<sup>490</sup>

The practical ramifications of having to commence Judicial Review in the High Court were highlighted in *William Bourne v HMRC*.<sup>491</sup> For the ordinary taxpayer, without the benefit of representation, the requirement to commence

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<sup>484</sup> Even in the case of VAT Act 1994, s. 83(c) Sales J in *Oxfam* recommended that taxpayers should still take this duplicative route, see: *Oxfam* (n 109) [80].

<sup>485</sup> John Avery Jones, ‘The reform of the tax tribunals: a story of uncompleted business’ (2006) BTR 282, 291-293.

<sup>486</sup> *ibid* 291.

<sup>487</sup> This is an issue which will be explored in greater detail below, Part IV. 4.2.1.4. Recommendations in respect of reliability, see text at n 384.

<sup>488</sup> As per The Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal Order 2008, s. 2(2) and (4), members of the First-tier Tribunal may be non-judges who are accountants or who have substantial experience in tax matters.

<sup>489</sup> This phrase is borrowed from John Laws, ‘Law and democracy’ (1995) PL 72, 79.

<sup>490</sup> John Avery Jones (n 485) 291, fn. 54.

<sup>491</sup> *William Bourne v HMRC* [2010] UKFTT 294 (TC).

dual proceedings is 'tantamount, in practice, to denying that appellant the ability to pursue that claim'.<sup>492</sup> The unrepresented taxpayer is unlikely to go to the expense of funding two sets of proceedings.<sup>493</sup>

Moreover, the dual requirement fails to align with reality in that a taxpayer must institute judicial review proceedings within 90 days of HMRC's decision,<sup>494</sup> and should simultaneously stay these proceedings behind the substantive appeal.<sup>495</sup> This anomaly arises by virtue of the fact that judicial review is a remedy of 'last resort'<sup>496</sup> and so should not be pursued if an alternative remedy, in the form of a statutory appeal to the First-tier Tribunal for instance, exists.<sup>497</sup>

Additionally restrictive of access to the courts are deterrents such as costs, and limitations to the scope for judicial review applications and awards introduced in recent times. As for the former, the cost of commencing Judicial Review proceedings (now £154), of requesting a reconsideration a Judicial Review application at a hearing (£385)<sup>498</sup> and of pursuing the claim if permission is granted (now £770)<sup>499</sup> is prohibitive generally and will close to absolutely deter persons with disputes of under £1,000. On the other hand, there is

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<sup>492</sup> *ibid* [24].

<sup>493</sup> Troup (n 110) 134. Whilst both sides to a dispute in the First-tier Tribunal generally bear their own costs (cf Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, Rule 10), the general rule for Judicial Review is that the losing party pays the costs, (CPR 44.3(2)).

<sup>494</sup> CPR 54.5.

<sup>495</sup> Ministry of Justice, *Pre-Action Protocol for Judicial Review* [5], available at: <[https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot\\_jrv](https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv)> accessed 31 September 2017.

<sup>496</sup> *ibid* [9]; Ministry of Justice, *Judicial Review: proposals for reform* (December 2012) [14], available at: <[https://consult.justice.gov.uk/digital-communications/judicial-review-reform/supporting\\_documents/judicialreviewreform.pdf](https://consult.justice.gov.uk/digital-communications/judicial-review-reform/supporting_documents/judicialreviewreform.pdf)> accessed 31 September 2017.

<sup>497</sup> Hui Ling McCarthy, 'Statutory appeal or judicial review?' (2014) 1234 *Tax Journal* 15, 16.

<sup>498</sup> Generally a necessity given that most Judicial Review applications are refused on paper, see: Ministry of Justice, *Judicial Review: Proposals for further reform* (September 2013) 8.

<sup>499</sup> See HM Courts and Tribunals Service, *EX50A HMCTS: 25th July 2016* (July 2016) 5.

currently no fee for taking a case to the First-tier Tax Tribunal, although the Government is consulting on introducing fees.<sup>500</sup>

As for the latter, section 84 of the Criminal Justice and Courts Act 2015 has the effect of introducing another barrier to access for claimants. This provides that the High Court must refuse to grant relief on an application for judicial review if it appears to the court to be *highly likely* that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred (although the Court retains a discretion to grant relief for reasons of exceptional public interest).<sup>501</sup> The same applies to the permission stage, although this only arises where the defendant brings the motion, or where the Court decides this of its own motion, that the outcome would have been substantially the same.<sup>502</sup> It is the words 'highly likely' which are at issue. Previously judges had a discretion to refuse relief where the same outcome would have been 'inevitable', a much higher standard.<sup>503</sup> The amendment was significantly criticized, most notably by Lord Pannick whose *Times* article on the issue<sup>504</sup> became a focal point for the debate as the bill passed through the houses.<sup>505</sup> Does the amendment actually hinder access to the courts for claimants? On the one hand, it could be argued that although this amendment

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<sup>500</sup> Ministry of Justice, *Consultation outcome: Enhanced fees response and consultation on further fee proposals* (July 2016) available at: <https://www.gov.uk/government/consultations/enhanced-fees-response-and-consultation-on-further-fee-proposals> accessed 31 September 2017.

<sup>501</sup> Criminal Justice and Courts Act 2015, s. 84(1).

<sup>502</sup> Criminal Justice and Courts Act 2015, s. 84(2).

<sup>503</sup> In respect of taking into account irrelevant considerations for instance, see *R (FDA) v Secretary of State for Work and Pensions* [2012] EWCA Civ 332, [2013] 1 WLR 444 [67] (Elias LJ).

<sup>504</sup> David Pannick, 'Why judicial review needs protection from our politicians' *The Times* (London, 20 February 2014).

<sup>505</sup> See for instance HC Deb 17 June 2014, vol 582, col 697 (Andy Slaughter); HL Deb 30 June 2014, vol 754, col 1557 (Baroness Campbell).

is undesirable from the perspective of reducing the scope for holding public authorities to account in respect of illegalities, the private rights of claimants are unaffected. In other words, if the claimant can demonstrate a right to remedy which is more than nominal, the case will still proceed. This however is to overlook the obfuscating nature of the amendment. Judicial review targets the propriety of the decision-making process, not the decision itself. By reducing the standard to 'highly likely' from 'inevitable', the judge is forced to place herself in the shoes of the decision-maker and hypothesize on whether it was highly likely that she too would arrive at the same decision.<sup>506</sup> By introducing this possibility, it increases the scope for the judge to decide that the claimant's action should be dismissed. The consequence of the change thus is to make it more difficult for a claimant to bring an action and to seek relief.

### 5.3. Interim Conclusion

Although tax cases such as *Preston*, *MFK Underwriting*, and *Unilever* contributed to the foundation of the doctrine of legitimate expectations,<sup>507</sup> its utility as a protective tool for taxpayers seeking to rely upon general HMRC soft law is severely compromised. The principle of *ultra vires* and the condition that a representation 'be clear, unambiguous and devoid of relevant qualification' combine to drastically reduce the prospects of a successful claim. HMRC's evident desire to maintain control over the application of its general soft law meanwhile and the deterring effect associated with the requirement to institute

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<sup>506</sup> Criminal Justice and Courts Bill Deb 13 March 2014, Col 106 (Angela Patrick).

<sup>507</sup> Jeff King, 'The pervasiveness of polycentricity' (2008) Public Law 101, 120.

dual-proceedings, costs, and the Criminal Justice and Courts Act 2015, s. 84 diminish the doctrine's force in practice.

Notably, it is not the doctrine itself which is at issue in this Section, but rather its application in practice. The problem is that as it stands today, it is inapt as a protective tool. If a taxpayer is deprived of the assurance that she can rely upon an HMRC publication, then the justification that general soft law provides greater certainty to taxpayers of their rights and obligations falls away. The matter is also detrimental to HMRC. The production of general soft law is warranted on the basis that it facilitates collection of tax and hence performing HMRC's primary statutory duty, ultimately to the benefit of the overall tax yield. The case law cited and the manner in which HMRC approaches general soft law reliance, on the other hand, undermine this justification. Taxpayers and their advisers are incentivized not to rely upon the publications, but rather to approach HMRC directly, thereby increasing the costs of collection otherwise reduced by the provision of general soft law in the first place!<sup>508</sup> In this regard, *Gaines-Cooper* in particular may prove to be a Pyrrhic victory.

## 6. Cometh the hour, cometh the Ombudsman?<sup>509</sup>

*HMRC has considerable power at its disposal, but with that power comes a responsibility to act proportionately, appropriately and fairly, and with regard for the law and its own internal procedures*<sup>510</sup>

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<sup>508</sup> Williams, 'The Multiple Doctrines of Legitimate Expectations' (n 109) 651-652.

<sup>509</sup> See Stephen Daly, 'Oversight of HMRC soft law: lessons from the Ombudsman' (2016) 38(3) *Journal of Social Welfare and Family Law* 343

<sup>510</sup> Parliamentary and Health Service Ombudsman, *Annual Report 2008-09* (HC 2008-09, 786) 12 (Ann Abraham). Cf Dawn Oliver, 'Ombudsmen in search of a role' (1978) 41 *MLR* 446, 452.

The Parliamentary and Health Service Ombudsman ('the Ombudsman'), has 'carved for itself a distinctive niche'<sup>511</sup> in the public law framework.<sup>512</sup> The original purpose of the office was to act as an aid to Parliamentary scrutiny of the executive,<sup>513</sup> the other supervisory mechanisms such as questioning by MPs in Parliament and indirect oversight by the courts having been deemed no longer suited to the task.<sup>514</sup> The office also has capacity to dispense individual justice<sup>515</sup> by way of compensating individuals for maladministration. As such, the role of the office is broader than originally conceived and it acts 'as a source of dispute resolution, as a guardian of good public administration, and as a systematic check upon departmental effectiveness'.<sup>516</sup> Analysis of the history of the Ombudsman reveals that the office has been effective at curing systemic executive defects and dispensing individual justice.

This Section accordingly seeks to analyse these two aspects of the Ombudsman's role with respect to forms of general HMRC soft law, namely, the degree of supervision exercised and the capacity of the office to bind HMRC to its soft law. Although the study will reveal the admirable utility of the Ombudsman, it will not go so far as to advocate equipping the Ombudsman to comprehensively take on these functions. Instead, this Section will seek to

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<sup>511</sup> Ann Abraham, Preface to Richard Kirkham, *Parliamentary Ombudsman: Withstanding the Test of Time* (HC 2006-07, 421) 1.

<sup>512</sup> For more, see: Roy Gregory and Gregory Giddings, *Practice and Prospects of the ombudsmen in the United Kingdom* (Edwin Mellon Press, 1995).

<sup>513</sup> Ann Abraham, Preface to Kirkham (n 511) 1.

<sup>514</sup> Peter Leyland and Gordon Anthony, *Textbook on Administrative Law* (8th edn., OUP 2016), 132.

<sup>515</sup> Oliver, 'Ombudsman' (n 510) 446; Parliamentary Commissioner for Administration, *Annual Report 1977* (HC 1977-78, 157) 7; Guy Powles, *Report of the Ombudsmen for the year ended March 31, 1964* (Wellington, 1964) 5.

<sup>516</sup> Ann Abraham, Preface to Kirkham (n 511); Oliver, 'Ombudsman' (n 510) 452; Parliamentary Commissioner for Administration, *Report for 1983* (HC 1983-84, 322) 1.

highlight that experiences from the history of the Ombudsman can be drawn upon when designing a framework to alleviate the previous outlined failings as regards general HMRC soft law. It will further be argued that the body plays a unique constitutional role, one which should be interwoven alongside other institutional solutions.

It should be noted that although this Section focuses upon the role which the Ombudsman plays in relation to general HMRC soft law, it might be queried why a similar amount of attention is not paid to the role of the Adjudicator's Office, which is effectively an HMRC Ombudsman.<sup>517</sup> There are two practical reasons for this. First, there are simply more sources which can be investigated in the case of the Ombudsman. Its birth precedes that of the Adjudicator's Office by almost three decades.<sup>518</sup> Secondly, the remit of both bodies is almost identical. Complaining to the Adjudicator is a step prior to issuing a complaint to the Ombudsman.<sup>519</sup> As such, an investigation of the role of the Ombudsman in respect of general HMRC soft law serves as a proxy for investigating the contribution by the Adjudicator's Office.<sup>520</sup> In the interests of completeness nevertheless, this Section will briefly analyse the role of the Adjudicator's Office in respect of general HMRC soft law.

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<sup>517</sup> Part III. Section 6.4. The possibility of extending the role of the Ombudsman or Adjudicator to fill the gaps, see text at p 213.

<sup>518</sup> The Adjudicator's Office came into being in 1993. See: The Adjudicator's Office, *Annual Report 2003* (March 2003) 1. Meanwhile, the Ombudsman came into being with the Parliamentary Commissioner Act ('PCA') 1967.

<sup>519</sup> Adjudicator's Office, *The Role of the Adjudicator* (August 2017) 1 available at: <<http://www.adjudicatorsoffice.gov.uk/pdf/ao1.pdf>> accessed 31 September 2017.

<sup>520</sup> This in turn is driven by the word constraints of the thesis.

## 6.1. Remit, powers and influence of the Ombudsman

Before proceeding to the discussion of supervision and protection, it is first necessary to provide a general overview of the Ombudsman by reference to the office's broad remit, extensive powers and the potency of its investigations. These form the bedrock of the office's effectiveness.

### 6.1.1. Remit

The Ombudsman's remit, drafted in very broad terms, is to investigate complaints of 'maladministration' by government departments and some other public bodies<sup>521</sup> (including HMRC)<sup>522</sup> causing 'injustice' to a member of the public.<sup>523</sup> The complaint must be raised within one year of the grievance arising.<sup>524</sup> Both 'maladministration' and 'injustice' are not defined. Richard Crossman, the Minister of Housing and Local Government who played a significant role in passing the bill through Parliament,<sup>525</sup> nonetheless opined that it would be a 'wonderful exercise' to try to define the former by reference to a catalogue of the qualities which would make up maladministration: 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on'.<sup>526</sup> Injustice on the other hand is said to encompass 'not merely injury redressable in a Court of Law',<sup>527</sup> but also, in Crossman's words, 'the sense of

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<sup>521</sup> PCA 1967, s. 5(1)(a).

<sup>522</sup> PCA 1967, s. 4, Sch. 2 (as amended).

<sup>523</sup> PCA 1967, s. 5(1)(a).

<sup>524</sup> PCA 1967, s. 6 (3).

<sup>525</sup> Leyland and Anthony (n 514) 137.

<sup>526</sup> HC Deb 18 October 1966 vol 734, col 51.

<sup>527</sup> Stanley Alexander De Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (5th edn, Sweet and Maxwell, 1995) [1-102].

outrage aroused by unfair or incompetent administration, even where the complainant has suffered no actual loss'.<sup>528</sup> The threshold of 'injustice' is surpassed by virtue of the citizen being 'affected by the maladministration in some way'.<sup>529</sup> The implication from these attempts at definitions is that a broad approach is to be taken to the question of what constitutes maladministration causing injustice.<sup>530</sup> Although Maladministration is not intended to encompass questioning the 'merits of a decision',<sup>531</sup> the condition, in practice, has not been strictly followed.<sup>532</sup>

In a similar vein, although the Ombudsman is not permitted by reason of s.5 of the governing Act to investigate complaints where the aggrieved person has a right of appeal, reference or review to or before a tribunal<sup>533</sup> or through proceedings in a court of law,<sup>534</sup> the officer may do so where it is not reasonable to expect the aggrieved person to have sought such redress.<sup>535</sup> The effect of this drafting is to attempt to separate issues of law from administration, placing the latter but not the former within the ambit of the Ombudsman's powers.<sup>536</sup> It is

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<sup>528</sup> HC Deb 18 October 1966 vol 734 col 51. See also: *R v Parliamentary Commissioner for Administration, ex parte Balchin* [1998] 1 PLR 1, 11 (Sedley J).

<sup>529</sup> Timothy Endicott, *Administrative Law* (3rd edn., OUP 2015) 498.

<sup>530</sup> Wade and Forsyth (n 289) 74; Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn., CUP 2009) 533; Mary Seneviratne, *Ombudsmen: Public Services and Administrative Justice* (Butterworths 2002) 45-46.

<sup>531</sup> PCA 1967, s. 12(3); *R v Local Commissioner for Administration, ex p Bradford Metropolitan City Council* [1979] QB 287, 311H (Lord Denning MR); *R v Local Commissioner for Administration, ex p Eastleigh Borough Council* [1988] QB 855, 863 (Lord Donaldson MR).

<sup>532</sup> Endicott (n 529) 493-496; Harlow and Rawlings (n 530) 533; Kirkham (n 511) 7-8. For instances of the Ombudsman questioning the merits of decisions, see: Parliamentary and Health Service Ombudsman, *Tax Credits: Getting it wrong?* (HC 2006-07, 1010), 9-10; Parliamentary Ombudsman, *Annual report 1999-00* (HC 1999/00, 593) 31; Parliamentary commissioner for administration, *Annual report for 1990* (HC 1990/91, 299) 16.

<sup>533</sup> PCA 1967, s. 5 (2)(a).

<sup>534</sup> PCA 1967, s. 5 (2)(b).

<sup>535</sup> PCA 1967, s. 5 (2).

<sup>536</sup> Leyland and Anthony (n 514) 140; Kirkham (n 511) 5.

however merely a ‘modest attempt to avoid overlapping remedies’,<sup>537</sup> and there have been many cases investigated in practice where legal remedies would have been available.<sup>538</sup>

There is one condition though which does undoubtedly restrict the remit of the Ombudsman. In order for a complaint to be investigated, it must come through the relevant Member of Parliament for the aggrieved constituent,<sup>539</sup> before being referred to the Ombudsman (with the complainant’s consent).<sup>540</sup>

### 6.1.2. Powers

The utility of the office is ensured by the wide powers of investigation endowed upon the Ombudsman.<sup>541</sup> The officer has almost unfettered access to papers and persons, a ‘striking advantage’ of the Ombudsman over MPs’ questioning.<sup>542</sup> The officer may effectively compel any Minister, officer, member, or person related to the purportedly offending department to furnish information or produce documents.<sup>543</sup> As the investigation takes place in private, any secrecy or confidentiality condition of that person’s employment is obviated,<sup>544</sup> except in relation to Cabinet proceedings.<sup>545</sup> The Commissioner has the same powers as the Court to summon and examine witnesses.<sup>546</sup>

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<sup>537</sup> Harlow and Rawlings (n 530) 539.

<sup>538</sup> Wade and Forsyth (n 289) 76-77. See below Part III. 6.2.2.1. Binding HMRC to its soft law.

<sup>539</sup> PCA 1967, s. 5(1)(a). A related condition implicit in s. 5 is that the complainant must be a UK resident, or the complain must relate to rights and obligations accruing in the UK (PCA 1967, s. 6(1)).

<sup>540</sup> PCA 1967, s. 5(1)(b).

<sup>541</sup> Kirkham (n 511) 6.

<sup>542</sup> KC Wheare, *Maladministration and its Remedies* (Stevens 1973) 144.

<sup>543</sup> PCA 1967, s. 8(1).

<sup>544</sup> PCA 1967, s. 8(3).

### 6.1.3. Influence

The potency of the Ombudsman's investigations derives from its founding constituents. The Ombudsman is an officer of the House of Commons and is appointed by the Crown on the advice of the Prime Minister. The body is accountable to Parliament through the medium of the Public Administration and Constitutional Affairs Committee ('PACAC').<sup>547</sup> Reports on the investigations undertaken are laid before the PACAC,<sup>548</sup> whilst individual findings and recommendations are dispatched to the referring MP.<sup>549</sup> The names of the complainants are anonymised.<sup>550</sup> Although the Ombudsman holds no formal powers to compel compliance with any of the office's recommendations, the involvement of the PACAC<sup>551</sup> and referring MP<sup>552</sup> is generally sufficient to ensure compliance on the part of the offending public body. As Roskill LJ noted in *Congreve v Home Office*,<sup>553</sup> 'no criticism of a government department could be more devastating'.<sup>554</sup> The case of *R (Bradley) v Secretary of State for Work and Pensions ('Bradley')*<sup>555</sup> however adds a legal edge to recommendations from the Ombudsman. Therein it was found that a government department could only

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<sup>545</sup> PCA 1967, s. 8(4).

<sup>546</sup> PCA 1967, s. 8(2). See however PCA 1967, s. 11(3).

<sup>547</sup> Parliamentary and Health Service Ombudsman, *Annual Report 2011-12* (HC 2011-12, 251) 5.

<sup>548</sup> PCA 1967, s. 10(4).

<sup>549</sup> PCA 1967, s. 10(1).

<sup>550</sup> For instance, see: Parliamentary and Health Service Ombudsman, *Selected summaries of investigations by the Parliamentary and Health Service Ombudsman Volume 1, report 1* (February and March 2014) (HC 2014-15, 566).

<sup>551</sup> Harlow and Rawlings (n 530) 534.

<sup>552</sup> Wade and Forsyth (n 289) 69.

<sup>553</sup> *Congreve v Home Office* [1976] QB 629.

<sup>554</sup> *ibid*, 654-655. See also: *Seifert and Lynch v Pensions Ombudsman* [1997] 1 All ER 214, 222 noted in Harlow and Rawlings (n 530) 482-483.

<sup>555</sup> *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114.

reject an Ombudsman's finding of maladministration 'on cogent reasons'<sup>556</sup> and that any decision to reject a finding may itself be judicially reviewed and quashed if judged to be irrational.<sup>557</sup> Should an entity decide not to act as the Ombudsman recommends the implication is that the injured party may challenge a decision not to follow an Ombudsman's recommendation on the basis that to refuse to do so would be irrational. Similarly, should the entity decide not to act on the basis that an Ombudsman's conclusion as to the relevant facts is inaccurate, the implication is that in fact the party is armed with the ability to go to court to check whether the authority has good reason to reject the Ombudsman's findings of fact.

The recommendations of the Ombudsman, which can range from the issuance of an apology<sup>558</sup> to financial compensation,<sup>559</sup> seek to restore the complainant to the position he or she would have been in had the maladministration not occurred.<sup>560</sup> Recommendations may also be directed towards broader, systemic change, as arose in relation to the introduction of compensation for expenses incurred by reason of official error on the part of HMRC.<sup>561</sup>

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<sup>556</sup> Ibid [51], [72] (Sir John Chadwick).

<sup>557</sup> Ibid [95] (Sir John Chadwick).

<sup>558</sup> Parliamentary Commissioner for Administration, *Third report of the parliamentary commissioner for administration* (HC 1973-74, 281) 12; Parliamentary Commissioner for Administration, *Annual report for 1988* (HC 1988/89, 301) 16; Parliamentary and Health Service Ombudsman, *Annual Report 2010-11* (HC 2010-11, 1404) 17.

<sup>559</sup> Parliamentary Commissioner for Administration, *Second report of the Parliamentary Commissioner for Administration* (HC 1973-74, 106) 7.

<sup>560</sup> Parliamentary and Health Service Ombudsman, *Equitable Life: a decade of regulatory failure* (HC 2007-08, 815-I) 377.

<sup>561</sup> Part IV. 4.2.1.3. Recommendations in respect of accessibility, see text at n 355. For another instance of achieving systemic change, see: Parliamentary Commissioner for Administration, *Annual report for 1995* (HC 1995/96, 296) [54].

## 6.2. Relationship between the Ombudsman and HMRC

Having set out the office's broad remit, extensive powers and the potency of its investigations, attention can now be turned to the role that the Ombudsman plays vis-à-vis general HMRC soft law.

### 6.2.1. Supervision of HMRC soft law

The supervisory mechanisms which ought to be active as regards forms of general HMRC soft law were previously demonstrated to be insufficient.<sup>562</sup> Research into the Ombudsman's reports, set out below, demonstrates that the Ombudsman has been effective to an extent in remedying failings of general HMRC soft law in relation to quality and accessibility, such as inconsistency with the underlying law, insufficiency of guidance and non-publication.

#### 6.2.1.1. Inconsistency

In terms of combatting inconsistency between the law and the corresponding soft law, the Ombudsman has on numerous occasions forced HMRC to change its guidance where it is inconsistent with the law to which it relates. Inconsistency can arise by reason simply of an incorrect interpretation or where the soft law no longer adequately reflects the underlying legal position.

The former arose in a case concerning the collection of betting duty from an on-course bookmaker.<sup>563</sup> As it stood at the time, possession of a valid betting duty card was necessary before a bookmaker could stand at a race meeting.

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<sup>562</sup> See generally Part III. 4. Analysis of the scrutiny afforded to HMRC soft law.

<sup>563</sup> Parliamentary Commissioner for Administration, *Annual report for 1976* (HC 1976-77, 116) 8.

Before these cards could be issued, the bookmaker had to pay a deposit calculated by reference to estimated duty liability. The complainant in this case, who had held a bookmaker's permit for about fourteen years, received a demand for payment of £35. It was said that he owed betting duty amounting to over £200 for the previous year and the amount of £35 was required as a deposit if he wished to obtain further betting duty cards while the matter was being investigated. During the course of the investigation, the Ombudsman found that Customs Notice No. 455 (which provided that cards would not be issued until all duty due was paid) was inconsistent with the Department's legal advice about the circumstances in which officials were empowered to refuse to issue a card. Subsequent to this issue being highlighted, the Department corrected Customs Notice No. 455 so as to properly reflect the underlying legal position. This was that Customs officers were not empowered to refuse the issue of a betting duty card to a bookmaker on the ground of being in arrears with duty payment, but merely to require additional security as a condition of the issue of a card.<sup>564</sup>

At other times, the Ombudsman has caused HMRC to update its guidance so as to reflect the law as it stands at any given time. For instance, the Ombudsman urged the Inland Revenue to abandon the hardship test in the rules governing the application of (now) ESC A19, a concession which allows for the forgiveness of tax where there are delays on the part of the Department in using information.<sup>565</sup> Owing to this pressure, the Inland Revenue relinquished the requirement that the delay must additionally have caused the taxpayer

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<sup>564</sup> Parliamentary Commissioner for Administration, *Fifth report of the parliamentary commissioner for administration* [cases investigated 1st February to 30th April, 1976] (HC 1975-76, 496) 812.

<sup>565</sup> See: HMRC, *Concessions as at 6 April 2017* (n 299).

hardship.<sup>566</sup> In other cases, it need not necessarily be substantive soft law which is in need of updating however. General procedural soft law may also need amending so as to continue to be commensurate with the underlying law. In the damning *Tax Credits: Getting it wrong?* report,<sup>567</sup> dealing with the systemic problems encountered following the introduction of Tax Credits, the Ombudsman recommended that HMRC develop feedback mechanisms to enable staff to learn from complaints about the unreasonable application of COP 26.<sup>568</sup> This is the Code of Practice which sets out the procedure for remedying overpayment of tax credits.<sup>569</sup> The report also recommended that HMRC should ensure that proper consideration is given to the impact of recovery decisions on the individuals and families concerned. Both recommendations were accepted.<sup>570</sup> In terms of the latter, HMRC responded by ensuring in future that any time a question of 'hardship' were to arise, it would be put to the Debt Management and Banking Unit in HMRC, who are specialists in determining the question of hardship.<sup>571</sup>

#### 6.2.1.2. Insufficiency

In combatting the insufficiency of some pieces of soft law in providing guidance to taxpayers as to their treatment by HMRC, the Ombudsman has

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<sup>566</sup> Parliamentary Commissioner for Administration, *Annual report for 1996* (HC 1996/97, 386) [37].

<sup>567</sup> PHSO, *Tax Credits: Getting it wrong?* (n 532).

<sup>568</sup> *ibid* 12, 38.

<sup>569</sup> See: HMRC, *What happens if we've paid you too much tax credits (COP 26)* (October 2014) available at: <<https://www.gov.uk/government/publications/tax-credits-what-happens-if-youve-been-paid-too-much-cop26>> accessed 31 September 2017.

<sup>570</sup> Parliamentary and Health Service Ombudsman, *Annual Report 2007-08* (HC 2007-08, 1404) 20.

<sup>571</sup> PHSO, *Tax Credits: Getting it wrong?* (n 532) 13, 38.

likewise intervened at times to good effect. This was what arose in relation to ESC A5 (now obsolete).<sup>572</sup> The concession specified that it was Inland Revenue practice not to assess removal expenses borne by an employer where an employee '*has to change residence*'<sup>573</sup> as a result of a transfer to another post within an organisation. This was said only to apply if the employee was forced to travel at least 25 miles or over an hour by public transport. In the case itself, the employee's new office was 20 miles from his residence, but his employer, for commercial reasons, thought it essential for him to live within five miles of the new branch. The Ombudsman did not find that there was maladministration in the case in failing to apply the terms of the concession to the employee in question, but did query the wording of the concession as it failed to make clear the degree of necessity required by the phrase '*has to change residence*'. Accordingly, the Chairman of the Board of Inland Revenue accepted that the concession was seriously ambiguous and that it needed to be reviewed and improved.

Problems of insufficiency can also manifest themselves in internal guidance to department officials. In a case concerning a returning holidaymaker, the Ombudsman found that actions of Customs officials had been contrary to legal advice, but also that the advice to the officials in the case had been fragmented and imprecise.<sup>574</sup> The holidaymaker in question was returning to the UK with furniture, but had improperly completed a declaration form. The

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<sup>572</sup> Parliamentary Commissioner for Administration, *Annual report for 1987* (1987/88 HC 363) 13.

<sup>573</sup> [emphasis added].

<sup>574</sup> Parliamentary Commissioner for Administration, *Annual report for 1982* (HC 1982/83, 257) 16-17.

question for Customs officials was whether this was 'reckless' or 'careless', but during the interview, the holidaymaker had not been advised that 'recklessness' was being considered. The woman had been given a Rule II caution by the Customs officials, but not a Rule III caution,<sup>575</sup> before she was offered the option of court proceedings or payment of a sum to compound proceedings. The proper legal course of action in instances where there have been allegations of recklessness was in fact to refer to the department's solicitor, but the officials were not clearly informed of this. The department accordingly agreed to make administrative changes in the procedures to shore up these inadequacies in the internal guidance. The case also serves to demonstrate the two-way nature of soft law - even where it is primarily directed at officials, it can nevertheless impact upon taxpayers. Another soft law instrument evidencing this two-way phenomenon is Code of Practice 26 (COP 26)<sup>576</sup> and, similar to the internal guidance on Rule II and Rule III cautions, was previously found to be insufficiently clear. In *Tax Credits: Getting it wrong?*, the Ombudsman recommended that the department produce a set of clear and comprehensive guidelines on the application of the revised COP 26, together with training for staff in its application and the desired outcomes.<sup>577</sup> The revised COP 26 replaced the 'reasonable belief' test with a much clearer test of whether the tax credit customer has alerted HMRC to an error or change of circumstances. Previously it

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<sup>575</sup> Rule II of the Judges' Rules provided that a caution was to be issued as soon as an officer had evidence which would afford reasonable grounds for suspecting that a person has committed an offence. Rule III provided that where a person is charged with or informed that s/he may be prosecuted for an offence, s/he shall be cautioned. See: Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (10th edn., OUP 2014) 383.

<sup>576</sup> Formally on HMRC's website as *Tax credits: what happens if you've been paid too much (COP 26)*. See above n 589.

<sup>577</sup> PHSO, *Tax Credits: Getting it wrong?* (n 532) 39.

was a requirement that it must have been reasonable for the claimant in question to believe that their payments were correct in order to obtain the benefit of the Code of Practice. The following year, the Ombudsman further forced HMRC to clarify whether COP 26 would be applied retrospectively.<sup>578</sup>

### 6.2.1.3. Publication

By having such unencumbered access to internal documents and people, the Ombudsman is well placed to understand internal HMRC guidance and to provoke publication where the guidance enshrines policies, procedures or interpretations which impact taxpayers. By way of example, the Ombudsman's investigations for the year 1991 revealed a previously unpublished extra-statutory practice.<sup>579</sup> The Inland Revenue was allowing repayments of tax to be made outside the statutory six-year time limit laid down by Taxes Management Act 1970, s. 43 where the claim is delayed by reason of mistakes made by the Inland Revenue or by another government department. Following the Ombudsman's inquiry into a complaint from a taxpayer who belatedly discovered that he had not received the benefit of old age allowance to which he had an entitlement since the mid-1970 (for which the Inland Revenue made an ex gratia payment of £1,930.17), the Inland Revenue agreed to look into the possibility of publishing the existence of the practice and undertook to ensure that it was promulgated in the Revenue's internal instructions to tax offices. The

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<sup>578</sup> PHSO, *Annual Report 2007-08* (n 570) 18.

<sup>579</sup> Parliamentary Commissioner for Administration, *Annual report for 1991* (HC 1991/92, 347) 15.

concession was subsequently published that year as ESC B41.<sup>580</sup> In another case where a citizen accused Customs officials of having damaged his property when his luggage was being searched at a port of entry, the result of the Ombudsman's investigation was the revision of internal guidance and its publication as a Code of Practice.<sup>581</sup> The particular officials were wearing outer coats thereby concealing their name badges, contravening Customs & Excise guidance ('Traveller's Charter'). Meanwhile, internal guidance on dealing with complaints was also not followed. Subsequent to this investigation, Customs and Excise modified its internal policy and thereafter published it as 'Complaints and putting things right: our code of practice' in January 1996.<sup>582</sup>

### 6.2.2. Relief for taxpayers: Individual Justice

As with supervision, the remit, powers and influence of the Ombudsman by default render the body well placed to hold HMRC to its position stated in general soft law, thereby providing protection for taxpayers. HMRC is regularly placed in the upper ranks of Ombudsman statistics for number of complaints received<sup>583</sup> whilst the Ombudsman consistently upholds more than half of the complaints concerning HMRC which are reported on (including claims which are

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<sup>580</sup> See: Inland Revenue, *IR1 (Supp)* (1991).

<sup>581</sup> PCA, *Annual report for 1995* (n 561) [67].

<sup>582</sup> Now found here: see: HMRC, *Putting things right: how to complain* (February 2015) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/408997/C\\_F\\_S\\_02\\_15.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408997/C_F_S_02_15.pdf)> accessed 31 September 2017.

<sup>583</sup> Parliamentary and Health Service Ombudsman, *Annual Report 2006-07* (HC 2006-07, 838) 8. Note that this is not merely a recent problem. For instance see: Parliamentary commissioner for administration, *Annual report for 1980* (HC 1980/81, 148) 5-11.

partially upheld).<sup>584</sup> These observations go some way to demonstrate generally the efficacy of the Ombudsman in acting as a force to constrain impropriety on the part of HMRC and conversely to reinstate citizens in the position they would have been in had the maladministration not occurred. More pertinent for our purposes is the specific question of whether the Ombudsman also achieves such ends in relation to general HMRC soft law by providing redress where HMRC seeks to depart from its written position. A review of the reports not only suggests that the Ombudsman is proficient in this role, but also that the body may be better positioned to bind HMRC to its soft law than the courts.

#### 6.2.2.1. Binding HMRC to its soft law

Although the Ombudsman should, strictly speaking, not investigate these complaints by reason of section 5 of Parliamentary Commissioner Act 1967 (as they would be subject to judicial review), the Ombudsman is not rigidly inhibited from investigating claims for which there would be legal remedies available. Frustrating an expectation that HMRC would not depart from its written position falls within the Ombudsman's jurisdiction *in practice*. The reports of the Ombudsman to this end are replete with examples of the body investigating claims of this sort and thereafter dispensing reparation to the citizen concerned.<sup>585</sup> The *Annual report for 1990* provides two such examples.<sup>586</sup> HMRC's practice on reimbursing taxpayers for expenses arising by reason of

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<sup>584</sup> PHSO, *Annual Report 2010-11* (n 558) 41; PHSO, *Annual Report 2009-10* (HC 2009-10, 274) 26; PHSO, *Annual Report 2008-09* (n 510) 32; PHSO, *Annual Report 2007-08* (n 570) 12; PHSO, *Annual Report 2006-07* (n 583) 10.

<sup>585</sup> See: Alastair Mowbray, 'The Parliamentary Commission and administrative guidance' (1987) PL 570.

<sup>586</sup> PCA, *Annual report for 1990* (n 532) 14.

official error arising on the part of the department is set out in soft law.<sup>587</sup> In one case, the Ombudsman found that a solicitor's costs fell squarely within the terms of the concession and the department agreed to reimburse the expense. In another case, the Ombudsman found that a taxpayer fell within the terms of a concession relating to sick pay (the now obsolete ESC A26)<sup>588</sup> but the department had overlooked to apply it in the case at hand. It was agreed that the complainant should be endowed with an ex gratia payment totaling £96.

The Inland Revenue's refusal to apply another concession, namely ESC A19 which forgives tax where there are delays on HMRC's part, to cases which fell within its terms came in for much criticism in the *Annual report for 1991*.<sup>589</sup> The Ombudsman's opposing opinion that the taxpayers concerned did actually fall properly within the terms of ESC A19 was sufficient to provoke the Inland Revenue to give the taxpayers the benefit of the concession.<sup>590</sup> In one case, the Revenue had initially refused to apply the concession because a separate governmental department, the Department of Social Security ('DSS'),<sup>591</sup> caused the relevant delay. The DSS had acquiesced in its duty to pass information concerning the State pension to the Inland Revenue. After the Ombudsman's intervention, the Inland Revenue agreed to compensate the taxpayer to the tune of £598.14. In a similar case, the taxpayer had been aware that the DSS had this arrangement with the Inland Revenue and accordingly relied upon this

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<sup>587</sup> Initially, it was set out in Statement of Practice A31, which was replaced by Code of Practice 1 on 17 February 1993, available at: <http://webarchive.nationalarchives.gov.uk/20060820083451/hmrc.gov.uk/leaflets/cop1.htm> accessed 31 September 2017.

<sup>588</sup> Rendered obsolete by 1999, see: Inland Revenue *IR1* (August 1999).

<sup>589</sup> PCA, *Annual report for 1991* (n 579).

<sup>590</sup> *ibid* 13-14.

<sup>591</sup> Now has been subsumed within the Department for Work and Pensions.

mechanism, rather than informing the Inland Revenue himself of his State pension. The Ombudsman recommended that the taxpayer obtain the benefit of the concession for the delay caused again by the DSS's tardiness in passing on information. He received an exceptional ex gratia payment of £975.

A similar instance of the Ombudsman forcing the hand of the Inland Revenue in terms of reconsidering whether a taxpayer falls within the terms of its general soft law can be found in the *Annual Report for 1994*.<sup>592</sup> In a case concerning the application of Statement of Practice A31, errors on the part of the Inland Revenue resulted in the accumulation of £146.88 in accountants' fees. The Chairman of the Board sought to excuse the errors on the part of the Revenue as 'pardonable' but following the advice of the Ombudsman that the department's reading of A31 was 'unjustifiably restrictive', agreed to pay the accountants' costs and review the internal guidance issued to officers.

#### 6.2.2.2 The non-existence of the *Ultra Vires* hurdle

As discussed earlier,<sup>593</sup> it is the orthodox view that there cannot be effectuation of an *ultra vires* legitimate expectation. Owing to this, one cannot say with absolute confidence when it is possible to rely upon general HMRC soft law, thereby undermining the utility of publications to assure taxpayers as to their treatment by HMRC. Furthermore, it can clearly bring hardship to bear in cases where an individual has sincerely placed reliance upon representations of a

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<sup>592</sup> Parliamentary commissioner for administration, *Annual report for 1994* (HC 1994/95, 307) [56].

<sup>593</sup> See below, Part III. 5.2.1.1. The orthodox position.

public body.<sup>594</sup> The problem is eschewed in the case of the Ombudsman<sup>595</sup> given that the office's jurisdiction to investigate complaints of *maladministration causing injustice* makes no mention of *vires*.<sup>596</sup> The Ombudsman may recommend that an individual be compensated to produce an effect equivalent to an incorrect, more favourable tax assessment that the taxpayer thought they were entitled to.<sup>597</sup> There is no restriction by reason of the effect being *ultra vires* HMRC to produce, despite the presence of a Revenue legal error.

In one case for instance a taxpayer was compensated for failure on the part of a Customs and Excise officer to advise him of a more 'tax efficient' way of structuring the refurbishment of his house.<sup>598</sup> VAT relief was available for DIY house-builders who had built a new dwelling, but was not available for reconstructions. The complainant had incorporated an old building in a new structure (which would not qualify for the relief) but the Customs and Excise office gave the impression that it might be available and failed to intervene when it became apparent that the complainant was under the false impression. The Department compensated the taxpayer to the tune of £961.67 (representing the VAT paid on the building materials) thereby effectively arriving at the result the taxpayer had hoped, notwithstanding the fact that the taxpayer clearly did not come within the scope of the law properly applied. Another case concerned a

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<sup>594</sup> *Stretch v West Dorset District Council* [1998] 3 EGLR 62, 66-67 (Peter Gibson LJ).

<sup>595</sup> Wade and Forsyth (n 289) 285.

<sup>596</sup> PCA, *Second report of the Parliamentary Commissioner for Administration* (n 559) 7; Parliamentary Commissioner for Administration, *Annual report for 1979* (HC 1979-80, 402) 17-18. See in respect of private bodies: *Re an application by JR55 for Judicial Review (Northern Ireland)* [2016] UKSC 22, [2016] All ER (D) 74.

<sup>597</sup> See: Parliamentary Commissioner for Administration, *Annual report for 1986* (HC 1986/87, 248) 11.

<sup>598</sup> Parliamentary Commissioner for Administration, *Fifth report for session 1983-84* (HC 1983/84, 322) 26-27.

woman who was overpaid tax credits.<sup>599</sup> HMRC in the interim sent her a notice that was factually incorrect. After bringing it to an official's attention, she was told to ignore the notice. Approximately two years later, HMRC tried to claim back the overpayment of £1,673.57. The Ombudsman upheld the complaint on the basis of HMRC's delay and mishandling of the case. Following from this, HMRC did not reclaim the overpayment which she was not entitled to under the law and made an additional *ex gratia* payment of £50 for the unnecessary worry and distress it had caused. A final case worthy of consideration is that of a woman who the Inland Revenue had misled as to her pension entitlements.<sup>600</sup> She was of the understanding that she would qualify on retirement for 96% of the standard rate retirement pension, when she actually was entitled to only 86% of the standard rate. By the time this was relayed to her however, it was too late for her to purchase additional years of pension under her employer's occupational pension scheme. She considered that rectification of this issue would require that she be paid the state retirement pension at 96%. The Ombudsman agreed on the facts that maladministration had occurred and was satisfied that an *ex gratia* payment from the Inland Revenue of £500 would provide sufficient redress, as the amount broadly reflected what she would have invested in her employer's occupational pension scheme had she not been misled as to her entitlements.

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<sup>599</sup> PHSO, *Annual Report 2007-08* (n 570) 20.

<sup>600</sup> Parliamentary commissioner for administration, *Selected cases 1981 - volume 2* (HC 1980/81, 250) 32-37.

## 6.3. The Adjudicator's Office

### 6.3.1. Remit, powers and influence of the Adjudicator's Office

The Adjudicator's Office was established in 1993 initially to investigate complaints in relation to the Inland Revenue.<sup>601</sup> The Adjudicator is responsible for complaints in relation to HMRC and the Valuation Office Agency ('VOA'),<sup>602</sup> and has a similar remit to that of the Ombudsman.<sup>603</sup> Unlike the Ombudsman, the Adjudicator's Office does not have a statutory footing or the MP filter, but it is instead predicated upon a contractual relationship with HMRC.<sup>604</sup> The Adjudicator is not an employee of HMRC, nor a civil servant and is thus not subject to any direction from HMRC in respect of any individual complaint or type of complaint.<sup>605</sup>

The Adjudicator's role is to consider whether these bodies have handled complaints appropriately and have given reasonable decisions.<sup>606</sup> The Adjudicator can look at complaints about mistakes, unreasonable delays, poor or misleading advice, inappropriate staff behaviour and the use of discretion. But the Adjudicator cannot look at matters of government or departmental policy, complaints where there is a specific right of determination by any court, tribunal, or other body with specific jurisdiction over the matter (as with the

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<sup>601</sup> Inland Revenue *Press Release*, February 17, 1993, reprinted in (1993) 13 *Business Law Review* 98 as noted in Philip E. Morris 'The Revenue Adjudicator - the first two years' (1996) PL 309, 309 at fn. 5.

<sup>602</sup> Up until 2016 the Adjudicator's Office also investigated complaints into the Insolvency Service. See: Adjudicator's Office, *Annual Report 2017* (September 2017) 28.

<sup>603</sup> Adjudicator's Office, *The Role of the Adjudicator* (n 519) 1.

<sup>604</sup> Harlow and Rawlings (n 530) 458.

<sup>605</sup> Dawn Oliver, 'The Revenue Adjudicator: a new breed of Ombudsperson?' (1993) PL 407, 407-408.

<sup>606</sup> See generally Adjudicator's Office, *The Role of the Adjudicator* (n 519) 1

Ombudsman), valuation decisions of Statutory Officers in the VOA, complaints about whether HMRC, or the VOA have complied with the Freedom of Information Act 2000 and the Data Protection Act 1998, complaints about an ongoing investigation or enquiry, or complaints that have been or are being investigated by the Parliamentary Ombudsman. The breadth of the Adjudicator's jurisdiction runs parallel evidently to that of the Ombudsman. But the Adjudicator is a prior step in the complaints machinery.<sup>607</sup> Complainants should approach first the Adjudicator before, if still dissatisfied approaching the Ombudsman through their MP. Given its placing in the complaints machinery, the Adjudicator's Office has been called a 'middle tier' between the internal complaints process and the Ombudsman.<sup>608</sup>

In terms of powers, and in a similar manner to the Ombudsman, the Adjudicator has full access to HMRC's records and can interview relevant staff.<sup>609</sup> Where the Adjudicator thinks that either HMRC or the VOA have fallen short, the body will recommend what they need to do to put matters right. This may include making suggestions for broader service improvements where this is considered to be of benefit to the wider public. Additionally, these powers may be used to recommend ex gratia payments, recompense and other payments to complainants such as covering expenses incurred in pursuing complaints and compensation for loss of time in pursuing complaints.<sup>610</sup>

The influence of the Adjudicator slightly departs from that of the Ombudsman. Undoubtedly, the opinion of the Adjudicator holds significant sway

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<sup>607</sup> *ibid.*

<sup>608</sup> Harlow and Rawlings (n 530) 458.

<sup>609</sup> Oliver, 'The Revenue Adjudicator' (n 605) 408.

<sup>610</sup> *Ibid.*

with HMRC. For instance, in the years 2015/16,<sup>611</sup> 2014/15,<sup>612</sup> 2013/14,<sup>613</sup> 2012/13,<sup>614</sup> 2011/12,<sup>615</sup> and 2010/11,<sup>616</sup> 2009/10,<sup>617</sup> and 2008/09,<sup>618</sup> all the Adjudicator's recommendations were accepted by HMRC.<sup>619</sup> This reflects the general agreement between the Adjudicator and HMRC that the recommendations, although not binding, will be accepted and followed in all but exceptional circumstances.<sup>620</sup> Furthermore, again although the recommendations are not binding, the ability of the Adjudicator to publicise non-compliance with a recommendation represents a potent weapon in the armoury of the Office.<sup>621</sup> However the power of the Ombudsman's findings is bolstered by the fact of the link with Parliament. The status of the Adjudicator as independent of the House of Commons means the Office cannot benefit from this political power.<sup>622</sup>

### 6.3.2. Supervision of HMRC soft law and holding the body to its soft law

Given the similarity in terms of remit, powers, and influence it should be unsurprising that the Adjudicator's Office would have a similar track record to

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<sup>611</sup> Adjudicator's Office, *Annual Report 2016* (September 2016) 12 and 24.

<sup>612</sup> Adjudicator's Office, *Annual Report 2015* (September 2015) 12 and 22.

<sup>613</sup> Adjudicator's Office, *Annual Report 2014 Learning is paramount!* (July 2014) 12 and 22.

<sup>614</sup> Adjudicator's Office, *Annual Report 2013 The Adjudicator calls for greater organisational learning* (June 2013) 12, 17 and 22.

<sup>615</sup> Adjudicator's Office, *Annual Report 2012 A year of challenges* (July 2012) 12, 18 and 22.

<sup>616</sup> Adjudicator's Office, *Annual Report 2011 A year of record breaking performance* (July 2011) 12, 18 and 22.

<sup>617</sup> Adjudicator's Office, *Annual Report 2010 continuous improvement driving performance learning lessons* (September 2010) 12, 17 and 20.

<sup>618</sup> Adjudicator's Office, *Annual Report 2009* (September 2009) 15.

<sup>619</sup> It is worth noting that most complaints to the Adjudicator's Office relate to tax credits. See for instance, Adjudicator's Office, *Annual Report 2016* (n 611) 12.

<sup>620</sup> Oliver, 'The Revenue Adjudicator' (n 605) 408.

<sup>621</sup> Morris (n 601) 310.

<sup>622</sup> *Ibid.*

the Ombudsman with respect to supervising general HMRC soft law and holding HMRC to its soft law. As such, an investigation of the role of the Ombudsman in respect of general HMRC soft law serves as a proxy for investigating the contribution by the Adjudicator's Office.<sup>623</sup> Nevertheless, it is worth setting out a few examples of interventions from the Adjudicator resulting in changes to HMRC soft law. As with the case studies in respect of the Ombudsman, this Section will detail instances where HMRC soft law was inconsistent with the law, insufficiently clear, and unpublished and how the recommendations of the Adjudicator led to change in respect of these problems. The Section thereafter will set out briefly how the Adjudicator is effective at holding HMRC to its soft law, as with the Ombudsman, but will note that the jurisdiction of the Ombudsman is broader.

A case study in the 2014 Annual Report evidences the ability of the Adjudicator to force HMRC to change a soft law instrument where the instrument incorporates a position which is inconsistent with the law. HMRC guidance provided that the cost of court fees could be deducted from claims for tax refunds. This was incorrect as a matter of law and following the investigation and recommendation from the Adjudicator the guidance was amended to reflect the correct legal position.<sup>624</sup> A case study in the 2007 Annual Report highlights the ability of the Adjudicator to tackle issues in respect of both lack of clarity and non-publication. HMRC operated a Flat Rate VAT scheme. However, the guidance on the matter was contradictory and unclear, leading the Adjudicator to recommend, and HMRC to accept, that the guidance should be amended.

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<sup>623</sup> This in turn is driven by the word constraints of the thesis.

<sup>624</sup> Adjudicator's Office, *Annual Report 2014* (n 613) 17.

Furthermore, the Adjudicator expressed concern about the fact that entities could be retrospectively added to the Flat Rate VAT scheme but that this was not widely published. Rather, the clear guidance on retrospection was available to businesses applying electronically but not to other applicants. To this end, it was recommended that HMRC consider whether the guidance could be expanded to a wider audience.<sup>625</sup> It is now to be found in an HMRC manual online.<sup>626</sup>

In terms of holding HMRC to its soft law, like the Ombudsman, the Adjudicator has been a useful tool for administering justice to individuals otherwise deprived of treatment provided for in general HMRC soft law instruments. ESC A19 is a concession which provides that HMRC will not seek the arrears of income or capital gains tax liability if they result from HMRC's failure to make proper and timely use of information. Two case studies in the 2013 Annual Report demonstrate instances where HMRC incorrectly failed to apply this concession, but later did so after reconsideration on the basis of the Adjudicator's investigations.<sup>627</sup> However, whilst a notable feature of the operation of Ombudsman redress was the apparent lack of an *ultra vires* barrier, the Adjudicator is more constrained in the remedies that can be issued. The Adjudicator regularly repeats that the Office has 'no jurisdiction to ask HMRC to act outside of their guidance or instructions'.<sup>628</sup> That is not to say that the Adjudicator may not advise remedies beyond HMRC's power, but rather that the Adjudicator could only do so if HMRC's guidance seemingly permits the body to

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<sup>625</sup> Adjudicator's Office, *Annual Report 2007* (September 2007) 38-39.

<sup>626</sup> See HMRC, *VAT Flat Rate Scheme: FRS3000* (April 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/vat-flat-rate-scheme/frs3000>> accessed 31 September 2017.

<sup>627</sup> Adjudicator's Office, *Annual Report 2013* (n 614) 13-14.

<sup>628</sup> *Ibid* 18; Adjudicator's Office, *Annual Report 2012* (n 615) 13.

do so. An example is that found in HMRC's 'Putting things right' factsheet in which HMRC states that persons may be entitled to compensation for distress caused by HMRC mistakes or delays. The legal basis for this is unclear, and should a complainant seek to enforce this in a court would likely struggle with the *ultra vires* legitimate expectations problem assessed earlier in this thesis. Nevertheless, the fact that the passage is included in HMRC soft law means that the Adjudicator can oversee such a course of action, and has indeed done so on several occasions.<sup>629</sup>

#### 6.4. The possibility of extending the role of the Ombudsman or Adjudicator to fill the gaps

There is an obvious question which follows from a reading of this Section. Why not simply empower the Ombudsman or Adjudicator's Office to further engage in the roles of supervision and protection in relation to forms of general HMRC soft law, thereby vitiating the problems identified in the Sections 2-5 of Part III? Here the limitations of the ombudsman-type solution with regard to the HMRC must be noted.

First, there is the issue that the Ombudsman's *focus* is not upon HMRC soft law. The above handful of case studies cited were the finest examples of Ombudsman interventions in relation to general HMRC soft law which the author could find from a comprehensive study of all the Ombudsman's annual reports since the office's inception.<sup>630</sup> To this end, the examples are not a general

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<sup>629</sup> See for instance Adjudicator's Office, *Annual Report 2010* (n 617) 14.

<sup>630</sup> The methodology was to review the annual reports and refer to any tangential reports which were referenced therein.

reflection of the work undertaken by the office, but rather a collection of individual instances of admirable interposition. Following from this point, is the more important observation that the examples cited arose tangentially out of Ombudsman investigations. The Ombudsman's focus is upon remedying general administrative deficiencies within public bodies which have caused individuals injustice.<sup>631</sup> That the office has at times in its history remedied problems in relation to general HMRC soft law is to an extent serendipitous. It would be misconceived accordingly to believe that simply urging the Ombudsman to take greater control of general HMRC soft law issues would provide the redress that is required. Rather what would be required would be the establishment of a separate department within the Ombudsman's office which solely focused upon matters of general HMRC soft law. This department would in turn have to be endowed with extra resources in terms of staff, expert training and funding. Reforms of this sort to the office seem infeasible, although reform itself is not off the cards as there is ongoing debate more generally as to the desirability of merging several ombudsman schemes.<sup>632</sup> As it stands, HMRC already accounts for a substantial proportion of the Ombudsman's resources. It is regularly the second most complained of department and ranks consistently in the top 5 for government departments in terms of complaints taken for formal investigation.<sup>633</sup> To expect that forms of general HMRC soft law should be further

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<sup>631</sup> Oliver, 'Ombudsman' (n 510) 452.

<sup>632</sup> Lucinda Maer and Michael Everett, *The Parliamentary Ombudsman: role and proposals for reform* (Briefing Paper: Number CBP7496, March 2016) 3.

<sup>633</sup> PHSO, *Annual Report 2011-12* (n 547) 17; PHSO, *Annual Report 2010-11* (n 558) 14; PHSO, *Annual Report 2009-10* (n 584) 22; PHSO, *Annual Report 2007-08* (n 570) 11; PHSO, *Annual Report 2006-07* (n 583) 8.

assigned a disproportionate share of the Ombudsman's resources does not appear to be realistic.

A second significant hurdle is the *remit* of the Ombudsman in its current form. Its jurisdiction would have to be stretched, or would have to be amended, in order to fully take on the supervisory and protection roles in respect of general HMRC soft law. Firstly, the Ombudsman is supposedly constrained to the extent that it cannot question the merits of HMRC decisions.<sup>634</sup> However, the case studies demonstrating the effectiveness of the Ombudsman in supervising general HMRC soft law largely involve questioning the judgements underlying the interpretations in the relevant soft law. Thus, the effectiveness of the Ombudsman here has been founded upon a blurring of its jurisdictional boundaries. Put another way, general soft law is not an area *per se* that the Ombudsman is entitled to investigate and it would not be sensible accordingly to seek to continue to overstep this boundary by putting greater pressure on the Ombudsman to interrogate general HMRC soft law. Meanwhile, the case studies in this Section which exemplify the Ombudsman's utility in binding HMRC to its soft law similarly involved a stretching of the office's jurisdiction. The Ombudsman is not in general permitted to investigate complaints where the aggrieved person has a right of appeal, reference or review to or before a tribunal<sup>635</sup> or through proceedings in a court of law.<sup>636</sup> The intention underlying the limitation was to separate issues of law from issues of administration.<sup>637</sup> Nevertheless, the examples showcased herein have all, to one degree or another,

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<sup>634</sup> PCA 1967, s. 12(3).

<sup>635</sup> PCA 1967, s. 5 (2)(a).

<sup>636</sup> PCA 1967, s. 5 (2)(b).

<sup>637</sup> Leyland and Anthony (n 514) 140; Kirkham (n 511) 5.

involved issues which could have been judicially reviewed. Moreover, in order to fully function as a supervisory body in respect of general HMRC soft law, it would be necessary to remove the requirement that there is an individual complaint before action can be taken, the merits of which have been subject to debate,<sup>638</sup> with some proposing for the Ombudsman to have its own powers to initiate investigations.<sup>639</sup> This requirement undermines the effectiveness of a supervisory body in ensuring correctness and clarity of general soft law, in addition to ensuring its publication where relevant to taxpayers. Although individual complaints help to focus the attention of the Ombudsman, the requirement severely curtails the Ombudsman's ability to comprehensively scrutinize general HMRC soft law. Simply because an individual complaint has not reached an Ombudsman does not mean that there are no problems! Further, the requirement is particularly unhelpful in directing the Ombudsman towards general soft law which exists but is not published and *ought to be* published. An individual is unlikely to know about the existence of any internal guidance for which s/he is not receiving the benefit and therefore will not know of any reason to complain to the Ombudsman. Combined, these three jurisdictional issues underline the limitations of the Ombudsman's current remit to act as an effective supervisory body for general HMRC soft law and one which can provide effective protection for taxpayers against HMRC reneging on earlier positions.

Taking the two hurdles of *focus* and *remit* together, the problem of empowering the Ombudsman to further engage in the roles of supervision and protection is that it would require the establishment of a new department with a

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<sup>638</sup> Kirkham (n 511) 19.

<sup>639</sup> Maer and Everett (n 632) 15-16.

new remit. Whilst this would be possible, it should become apparent that this would effectively result in the creation of a new institution. It is unrealistic to expect the Ombudsman to comprehensively plug the holes in the existing framework. To this end, it is surely preferable to accept that there is a need for a new institution rather than trying to do so by the backdoor by tinkering to such an extent with the Ombudsman.

Of course, the Adjudicator's Office acts in an ombudsman-type role in relation to HMRC. The Adjudicator is responsible for complaints in relation to HMRC and the Valuation Office, and is given an almost identical remit to that of the Ombudsman (but without the MP filter), in addition to similar powers, influence and track record in respect of general HMRC soft law. To this end, there is, in a sense, an HMRC Ombudsman, but the point remains that it would be unrealistic to expect the Adjudicator to dedicate a disproportionate share of its resources towards overseeing a very specific area of HMRC activity, namely general soft law. It would similarly be stretching the remit of the Adjudicator to have the body overseeing general soft law and providing protection for taxpayers. The reasons given in this section that the Ombudsman is not the ultimate answer to the issues identified likewise apply to the Adjudicator accordingly.

Furthermore, relying on the Ombudsman, or to this end, the Adjudicator, alone for the purpose of oversight has a sort of 'closing the stable door after the horse has bolted' feel about it. The Ombudsman operates *ex post* when a problem has already been perceived to have arisen, whilst the current thesis makes the case that there is a need for some concurrent or *ex ante* control to filter issues before they manifest themselves as errors in general soft law

affecting the public. But that is precisely the point. The Ombudsman serves an important constitutional role in providing a crucial link between the individual citizen and the various institutions of the state. It is a salient constitutional principle that those empowered to provide public services should be accountable to the public for the provision of those services.<sup>640</sup> Acting on behalf of the individual to provide redress or to investigate potential impropriety. In the case of general soft law, the Ombudsman is a form of specialized scrutineer of systemic administrative practice for the citizen. The Ombudsman should continue to operate in such a capacity, in tandem with other institutional reforms. Any reforms to the body itself,<sup>641</sup> or to the framework within which general soft law is produced should be cognizant of this function and cautious not to dilute it.

Finally, the case of *Bradley* could be interpreted as demonstrating weaknesses in the Ombudsman route, and in using the Adjudicator's Office. The Claimant in the case had to take the relevant body to Court in order for the body to be bound by the decision of the Ombudsman. In this sense, *Bradley* demonstrates that the most effective remedy for disgruntled citizens still lies through the legal system, rather than the ombudsman-type route.

## 6.5. Interim Conclusion

Owing to increasing exploration of the 'flexibility' contained within the governing 1967 statute, the Ombudsman has become a 'valuable tool in the

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<sup>640</sup> Kirkham, 'The Constitutional Role of the Ombudsman' (n 340) 129.

<sup>641</sup> See: Nick O'Brien, 'The ombudsman as democratic 'alternative': Reading the EU Consumer ADR Directive in the light of the PASC reports' (2015) 37(2) Journal of Social Welfare and Family Law 274.

ongoing process of calling the government to account'.<sup>642</sup> Within the office's sprawling ambit have inevitably come HMRC's activities in relation to its general soft law the Ombudsman has demonstrated, at times, a capacity to alleviate failings in the current framework for general HMRC soft law by both exercising oversight and also by holding HMRC to its published position. In terms of the former, this demonstrates the benefit of having an expert scrutinising general HMRC soft law to ensure that it is consistent with the underlying law which it is purporting to interpret; is sufficiently clear so as to guide taxpayers and is published where the soft law in question impacts upon individuals. As for the latter, similarly, the case studies exemplify the advantage of an independent adjudicator holding HMRC to account and binding the body to its word when it might otherwise seek to depart. Similar findings in respect of supervising general HMRC soft law and holding the body to it arise in respect of the Adjudicator's Office. In this respect, the operation of the Ombudsman and the Adjudicator's Office somewhat dampen the assertion in the previous Section that there is inadequate protection for taxpayers.<sup>643</sup> The absence of the *ultra vires* barrier in this respect is a considerable advantage intrinsic to the jurisdiction of the Ombudsman over that of the courts, rendering the officer unencumbered in terms of providing relief.

All the same, the lessons should not be overstated. It is unrealistic, for reasons of institutional setup and remit, to expect the Ombudsman and thus in turn the Adjudicator's office to comprehensively plug the holes in the existing framework. For these reasons, there is a strong argument that the offices of the

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<sup>642</sup> Kirkham (n 511) 20.

<sup>643</sup> See Part III. 5. 5. Reliability for taxpayers? The inadequacy of public law protection.

Ombudsman and the Adjudicator should continue to work in their current capacities but also in tandem with any new institution which the thesis will recommend. The history of the Ombudsman and the Adjudicator provide food for thought in the establishment of a new structure for combating issues of general HMRC soft law, but not a pre-packaged solution.

## 7. Conclusion to Part III

Notorious amongst public law scholars is a book published in 1929 by Lord Hewart, then Lord Chief Justice, entitled *The New Despotism*.<sup>644</sup> The author produced an example in the book which purported to demonstrate the danger of allowing power in the hands of government to undermine Parliament and evade oversight by the Courts:

Let it be supposed [...] that the power of deciding disputes as to liability to income-tax were vested in the Board of Inland Revenue, without appeal to the Courts. 'Oh,' it may be said, 'but that is an extreme case which would never be sanctioned by Parliament.'<sup>645</sup>

His view of an apparent creeping trend of Parliament being hoodwinked by the Cabinet and of a vast conspiracy to deprive the commonwealth of the hard-earned constitutional liberties was one which apparently represented 99 per cent of the opinion of the bench, the bar and the solicitors' profession at the time.<sup>646</sup> This was the setting in which the Donoughmore Committee on Ministerial Powers was established. To this end, given the general skepticism

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<sup>644</sup> Lord Hewart, *The New Despotism* (Ernest Benn 1929).

<sup>645</sup> *ibid* 46.

<sup>646</sup> William Robson, 'The Report of the Committee on Ministers' Powers' (1932) *The Political Quarterly* 346, 350.

elicited towards administration, it is surprising that the terms of reference for the Donoughmore Committee were limited to delegated legislation (and judicial powers),<sup>647</sup> rather than looking more broadly at all forms of administrative rule-making. Had this been the case, the preceding discussion in Part III about problems in relation to forms of general HMRC soft law might not have arisen.

At any rate, myriad problems have been identified in this Part in terms of the quality of general HMRC soft law, its accessibility, the scrutiny exercised over it and the protections in place to ensure that taxpayers can rely upon it. There were however some positive features of the current system identified in Part III which can be further developed. For instance, the Ombudsman was demonstrated to play an important role in overseeing general soft law and dispensing justice to individuals. Similarly, HMRC's willingness to consult taxpayers on policy matters and develop general soft law in tandem with their responses is a positive development.

Having critically outlined the various inadequacies of the system for the promulgation of general HMRC soft law accordingly, the purpose of Part IV of this thesis will be to seek to provide recommendations for the reforms which are necessitated. If general soft law, as set out in Part II, is desirable in principle, then the practical problems identified in Part III should not defeat the case for soft law without there first being an investigation of possible reforms.

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<sup>647</sup> Committee on Ministers' Powers Report (n 1) 1.

## PART IV. A NEW APPROACH FOR HMRC SOFT LAW

### 1. Outline

HMRC soft law refers to those soft law sources that encapsulate norms, which are produced pursuant to HMRC's managerial discretion and seek to elaborate upon legal rights and obligations of taxpayers in order to guide actions. The particular inquiry of the thesis is into forms of general HMRC soft law. What follows is that general HMRC soft law needs to be of a sufficient quality; that it is accessible to taxpayers; that there is some kind of mechanism for binding HMRC to its stated position and that there is scrutiny of the process. The UK system however falters with regards to satisfying these objectives, as Part III has made clear.

It is not the UK alone however which has struggled with the 'soft law problem'. Although it is far from novel, few solutions have been proffered by other countries. Amongst these is the US which in 1946 introduced what has been dubbed 'the bill of rights' against administrative actions,<sup>1</sup> namely the Administrative Procedure Act 1946. With the expansion of the welfare state came an explosion in non-statutory material emanating from public authorities and with that, recognition of the need for regulation in the area.<sup>2</sup> Other common law countries such as Australia and New Zealand have adopted the approach

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<sup>1</sup> *Congressional Record*, Senate, (March 12, 1946) 298 (Senator Pat McCarran).

<sup>2</sup> Committee on the Judiciary, Report of the Committee on the Judiciary: A Bill to improve the administration of justice by prescribing fair administrative procedure (Senate Bill 7, 79th Congress, 1st session, report no. 752, 1945) 187-189.

meanwhile of putting in place a process for the production of binding ‘rulings’, which are definitive interpretative statements from the revenue authorities.

The purpose of this Part is ultimately to propose a package of solutions to ameliorate the issues in the UK in relation to general HMRC soft law. Most obviously, there is a clear need for a more structured framework in relation to general HMRC soft law. To this end, Section 2 will assess the alternative approaches, such as those adopted in the US, Australia and New Zealand, before deciding upon a model which can be used to build a framework suitable for general HMRC soft law. It will be demonstrated that the Australian model is most suitable *per se*, and as such, Section 3 will tease out how this system performs against our normative benchmarks. Section 4 thereafter will seek to synthesize what has been gathered from that investigation and from other parts of this thesis into a package of proposals.

## 2. Deciding upon an alternative approach

*But something important is being said about democracy when the only legislative chamber to perform the functions that people expect – deliberation, revision, improvement – contained not a single elected politician<sup>3</sup>*

As should have become clear, general soft law is more than just the opinion of HMRC.<sup>4</sup> It may have *de facto* legal effect from the perspective of

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<sup>3</sup> Hugo Young, ‘Democracy is in crisis if we have to rely on the Lords’ *The Guardian*, (18 December 2001).

<sup>4</sup> As HMRC at times seeks to imply, see: Institute of Chartered Accountants in England and Wales, *Legitimate Expectation and Reliance on HMRC Guidance* (Technical Release 06/13), 13.

taxpayers.<sup>5</sup> Whilst it might not have the automatic binding effect of law, its practical impact is not inconsequential.<sup>6</sup> It occupies a place on the spectrum somewhere short of law, although sometimes, if only rarely, achieving binding effect by reason of the public law remedy of legitimate expectations.<sup>7</sup> HMRC accordingly acts in a quasi-legislative capacity when it promulgates general soft law and any proposal accordingly should be minded of this reality.

With that, the purpose of this brief Section is to evaluate the possible options for reform and decide upon a model of 'best practice' on which a framework for the UK can be based. This exploration will reveal that the Australian model in particular offers many lessons for the UK system by reason of its similar style of engaging with taxpayers and for its interposition of expert oversight.

## 2.1. Alternative approaches

There are three approaches to reform which can be taken to general HMRC soft law. The first would be the maintenance of the status quo, but that would obviously be to surrender to the problems identified already in this thesis and to continue to ignore the reality of general HMRC soft law having *de facto* legal effect. The second would be to utilise the existing mechanisms for the production of primary and secondary legislation for general HMRC soft law. The

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<sup>5</sup> Robert Baldwin and John Houghton, 'Circular arguments: the status and legitimacy of administrative rules' (1986) PL 239, 267; Gabriele Ganz, *Quasi Legislation: recent developments in secondary legislation* (Sweet & Maxwell, 1987); Robert Baldwin, *Rules and Government* (OUP 1995).

<sup>6</sup> See generally Part II. 2.2 The scope of HMRC soft law and its manifestations.

<sup>7</sup> See generally Part III. 5. Reliability for taxpayers? The inadequacy of public law protection.

third is to develop a new framework for general HMRC soft law. The latter two will be considered in turn.

### 2.1.1. Direct Parliamentary Control

An obvious alternative to the current regime for general HMRC soft law would be to subject HMRC publications to Parliamentary scrutiny.<sup>8</sup> Such soft law could be tabled for approval by Parliament, or alternatively, Parliament would be given the chance to disallow the soft law in a similar vein to secondary legislation.<sup>9</sup> This is problematic in practice due to constraints upon Parliamentary time. HMRC produces a vast bulk of non-statutory material and it would be impossible for Parliament to scrutinize even a portion in any meaningful way. There is simply insufficient Parliamentary time to place problematic general soft law on a statutory footing.<sup>10</sup> This is no more evidenced than by the fact that despite a concerted effort over the last decade, the placing of ESCs in legislation has occurred at a sluggish pace.<sup>11</sup> Other practical problems would be that it could delay the process of producing general soft law, thereby causing further uncertainty for taxpayers and perhaps even lead to the politicization of the administration of the tax laws.<sup>12</sup>

Furthermore, subjecting general soft law to Parliamentary control in order to resolve problems in relation to such soft law assumes that Parliament

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<sup>8</sup> On which, see: Baldwin and Houghton (n 5) 269-271.

<sup>9</sup> On Statutory Instruments, see: Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th edn., CUP 2011) 268-283.

<sup>10</sup> Treasury and Civil Service Committee, *Budgetary Reform in the UK* (HC 1981-82; 137-vi) Q 500 (Sir Geoffrey Howe, then Chancellor of the Exchequer); Ganz (n 5) 93.

<sup>11</sup> See above Part II. 3.1.3. The counterclaims: six arguments, see text at n 308.

<sup>12</sup> See: Commonwealth of Australian, *Review of Aspects of Income Tax Self Assessment* (August 2004) 16; Joint Committee of Public Accounts and Audit, Report No. 326, *An Assessment of Tax – A Report on an Inquiry into the Australian Taxation Office* (1993) 110.

would actually be an effective scrutinising agent.<sup>13</sup> There is little reason for such faith. On Parliamentary scrutiny of secondary legislation in general, former Lord Chief Justice Igor Judge notes that since 1950, 170,000 statutory instruments have been laid before Parliament. Only 17 have been rejected.<sup>14</sup> The learned Lord cites that between six and ten statutory instruments are laid before the relevant committee of the House of Commons daily.<sup>15</sup> These sittings however rarely last longer than ninety minutes.<sup>16</sup> Moreover, the last time that the House of Commons rejected a statutory instrument was in 1979.<sup>17</sup>

The evidence that Parliament effectively scrutinizes Finance Bills in turn is likewise largely absent.<sup>18</sup> Former Chancellor of the Exchequer Nigel Lawson once confessed that the Treasury could use the ‘arcane’ language of the Finance Bill, which bore ‘little resemblance to the English language’, to successfully evade Parliament’s gaze.<sup>19</sup> The inutility of scrutiny by the Houses is also underlined by cases like the GAAR legislation which went to a standing committee, rather than Parliament, to be analyzed in detail.<sup>20</sup> Subjecting general HMRC soft law to Parliamentary scrutiny in reality would do little to prevent *inter alia* there being

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<sup>13</sup> On which, see: Daniel Greenberg, ‘Dangerous Trends in Modern Legislation’ [2015] 1 PL 96.

<sup>14</sup> Igor Judge, ‘Ceding Power to the Executive; the Resurrection of Henry VIII’ (King’s College London, April 2016) 10.

<sup>15</sup> *ibid* 10.

<sup>16</sup> *ibid* 10.

<sup>17</sup> *ibid* 11.

<sup>18</sup> See Sandra Eden, ‘United Kingdom’ in Dourado (ed), *Separation of Powers in Tax Law* (IBFD 2010); IFS, *Making Tax Law: IFS Tax Law Review Committee Discussion Paper No. 3* (March 2003) [2.4]; See generally Antony Seely, ‘The Budget and the annual Finance Bill’ (Briefing Paper: Number 00813, March 2016) 8-9, 14, 16-17, 20-22.

<sup>19</sup> Nigel Lawson, *The View from No 11* (Bantam Press, 1992) 354-55 as noted in Glen Loutzenhiser, *Tiley’s Revenue Law* (8th edn., Bloomsbury 2016) 41.

<sup>20</sup> Natalie Lee, in “Editorial” (2013) *Private Client Business* 143

contradictions between various provisions<sup>21</sup> or from the soft law being insufficiently clear!

To argue solely on the grounds of pragmatism however, is to miss the point of general soft law. This is namely that it should not be regularised into hard law because *it is not hard law!* It serves a separate purpose, namely to guide taxpayers as to their obligations and rights *under the law*. General soft law and the underlying law merit separate places in the infrastructure:<sup>22</sup> the two co-exist in a symbiotic relationship (although it is accepted in practice the risk that the availability of soft law may negatively impact the legislative process).

Accordingly, there is a need for an alternative structure to that which exists for the formation of hard law to accommodate the different, albeit related, purpose of general soft law. It is quasi-legislative and so requires a quasi-legislative framework.

### 2.1.2. Bespoke framework

Subjecting general soft law to Parliamentary control overlooks the reality that such soft law is a necessary component in giving guidance to taxpayers on the law. It requires its own bespoke framework which incorporates mechanisms for adequate scrutiny.<sup>23</sup> This alone however fails to protect taxpayers where

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<sup>21</sup> This responds to a criticism made in Sue Arrowsmith, 'Quasi-legislation: recent developments in secondary legislation' (1990) PL 144, 145.

<sup>22</sup> On which, see: Paul Daly, 'Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the Canadian Charter of Rights and Freedoms' (2014) 65 Supreme Court Law Review 249, 266; Susan Gratton, 'Standing at the Divide: The Relationship between Administrative Law and the Charter post-Multani' (2008) 53 McGill Law Journal 477, 482.

<sup>23</sup> Richard Stewart 'The Reformation of American Administrative Law' (1975) 88 Harvard Law review 1667, 1688. See also: Aneurin Bevan at the Select Committee on Delegated Legislation 1953, *Minutes of Evidence*, 144 quoted in CK Allen, *Law and Orders* (3rd edn. Stevens & Sons 1965) 164-165; Michael Asimow, 'Nonlegislative rulemaking and regulatory reform' (1985) *Duke Law Journal* 381, 426. There have been many criticisms over the years of the degree of scrutiny

HMRC chooses to rescind its purported published treatment. As such, it is further necessary to include a mechanism in order to accord binding force to general soft law, thereby strengthening reliability from the perspective of taxpayers. Aside from the use of traditional administrative law principles already demonstrated to be inadequate,<sup>24</sup> the solution to this issue lies in the creation of a specialized rulings regime which produces binding revenue advice.<sup>25</sup>

Having regard to these overarching elements, two issues must be addressed. The first is whether it is even constitutionally permissible to have formal binding advice emanating from HMRC. Moving on then to the question of designing the framework for general soft law which would counteract the problems of quality, accessibility, scrutiny and reliability, it is necessary to delineate which jurisdiction would serve as a 'best practice' example.

#### **2.1.2.1 Permissibility of Binding advice**

On the question of whether it is permissible for the UK to introduce a system for formally binding advice, it is first worth pointing out in response that many other common law countries with similar constitutional structures have a system of binding administrative advice. For instance, regulations promulgated by the Treasury in the US which are processed through the 'Notice and

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HMRC is subjected to. See: House of Lords Select Committee on Economic Affairs, *Tackling Corporate Tax Avoidance in a Global Economy: is a New Approach Needed?* (HL 2013–14, 48) [124]; Judith Freedman evidence [122]; Margaret Hodge [119].

<sup>24</sup> Part III. 5. Reliability for taxpayers? The inadequacy of public law protection. There were many proponents of the view that the existing mechanisms would be sufficient to control administrative rule-making. For instance, see: Baldwin and Houghton (n 5) 275-284; Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (2nd edn, Baton Rouge 1971) 42.

<sup>25</sup> See Dominic de Cogan, 'Tax, Discretion and the Rule of Law', 8-9 in Chris Evans, Judith Freedman and Richard Krever (eds.), *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD 2011).

Comment' procedure in accordance with the Administrative Procedure Act 1946 are binding.<sup>26</sup> Meanwhile both Australia and New Zealand have a binding rulings regime.<sup>27</sup> Many Civil Law countries additionally have some kind of binding regime.<sup>28</sup> A 2015 report from the OECD surveyed 56 countries, 22 of which were non-OECD members.<sup>29</sup> 53 of the countries reported having a system of public rulings which produced advice to the public which was generally binding.<sup>30</sup> 51 meanwhile reported operating a system of binding private rulings for individuals.<sup>31</sup> In sum, the idea of binding advice is far from novel.<sup>32</sup>

Moving on to the more important issue about the constitutionality of binding administrative advice, the foremost problem is that it purports to undermine Parliamentary sovereignty. However, we currently operate in a system in which general soft law in and of itself is not contrary to Parliamentary sovereignty<sup>33</sup> and in fact that general soft law furthers the rule of law.<sup>34</sup> The problem for Parliamentary sovereignty accordingly arises where general soft law conflicts with the underlying legislation or case law.<sup>35</sup> However, the tension with Parliamentary sovereignty arises regardless of whether there operates a formal

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<sup>26</sup> See: *Mayo Foundation for Education and Research v United States* 131 S. Ct. 704 (2011). Part IV. 2.1.2.2. Comparative overview of scrutiny options, see text at n 41.

<sup>27</sup> Part IV. 2.1.2.2. Comparative overview of scrutiny options, see text at n 42.

<sup>28</sup> See: OECD, *Tax Administration 2015 Comparative Information on OECD and Other Advanced and Emerging Economies* (August 2015) 289.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> See also Part II. 2.2.6. Rulings. Additionally, a formal system for Pre-Transaction Rulings was seriously discussed in the UK in 1995, see: Inland Revenue, *Pre-Transaction Rulings: A Consultative Document* (November 1995), reported in (1995) 46 *Simon's Tax Intelligence*. It was dropped the following year, as reported in (1996) 40 *Simon's Tax Intelligence*.

<sup>33</sup> See generally Part II. 2.1. The constitutional propriety of HMRC soft law.

<sup>34</sup> See generally Part II. 3.1.1 How the rule of law advances the case for soft law.

<sup>35</sup> On which, see: Dominic de Cogan, 'A Changing Role for the Administrative Law of Taxation' (2015) Vol. 24(2) *Social & Legal Studies* 251.

system of binding rulings, if it is recalled that administrative guidance itself has *de facto* binding features.<sup>36</sup> Having a formal system for binding administrative advice merely prevents HMRC from reneging on a position where it dislikes the consequences. Furthermore, if a binding element were to be introduced as part of a system which provides for expert scrutiny of general HMRC soft law, the prospect of administrative advice conflicting with the underlying law in the first place is reduced. Taking these together, the principle of Parliamentary sovereignty is better upheld by such a proposal than occurs in its absence.

Secondly, there is tension with Parliamentary sovereignty in more than one respect. Stating that HMRC being bound to its published position, which might be different to what Parliament has prescribed, undermines Parliament is only one side of the coin. The other is the ideal of good administration. Whilst a public authority failing to give effect to express statutory words might be regarded as *ultra vires*, it could equally be argued that Parliament itself has prescribed that the powers it grants to a public body must not be abused. Allowing HMRC to renege on its published position could be characterised as a misuse of powers itself as it is contrary to the ideal of good administration, and hence also *ultra vires* HMRC.<sup>37</sup> This will particularly be the case where the soft law in question has been generated through a system that has canvassed the views of an expert body and the public (which is something the model to be proposed in this thesis will do). This would give rise to a crisp form of general soft law where all precautions have been made to ensure that the soft law is

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<sup>36</sup> On which, see Greg Weeks, 'The Public Law of Restitution' (2014) 38 Melbourne University Law Review 198, 203.

<sup>37</sup> Paul Craig, *Administrative Law* (8th edn., Sweet and Maxwell 2016) 703; *Laker Airways Ltd v Department of Trade* [1977] QB 643, 707; [1977] 2 WLR 234 (Lord Denning); Stephen Daly, 'Recent developments in tax law: vires revisited' (2016) 2 PL 190, 192 and 197.

correct and sufficiently clear. The taxpayer in this instance would have little reason to suspect that there should be any reason not to be able to rely upon it. To rescind the promised treatment later in such circumstances could be viewed as abusive. In this Morton's fork situation, both options are equally *ultra vires*. 'Parliamentary sovereignty' in terms of legislative intention accordingly does not trump, but must be balanced with, the requirement of good administration. As Whipple J noted in *R (Hely-Hutchinson) v HMRC* ('*Hely-Hutchinson*'),<sup>38</sup> HMRC's duty to collect tax as prescribed by Parliament is not a 'trump card which prevails over all other considerations'.

Finally, there is an air of excessive introspection about insisting that general soft law cannot be binding for constitutional reasons. The ultimate effect is that the taxpayer is deprived of a legal remedy against HMRC. However, even critics who insist that the Parliamentary sovereignty must be protected against incursions such as insisting HMRC be bound to its soft law even if it is incorrect, hold no objection to the idea that the Ombudsman could effectively place the taxpayer in the position as if HMRC had been so bound.<sup>39</sup> Therefore, the taxpayer can be placed in the same position as if she had a legal remedy, but it is insisted that she reach that point through a specific avenue.

#### **2.1.2.2. Comparative overview of options**

To design a framework for general soft law which would ameliorate the problems identified in this thesis, it will be prudent to look to the solutions that

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<sup>38</sup> *R (Hely-Hutchinson) v HMRC* [2015] EWHC 3261 [43], [2016] STC 962.

<sup>39</sup> See William Wade and Christopher Forsyth, *Administrative Law* (11th edn, OUP 2014) 284-285.

other countries have adopted in this area. Whilst many countries have a much stricter approach than the UK to attempts by public authorities to renege on previous advice,<sup>40</sup> there have only been a few which have adopted frameworks to deal also with the issue of scrutiny, and the related issues of quality and accessibility. The US introduced the Administrative Procedure Act in 1946 to address the problems associated with the proliferation of general soft law materials. Wherever general soft law of a public authority has the 'force of law', it will be subject to a 'notice and comment' procedure whereby it is put on the Federal Register for comments by the public. The public authority must thereafter produce a concise general 'basis and purpose' statement in conjunction with the final rules.<sup>41</sup> New Zealand on the other hand operates a system for binding public rulings.<sup>42</sup> These are pieces of advice generated by the Inland Revenue Department which are publicly available. Draft public rulings are subject to public consultation which generally runs for a minimum of six weeks. Thereafter, the rulings are legally binding on the Commissioner of Inland Revenue.<sup>43</sup> Australia meanwhile adopts a system for binding rulings which combines the elements of public consultation adopted by the US and New Zealand, but also interposes an expert body in the form of the Rulings Panels composed of Revenue officials, respected practitioners and academics to oversee

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<sup>40</sup> See OECD, *Tax Administration 2015* (n 28) 288-290.

<sup>41</sup> Administrative Procedure Act, 5 USC § 553. For more on the interaction the Administrative Procedure Act and Tax Law in the US, see: Kristin Hickman, 'Unpacking the Force of Law' (2013) 66(2) *Vanderbilt Law Review* 465; Kristin Hickman, 'The Promise and Reality of US Tax Administration' in Evans, Freedman and Krever (n 25).

<sup>42</sup> Inspector-General of Taxation, *Review of the Tax Office's administration of public binding advice* (April 2009) Appendix 4. For more information on New Zealand, see: Adrian Sawyer, 'Binding rulings in New Zealand. An assessment of the first ten years' (2006) 12 *Canterbury Law Review* 273.

<sup>43</sup> See generally, Tax Administration Act 1994, ss. 91A-91J.

the process. This is a valuable addition. The Australian system accordingly appears superior to the other options for three key reasons. The first is that there is symmetry between the general approaches taken to administrative advice by the revenue authorities in both countries, as will be further explained in the proceeding Section.<sup>44</sup> Adopting a framework based on a system which largely mirrors the UK renders successful integration a more realistic prospect. Secondly, it would *prima facie* satisfy to a greater extent one of the normative benchmarks, namely scrutiny. As stressed in *Part III. 4. Analysis of the scrutiny afforded to HMRC soft law*, an effective oversight body is something which is lacking in the current set-up. Finally, and most importantly, *Part III. 6. Cometh the hour, cometh the Ombudsman?* which detailed the effectiveness of the Ombudsman and the Adjudicator's Office in tackling general soft law problems underlined the utility of scrutiny by a body separate to HMRC. For these key reasons, the Australian regime is one which merits greater interrogation in this thesis and so the proceeding Section will undertake this more forensic analysis.

## 2.2. Interim Conclusion

John Locke once wrote that '[s]o the thing be understood, I am indifferent as to the name'.<sup>45</sup> Much the same point can be made about general soft law in this thesis. The phenomenon could equally have been labeled 'quasi-legislation' or 'administrative rule-making'. The crucial point is that it is not law, nor is it promulgated in accordance with an express statutory provision. As such, a

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<sup>44</sup> See below Part IV. 3.1. Australian approach to administrative advice. See also Peter Cane, *Controlling Administrative Power: An Historical Comparison* (CUP 2016) Ch. 8.

<sup>45</sup> John Locke, *Second Treatise of Civil Government* (1690) Ch. 12, [146].

framework for general soft law which reflects this reality is required. In this respect, it seems *prima facie* wrong to seek to deal with the issues which arise in practice in relation to general soft law through the machinery used to promulgate and amend legislation.

This Section considered in outline the different models which can be adopted and built upon in relation to general HMRC soft law. Direct Parliamentary control was considered but ultimately dismissed as being unhelpful from a practical standpoint and unsuitable in principle. It was concluded that a bespoke model would be necessary, and so its skeletal structure was to be decided upon. A preliminary resolution was that it would be constitutionally viable for the new structure to contain a binding mechanism. Thereafter, the different models adopted in other commonwealth countries were considered and it was ultimately decided that the Australian system, by reason primarily of its symmetry with the UK and its interposition of an expert oversight body, merited consideration in further detail. The subsequent Section accordingly will explore in greater depth the merit of the Australian model by reference to the four normative benchmarks.

### **3. The Australian Regime**

It has been asserted that the new techniques of general soft law 'stand ... established theory on its head'.<sup>46</sup> Certainly, general soft law involves serious difficulties of both a practical and a conceptual nature. The fact that it is generally badly drafted, hard to understand and almost impossible to locate

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<sup>46</sup> Commonwealth Parliamentary Debates (Senate), 15 June 1989, 4129 (Senator Collins).

makes it an undesirable and potentially dangerous addition to the legislative framework. These problems, in turn, raise serious questions not only about the use of general soft law but also its validity.<sup>47</sup>

Advice from the Australian Tax Office ('ATO') may take a variety of forms as with the UK. An important difference however is the proliferation of guidance in the form of binding public rulings in Australia, for which a comprehensive framework has evolved. The development of this system of rulings is owed in particular to two significant events. The first was the introduction of the Freedom of Information Act in 1982. Until that point, the Commissioner had used an internal system, as in the UK,<sup>48</sup> for disseminating information on the application of the taxation law to staff<sup>49</sup> since at least the 1920s.<sup>50</sup> The system in place then for producing advice however could best be described as 'sporadic'.<sup>51</sup> The Freedom of Information Act forced the publication of this internal advice.<sup>52</sup> The next significant event was the introduction of self-assessment in the latter half of the 1980s.<sup>53</sup> The shift in responsibilities to taxpayers was said to merit the introduction of a formal rulings regime, which would provide greater 'certainty'

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<sup>47</sup> Stephen Argument, Papers on Parliament No. 15, *Parliamentary Scrutiny of Quasi-legislation* (1992).

<sup>48</sup> See above Part II. 2.2.3. Manuals.

<sup>49</sup> Auditor General, *The Australian Taxation Office's Administration of Taxation Rulings* (2001) 175.

<sup>50</sup> Leigh Edmonds, *Working for all Australians 1910-2010: A brief history of the Australian Taxation Office* (ATO, 2010) 76.

<sup>51</sup> Auditor General, *The ATO's Administration of Taxation Rulings* (n 49) 175; Graeme Cooper, 'Improving the operation of the Income Tax Rulings system' Discussion Paper: Report for the Australian Society of CPAs (1998) 9.

<sup>52</sup> JCPAA, *Assessment of Tax* (n 12) 20; Commissioner of Taxation, *Sixty-Second Annual Report, Commonwealth Government Printer* (1983) 7.

<sup>53</sup> See: Commonwealth of Australia, *Discussion Paper: Review of Aspects of Income Tax Self Assessment* (March 2004) 3 ('ROSA Discussion Paper').

for taxpayers as to how they should arrange their affairs.<sup>54</sup> It is notable in Australia that there are almost 18million income tax returns from a population of 24million.<sup>55</sup> By way of comparison, merely 10million self-assessment tax returns are submitted in the UK from a population of 64million.<sup>56</sup> When over 70% of the entire population self-assesses, the need to introduce a rulings system becomes more compelling.

Of interest for present purposes is the system in place in Australia for the production of public rulings: pieces of advice generally available to taxpayers, like general soft law in the UK, but which are formally binding upon the ATO. These are different from individual rulings explored earlier in this thesis as they are produced for use by taxpayers generally.<sup>57</sup> The framework for the production of such rulings interposes Rulings Panels, comprised of several of the most senior ATO personnel as well as external representatives who are respected tax practitioners and academics,<sup>58</sup> in addition to including consultation with the public. This Section seeks to assess how this system operates with respect to the normative benchmarks of scrutiny, quality, accessibility, and reliability.

Before proceeding to the substantive analysis in this Section, it will first be necessary to give an overview to the ATO's approach generally to soft law. This will help to establish symmetry between the attitudes and approaches adopted by the revenue authorities in the UK and Australia, a pre-requisite for

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<sup>54</sup> Peter Baldwin, Second Reading Speech Taxation Laws Amendment (Self-Assessment) Bill 1992 House of Representatives Hansard Reports 26 May 1992; Edmonds (n 50) 400. The case of *David Jones Finance v Commissioner of Taxation* (1990) 12 ATR 1506 was the catalyst, see Joint Committee of Public Account and Audit, Report 410, *Tax Administration* (June 2008) 122.

<sup>55</sup> Commissioner of Taxation, *Annual report 2014–15* (October 2015) 23.

<sup>56</sup> HMRC, *Annual Report and Accounts 2014-15* (HC 2014-15, 18) 5.

<sup>57</sup> See above Part II. 2.2.6. Rulings

<sup>58</sup> ATO, *PS LA 2008/3: Provision of advice and guidance by the ATO* (20 February 2014) [33].

successful adoption of comparative-based reform.<sup>59</sup> It is thereafter necessary to detail the scope of public rulings. The discussion then will move on to assessing the performance of the rulings regime with respect to the normative benchmarks.

### 3.1. Australian approach to administrative advice

The ATO is the chief revenue collecting body in Australia. Unlike HMRC, which is a non-ministerial governmental department, the ATO is accountable to the Treasurer and Assistant Treasurer (both sitting Ministers). The ATO is led by the Commissioner of Taxation.<sup>60</sup> The ATO's primary role is to effectively manage and shape the tax and superannuation (or pensions) systems.<sup>61</sup> This includes collecting revenue, administering the goods and services tax ('GST')<sup>62</sup> on behalf of the Australian states and territories, and administering the major aspects of Australia's superannuation system. The ATO's authority for this general administration is to be found in the relevant primary legislation.<sup>63</sup> Generally, the Acts, or parts thereof,<sup>64</sup> will contain a provision which states that 'the Commissioner shall have the general administration of this Act' or 'the

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<sup>59</sup> This was referenced above at Part IV. 2.1.2.2. Comparative overview of options, see text at n 43.

<sup>60</sup> The legal relationship between the ATO and the Commissioner is governed by the *Carltona* principle, see: *Carltona Ltd v Works Commissioners* [1943] 2 All ER 560 (CA). Note that from a strict constitutional standpoint, it is the Commissioner of Taxation as the statutory office holder who has general administration of the tax legislation. See Taxation Administration Act 1953 ('TAA') 1953, s. 3A; Ann O'Connell, 'The ATO and the Giving of Advice' (Centre for Tax Law Workshop, Cambridge UK, 12 July 2011) 1.

<sup>61</sup> Australian Tax Office, *About Us* <<https://www.ato.gov.au/About-ATO/About-us/>> accessed 31 September 2017.

<sup>62</sup> GST is a broad-based tax on most goods, services and other items sold or consumed in Australia.

<sup>63</sup> Australian Tax Office, *PS LA 2009/4: Escalating a proposal requiring the exercise of the Commissioner's powers of general administration* (February 2016) <<https://www.ato.gov.au/law/view/document?docid=PSR/PS20094/NAT/ATO/00001#ft1>> accessed 31 September 2017.

<sup>64</sup> See, for example, Superannuation Industry (Supervision) Act 1993, s. 6.

Commissioner has the general administration of this Act'.<sup>65</sup> In interpreting the scope of the ATO's power of general administration, the courts have acknowledged that the Commissioner must be empowered to undertake any necessary actions incidental to the effectuation of this provision,<sup>66</sup> as in the UK.<sup>67</sup> Although the powers of general administration assist the Commissioner in administering the taxation laws in accordance with Parliament's legislative intent accordingly,<sup>68</sup> they cannot be utilised in a manner which would be inconsistent with the purpose or object of the taxation laws.<sup>69</sup> Importantly for present purposes, the principle underpinning the general powers of administration has long been recognised as allowing the ATO to engage with the public in order to help individuals, entities and undertakings to understand their obligations and rights under the law.<sup>70</sup> Commissioner Patrick McGovern in 1958 put it thusly:

It has been remarked that there is no justification for a programme to improve the relations between taxpayers and the Tax Administration. Taxes, like death, are certain it is said – there is no escaping them. The Administration is clothed with adequate power to enforce payment. So why bother about what the taxpayers think of the Administration?

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<sup>65</sup> For instance, Income Tax Assessment Act 1936, s. 8; Superannuation Guarantee (Administration) Act 1992, s. 43; Excise Act 1901, s. 7.

<sup>66</sup> See: Commonwealth of Australia, *An "Extra-Statutory Concession" Power for the Commissioner of Taxation?*, Discussion Paper (12 May 2009) [14], available at: <[http://archive.treasury.gov.au/documents/1534/PDF/Extra\\_Statutory\\_Concessions.pdf](http://archive.treasury.gov.au/documents/1534/PDF/Extra_Statutory_Concessions.pdf)> accessed 31 September 2017.

<sup>67</sup> See Part II. 2.1.2. Understanding HMRC's managerial discretion.

<sup>68</sup> Bruce Quigley, 'The Commissioner's powers of general administration: How far can he go?' (24th National Convention, Sydney, 12 March 2009) fn 4; available at: <<https://www.taxinstitute.com.au/convention-papers/the-commissioner-s-powers-of-general-administration-how-far-can-he-go-paper->> accessed 31 September 2017.

<sup>69</sup> Commonwealth of Australia, *An "Extra-Statutory Concession"* (n 66) [18]; Quigley (n 68) 5-6.

<sup>70</sup> Commonwealth of Australia, *An "Extra-Statutory Concession"* (n 66) [19]; ATO, *PS LA 2008/3* (n 58) 'Key Principles' section.

Both experience and common sense provide an emphatic denial to the validity of these views in present day conditions. ...There is in these days a desire to understand and be understood. It would be futile to expend effort on improving public relations unless the basic conditions for the success of the effort were present. Fortunately, this is the case. Equitable tax administration has existed in the Commonwealth for nearly fifty years. This enables a positive approach to be made to improve relations between the Administration and the public. There are two branches of this positive approach – first – the promotion of an understanding of taxation law itself and second – the furthering of confidence in the organisation entrusted with the administration of the law<sup>71</sup>

What is notable about this approach is its symmetry to that of HMRC in the UK in relation to the importance of engaging with the public and proactively providing advice. As stressed earlier in this thesis, the approach of HMRC is to engage with taxpayers in a co-operative relationship as a means of carrying out the primary function of collecting and managing taxes.<sup>72</sup> The successful adaptation of any program for reform relies upon the fundamentals being present in the first place. The congruity of approaches to the effectuation of the primary duty accordingly augurs well for the positive implementation of reforms based upon the Australian model for the provision of binding general advice.

### 3.2. What is a public ruling?

The ATO produces a range of different pieces of advice to taxpayers in a variety of forms.<sup>73</sup> Of interest for the purposes of this thesis is what is known as a public ruling. This is a published statement on the way the law applies in defined

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<sup>71</sup> See Edmonds (n 50) 184-185; Commissioner of Taxation, *Annual Report 1957-58*, 29.

<sup>72</sup> See generally Part II. 2.1.2 Understanding HMRC's Managerial Discretion.

<sup>73</sup> See generally See: ATO, *ATO advice and guidance* (May 2017) <<https://www.ato.gov.au/printfriendly.aspx?url=/General/ATO-advice-and-guidance/>> accessed 31 September 2017.

circumstances that are common to a general class of taxpayers. It is binding on the ATO.<sup>74</sup> A taxpayer can rely on a public ruling if her circumstances fall within its terms. If the advice turns out to be incorrect in law and the taxpayer mistakenly submits an incorrect tax return as a result, she will be protected from paying tax that would otherwise be payable under the law, in addition to protection from interest and penalties. Conversely, a ruling does not bind the taxpayer, who is free to apply the law if it provides a more favourable result for her than the ruling.<sup>75</sup> The provisions governing the production of rulings can be found in the Taxation Administration Act 1953 ('TAA 1953'), Schedule 1, Part 5-5. The Commissioner has wide discretion to issue rulings on provisions relating to, *inter alia*, income tax, fringe benefits tax, indirect tax, excise duty and the administration or collection of those taxes levies and duties.<sup>76</sup> It is notable that the scope of issues for which rulings may be provided has expanded over time.<sup>77</sup> When initially introduced, rulings were reserved *only* for interpretations, guidelines, precedents, practices or procedures which established a new interpretation of administration of the tax laws that affected a group of taxpayers.<sup>78</sup>

Public rulings are grouped into different series as follows: Taxation Rulings series (TR series); Taxation Determination series (TD series); Class

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<sup>74</sup> See generally: ATO, *PS LA 2008/3* (n 58).

<sup>75</sup> In the case of requested rulings, the taxpayer must have made a full and true disclosure of all relevant facts. See ATO, *PS LA 2008/3* (n 58) [55], [60] and [81].

<sup>76</sup> TAA 1953, s. 357-5.

<sup>77</sup> ATO, *TR 2006/10: Public rulings* (March 2015) [13]; Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005 [3.22]. See also: John Ralph, Rick Allert & Bob Joss, *Review of Business Taxation: A tax system redesigned. More certain, equitable and durable* (Australian Government Publication Services 1999) ('Ralph report') 37, 137-138.

<sup>78</sup> See ATO, *Taxation Ruling 1*, available in Australian Income Tax Weekly Summary, Issue No. 4 (Butterworths 25 January 1983).

Rulings series (CR series); Product Rulings series (PR series); Product Grants and Benefits Rulings series (PGBR series); Excise Rulings series (ER series); Fuel Tax Rulings series (FTR series); Fuel Tax Determination series (FTD series); Goods and Services Tax Rulings series (GSTR series); Goods and Services Tax Determination series (GSTD series); Miscellaneous Tax Rulings (MT series) that are labelled as 'legally binding'; Wine Equalisation Tax Rulings series (WETR series); Wine Equalisation Tax Determination series (WETD series); and Luxury Car Tax Determination series (LCTD series).<sup>79</sup> There are also specific public rulings known as product<sup>80</sup> and class rulings<sup>81</sup> available for tax schemes. However, the process for the production of these is different from that of public rulings generally,<sup>82</sup> and so will not be included in this discussion.

### 3.3. Performance of the public rulings regime

This thesis is concerned with producing a framework for the production and operation of general soft law in tax that adequately takes account of the need for scrutiny, quality, accessibility, and reliability. The proceeding section accordingly will analyse whether the Australian model of public rulings satisfies these normative pillars. Although scrutiny was the third normative criterion tested against general HMRC soft law in Part III of this thesis, it is considered first here as this flows better in terms of considering the Australian system. Scrutiny is a major component of the framework and assessing the Australian

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<sup>79</sup> ATO, *TR 2006/10: Public rulings* (n 77).

<sup>80</sup> ATO, *PR 2007/71* (August 2014). Product rulings were introduced in 1998. See: Commonwealth of Australia, *ROSA Discussion Paper* (n 53) 13.

<sup>81</sup> ATO, *CR 2001/1* (September 2013). Class rulings were introduced in 2001. See JCPAA, *Tax Administration* (n 54) 94.

<sup>82</sup> See below n 83.

performance in terms of quality makes little sense without first considering Scrutiny, as will become apparent.

### 3.3.1 Scrutiny

Public rulings other than class and product rulings<sup>83</sup> go through a comprehensive development process before being released in final form. This includes significant public consultation, including publication of drafts, and importantly for our purposes consultation with an independent, expert body.

The standard process is as follows:<sup>84</sup>

Stage 1 – An issue is identified that may need to be resolved by a public ruling:

The ATO considers whether to issue a public ruling in response to an identified risk (as set out above). The process involves consultation with taxpayers and professional groups to ensure that the selected issues are indeed of concern to taxpayers.

Stage 2 – The topic is added to the public rulings program:

If the ATO decides on the basis of the consultation to proceed with the ruling, the topic is added to the Public rulings Program. This is accessible to taxpayers on the ATO website.<sup>85</sup>

Stage 3 – A draft public ruling is prepared:

In most cases a draft public ruling is prepared and, if done, taxpayers and professional groups are invited for consultation again.

Stage 4 – The draft public ruling is internally approved:

The draft public ruling goes through a comprehensive technical quality review, which includes the Public Rulings Panel, the Deputy Chief Tax Counsel or Chief Tax Counsel. This is an important step in the process, as will be further detailed below.

Stage 5 – The draft public ruling is released for comment:

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<sup>83</sup> The process for the production of product and class rulings is completely different, and more akin to the process for producing private rulings. See generally, ATO, *ATO advice and guidance* (n 73).

<sup>84</sup> ATO, *ATO advice and guidance* (n 73). Auditor General, *The ATO's Administration of Taxation Rulings* (n 49) 85.

<sup>85</sup> Australian Tax Office, *Rulings Program*, available at: [http://law.ato.gov.au/atolaw/Browse.htm?ImA=folder&Node=5~0&OpenNodes=,5~2,5&DBTOC=03%3AATO%20Rulings%20and%20Determinations%20\(Including%20GST%20Bulletins\)%3ARulings%20Program&anchor=5~0#5~0](http://law.ato.gov.au/atolaw/Browse.htm?ImA=folder&Node=5~0&OpenNodes=,5~2,5&DBTOC=03%3AATO%20Rulings%20and%20Determinations%20(Including%20GST%20Bulletins)%3ARulings%20Program&anchor=5~0#5~0) accessed 31 September 2017.

The draft public ruling is published on ato.gov.au, with notification also posted on the government's website.<sup>86</sup> The draft ruling includes contact details of an ATO officer who will receive feedback and discuss details. The standard feedback period is six weeks for draft public rulings.

Stage 6 – The final public ruling is prepared:

There is a further consideration of comments on the draft public ruling and amendments are accordingly made where appropriate. Again, taxpayers and professional groups are consulted throughout the preparation of the final public ruling.

Stage 7 – The final public ruling is internally approved:

The process for approving the final public ruling is identical to that for the draft public ruling. In other words, the final ruling goes through technical scrutiny from a panel of independent experts. A compendium of comments on the draft ruling is prepared, containing a summary of comments received and the ATO response or action taken.

Stage 8 – The final public ruling is published:

The final public ruling and the compendium of comments are published on the ATO's website. Details of the final public ruling are also published in the *Commonwealth Gazette* and tabled in Parliament. ATO officers are available to discuss details.

Stage 9 – Post-publication matters:

A compendium of comments is sent to all who submitted comments within 7 days of the final public ruling being issued. Further comments can be submitted through a feedback mechanism on the ATO Legal Database. The ATO also conduct formal post-implementation reviews for significant public rulings to assess their effectiveness. Public rulings are also reviewed regularly and updated as necessary to maintain the currency, accuracy and consistency of the precedential ATO view.

Accordingly, scrutiny of the process for producing public rulings operates at two important levels beyond the ATO itself. The first is through Rulings Panels, either by the 'Public Rulings Panel' or the 'Superannuation Ruling Panel' at both stages 4 and 7 in the above consultative framework. The second is through public consultation.

When the rulings scheme was introduced in 1992, it did not contain a mechanism for robust scrutiny of the rulings produced by the ATO. The

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<sup>86</sup> <<https://consultation.business.gov.au/consultation/>> accessed 31 September 2017.

introduction of Rulings Panels is owed to a report from the Joint Committee of Public Accounts and Audit in 1993 which reviewed the new system<sup>87</sup> and recommended that greater attention be given to contrary views.<sup>88</sup> The primary role of the Rulings Panels accordingly is to discuss the technical and practical merits of the draft ruling presented to them and to advise on the proposed interpretation of the law.<sup>89</sup> It is far from a bureaucratic box-ticking exercise with some discussions of the panels taking days and weeks of deliberation.<sup>90</sup> Membership of the Rulings Panels is made up of senior ATO officers; respected tax specialists; academics and a representative from the states and territories when goods and services tax (GST) rulings are discussed. A Deputy Chief Tax Counsel or Special Tax Adviser chairs the Rulings Panels, with up to three members from outside the ATO on a topic-by-topic basis.<sup>91</sup> The panels provide advice on the technical and practical merits of the proposed ruling. They may also make suggestions to ensure that the legal, practical and commercial implications of a ruling are taken into account. The parties are paid for their participation in the panel.

As well as giving advice about interpretative matters and technical accuracy, the Rulings Panels advise the ATO on a range of related issues associated with the preparation of public rulings, including:

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<sup>87</sup> Auditor General, *The ATO's Administration of Taxation Rulings* (n 49) 83.

<sup>88</sup> JCPAA, *Assessment of Tax* (n 12) 103

<sup>89</sup> ATO, *PS LA 2008/3* (n 58) [33].

<sup>90</sup> Auditor General, *The ATO's Administration of Taxation Rulings* (n 49) 83.

<sup>91</sup> Australian Tax Office, *Public Rulings Panels*, available at: <https://www.ato.gov.au/general/ato-advice-and-guidance/how-we-develop-public-advice-and-guidance/> accessed 31 September 2017.

- whether a ruling is the best way to clarify the law, or whether an alternative should be used (such as legislative amendment or litigation);
- whether the structure and wording of the proposed ruling can be improved to make it easier to understand;
- whether there are realistic examples we can include to make the ruling more useful;
- the most appropriate date of effect for the proposed ruling;
- whether there are other related topics that may also be appropriate for rulings.

The panels may support, challenge or disagree with aspects of the proposed position and make recommendations on the interpretation to be taken. They do not, however, decide on the ATO position, nor are their recommendations publicly available. The author and approving officer of a particular public ruling will decide on the approach to be taken. In practice however, there is a strong emphasis on obtaining consensus among external members concerning the direction taken in the public ruling.<sup>92</sup>

Thereafter, the relevance and performance of the public rulings program is monitored by the National Tax Liaison Group, a stewardship committee which consists of representatives of the major tax, law and accounting professional associations and senior members of the ATO and Treasury.<sup>93</sup> Topics on the program arise from or reflect suggestions made either internally through ATO issue escalation processes, or from external sources such as tax professional and industry representative bodies.<sup>94</sup> A recent innovation in relation to monitoring

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<sup>92</sup> Auditor General, *The ATO's Administration of Taxation Rulings* (n 49) 83; JCPAA, *Tax Administration* (n 54) 99.

<sup>93</sup> See: Australian Tax Office, *National Tax Liaison Group* <[https://www.ato.gov.au/General/Consultation/Consultation-groups/Stewardship-groups/National-Tax-Liaison-Group-\(NTLG\)/](https://www.ato.gov.au/General/Consultation/Consultation-groups/Stewardship-groups/National-Tax-Liaison-Group-(NTLG)/)> accessed 31 September 2017.

<sup>94</sup> ATO, *PS LA 2008/3* (n 58).

the performance of the public rulings programme is the use of private bodies, entities and persons to update old rulings.<sup>95</sup>

As well as these formal supervisory bodies, public consultation acts as an informal means of scrutinising the rulings. There is particular emphasis placed on early and frequent public consultation.<sup>96</sup> To this end, public comment is sought at stages 1-3, 5-6 and 9 of the consultation framework as set out above. Further, transparency is ensured by the wide circulation of the rulings through publication on the ATO website and the Gazette. These steps underline the importance of transparency<sup>97</sup> and public engagement,<sup>98</sup> allowing the taxpaying community to scrutinise the work of the ATO in respect of public rulings.

On the whole, the processes for scrutinising public rulings have been perceived to be successful in ensuring that a variety of views on the correct operation of the relevant laws are considered, thereby ensuring robust legal analysis of the rulings concerned.<sup>99</sup> The Auditor General, in his 2001 report, was highly complementary of the processes for producing rulings:

In the audit we found that the drafting and approval processes for public rulings were exhaustive. The drafting and approval processes involved wide consultations with affected taxpayers and/or their representatives and in some cases examination by the relevant Public Rulings Panel (whose membership consists of very senior technical officers in the ATO and eminent external tax professionals). Overall, ANAO concludes that the ATO has undertaken significant measures to ensure that the process of

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<sup>95</sup> Commissioner of Taxation, *Annual Report 2014-15* (n 55) 97.

<sup>96</sup> See: Australian Taxation Office, *Consultation on public advice and guidance* available at: <<https://www.ato.gov.au/general/ato-advice-and-guidance/how-we-develop-public-advice-and-guidance/>> accessed 31 September 2017; JCPAA, *Assessment of Tax* (n 12) [31], [6.21]; Auditor General, *The ATO's Administration of Taxation Rulings* (n 49) 20; Tony Pagone, 'Tax Uncertainty' (Annual Tax Lecture, Melbourne Law School, 20 August 2009) 26.

<sup>97</sup> Auditor General, *The ATO's Administration of Taxation Rulings* (n 49) 54-55.

<sup>98</sup> *ibid* 55.

<sup>99</sup> See generally below Part IV. 3.3.2. Quality.

preparing and issuing public rulings provides for extensive technical review and community consultation...<sup>100</sup>

Overall the ATO has a well-developed public rulings system, which draws on the expertise of ATO staff with detailed knowledge of taxation law, industry and community group experts, academics and the general public.<sup>101</sup>

Circa 40 per cent of private sector tax professional surveyed for the 2001 report rated consultation as highly effective, with a similar number concluding that consultation as moderately effective.<sup>102</sup> Member of the Public Rulings Panel, Professor Ann O'Connell is similarly complementary of the level of deliberation which takes place during meetings of the Rulings Panels: 'Discussion is robust and the focus is on getting the correct interpretation, not necessarily the one that is most advantageous to the revenue'.<sup>103</sup> Former judge of the Supreme Court of Victoria Tony Pagone remarked in relation to public rulings that:<sup>104</sup>

The Commissioner has adopted an impressive array of measures to ensure taxpayer representation in his decision-making or decision forming internal bodies and processes

Former Commissioner Michael D'Ascenzo, who was highly influential in the evolution of the rulings regime, similarly compliments the process<sup>105</sup>

The existence of this Panel, which includes external experts, to advise the Commissioner on this important aspect of tax

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<sup>100</sup> Auditor General, *The ATO's Administration of Taxation Rulings* (n 49) 206.

<sup>101</sup> *ibid* 20.

<sup>102</sup> *ibid* 81. There were 209 private sector parties submitted responses to the survey, see *ibid* 248.

<sup>103</sup> O'Connell (n 60) 18.

<sup>104</sup> Pagone (n 96).

<sup>105</sup> Michael D'Ascenzo, 'Modernising the Australian Taxation Office: Vision, people, systems and values' (2015) 13(1) *eJournal of Tax Research* 361.

administration provides extra legitimacy to the quality and integrity of public rulings

Notwithstanding these endorsements that the system for scrutiny has received, there are two cautionary notes which ought to be sounded. The first is that not all rulings are processed by the Rulings Panels or put out to public consultation. This may arise for instance, where the Chief Tax Counsel decides that review by a ruling panel is not necessary, or where the matter is procedural.<sup>106</sup> Additionally, the recent shift in leadership of the ATO has resulted in a change of ethos within the body. The focus is now placed on the provision of timely advice and will probably see the use of Rulings Panels reduced<sup>107</sup> given the impact which they have upon the expediency of the provision of rulings.<sup>108</sup> This relates to a broader point about the breadth of the public rulings regime. It is not possible practically for all pieces of general soft law to be put through the system.<sup>109</sup> The second is that the thoroughness of public consultation relies upon engagement of the various categories of taxpayers who are affected by particular laws. It is vital in ensuring the proper scrutiny of public rulings that a broad cross section of society is therefore engaged.<sup>110</sup>

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<sup>106</sup> ATO, *ATO Advice and Guidance* (n 73).

<sup>107</sup> ATO, *Future public advice and guidance* (July 2015); National Tax Liaison Group, *Minutes: 10 September 2015 meeting* (September 2015) 'Update on the ATO's future public advice and guidance'.

<sup>108</sup> Auditor General, *The ATO's Administration of Taxation Rulings* (n 49) 85.

<sup>109</sup> A point which will be dealt with below when it comes to reforms recommended for the UK. See Part IV. 4.2. Proposals in respect of soft law not having a 'significant impact'

<sup>110</sup> A point which will be dealt with below when it comes to reforms recommended for the UK. See Part IV. 4.1.1.2. Details of the relevant participants in the process.

### 3.3.2. Quality

Although the system took off with some turbulence,<sup>111</sup> subsequent commentary has attested to the increased quality of rulings. As might be expected of a system which stresses the importance of incorporating the scrutiny of experts and the public,<sup>112</sup> the rulings regime has been found to have enhanced the technical quality<sup>113</sup> of publications which go through it. Indeed, the two elements are interwoven. The increased quality of rulings both in terms of clarity and in terms of consistency with the law is related to the increased use of consultation and public engagement.<sup>114</sup>

In his report on the rulings system almost a decade after its introduction, the Auditor General concluded that the ‘processes for the production of public rulings of high technical quality operate effectively overall’.<sup>115</sup> This conclusion was supported by evidence from the private sector that the quality of public rulings had increased since the regime’s inception by reason of the variety of measures taken by the ATO, such as the introduction of Rulings Panels and the priority rulings system.<sup>116</sup> The ATO likewise submitted that the introduction of

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<sup>111</sup> JCPAA, *Assessment of Tax* (n 12) [21].

<sup>112</sup> This should be unsurprising in light of the analysis undertaken in Part III. 6.2.1. Supervision of HMRC soft law.

<sup>113</sup> The word ‘quality’ used in this section relates to technical quality which in turn relates to both clarity and consistency with the law. Although this might be confusing in light of the use of the term in previous Parts of this thesis, its use here is dictated by the terminology adopted in the Australian reports.

<sup>114</sup> JCPAA, *Assessment of Tax* (n 12) [6.21]. Whilst the previous section ‘Scrutiny’ commented upon the functioning of the system, this section elaborates upon how the objectives of clarity and consistency with the law are achieved through the system.

<sup>115</sup> Auditor General, *The ATO’s Administration of Taxation Rulings* (n 49) 16, 96.

<sup>116</sup> *ibid* 85.

Rulings Panels to review public rulings was a 'significant factor in the ATO improving the quality of its public rulings'.<sup>117</sup>

The report of the JCPAA on *Tax Administration* in 2008 reached a similar conclusion.<sup>118</sup> The Institute of Chartered Accountants in Australia advised the Committee that the Public Rulings Panel had improved the standard of public rulings:

[T]he establishment of a Public Rulings Panel and an International Public Rulings Panel,<sup>119</sup> which include external tax experts, to supplement a public consultation process, in which professional bodies participate, has gone some way to ensure the quality of public rulings and, more particularly, public confidence in these rulings<sup>120</sup>

On the indirect tax front meanwhile, private practitioners have commended the ATO on the quality of GST rulings.<sup>121</sup>

I should state at the outset that the overall standard of public GST rulings is high, and that nothing I say below should be taken to diminish that conclusion. While I do not always agree with the conclusions expressed in public GST rulings, nor the reasons advanced in support of those conclusions, the rulings demonstrate a high level of technical expertise and clarity

The history of rulings over the past two and a half decades is replete with examples demonstrating the merit of interposing Rulings Panels and the public generally in order to improve the quality of rulings. Consultation with the Public Rulings Panel often results in a change of direction of the public ruling,

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<sup>117</sup> *ibid.*

<sup>118</sup> JCPAA, *Tax Administration* (n 54) 99.

<sup>119</sup> This panel was later subsumed by the Public rulings Panel.

<sup>120</sup> JCPAA, *Tax Administration* (n 54) 99.

<sup>121</sup> Kevin O'Rourke, "The GST Rulings System – Is it Failing?" (2002) 11(1) *Revenue Law Journal* 79, 86. See also Cooper (n 51) 53.

sometimes very significantly, from the initial ATO position.<sup>122</sup> Although there is no publicly available data on the performance of the Rulings Panels (as the advice produced by the panels is confidential),<sup>123</sup> their impact can be surmised from the history of individual rulings. If an initial view published by the ATO in the form of non-binding guidance, such as an 'Interpretative Decision', is contrasted with a subsequently published draft ruling on the same issue, it can reasonably be inferred that the relevant ruling panel has forced the ATO to reconsider its view.

An example of the Public Rulings Panel intervening to correct a legally incorrect interpretation arose, for instance, in the case of ATO Interpretative Decision 2001/94 ('ATO ID 2001/94'), which concerned the deductibility of depreciation on wardrobes in rental properties. The ATO determined that depreciation on a wardrobe secured to a wall is an allowable deduction under section 42-15 of the Income Tax Assessment Act 1997 ('ITAA 1997') even where it can be dismantled quickly and easily without damage to it or the wall.<sup>124</sup> This provision allowed deduction for depreciation of 'plant' owned and used in the production of assessable income.<sup>125</sup> Accordingly, the interpretation turned on the definition of 'plant' for the purposes of the Act. ATO ID 2001/94 first highlighted that the relevant law is made up of two essential questions, the answers to which are highly fact sensitive. First, whether the item forms part of the 'fabric of the property'; secondly, whether the function performed by the

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<sup>122</sup> Auditor General, *The ATO's Administration of Taxation Rulings* (n 49) 83.

<sup>123</sup> *ibid* 85.

<sup>124</sup> ATO, *ATO ID 2001/94* (July 2001), available at:

<<http://law.ato.gov.au/atolaw/view.htm?rank=find&criteria=AND~forms~basic~exact&target=JA&style=java&sdocid=AID/AID200194/00001&recStart=1&PiT=99991231235958&Archived=true&recnum=3&tot=6929&pn=ALL::ALL>> accessed 31 September 2017.

<sup>125</sup> See now Income Tax Assessment Act 1997, Division 40.

thing is so related to the taxpayer's operations that it warrants it being held to be plant. The ATO concluded that the wardrobe could be considered 'plant' notwithstanding the fact that it could be detached from the building with the removal of a few screws, resulting in minimal damage to both the wardrobe and property; could retain its own identity after removal and was not considered to be an essential part of the rental property. The wardrobe fulfilled a function sufficiently related to the rental scenario to be considered plant, as it provided a designated space for storage, which bore the necessary relationship to the income earning operations.

ATO ID 2001/94 was withdrawn on 18 May 2004 however as it did not 'accurately reflect the ATO view'.<sup>126</sup> A draft ruling TR 2004/D3 was released for comment<sup>127</sup> in which the ATO adopted a different understanding of 'plant'.<sup>128</sup> It was held that a 'built-in' wardrobe, whether it be the type built-in to an alcove shaped wall or the type labelled 'built-in' by the manufacturer because its side panels create the appearance of a wardrobe which is created out of the walls of the property (relatively analogous to the type described in ATO ID 2001/94), forms part of the premises. As a result, it is part of the setting of the landlord's rental income earning activities and so not within the ordinary meaning of

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<sup>126</sup> ATO, *ATO ID 2001/94* (n 124).

<sup>127</sup> ATO, *TR 2004/D3* (June 2004), available at: <<https://www.ato.gov.au/law/view/document?docid=DTR/TR2004D3/NAT/ATO/00001#ftF46>> accessed 31 September 2017.

<sup>128</sup> See for final version ATO, *TR 2004/16* (November 2004) <<https://www.ato.gov.au/law/view/document?docid=TXR/TR200416/NAT/ATO/00001>> accessed 31 September 2017.

'plant'. Later ATO guidance confirms that such wardrobes are only eligible for capital works deduction.<sup>129</sup>

Public scrutiny is important also in enhancing the quality of rulings. A cautionary tale from the 2000s evidences this by, conversely, demonstrating the errors which arise in its absence and which are thereafter corrected by reason of consultation. GSTD 2002/1 was released on 27 March 2002, but was not previously released as a draft Determination.<sup>130</sup> The determination provided that Division 72 of the GST Act, and not Division 130, applied where a partner from a partnership took trading stock for personal use. This was plainly an incorrect interpretation of the statute.<sup>131</sup> On 27 November 2002, the Determination was replaced with GSTD 2002/D5, first as a draft and thereafter on 26 March 2003, as a finalised Determination GSTD 2003/2 without change. The Determination now acknowledged that Division 72 was not applicable in the scenario of a partner taking goods for personal use and rather that Division 130 applied to require an increasing adjustment.<sup>132</sup> As pointed out at the time by Peter Hill, the 'debacle that preceded GSTD 2003/2 would have been avoided had the ATO's original views been subjected to review'.<sup>133</sup>

In other instances where there is a perceived inconsistency with the underlying law, the public rulings regime forces the ATO to defend its interpretations. This contrasts with issues concerning general soft law in the UK

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<sup>129</sup> ATO, *Rental properties 2015* (June 2015) 34  
<<https://www.ato.gov.au/uploadedFiles/Content/MEI/downloads/Rental-properties-2015.pdf>>  
accessed 31 September 2017.

<sup>130</sup> 'Determinations' are rulings for the purposes of the TAA 1953 as set out above.

<sup>131</sup> Peter Hill, 'Binding GST Rulings - A Proposed Framework' (2003) 18 *Australian Tax Forum* 177, 201.

<sup>132</sup> *ibid* 200-201.

<sup>133</sup> *ibid* 201.

where a potentially incorrect interpretation can go unchallenged for many years.<sup>134</sup> The ATO now often publishes contrary views in its rulings.<sup>135</sup> The evolution of *Tax Ruling 98/15: Income tax: taxation consequences of trading in a previously leased asset for a replacement leased asset*<sup>136</sup> illustrates the utility of the consultative framework in forcing the ATO to deal with contrary interpretations. The initial draft ruling *TR 95/D28*<sup>137</sup> did not mention the High Court decision of *AL Hamblin Equipment*<sup>138</sup> on the treatment of trade-ins. The ATO advised that it did not consider the *Hamblin* case to be relevant. However, in response to submissions on the draft ruling, the ATO published its reasons for believing the case to be irrelevant. These were contained in the final ruling when it was published three years later.

Of course, the interposition of the rulings process does not absolutely prevent rulings from being inconsistent with the underlying law,<sup>139</sup> nor from being ambiguous (which in turn frustrates the utility of the ruling).<sup>140</sup> Quality is

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<sup>134</sup> See for instance *Hely-Hutchinson* (n 38); on which see Stephen Daly, 'Fairness in tax law and revenue guidance: *R (Hely-Hutchinson) v HMRC*' (2016) 1 BTR 18, 23.

<sup>135</sup> These are often found in the compendium to public rulings. See, for instance, ATO, *TR 2010/6EC: Ruling Compendium*, available at: <<https://www.ato.gov.au/law/view/document?LocID=%22CTR%2FTR2010EC6%2FNAT%2FA TO%2F00001%22&PiT=99991231235958>> accessed 31 September 2017

<sup>136</sup> ATO, *TR 98/15: Income tax: taxation consequences of trading in a previously leased asset for a replacement leased asset* (September 1998) available at: <<http://law.ato.gov.au/atolaw/view.htm?locid=%27TXR/TR9815/NAT/ATO%27>> accessed 31 September 2017.

<sup>137</sup> ATO, *TR 95/D28: Income tax: leasing - trade-ins and balloon payments* (November 1995), available at: <<http://law.ato.gov.au/atolaw/view.htm?locid=%27DTR/TR95D28/NAT/ATO%27>> accessed 31 September 2017.

<sup>138</sup> *AL Hamblin Equipment Pty Ltd; AL Hamblin Constructions Pty Ltd v Federal Commissioner of Taxation* (1974) 131 CLR 570.

<sup>139</sup> E.g. see: *Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* [2007] FCAFC 16 [3]-[6] Allsop J, with which Stone J concurred [1]; [43]-[47] Edmonds J.

<sup>140</sup> Diana Scolaro, 'Tax Rulings: Opinion or Law? The Need for an Independent 'Rule-Maker'' (2006) 16 *Revenue Law Journal* 109, 124-146; John Prebble, 'Avoidance and Other Consequences of Publishing Commissioner's Interpretation Guidelines' (2004) 19 *Australian Tax Forum* 245, 250-264

not unconditionally guaranteed in a public rulings regime. But the array of endorsements and evidence cited above support the conclusion that the public rulings regime on balance is preferable to a system which lacks a framework for independent scrutiny.

Two problems however in the set-up of the public rulings regime that potentially have an effect on the quality of rulings have been mooted over the years. The first is ‘revenue bias’,<sup>141</sup> a cause which, if made out, would undermine the ability of the regime to ensure that rulings are consistent with the law. The basic argument to this effect is that the ATO hypothetically seeks to produce rulings which are favourable to the exchequer. However, the suggestions of revenue bias are flawed in respect of both the theoretical arguments and the empirical evidence purporting to support them. As for the former, Scolaro cites that the ATO has a ‘pecuniary interest’ in the collection of tax and so will err on the side of caution in the interpretative process.<sup>142</sup> But if the Commissioner’s primary role is to collect tax revenue,<sup>143</sup> is that role not satisfied by collecting the tax which is *due* rather than by collecting the greatest quantum possible? Put another way, it is in the interest of the Treasury, not the ATO, to have more money available for the provision of essential public services. To conflate ‘revenue collection’ with ‘revenue raising’ is to misconceive the role of the ATO. As for the latter, the reports are at best inconclusive on the matter by reason of a lack of evidence produced to support the assertion of bias. Both the Auditor

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<sup>141</sup> Scolaro (n 140); Duncan Bentley, ‘A Proposal for Reform of the Australian Ruling system’ (1997) 26 *Australian Tax Review* 57; Cooper (n 51) 36; Tony Rumble, *Ralph Review Submission No 30* (31 December 1998) 41.

<sup>142</sup> Scolaro (n 140) 121; Bentley (n 141) 63; Allars, *Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990) Ch. 6.

<sup>143</sup> Scolaro (n 140) 121.

General's 2001 report<sup>144</sup> and the ROSA discussion paper<sup>145</sup> held that it was difficult to determine whether there was any validity to the accusation. The best available evidence for deciphering whether there is a pro-revenue bias in interpretations arises in the relatively analogous context of private rulings. Importantly, such rulings do not go through the formal consultative process in place for public rulings. As a result, if there is pro-revenue bias to be found anywhere, it will at the very least be where there is little oversight. The Inspector-General of Taxation ('IGT'), an independent statutory agency created to review systemic tax administration issues,<sup>146</sup> prepared a report in 2008 on potential revenue bias in private binding rulings.<sup>147</sup> There were no examples of undue revenue bias submitted to the review.<sup>148</sup> The IGT considered whether Tax Office processes and records of internal thinking that produced a private binding ruling indicated any evidence of an intention to impose more revenue than was open on a purposive interpretation of the law, as the Tax Office understands it. The sample did not exhibit evidence of such intentions.<sup>149</sup> The review concluded that there was no evidence of undue revenue bias:<sup>150</sup>

Based on a survey of representative large corporate PBR applicants' views, submissions to the review, the proportion of favourable PBRs given, the pattern of external review of the Tax Office's PBR objection decisions, and review of a random sample of

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<sup>144</sup> Auditor General, *The ATO's Administration of Taxation Rulings* (n 49) 95.

<sup>145</sup> Commonwealth of Australia, *ROSA Discussion Paper* (n 53) 24.

<sup>146</sup> *Inspector-General of Taxation* <<http://www.australia.gov.au/directories/australia/igt>> accessed 31 September 2017.

<sup>147</sup> *Inspector-General of Taxation, Review of the potential revenue bias in private binding rulings involving large complex matters* (2008).

<sup>148</sup> *ibid* [2.3].

<sup>149</sup> *ibid* [2.4].

<sup>150</sup> *ibid* [2.5].

Tax Office files undertaken by the staff of the Inspector-General, this review has found no evidence of undue revenue bias.

Scolaro's own evidence for suggesting that there is a revenue bias in public rulings is likewise weak. The paper initially cites submissions of taxpayers' claims of bias<sup>151</sup> before providing case studies intended to exemplify the inherent bias, which in fact merely demonstrate that the ATO is liable to get their interpretations wrong from time to time.<sup>152</sup> The author is on firmer ground with examples of rulings which contradict case law,<sup>153</sup> but this is merely cause for having greater scrutiny of rulings. When confronted with the suggestion that scrutiny minimises the possibility of the ATO incorrectly interpreting the law and ensures objectivity,<sup>154</sup> the scholar merely responds that the current rulings regime is not on a solid enough legislative basis.<sup>155</sup> Importantly then, it is conceded by Scolaro that the current regime has safeguards to preclude the problems she contends exist. Transparency is an important protection against the possibility of such bias arising.

A second criticism that has been levelled against the rulings system relates to the link with the penalties regime. As a taxpayer may be punished for failing to follow a public ruling, the regime is clothed with punitive force.<sup>156</sup> A deterrent against refusing to follow a public ruling is the possibility of incurring

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<sup>151</sup> Scolaro (n 140) 121-123.

<sup>152</sup> *ibid* 123-124.

<sup>153</sup> *ibid* 124-126.

<sup>154</sup> *ibid* 130.

<sup>155</sup> *ibid* 130.

<sup>156</sup> Cooper (n 51) 34.

penalties. Penalties have been interwoven with the regime since its inception.<sup>157</sup> Penalties will be avoided where a taxpayer adopts a ‘reasonably arguable’ position.<sup>158</sup> A matter is reasonably arguable if it would be concluded in the circumstances, *having regard to relevant authorities*, that what is argued for is about as likely (or more likely) to be correct as incorrect.<sup>159</sup> Crucially, a ‘relevant authority’ for the purposes of the penalty regime may be a public ruling.<sup>160</sup> The fact that there is a public ruling that contradicts the taxpayers approach does not necessarily mean that alternative treatments to that suggested by the public ruling cannot be reasonably arguable.<sup>161</sup> However, it is a difficult threshold to surpass.<sup>162</sup> The fact that there are alternative arguments alone does not mean that the taxpayer’s interpretation is reasonably arguable. Rather, there must be ‘sound reasons’ for adopting the alternative position.<sup>163</sup> Furthermore, a ruling will generally incorporate any potential alternative interpretations, which likewise will not necessarily equate to having a reasonably arguable position.<sup>164</sup> The disincentives against challenging an ATO public ruling amongst other issues have led commentators, including Australia’s equivalent of the Public Accounts

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<sup>157</sup> Commonwealth of Australia, *A Full Self Assessment of Taxation — A Consultative Document* (Canberra, 1990) [1.6] [1.7] and [6.23]. For a critique, see Cooper (n 51) 18-19; JCPAA, *Assessment of Tax* (n 12) [6.72] and [6.80] recommended the severing of the link with penalties.

<sup>158</sup> See: TAA 1953, Sch. 1, s. 284-75(2). Also arises under subsection 284-75(2) - penalty relating to statements; paragraph 284-160(1)(b) - base penalty amount for Part IVA schemes; paragraph 284-160(2)(b) and subsection 284 160(3) table items 1 and 2 - base penalty amount for transfer pricing schemes; and subparagraphs 290-65(1)(b)(i) and 290-65(1)(b)(ii), and subsection 290-65(2) - meaning of tax exploitation scheme.

<sup>159</sup> TAA 1953, Sch 1, subs 284-15 (1) [emphasis added]. See also: *Walstern Pty Ltd v Commissioner of Taxation* [2003] FCA 1428.

<sup>160</sup> TAA 1953, Sch 1, subs 284-15(3).

<sup>161</sup> ATO, MT 2008/2: Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable (April 2015) [46].

<sup>162</sup> Cooper (n 51) 19.

<sup>163</sup> ATO, MT 2008/2 (n 161) [47].

<sup>164</sup> *ibid* [48].

Committee<sup>165</sup> the Joint Committee of Public Accounts and Audit,<sup>166</sup> to conclude that rulings are *de facto* law.<sup>167</sup> When faced with the possibility that failing to follow the public ruling may result in an additional penalty, the taxpayer will be more inclined to follow the ruling rather than challenge the ATO's view. This has the effect of potentially placing rulings in a superior position to the underlying law, thereby undermining the ideal of providing rulings which are consistent with the law. The link with penalties accordingly is undesirable: 'in a Westminster-style democracy, taxpayers should be penalised for infractions of legislation, not the ATO's view of it'.<sup>168</sup>

### 3.3.3. Accessibility

There are three strands to accessibility, being the ability of the taxpayer to access the relevant soft law. The first is the ability to physically access the general soft law which affects her. Non-publication of internal policies which affect groups of taxpayers would undermine this objective. This is an area of concern in the UK.<sup>169</sup> Several aspects of the Australian system act to safeguard against secret guidance. Although the decision to produce a ruling is a matter of discretion for the Commissioner, the engagement of taxpayers through consultative forums and in particular through the work of the National Tax Liaison Group reduces the prospect of this occurring. When the IGT reviewed the

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<sup>165</sup> The powers and duties compare Public Accounts and Audit Committee Act 1951, s. 8(1) and Joint Committee of Public Accounts and Audit, Report No. 432, *APS – Fit for Service* (2012).

<sup>166</sup> JCPAA, *Assessment of Tax* (n 12).

<sup>167</sup> *ibid* [9]; Scolaro (n 140) 109-110.

<sup>168</sup> Cooper (n 51) 51.

<sup>169</sup> See Part III. 3.1. Publication.

self-assessment system in 2012,<sup>170</sup> it was concluded that collaboration with tax professionals has led to a better assessment of what the priority areas of uncertainty were, as well as improving the ATO's understanding and its capacity to address them effectively.<sup>171</sup> This appears to likewise be the understanding amongst senior ATO staff:<sup>172</sup>

[T]he ATO's law experts and leaders need to have ongoing engagement with the tax profession about contentious and uncertain issues. During the last year or so, this has started to happen more and more, but I think a wider range of law experts (and not just the senior officers) need to be engaging this way. This type of ongoing open and frank discussions with the accounting and law firms should help to provide a better understanding of contentious issues and areas of uncertainty in the laws, as well as developing a more constructive relationship between the ATO and the profession. It would also enable a greater understanding of each other's views and perspectives<sup>173</sup>

The second strand to accessibility is the ability to know how the general soft law applies at any given time. Retrospective changes to guidance hinder this capability. As the IGT has noted, taxpayers are concerned with retrospective effect, not with change *per se*.<sup>174</sup> In general accordingly, the ATO seeks only to change interpretations prospectively.<sup>175</sup> This is equivocally the case in respect of rulings. A public ruling binds the Commissioner from the time it is published or

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<sup>170</sup> Inspector-General of Taxation, *Review into improving the self assessment system* (August 2012).

<sup>171</sup> *ibid* 43.

<sup>172</sup> *ibid*.

<sup>173</sup> Kevin Fitzpatrick, 'A Long Innings — Valedictory Address by Kevin Fitzpatrick' (2012) 46(9) *Taxation in Australia* 394.

<sup>174</sup> Inspector-General of Taxation, *Review into delayed or changed Australian Taxation Office views on significant issues* (March 2010) iii.

<sup>175</sup> See above: ATO, *PS LA 2011/27 Matters the Commissioner considers when determining whether the Australian Taxation Office view of the law should only be applied prospectively* (October 2015). For a note on the UK perspective, see: Stephen Daly, 'When HMRC changes its advice' (2017) [Accountingweb.co.uk](http://Accountingweb.co.uk), available at: <<https://www.accountingweb.co.uk/tax/hmrc-policy/when-hmrc-changes-its-advice>> accessed 31 September 2017.

at a separate earlier or later time as specified in the ruling.<sup>176</sup> Where a public ruling is withdrawn, it is published in the Gazette or, if set out in the ruling, ceases from the date set out therein.<sup>177</sup> Importantly, previous versions of rulings can be found via a weblink at the bottom of the page where the relevant ruling is found online.

In spite of this prospective-only rule, a perception of ATO 'U-turns', namely retrospective changes to guidance, has proliferated amongst taxpayers.<sup>178</sup> To this end, the IGT investigated the issue in 2010 and issued a report on U-turns.<sup>179</sup> The IGT concluded that, in certain circumstances, taxpayers' perception of changes in ATO views or practices were justified, but crucially not in respect of one piece of binding advice clearly changing a previous piece.<sup>180</sup> The crux of the matter was disagreement over whether a previous view or practice existed at all and if it did exist whether the subsequent view constituted a change.<sup>181</sup> In respect of these concerns, the IGT recommended that the solution lay in increased transparency and due process.<sup>182</sup> Early, collaborative engagement through the consultative framework, in particular through the use of the National Tax Liaison Group, with the taxpaying community was crucial to assuaging concerns of change.<sup>183</sup> Other internal

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<sup>176</sup> TAA 1953, ss 358-10(1).

<sup>177</sup> ATO, *PS LA 2008/3* (n 58) [40]-[41].

<sup>178</sup> See for example, Minutes of the National Tax Liaison Group meeting (4 June 1998), Item 5; Press Release, Corporate Tax Association, Greater Accountability Needed for ATO (28 April 1998) as noted in Cooper (n 51) 28. See also: *MacQuarie Bank v FCT* [2013] FCAFC 119.

<sup>179</sup> IGT, *Review into delayed or changed ATO views* (n 174).

<sup>180</sup> *ibid* iii.

<sup>181</sup> *Ibid*.

<sup>182</sup> *ibid*.

<sup>183</sup> *ibid* 42-43.

changes, such as counteracting taxpayer misconceptions early<sup>184</sup> and making sure that a new interpretation does not conflict with a previous approach,<sup>185</sup> were similarly recommended.

The third strand is the ability to know which parts of the relevant soft law the taxpayer can rely upon. The mingling of binding and non-binding advice disrupts this. When the system for public rulings was initially introduced, such mingling was seemingly prominent.<sup>186</sup> As one critic noted at the time, ‘the vast majority of verbiage that appears in tax rulings and determinations does not form part of the public ruling’.<sup>187</sup> However, it is inherent in the nature of the production of publicly binding advice that there be some background explanation to the binding interpretation. As the Auditor General has noted:<sup>188</sup>

[I]f a taxation ruling were to provide only the material that is legally binding on the Commissioner and did not provide an explanation for its interpretation of the law, taxation rulings would be less meaningful to taxpayers than they are now

The pragmatic solution proposed, and thereafter adopted accordingly, was that rulings should state in the preamble which parts of the ruling are binding.<sup>189</sup>

Although on the whole accordingly, the Australian regime has evolved over the years to include various facets that enhance accessibility for taxpayers, one minor problem with the system is the failure to specifically link the rulings

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<sup>184</sup> *ibid* 44.

<sup>185</sup> *ibid* 27-28.

<sup>186</sup> Sarah Bernhardt, ‘The Bellinz Case and the Rulings System’ (1998) 27 *Australian Tax Review* 117, 119; Cooper (n 51) 25. See also: *Crestani v FCT* (1998) 98 ATC 2219.

<sup>187</sup> Bernhardt (n 186) 119.

<sup>188</sup> Auditor General, *The ATO’s Administration of Taxation Rulings* (n 49) 91.

<sup>189</sup> *ibid* 94.

to the relevant legal provisions to which they relate. In other words, the rulings make no mention of the legal provisions to which their analysis relates. This hinders the taxpayers' access to the applicable law, rather than the soft law.

### 3.3.4. Reliability

Public rulings issued since 1992 are binding on the ATO. This augmentation of the reliability of rulings over other ordinary forms of guidance is underlined by the case of *Bellinz*.<sup>190</sup> Therein the appellant taxpayers claimed, *inter alia*, that the ATO was bound by advice it had issued prior to 1992, in other words prior to the introduction of formally binding rulings. Merkel J in the Federal Court noted first that these pre-1992 publications were informative but could not supplant the terms of the law.<sup>191</sup> Secondly, any assessment of whether the ATO would be held to the terms of such a ruling would be dictated by fairness, thereby drawing upon the early UK cases on the law of legitimate expectation.<sup>192</sup> Fairness to the taxpayers in turn would need to be balanced with the Commissioner's duty to collect taxes:<sup>193</sup>

But where the question arises as to the inclusion of an amount in assessable income or the allowance of an amount as a deduction, where no question of discretion arises and where the Commissioner is charged to administer the law (cf s 8 of the Act), and one might say bound so to do in accordance with the language used in the statute as passed by Parliament, it is difficult to see how the Commissioner can properly be said to have acted unfairly,

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<sup>190</sup> *Bellinz Pty Ltd & Ors v Commissioner of Taxation* [1998] FCA 615; (1998) 39 ATR 198.

<sup>191</sup> See: ATO, *Taxation Ruling 1* (n 78).

<sup>192</sup> *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617; *In re Preston* [1985] 2 WLR 836; [1985] STC 282; *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] STC 681.

<sup>193</sup> *Bellinz* (n 190) 210.

even if there is an element of discrimination, where he has acted in accordance with the law itself

The appellants' claim accordingly failed. Notably, this balancing exercise is analogous to that which is undertaken in the UK in the case of a legitimate expectation claim.<sup>194</sup> Had the appellants' circumstances fallen within the provisions of a ruling produced after 1992 on the other hand however, the judge stressed that the ATO would have to be held to its published position, regardless of the correct legal position:<sup>195</sup>

The Commissioner is bound in respect of an existing ruling, not withdrawn for relevant purposes, to assess tax in accordance with the ruling even where the tax law, in accordance with the relevant statute, might have otherwise resulted in more tax being payable

The case therefore underlines the distinction between rulings and other ATO publications, highlighting the binding nature of the former and hence reliability from the perspective of the taxpayer.

Although the binding nature of rulings is an admirable feature of the Australian system, it comes fused with an inevitable reluctance to produce rulings in cases of genuine doubt.<sup>196</sup> This in-built conservatism is reinforced by the ATO's concern for horizontal equity:<sup>197</sup>

Errors made by the Commissioner, in the taxpayer's favour, in legally binding material impact on the general community. It is the community that forgoes the revenue lost because of the error. In addition, those taxpayers, who are able to rely on that erroneous view of the law, may be able to obtain a benefit that is unavailable

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<sup>194</sup> See generally Part III. 5.1. The Parameters of the doctrine.

<sup>195</sup> *Bellinz* (n 190) 211; ATO, *PS LA 2008/3* (n 58) [24].

<sup>196</sup> *Pagone* (n 96) 905; JCPAA, *Assessment of Tax* (n 12) (1993) [6.26].

<sup>197</sup> ATO, *PS LA 2008/3* (n 58) [69].

to other taxpayers. It is these unfavourable outcomes that the Commissioner is avoiding by not being bound by all general publications

However, in spite of the fact that the decision to promulgate a public ruling lies exclusively with the ATO,<sup>198</sup> an innovation in the process has been to involve stakeholders as a means of assessing areas in which the ATO ought to issue a ruling.

The decision as to when a public ruling should be promulgated, other than in the case of a product or class ruling being requested by an individual or entity, is a matter of discretion for the ATO. There is no rule or provision specifying when a ruling should be issued. Instead, decisions to issue a public ruling are made by the ATO, as part of its risk management strategy, in consultation with stakeholders:

[P]ublic rulings arise out of our risk mitigation strategies. Risk processes are governed at an ATO level by the Enterprise Risk Management Framework (ERMF). All BSLs [Business and Service Lines] have risk management processes in place consistent with the ERMF (see for example LB&I [the Large Business and International BSL], Indirect Tax, and S&ME [the Small and Medium Enterprises BSL] risk intranet pages). It is generally through these processes that public rulings are internally sourced, including risks escalating out of private rulings work.<sup>199</sup>

Identification and prioritisation of potential topics for rulings and determinations is largely a demand-driven consultative and collaborative process involving representatives from the tax profession, such as the technical sub-committees of the National Tax Liaison Group (NTLG) and the NTLG Public rulings Steering Committee. Discussion with these groups already includes

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<sup>198</sup> Scolaro (n 140) 112. See TAA 1953, ss 14ZAAE, 14ZAAF and 14ZAAG.

<sup>199</sup> Inspector-General of Taxation, *Review into the ATO administration of class rulings* (September 2011) 43.

consideration of the appropriate vehicle for ATO advice or guidance on any given topic...<sup>200</sup>

This involvement of stakeholders tempers the ATO's conservatism by placing the body under pressure to produce rulings in areas of high priority.

A further by-product of this axiomatic reluctance is the use of caveats and qualifications so as to prevent rulings consuming more factual scenarios than the ATO is willing to accept in its advice.<sup>201</sup> Since *Bellinz* however, qualifying words such as 'likely' and 'generally' have been avoided as far as possible.<sup>202</sup>

Despite the continued calls for, and legislative amendments to produce,<sup>203</sup> increased use of the rulings system for a broader range of topics,<sup>204</sup> the ATO has been accused of not producing sufficiently broad rulings. In the 2009 review of the ATO's administration of public binding advice, the IGT noted that in spite of the widening of the broadening of the scope for ATO rulings, the tax office advice had nevertheless become 'more limited, cautious and conditional'.<sup>205</sup> This conclusion however is disputed by the ATO<sup>206</sup> and in fact, the issuance of binding rulings has been consistently on the increase since the introduction of the regime.<sup>207</sup>

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<sup>200</sup> *ibid* 42.

<sup>201</sup> Cooper (n 51) 30.

<sup>202</sup> O'Connell (n 60) 16.

<sup>203</sup> Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005, [1.12].

<sup>204</sup> Commonwealth of Australia, *Outcome of the Review of Aspects of Income Tax Self Assessment, Media Release No. 106 of 2004* (December 2004); Commonwealth of Australia, *Review of Aspects of Income Tax Self Assessment* (n 12) 10-12; Ralph Report (n 77) 37, 137-140; Commonwealth of Australia, *Tax reform: not a new tax, a new tax system* (Commonwealth of Australia 1998) 27, 147; Cooper (n 51) 51.

<sup>205</sup> IGT, *Review of the Tax Office's administration of public binding advice* (n 42) 9. The evidence to support this assertion is to be found summarised at pages 9 and 10 of that report.

<sup>206</sup> *ibid* 55.

<sup>207</sup> IGT, *Review into improving the self assessment system* (n 170) 30-32.

The lesson to be drawn from this is that in order for the system of binding rulings to have proper efficacy, it is necessary for the tax office to feel comfortable to be bound by particular pieces of advice. Reliability cannot be enhanced by the framework for the provision of binding rulings alone, but rather requires the tax office to buy-in to the objectives underlying the framework. As surmised in the proverb, you can lead a horse to water, but you can't make him drink.

### 3.4. Interim Conclusion

Soft law in Australia, at least in the case of tax law, has come a long way in the past 27 years from when Stephen Argument concluded that it was poorly drafted, difficult to understand and nearly impossible to locate.<sup>208</sup> The periodic, critical and constructive reviews of the system for rulings have resulted in the emergence of a robust, innovative and inclusive scheme. Given the other flawed options of either direct Parliamentary control or a model without scrutiny by an expert body, the Australian system for the production of binding public rulings certainly justifies its place as a 'best practice' model upon which the UK should base its reforms. The comprehensive provision of scrutiny by the Rulings Panels and the public has been roundly commended as operating effectively, and far surpasses the level of scrutiny currently afforded to general HMRC soft law.<sup>209</sup> In turn, the evidence is unequivocal that the quality of public rulings, as regards both clarity and consistency with the law, has been enhanced where there has been public consultation and scrutiny by the panels. Whilst claims of bias are

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<sup>208</sup> Stephen Argument (n 47).

<sup>209</sup> See Part III. 4. Analysis of the scrutiny afforded to HMRC soft law.

unfounded both theoretically and empirically, the link with the penalties regime is to be regretted. In terms of accessibility, the system is to be applauded by reason of the steps inserted to ensure publication and to protect against retrospection and mingling. Finally, reliability is undoubtedly increased as a result of public rulings being binding, although the efficacy of the scheme hinges upon the revenue authority buying in to its objectives.

In light of the foregoing critical analysis, it would be naïve to either conclude or indeed hope that the Australian system for the provision of binding advice is without wrinkle. On the other hand, however, it is roundly accepted that the existence of the system is preferable to its absence.<sup>210</sup> Analysis in the subsequent Section accordingly will assess how to extract the positive elements of the Australian system whilst minimizing the effect of its negatives.

#### **4. Proposals in the range: synthesis of the analysis undertaken**

*[The resignation of David Heaton from the GAAR Panel] was not just bad luck or an indication that the wrong person was chosen. It is the result of a failure to create a robust institution with a clear function. That in itself is the result of rushing developments, partial consultation with busy people and lack of an underlying route map about where we are going with our tax institutions.<sup>211</sup>*

The Aaronson Report recommended that the General Anti-Abuse Rule ('GAAR') Advisory Panel, a body to be established to update HMRC's GAAR

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<sup>210</sup> Cooper (n 51) 50; Scolaro (n 140) 129; Bentley (n 141) 64; JCPAA, *Tax Administration* (n 54) 99; Auditor General, *The ATO's Administration of Taxation Rulings* (n 49) 17.

<sup>211</sup> Judith Freedman, 'Creating new UK institutions for tax governance and policy making: progress or confusion?' (2013) BTR 373, 380.

guidance<sup>212</sup> and provide opinions on cases where HMRC considers the GAAR may apply,<sup>213</sup> should be made up of members of HMRC and a majority of independent tax experts, including an independent chair.<sup>214</sup> The reason for such a balanced composition was not fleshed out in the Report, but on the basis of the work in this thesis, an answer which could be posited is that such a constitution would help ensure robustness, deliberation and balance, taking into account the considerations from both an external and internal perspective. This however was missed in the subsequent developments on the GAAR. A 'significant majority' of respondents to the Government's consultation objected to HMRC's membership of the Panel.<sup>215</sup> The formality and powers of the panel in turn grew, further deviating from the original intent, with the advisory opinion of the GAAR Panel becoming a mandatory consideration for the courts and tribunals.<sup>216</sup> The 'odd constitutional role' now adopted by the Panel rendered the membership of HMRC officials untenable. With membership a contested feature, eyes turned to the appropriateness of the other members.<sup>217</sup>

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<sup>212</sup> Graham Aaronson, *GAAR Study: A study to consider whether a general anti-avoidance rule should be introduced into the UK tax system* (November 2011) ('Aaronson Report') 8, 26, 29-30, 34.

<sup>213</sup> *ibid* 8, 26, 33-34, 52, 58, and 72-73.

<sup>214</sup> *ibid* 26, 42, 33, 42, 52-53, 58, and 73.

<sup>215</sup> HMRC, *Summary of Responses: A General Anti-Abuse Rule* (December 2012), 20 available at: <<http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/budget-updates/11dec12/gaar-responses.pdf>> accessed 31 September 2017, cited in Freedman (n 211) 378.

<sup>216</sup> Finance Act 2013, s.211(2), cited in Freedman (n 211) 378. The original vision was that the Courts would be entitled to take into account the GAAR Panel's opinion. See: Aaronson Report (n 212) 42, 50.

<sup>217</sup> Freedman (n 211) 378.

On 27 June 2013, David Heaton presented some tips on minimizing tax liability at a conference entitled '101 Ideas for Personal Tax Planning'.<sup>218</sup> These would serve as a means of keeping money 'out of the Chancellor's grubby mitts'.<sup>219</sup> The following month, he was appointed to the GAAR Panel.<sup>220</sup> On 16 September, a BBC Panorama documentary, 'Tax, Lies and Videotape', was scheduled to be aired broadcasting footage of David Heaton speaking at this conference. A few days prior, he took the opportunity to resign from the Panel.<sup>221</sup> Had the original purpose of the Panel been more clearly expressed and better understood, and the subsequent departure from the original vision not taken place, it is most likely that the resignation of an expert tax planner from a panel tasked with advising on the acceptability of tax practices would not have been inevitable.<sup>222</sup>

The episode serves as a cautionary tale in the pursuit of reforms. It is necessary to clearly set out the underpinning reasons and in precise detail the necessary components of any reforms. The purpose of this Section is to set out in detail the reforms that this thesis proposes in relation to general HMRC soft law, taking heed of the 'GAAR Panel' lesson. The need to increase quality,

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<sup>218</sup> Mark McLaughlin, 'Conference Report: 101 Ideas for Personal Tax Planning' (August 2013), available at:

<<http://www.bloomsburyprofessionalonline.com/applib/newsitem/404/conference-report-101-ideas-for-personal-tax-planning>> accessed 31 September 2017.

<sup>219</sup> Calum Fuller, 'GAAR panel member steps down after Panorama sting' (September 2013), available at: <<http://www.accountancyage.com/aa/news/2294785/gaar-panel-member-steps-down-after-panorama-sting>> accessed 31 September 2017.

<sup>220</sup> Robert Lovell, 'Revenue reveals new GAAR panel' (July 2013), available at: <<http://www.accountingweb.co.uk/tax/hmrc-policy/revenue-reveals-new-gaar-panel>> accessed 31 September 2017.

<sup>221</sup> Claire Carter, 'Government tax adviser quits after talk on how to keep money out of George Osborne's 'grubby mitts'', *The Telegraph* (London, 13 September 2013), available at: <<http://www.telegraph.co.uk/finance/personalfinance/tax/10308987/Government-tax-adviser-quits-after-talk-on-how-to-keep-money-out-of-George-Osbornes-grubby-mitts.html>> accessed 31 September 2017.

<sup>222</sup> See Freedman (n 211) 379-380.

accessibility, scrutiny and reliability stands at the heart of the proposals. The Section is broken down into two parts, the first proposing and setting out the specifications for the introduction of a binding rulings regime in the UK. The second shall deal with other proposals which should be adopted to shore up the inadequacies of the general HMRC soft law regime which it will not be possible to process through the recommended rulings programme.

#### **4.1. Proposal to introduce public rulings in the United Kingdom**

Given the success of the rulings regime in Australia with reference to our key normative benchmarks, the first proposal of this thesis will be to introduce a rulings regime based upon the Australian model into the UK. Accordingly, it is necessary herein to set out the details of the operation of a public rulings regime in the UK. There are three aspects to this which require examination. The first is the actual mechanics of how such a regime would operate in the UK. The second is assessing the potential viability of the scheme. Implementing a framework for the provision of public rulings does not guarantee its success. It is necessary thus to analyse the prospects of realizing the underlying objectives in practice. The third is deciding which pieces of soft law should go through the new regime. It would not be feasible for every piece of general HMRC soft law to become a public ruling. A cut-off point must be established.

##### **4.1.1. The mechanics of the rulings regime in the UK**

Although a model based on the Australian regime is recommended for introduction into the UK, there were nevertheless some problems identified in the Australian system. Moreover, it is not possible to implement the foreign

regime without any regard to the pre-existing structure in the UK. The proceeding discussion of the mechanics of how the rulings regime should operate in the UK will take these aspects into account. Three elements merit consideration in light of this: first, the framework for the production of a public ruling from a stage-by-stage perspective; secondly, the make-up of the relevant participators in the regime; thirdly, what legislative changes need to be made.

#### ***4.1.1.1. The Framework: From Identification to Post-publication challenges***

The framework for public rulings should consist of the following 10

Stages:

Stage 1 – An issue for ruling is identified.

In consultation with taxpayers and the ‘Working Together’ Group (discussed further below),<sup>223</sup> and through internal communications, an issue is identified that should be resolved by a public ruling.

Stage 2 – The topic is added to the public rulings program.

If HMRC then decides on the basis of the consultation to proceed with the ruling, the topic will be added to the “Public rulings Program”. This will be accessible to taxpayers through the HMRC website.

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<sup>223</sup> See Part IV. 4.1.1.2. Details of the relevant participators in the process.

Stage 3 – A draft ruling will be prepared internally.

Taxpayers and professional bodies representing taxpayers may be invited for consultation. An official within the relevant team in HMRC will be assigned responsibility of the particular ruling. As it currently stands, the head of the relevant stream within HMRC has ultimate responsibility over the publications generated pursuant to that particular stream.<sup>224</sup>

Stage 4 – The draft public ruling is internally approved.

It must go through a comprehensive technical quality review which includes the Public Rulings Panel. Although in the Australian model it is not compulsory for each piece of general soft law to be analysed by a rulings panel, this thesis takes the stricter approach of utilising the Public Rulings Panel for all public rulings. The primary role of the Public Rulings Panel will be to discuss the technical and practical merits of the draft ruling presented to them and to advise on the proposed interpretation of the law. It should also advise HMRC on the following matters related to the preparation of public rulings:

- whether a ruling is the best way to clarify the law, or whether an alternative should be used (such as legislative amendment or litigation);

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<sup>224</sup> See HMRC, *Organisation Chart* (October 2017) available at: <<https://www.gov.uk/government/publications/hmrc-organisation-chart>> accessed 31 September 2017. It is standard practice however for one person to be assigned responsibility for liaising with taxpayers in relation to a particular publication. See, for instance, HMRC, *Part surrenders and part assignments of life insurance policies* (April 2016) <<https://www.gov.uk/government/consultations/part-surrenders-and-part-assignments-of-life-insurance-policies>> accessed 31 September 2017.

- whether the structure and wording of the proposed ruling can be improved to make it easier to understand;
- whether there are realistic examples we can include to make the ruling more useful;
- the most appropriate date of effect for the proposed ruling;
- whether there are other related topics that may also be appropriate for rulings.

The recommendations of the Public Rulings Panel should not be made publicly available. Although there is a strong public interest in the process being as transparent as possible, in this instance there is the countervailing consideration of protecting the panel members' independence. As will be detailed below, some of the members for the panel are to be drawn from the pool of professional practitioners. If their advice were to be public, there is a risk that it would no longer be impartial but would be tilted in favour of their clients or at least that clients could put pressure on the panel members. It is vital that the advisors are in a position to give an impartial, independent view on the matters before them. The potential conflict of interest which arises otherwise if the advice were to be published justifies its confidentiality.

Stage 5 – The draft public ruling is then released for public comment.

It will be published on [hmrc.gov.uk](https://www.hmrc.gov.uk), with notification also posted on the Government's general website, [gov.uk](https://www.gov.uk). The draft ruling should include contact details of the relevant HMRC officer who will receive feedback and discuss details. The standard feedback period should be at least 8 weeks for draft public rulings. This is in line generally with HMRC's commitment to subject secondary legislation which imposes significant new obligations and responsibilities, and

Finance Bills to 8 weeks consultation.<sup>225</sup> HMRC may decide, as a matter of discretion, if there should be a longer consultation period in any given case. Whilst HMRC already does canvass the views of taxpayers in respect of general soft law,<sup>226</sup> the advantage with the proposal here is that a set framework replaces an ad hoc system.

Stage 6 – The final public ruling is prepared.

The comments received on the draft ruling are to be considered by the HMRC officer in charge of the relevant public ruling. Amendments are made accordingly where appropriate to the final ruling, whilst taxpayers and professional groups are consulted throughout the preparation of the final public ruling.

Stage 7 – The final public ruling is internally approved.

The process for approving the final public ruling will be identical to that for the draft public ruling. In other words, the final ruling will go through technical scrutiny from the panel of experts. A compendium of comments on the draft ruling shall be prepared, containing a summary of comments received and the HMRC response or action taken.

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<sup>225</sup> HM Treasury and HMRC, *Tax Consultation Framework* (March 2011), available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/89261/tax-consultation-framework.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/89261/tax-consultation-framework.pdf)> accessed 31 September 2017;

<sup>226</sup> See generally Part III. 4.4. Consultation with taxpayers.

Stage 8 – The final public ruling is published.

The final public ruling and the compendium of comments will be published on HMRC's website, whilst a notice should be published in the Gazette and on the gov.uk website. The relevant HMRC officer should again be available to discuss details. The ruling will include also contrary views to those expressed in the ruling, an important feature from an accessibility standpoint. HMRC should, where permissible, elaborate upon why the contrary views are not accurate. Such a regime forces HMRC to squarely confront the aspects of the soft law which might be at odds with the underlying law, in turn acting as a subtle means of protecting the primacy of law. In this respect, although the advice from the Public Rulings Panel will be confidential, HMRC should distinguish its own view in the ruling from the advice of the Public Rulings Panel. In terms of combatting retrospection, the ruling should set out the date from which it applies. Where there are any changes to the ruling, it should expressly be noted only to take effect prospectively, whilst a link should remain at the bottom of the webpage on which the ruling is located to all permutations (and dates of effect) of the ruling. As for 'mingling' which likewise undermines accessibility, the paragraph in the beginning of the ruling should set out explicitly what elements of the ruling are binding. Importantly, the ruling should stress that it is only binding on HMRC, but that a taxpayer may choose to rely instead upon the law. Finally, the ruling should contain a link to the relevant underlying law.

Stage 9 – Post-publication matters.

A compendium of comments will be sent to all who submitted comments within 7 days of the final public ruling being issued. Further comments can thereafter be submitted through a feedback mechanism on the HMRC website. HMRC should also conduct formal post-implementation reviews for significant public rulings to assess their effectiveness. Public rulings should also be reviewed regularly and updated as necessary to maintain their currency, accuracy and consistency. This process should involve the Public Rulings Panel, the 'Working Together' Group and taxpayers. Where significant changes need to be made, the previous 8 stages of this framework should be revisited. Whether this is necessitated should be decided by HMRC in consultation with the Public Rulings Panel, the 'Working Together' Group and taxpayers.

#### Step 10 – Challenging the ruling.

In the Australian model, there is a disincentive for the taxpayer to challenge the ATO's ruling by reason of the link with penalties. This link should be severed as it undermines the 'quality' of general soft law.<sup>227</sup> To this end, taxpayers should not be subject to an additional penalty for failing to follow an HMRC public ruling.

A separate question arises in terms of the mechanics for challenging an HMRC ruling. Where one disagrees with an ATO public ruling, there are two avenues available for challenging the ruling. The first is by directly challenging

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<sup>227</sup> Part IV. 3.3.2. Quality, see text n 155.

the ruling in the tribunals<sup>228</sup> and then courts. The second is by indirect challenge, where the taxpayer submits her return on the basis of the Commissioner's assessment of the correct approach to the law and then objects to that assessment.<sup>229</sup> In terms of the former, the taxpayer must request a private ruling from the ATO and then challenge the ruling in the tribunal. The tribunal in turn may consider only the ruling itself and the application of the ruling to the facts that a taxpayer has submitted to the ATO.<sup>230</sup> However, the second, indirect route does in fact challenge the ATO's ruling in respect of the law.

These cumbersome methods of challenge seem to be driven by the *ad hoc* nature of the development of the Australian system. When designing the system from scratch accordingly, there seems little reason why a taxpayer who disagrees with HMRC's general soft law should not be entitled to challenge it directly in the tribunals and then the courts. Bearing in mind that the soft law ruling is only binding upon HMRC, the courts and tribunals will host adversarial proceedings in which the taxpayer will defend her view of the law and how it applies in the particular case, whilst HMRC will defend why its soft law should govern the scenario. This is identical in nature to precisely the types of disputes that the courts and tribunals hear in tax law. In order to streamline disputes about rulings with ordinary tax disputes, it would be necessary to amend the governing legislation.<sup>231</sup> It must be accepted at this juncture however the possibility that epistemic deference would arise and influence the court or

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<sup>228</sup> As with the UK, tax appeals are first heard in a tribunal, the Administrative Appeals Tribunal.

<sup>229</sup> Auditor General, *The ATO's Administration of Taxation Rulings* (n 49) 74.

<sup>230</sup> ATO, *PS LA 2008/3* (n 58) [139]-[144]. See: TAA 1953 ss 14ZAZA, 14ZY, and 14ZZ.

<sup>231</sup> Appeals to the tribunals against any particular decision of HMRC in respect of tax are governed the legislation relating to that particular tax or decision. Thus, appeals in respect of VAT are governed by Part V of the Value Added Tax Act 1994. Each piece of legislation which allows for appeals must be amended accordingly.

tribunal's view as to the correct interpretation of the law. The problem would be that the court or tribunal would in practice place significant weight upon the interpretation set out in the ruling, rather than approaching the issue completely *de novo*. It cannot be denied that this risk could materialise in practice, and faith must simply be placed in the integrity of the independent tribunals and courts to arrive at an independent view on such matters. At any rate, it should also be stressed that this can occur in practice as it stands with general soft law today and at least with a public rulings regime, there would be greater transparency and also possibility to participate in the drafting of the public ruling.

A more complicated issue arises where HMRC and the taxpayer disagree on whether a particular piece of soft law should apply in the particular circumstances. The parties do not disagree about the integrity of the soft law itself, and the interpretation it incorporates, but rather about whether the taxpayer's circumstances fall squarely within its terms. In such a case, how should the courts and tribunals respond? Should there be deference to HMRC's view of whether the soft law should apply to the taxpayer in question? It has been noted that in the cases involving the question of legitimate expectations where the taxpayers were successful, HMRC did not directly challenge whether the taxpayer's circumstances fell within the terms of the soft law.<sup>232</sup> As such, the question as to what standard the tribunals or courts should apply in this area has gone largely overlooked, although Mr Justice Sales in the cases of *Accenture v Revenue and Customs*<sup>233</sup> and *Corkteck Ltd v HMRC*<sup>234</sup> did consider the issue

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<sup>232</sup> See above Part III. 5.2.2.1 The difficulty in establishing requisite clarity.

<sup>233</sup> *Accenture Services Ltd v Revenue and Customs* [2009] EWHC 857, [2009] STC 1053.

<sup>234</sup> *Corkteck Ltd v HM Revenue & Customs* [2009] EWHC 785, [2009] STC 1681.

however. This thesis proposes that disputes of this nature should be resolved through the ordinary appeals route with the tribunals and then courts deciding *de novo* on the merits of the claim.<sup>235</sup> The first argument in support of this proposal is that the courts in a judicial review of this sort will necessarily defer in some respect to the view of a statutorily empowered, institutionally competent expert public body.<sup>236</sup> But this relinquishes power in favour of HMRC, allowing the body to control the decision which will be arrived at. That is not sufficient. The incentive for HMRC would be to refuse to accept that its ruling had applied. A more preferable state of affairs would be for the tribunals and then courts to have control over the dispute and the final say on the applicability of a piece of soft law. The added benefit of having the First-tier tribunal decide the matter in the first instance is that the problem of the courts later applying some deferential standard further up the chain of appeals is vitiated as the deference will be to the expert body which is the First-tier Tribunal, and importantly, *not* HMRC. This leads to a second supporting reason which is that issues of application and interpretation cannot easily be bifurcated. As stressed in *Part II. 2.1.1.2 Freedom to decide*, discretion operates at three stages. The latter two are where there are standards to be interpreted; and, there is application of the standards to the facts. However, these stages are not mutually exclusive. The degree of judgement permitted to be exercised at each stage will be influenced by its effectuation in the other stages. How the standards are to be interpreted will be influenced by the fact patterns to which they will be applied. This is

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<sup>235</sup> An argument which found favour with the Administrative Review Council in Australia: see: Commonwealth of Australia, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation* (November 2008) 34-36 as noted in Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart 2016) 3.

<sup>236</sup> On which, see Timothy Endicott, *Administrative Law* (3rd edn., OUP 2015) 234-236.

precisely the competence exercised by the courts and tax tribunals in resolving disputes in adversarial proceedings. The matter lies properly within the appeals realm of the machinery of justice. Thirdly, this suggestion renders the system simpler to administer: judges and members of the tribunals will apply the same standard to deciding the issues in respect of the public ruling.

Thus, the ordinary appeal system should apply to disputes in respect of whether the soft law interpretation adopted by HMRC is correct and whether particular soft law should apply in a given case. A potential problem of duality however can arise. Two streams of appeal could occur at once. The first would concern a substantive dispute in relation to the underlying law, the second would concern the soft law which seeks to guide taxpayers as to their rights and obligations under that law. Let's say for instance that HMRC has issued a public ruling on residency which is at odds with the underlying law. At the same time, the taxpayer argues that her affairs come within the terms of the public ruling on residency. Two issues accordingly have to be resolved: on the facts, what is the taxpayer's residency status? And, do the taxpayer's affairs fall within the scope of the ruling? The fact that there could be parallel disputes such as this arising within the same tribunal is not problematic and is in fact much more preferable to the situation which currently exists where a taxpayer could argue that their affairs fall squarely within the law, but in the alternative that they have a legitimate expectation, arising out of reliance upon HMRC soft law, not to be taxed. This results in dual proceedings in separate courts where the determination of one issue can render the determination of another redundant.

Having the one tribunal hear arguments on two separate points, one going to substance and the other going to reliance upon the ruling, allows the

tribunal to consider whether findings of fact are necessary for determining both points, or whether a finding on one point will vitiate the need to make a finding on the other and vice versa. The tribunal can also apply its expertise in deciding which issues ought to be resolved first, as the resolution of one may render resolution of the other redundant! This would avoid precisely the situation which arose in the case of *Gaines-Cooper*.<sup>237</sup> In the Supreme Court, two sets of judicial review proceedings were heard together. The procedural history of the two however was quite distinct. The first appellants had stayed the substantive hearing until after the judicial review whilst the second appellant had pursued the substantive appeal through the First-tier Tribunal (at the time the relevant body was known as the ‘Special Commissioners’) and thereafter instituted proceedings. Given that a successful judicial review would render the investment of time and resources by the Revenue in challenging the case redundant, Lord Wilson labelled it ‘unfortunate’ that the course taken in the case of the first appellants was not taken in the case of the second.<sup>238</sup>

#### ***4.1.1.2. Details of the relevant participators in the process***

There will be three participators in the rulings scheme other than HMRC. These will be the ‘Working Together’ Group, the Public Rulings Panel and taxpayers generally.

#### **Working Together**

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<sup>237</sup> *R (Davies) v HMRC; R (Gaines-Cooper) v HMRC* [2011] UKSC 47, [2012] 1 All ER 1048 (*Gaines-Cooper*).

<sup>238</sup> *Ibid* [6].

A notable difference between the proposal here and the Australian regime is the displacement of the National Tax Liaison Group in favour of what's termed the 'Working Together' Group. The reason for this is that the 'Working Together' Group already exists and more or less mirrors the activities of the National Tax Liaison Group. It makes more sense to build upon that which already exists in the UK rather than adding an unnecessary, overlapping layer. In Australia, the National Tax Liaison Group is a steering committee comprised of members from the major tax, law and accounting professional associations and senior members of the ATO and Treasury.<sup>239</sup> The 'Working Together' initiative on the other hand is a partnership between HM Revenue and Customs (HMRC) and a wide range of representative agent bodies.<sup>240</sup> HMRC works with 19 bodies as part of this initiative, including prominent institutions such as the Institute of Chartered Accountants of England and Wales and the Chartered Institute of Taxation. The purpose of the National Tax Liaison Group is to identify significant issues and drive improvements in relation to the tax system. The 'Working Together' initiative similarly seeks to look for ways to improve HMRC's operations for the benefit of tax agents, their clients and HMRC. Although the remits are slightly different, the latter's remit would eminently allow it to consider public rulings as these relate to HMRC operations. The National Tax Liaison Group meets quarterly, whilst the 'Working Together' initiative is made up of ten regions (covering the entirety of the UK) that each lead regular 'Working Together'

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<sup>239</sup> See generally ATO, *National Tax Liaison Group* (n 93).

<sup>240</sup> See generally HMRC, *Working Together* (April 2016), available at: <<https://www.gov.uk/government/groups/working-together>> accessed 31 September 2017.

online meetings. These meetings are supplemented by ‘Talking Points’: weekly online meetings usually 45 minutes in duration that focus on topics agents have highlighted as being of interest or on emerging issues that HMRC identify as impacting on agents. In turn, a subset of the ‘Working Together’ Group is the ‘Issues Overview Group’. This provides a forum to raise essential operational issues or problems identified by HMRC or professional bodies representing tax agents and advisers.<sup>241</sup> It comprises members of 7 of the most senior representative bodies and members of HMRC’s Business Customer and Strategy directorate. The purpose of the ‘Issues Overview Group’ is to *inter alia* focus on the delivery of the ‘Working Together’ service; ensure that the systemic issues raised via the ‘Working Together’ network are investigated effectively; identify areas or unresolved main priority issues and escalate them; and review suggestions raised via the professional bodies and agent members of the ‘Working Together’ network regional groups. The effect of the combination of the two groups is to have a particularly broad representation of the interests of taxpayers, both by engaging with the separate regions of the country and by incorporating 19 agents from 19 representative bodies. The fact that the ‘Working Together’ initiative spans ten regions, covering the entirety of the UK, should ensure that there is no for instance ‘London-centric’ bias. This should go some way to assuage the concern highlighted in this thesis about the need for the general soft law system to engage the general body of taxpayers, rather than specific classes.<sup>242</sup> It is worth highlighting also that the 19 representative agent

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<sup>241</sup> HMRC, *Issues Overview Group*, available at: <<https://www.gov.uk/government/groups/issues-overview-group>> accessed 31 September 2017.

<sup>242</sup> See above Part IV. 3.3.1 Scrutiny, see text at n 108.

bodies engaged in this initiative represent hundreds of thousands of members and as such their submissions to HMRC generally focus on a wide range of issues, from reforms which affect wealthy non-domiciled individuals<sup>243</sup> to those affecting ordinary workers<sup>244</sup> and Small and Medium sized enterprises.<sup>245</sup> They represent accordingly a wide variety of interests.

In light of the above, there is clearly scope to incorporate engagement with public rulings within the remit of the existing UK groups. It would be unnecessarily burdensome and duplicative to introduce a UK National Tax Liaison Group. The role of the 'Working Together' Group in conjunction with the 'Issues Overview Group' in respect of rulings thus will be to identify significant issues of concern that should be considered for resolution by public ruling. The groups should also consider the operation of the existing rulings and establish whether any amendments should be made.

### Public Rulings Panel

The establishment of a bespoke body in the form of the Public Rulings Panel is necessitated. Members of the Public Rulings Panel, to be paid for their

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<sup>243</sup> See for instance: Ruth Mace, *Reforms to the taxation of non-domiciles: further consultation - CIOT comments* (October 2016) available at: <<https://www.tax.org.uk/policy-technical/submissions/reforms-taxation-non-domiciles-further-consultation-ciot-comments>> accessed 31 September 2017.

<sup>244</sup> See for instance, Ruth Mace, *Off-payroll working in the public sector: reform of the intermediaries legislation - CIOT comments* (August 2016) available at: <<https://www.tax.org.uk/policy-technical/submissions/payroll-working-public-sector-reform-intermediaries-legislation-ciot>> accessed 31 September 2017.

<sup>245</sup> See for instance: Ruth Mace, *Soft Drinks Industry Levy - CIOT comments* (October 2016) 4-5, available at: <<https://www.tax.org.uk/policy-technical/submissions/soft-drinks-industry-levy-ciot-comments>> accessed 31 September 2017.

services,<sup>246</sup> will be drawn from the pool of senior HMRC officers, respected tax specialists and academics. Of the latter two categories, there is an abundance of personnel in the UK who dedicate a significant amount of time and resources to communicating with HMRC in respect of tax policy. The willingness of tax practitioners to contribute was highlighted already in respect of the 'Working Together' initiative. Meanwhile, the UK like Australia is endowed with considerable academic expertise in the field of taxation with personnel dedicated to making improvements in the field of taxation.<sup>247</sup> HMRC should produce a consultation document calling for all interested personnel to submit to HMRC their expression of interest in the project, with a brief description of their qualifications and areas of expertise. A formal list thereafter can be drawn up by HMRC. There should be annual calls for expression of interest so as to keep the list up to date.

The make-up of the Public Rulings Panel in any case will be decided on a topic-by-topic basis by HMRC, but it should be balanced in order to ensure that a broad range of perspectives are taken into account. The need for diversity of decision-makers when resolving legal questions has been supported by those in the highest judicial offices in the UK.<sup>248</sup> Indeed, this was the original plan for the 'GAAR Panel' in the UK also. There will be at least three members on the Public

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<sup>246</sup> At a rate to be decided by HMRC as being fair and commensurate with the work undertaken. By way of comparison, in Australia, participants in panels who complete a 90minute research session are paid \$140, which is approximately £70. See: ATO, *Small Business Consultation Panel*, available at: <<https://www.ato.gov.au/General/Consultation/Getting-involved-in-consultation/Small-Business-Consultation-Panel/>> accessed 31 September 2017.

<sup>247</sup> For instance, there are several specialist academic peer-reviewed tax journals and a significant number of conferences held every year which allow for contributions from academics, practitioners and HMRC officials.

<sup>248</sup> See for instance, Terence Etherton, "Liberty, the Archetype and Diversity: A Philosophy of Judging" [2010] PL 727; Brenda Hale 'Equality and the Judiciary: Why Should We Want More Women Judges?' [2001] PL 489.

Rulings Panel for each ruling, but more may be added if considered necessary in the circumstances by the chair, who in turn will be a senior officer from HMRC's legal department.<sup>249</sup> It is the chair who will have ultimate control of the composition of the panel in any given instance.

The reason that the chair should be an HMRC officer is a reflection of the role of the panel, namely to advise HMRC on its public ruling. From a practical perspective the HMRC officer will be more knowledgeable of institutional needs and even the language that should be used to communicate the message from the panel most clearly. It ensures the smooth operation of the system. The matter was also considered in Australia and reform by way of having a representative external to HMRC chair the panel was rejected not just by the ATO, but also the panel members. In addition to practical concerns, it was considered to be inappropriate from the more theoretical perspective that the decision on the ruling ultimately resides with the tax authority.<sup>250</sup> The composition of the panel should reflect this role. There is some force to this argument also. The provision of advice to taxpayers is legitimised in the hands of HMRC by reason of its endowment with responsibility from Parliament for the collection and management of taxes. It is appropriate to this end that the management of the Public Rulings Panel and the advice that it produces should reside with HMRC.

Aside from the physical composition of the Public Rulings Panel, the cultural make-up of the panel is of particular concern. There must be a 'buy-in' to the process. The role of the Public Rulings Panel is to provide balanced,

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<sup>249</sup> Note that the GAAR panel composition and is decided by HMRC, see: Finance Act 2013 Sch.43, cl.1.

<sup>250</sup> Auditor General, *Administration of Taxation Rulings Follow-up Audit, Audit Report no. 7 2004-05* (August 2004) 23.

impartial, robust advice. It is to get the correct interpretation, not driven by what would be most advantageous for either taxpayers or the exchequer.<sup>251</sup> To this end, the independence of the members is critical as is the need to draw upon the views not just of HMRC officers, but also tax experts and academics on any given ruling. There should be a strong emphasis on obtaining consensus among external members concerning the direction taken in the public ruling, but if disagreement persists, this should form part of the advice that the Public Rulings Panel issues to HMRC. Critical deliberation is a fundamental tenet of the development of policy.

Finally, although a concern might persist about the tendency of such a panel to have a ‘pro-revenue’ bias, notably the accusation was with little foundation in Australia and moreover, HMRC in particular is not incentivised to interpret legislation in a manner overly favourable to the exchequer. One of HMRC’s 3 primary objectives is to ‘Maximise revenues *due* and bear down on avoidance and evasion’.<sup>252</sup> One of the tools used to estimate the performance in respect of this objective is the tax gap that calculates the difference between the amount of tax that should, in theory, be collected by HMRC against what is actually collected.<sup>253</sup> Thus, the operations of HMRC are driven by the objective of collecting only the tax that is *due*. To interpret the law to maximise revenue *per se* would result in an increase in the size of the amount of tax which ought to be collected by HMRC and hence would make the tax gap look larger than it is, in

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<sup>251</sup> O’Connell (n 60) 18.

<sup>252</sup> HMRC, *Single departmental plan 2015 to 2020* (July 2017) [emphasis added], available at: <<https://www.gov.uk/government/publications/hmrc-single-departmental-plan-2015-to-2020/single-departmental-plan-2015-to-2020>> accessed 31 September 2017.

<sup>253</sup> HMRC, *Measuring tax gaps 2015 edition Tax gap estimates for 2013-14* (October 2015) 3.

turn indicating underperformance. In short, it would not be in HMRC's interest for the Public Rulings Panel to have a pro-revenue bias.

### Taxpayers

The third category of participant other than HMRC in the process is the general body of taxpayers to whom there will be consultation on what matters might require a ruling and on the rulings themselves. The representative bodies act in this capacity on behalf of taxpayers generally, although consultations by HMRC do seek the views additionally of individual taxpayers.<sup>254</sup> It has already been evidenced that HMRC are committed to consulting widely and seeking the input of taxpayers,<sup>255</sup> and as such the inclusion of consultation with taxpayers builds upon a pre-existing initiative.

One criticism which can be leveled at this structure however is that the process can get hijacked by dominant lobbying groups who may exert considerable pressure in order to extract favourable treatment for the parties they represent.<sup>256</sup> The problem with this argument however is that the possibility arises regardless of whether there is an open forum for participation. Dominant groups over the years have been able to extract concessionary treatment for instance in respect of miners' coal.<sup>257</sup> This was in spite of the fact that there was no formal system for participation. The opening of the forum for

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<sup>254</sup> Anybody can generally provide a submission to an HMRC consultation document. See, for instance, HM Treasury and HMRC, *Tax deductibility of corporate interest expense: consultation on detailed policy design and implementation* (May 2016) 7.

<sup>255</sup> See generally Part III. 4.4. Consultation with taxpayers.

<sup>256</sup> See for instance: Baldwin, *Rules and Government* (n 5) 74-80.

<sup>257</sup> Part III. 2.1. The problem of soft law being inconsistent with the law, see text at n 15.

consultation is a pragmatic improvement upon the previous structure. Less powerful classes of taxpayers are given the opportunity to engage. As Paul Craig has written: '[t]he introduction of a more structured system of participatory rights at least gives the less advantaged groups a chance to air their views'.<sup>258</sup>

#### **4.1.1.3. Legislative amendment**

As with the Australian model, it will be necessary to make a legislative amendment so as to bind HMRC to its public rulings.<sup>259</sup> This is necessary by reason of the obvious fact that without such a law, there would be no means of enforcing a ruling against HMRC (aside from the usual administrative law remedies). Additionally, it is necessary to amend legislation dealing with appeals, so as to allow taxpayers to challenge whether a ruling properly governs their dispute with HMRC.<sup>260</sup> There is a question however as to whether anything else is in need of legislative introduction? The possibilities would be to enshrine the aforementioned Stages in legislation or the formation and composition of the relevant groups. These do not necessitate legislative changes however and could readily be accommodated within HMRC's managerial discretion by reason of the fact that they pertain to HMRC's management of taxes and would be driven by a desire to improve overall the collection of taxes.<sup>261</sup> Moreover, as shall be set out

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<sup>258</sup> Paul Craig, *EU Administrative Law* (OUP 2012) 295.

<sup>259</sup> On which, TAA 1953, Schedule 1, Part 5-5 (in particular Division 358) provides a legislative framework which can be adopted.

<sup>260</sup> Appeals to the tribunals against any particular decision of HMRC in respect of tax are governed the legislation relating to that particular tax or decision. Thus, appeals in respect of VAT are governed by Part V of the Value Added Tax Act 1994. Each piece of legislation which allows for appeals must be amended accordingly.

<sup>261</sup> Commissioners for Revenue and Customs Act 2005 ('CRCA 2005'), s. 5. See above, Part II. 2.1.2 Understanding HMRC's Managerial Discretion.

below,<sup>262</sup> the skeletal components of the suggested framework are already largely in place, thereby suggesting that HMRC already considers such reforms to be within its power to implement.

It is opined to this end that it is preferable for the time being to allow the system to develop in a more organic fashion as occurred in Australia. The proper functioning in practice of the system may require subsequent changes unforeseen in this thesis and it would be advisable to retain flexibility initially accordingly.

#### **4.1.2. The success of the programme: contribution from Parliament, the Government and HMRC**

Aside from the demonstrable benefits which the regime would bring in terms of quality, accessibility, scrutiny and reliability, the successful adoption of the programme proposed herein hinges upon Parliament, the Government and HMRC buying in to its objectives.

In terms of Parliament, the requisite legislation must be passed. From the perspective of the House of Commons, any move that could compromise, or could be perceived to compromise, its primacy in respect of tax policy making would be unacceptable.<sup>263</sup> However, this would not be the effect of introducing a rulings regime. The present model does not seek to substitute itself for the use of law. Soft law in the form of public rulings is intended to supplement the

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<sup>262</sup> Part IV. 4.1.3. The success of the programme: contribution from Parliament, the Government and HMRC, see text at n 284.

<sup>263</sup> Andrew Tyrie, *Letter to David Gauke: Tax Policy* (3 November 2010) available at: <<http://www.parliament.uk/documents/commons-committees/treasury/DavidGaukeletter.pdf>> accessed 31 September 2017.

underlying law, thereby giving greater effect to the rule of law.<sup>264</sup> Meanwhile, there is no threat by reason of the regime having binding effect for the reasons already provided.<sup>265</sup> Furthermore, the alternatives to the proposed model being either direct Parliamentary control or simply retaining status quo have been demonstrated to be unacceptable.<sup>266</sup>

The concern in relation to the Government would be that the new regime would provide an opportunity to abdicate its responsibility to produce reasonably clear draft laws. That Government would purposefully draft laws more broadly, knowing that the rulings regime would fill the gaps.<sup>267</sup> In response, it is first worth noting that this concern arises regardless of whether the framework proposed herein would be adopted. Commentators in the past have already argued that there is a tendency for laws to be drafted widely in order to be later narrowed through general HMRC soft law<sup>268</sup> and indeed the thesis provided case studies of this practice occurring.<sup>269</sup> The potential for this to arise might be said to be increased in the case of a public rulings regime and this moral hazard type risk must be accepted. A rulings regime would however bring greater transparency to the system, thereby allowing concerned taxpayers to

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<sup>264</sup> See above generally Part II. 3. The case for HMRC soft law.

<sup>265</sup> See above Part IV. 2.1.2.1. Permissibility of Binding advice.

<sup>266</sup> See above Part IV. 2.1. Alternative approaches.

<sup>267</sup> Of course, a positive case could be made for drafting legislation more broadly. See: Judith Freedman, 'Improving (not perfecting) tax legislation: rules and principles revisited' (2010) BTR 717; Julia Black 'Forms and paradoxes of principles-based regulation' (2008) 3(4) Capital Markets Law Journal 425.

<sup>268</sup> Judith Freedman, 'Lord Hoffmann, Tax Law and Principles' in Paul Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015); ICAEW, *Legitimate Expectation and Reliance on HMRC Guidance* (n 4) 13; Tracey Bowler, 'HMRC's Discretion: The Application of the *Ultra Vires* Rule and the Legitimate Expectation Doctrine' (IFS 2014) 2 and 36, available at: <<http://www.ifs.org.uk/publications/7475>> accessed 31 September 2017; Judith Freedman and John Vella, 'HMRC's Management of the UK Tax System: The Boundaries of Legitimate Discretion' 112-113 in Evans, Freedman and Krever (n 25).

<sup>269</sup> See above Part III.2.1. The problem of soft law being inconsistent with the law, see text at n 54.

take up the issue through traditional democratic channels. Additionally, the new system allows for greater participation by concerned taxpayers and experts. If there is abdication of responsibilities through drafting widely, the merit of the proposed regime is that it imposes democratic features. Further, the formal rulings regime has been operating in Australia since 1992 and there has yet to be the accusation that this has led to wide drafting of legislation in order for gaps to be filled by rulings.

The successful implementation of the regime also relies upon a significant amount of goodwill on the part of HMRC. The body will have control over the Public Rulings Panel by virtue of having an officer as chair. The decisions as to which pieces of soft law should become rulings and which parts of the rulings should be binding rest primarily with HMRC. It is within the power of HMRC to decide that a longer or shorter period for consultation is required, which persons should be invited to the Public Rulings Panel for any given topic and what, ultimately, the ruling will look like. Most importantly, it is HMRC who will be tasked with defending the ideal of the regime, namely, to produce robust, impartial advice which is consistent with the law, clear and accessible. However, a rulings regime which forces HMRC to be bound to its rulings comes inevitably fused with conservatism as to the breadth of reliance the body is comfortable to allow. This produces an obvious tension. What evidence accordingly is there to suggest that HMRC actually will utilise the rulings system in the manner that is hoped?

The first reason for optimism is the success of the regime in Australia, where the ATO has 'bought in' to the regime. Although there was criticism by the IGT in 2009 that the body's advice since 2006 had become 'more limited,

cautious and conditional',<sup>270</sup> it is suggested that this does not undermine this assessment. First, the criticism was not directed at rulings *per se*, but rather more generally about advice which can be binding.<sup>271</sup> Moreover, the criticism was not accompanied by any recommendation that the ATO should produce more binding public rulings, thereby detracting from the idea that the ATO has shied away from producing a sufficient number of public rulings. If it were such a problem, it is strange that the IGT would not recommend that the ATO take action to increase the number of binding rulings. In the years since likewise the IGT has only made one recommendation in relation to public rulings which was that *TaxPack* (which is guidance on income tax returns) should be reinstated and declared a public ruling in addition to other related items of soft law. This is an odd recommendation given that *TaxPack* would, in 2012, only apply to the 6.5% of self-assessed persons who lodge paper returns (the number is presumably even lower again today) and that the evidence from the tax community is that such a move is not needed.<sup>272</sup> It is also worth noting that this odd *TaxPack* issue was one of the 5 pieces of evidence provided by the IGT which underpinned the 2009 criticism.<sup>273</sup> In sum, it appears that the initial criticism was less equivocal than at face value appears and in fact has little bearing on the ATO's production of binding public rulings. Furthermore, since 1998, there has been a trend away from using qualifying words in rulings such as 'likely' and 'generally' which

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<sup>270</sup> IGT, *Review of the Tax Office's administration of public binding advice* (n 42) 9.

<sup>271</sup> In Australia, it is not merely rulings which can be binding on the ATO, see: IGT, *Review into improving the self assessment system* (n 170) Appendix 3.

<sup>272</sup> *Ibid* 51.

<sup>273</sup> IGT, *Review of the Tax Office's administration of public binding advice* (n 42) 9-10.

restrict the ambit of rulings.<sup>274</sup> Similarly, the number of rulings introduced has increased since the introduction of the regime.<sup>275</sup> In recent years, the ATO has produced between 60 and 100 public rulings each year in the generalised form under consideration here. For the 2014/15 tax year, there were 64 issued.<sup>276</sup> For the 2013/14 tax year, the number was 72.<sup>277</sup> For the 2012/13 tax year, there were 69 issued.<sup>278</sup> 92 were issued in 2011/12 tax year.<sup>279</sup> For the 2010/11 tax year, there were 62 issued.<sup>280</sup>

The reason that there is hope for the success in Australia to be replicated in the UK is that the approach to tax collection in the UK and Australia is relatively congruous. The ATO acknowledges the importance of engaging with taxpayers and providing advice as a means of facilitating the collection of tax.<sup>281</sup> As set out in detail earlier in this thesis, this is similarly recognised in the UK<sup>282</sup> where HMRC takes a similar view. Lin Homer, during her tenure as chief executive of HMRC, made clear that HMRC's role in assisting taxpayers went beyond merely answering their phonecalls:

Better service is about so much more than how quickly we pick up the phone – important as that is. It is about us providing services that the vast majority of people understand and can use without needing to call us or write to us or arrange a meeting.<sup>283</sup>

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<sup>274</sup> O'Connell (n 60) 16.

<sup>275</sup> IGT, *Review into improving the self assessment system* (n 170) 30-32.

<sup>276</sup> Commissioner of Taxation, *Annual report 2014–15* (n 55) 30.

<sup>277</sup> *ibid* 36.

<sup>278</sup> *ibid* 29.

<sup>279</sup> *ibid* 52.

<sup>280</sup> *ibid* 78.

<sup>281</sup> Part IV. 3.1. Australian approach to administrative advice.

<sup>282</sup> See generally Part II. 2.1.2 Understanding HMRC's Managerial Discretion.

<sup>283</sup> Lin Homer, *Speech to first annual HMRC stakeholder conference* (July 2013), available at: <<https://www.gov.uk/government/speeches/lin-homer-speech-to-first-annual-hmrc-stakeholder-conference>> accessed 31 September 2017.

Making soft law forms and guidance simpler<sup>284</sup> and hence more user friendly is a key aspect of this. As such, the positive adoption in Australia of the binding rulings regime is a reflection of its attitude generally to helping taxpayers, an attitude which HMRC similarly takes towards the effectuation of its primary duties.

Aside from its effective operation in Australia, the second reason for optimism that the regime could be implemented successfully in the UK with the requisite help of HMRC is that HMRC is already *de facto* committed to engaging in such a structure. Put another way, the necessary underpinnings are already in place in the UK. HMRC has already demonstrated a willingness to commit. Fundamentally, there are just two components to the new regime that HMRC would be required to get behind: a consultative framework that engages the views of taxpayers, representative bodies and HMRC officers, and the fact that rulings produced through the framework will be binding. As for the former, HMRC's receptiveness to changes in its general soft law or publishing internal policies after being informed by an expert body of such a need;<sup>285</sup> the commencement of the 'Working Together' initiative;<sup>286</sup> the evident willingness to consult with taxpayers as identified earlier in this thesis;<sup>287</sup> and an openness to a

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<sup>284</sup> Ibid. See also: Lin Homer, *HMRC priorities 2013* (June 2013) available at: <<https://www.gov.uk/government/speeches/hmrc-priorities-2013>> accessed 31 September 2017; Ruth Owen, *Building our Future: transforming how HMRC serves the UK* (July 2014), available at: <<https://www.gov.uk/government/speeches/building-our-future-transforming-how-hmrc-serves-the-uk>> accessed 31 September 2017.

<sup>285</sup> See generally Part III. 6.2.1. Supervision of HMRC soft law.

<sup>286</sup> Part IV. 4.1.1.2. Details of the relevant participators in the process, see text at n 240.

<sup>287</sup> See generally Part III. 4.4. Consultation with taxpayers.

change of stance in the soft law after consultation<sup>288</sup> or to produce general soft law after having consulted taxpayers and representative groups<sup>289</sup> contribute to a view that the introduction of the framework for the rulings regime would be a minor, pragmatic development upon pre-existing pillars.

As for the latter, HMRC does not reject the idea that it should be bound to representations that it makes to taxpayers. Where it produces advice for a taxpayer who has produced all the relevant facts and has drawn HMRC's attention to the relevant issues, it will consider itself bound.<sup>290</sup> Where it later materializes that HMRC's advice was incorrect in law, it will still consider itself bound provided that the taxpayer can show detrimental reliance<sup>291</sup> (although this approach is stricter than that which exists in law).<sup>292</sup> As such, the Rubicon has already been crossed in terms of being comfortable with being bound to advice given to taxpayers. The allowance of binding rulings is a minor development upon this. The counterargument will be that HMRC's primary concern is that being bound may conflict with its statutory duty to collect all taxes that are due.<sup>293</sup> This argument must be read in light of the fact however that the provision of binding rulings will *also* have a statutory footing. Parliament's intention that HMRC should collect taxes due, already acknowledged to be subject to HMRC's managerial discretion,<sup>294</sup> should be

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<sup>288</sup> Part III. 4.4. Consultation with taxpayers, see text at n 254.

<sup>289</sup> Part III. 4.4. Consultation with taxpayers, see text at n 250.

<sup>290</sup> HMRC, *When you can rely on information or advice provided by HM Revenue and Customs* (March 2009), available at: <<https://www.gov.uk/guidance/when-you-can-rely-on-information-or-advice-provided-by-hm-revenue-and-customs>> accessed 31 September 2017.

<sup>291</sup> *ibid.*

<sup>292</sup> Part III. 5.2.1.3. Interim remark, see text at n 414.

<sup>293</sup> CRCA 2005, s.5. See: HMRC, *When you can rely on information or advice provided by HM Revenue and Customs* (n 290).

<sup>294</sup> See generally Part II. 2.1.2 Understanding HMRC's Managerial Discretion.

balanced against Parliament's intention that HMRC should provide binding rulings. The provision of rulings accordingly would not be an abdication of HMRC's responsibilities, but rather a furtherance of them.

Another concern of HMRC will be that it would not like to relinquish control over what should be binding for fear that taxpayers might use it for the purposes of tax avoidance. HMRC to this end has long sought to refuse to apply the terms of published ESCs where they are used for the purposes of tax avoidance, and the High Court in *R v Inspector of Taxes, ex parte Fulford-Dobson* indulged the body.<sup>295</sup> The concern of HMRC should first be tempered by the fact that the extensive consultative framework will regulate the chances of this arising. With the Public Rulings Panel, 'Working Together' Group, and HMRC officials involved in the process, it is less likely that these possibilities for tax avoidance will slip through. Secondly, HMRC now has a range of tools at its disposal to combat tax avoidance<sup>296</sup> which will *continue to apply* and will override the ruling in circumstances where they apply. For instance, HMRC may apply the GAAR to counteract tax arrangements which are abusive<sup>297</sup> and as with Australia,<sup>298</sup> the GAAR will apply to rulings. The Disclosure of Tax Avoidance Schemes ('DOTAS') rules meanwhile broadly require those who have engaged in

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<sup>295</sup> *R v Inspector of Taxes, ex parte Fulford-Dobson* [1987] 1 QB 978 (McNeill J) and also *R (Bampton) v King* [2012] EWCA Civ 1744, [2014] STC 56 [109].

<sup>296</sup> See HMRC, *Dealing with HMRC: Tax Avoidance*, available at: <<https://www.gov.uk/topic/dealing-with-hmrc/tax-avoidance>> accessed 31 September 2017.

<sup>297</sup> HMRC, *Tax Avoidance: General Anti-Abuse Rule* (March 2017), available at: <<https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules>> accessed 31 September 2017.

<sup>298</sup> On which, see: Australian Tax Office, *PS LA 2005/24: Application of General Anti-Avoidance Rules* (September 2016).

tax avoidance arrangements to notify HMRC.<sup>299</sup> The Promoters of Tax Avoidance Schemes ('POTAS') rules oblige certain promoters of schemes to notify their clients that HMRC is monitoring them, to disclose details of their products and clients to HMRC, and to warn clients about the risks of tax avoidance.<sup>300</sup> Finally, there are Accelerated Payment Notices, Partner Payment Notices and Follower Notices.<sup>301</sup> The effect of these is to force the hands of taxpayers in defined circumstances<sup>302</sup> to either settle the dispute, or to pay the disputed tax amount upfront before proceeding with an appeal to the tribunals on the substance of the arrangements. Each of these devices would still be applicable to public rulings. With so many powerful tools to combat avoidance and a framework which regulates the possibility of it arising in the first place, concerns in this sphere about relinquishing control for fear of exploitation by unscrupulous taxpayers would be misplaced.

Finally, it would be materially in HMRC's interests to fully engage with the new framework. A system of binding public rulings would reduce operational costs for HMRC. As stressed by Moses LJ in the Court of Appeal hearing of *Gaines-Cooper*<sup>303</sup> and cited with approval in the Supreme Court by Lord Wilson:<sup>304</sup>

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<sup>299</sup> See: HMRC, *Disclosure of Tax Avoidance Schemes Guidance* (October 2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/492629/DO\\_TAS\\_guidance\\_Nov\\_15\\_version\\_-\\_for\\_publishing-3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492629/DO_TAS_guidance_Nov_15_version_-_for_publishing-3.pdf)> accessed 31 September 2017.

<sup>300</sup> Finance Act 2014, Part 5 and Schedules 34-36. See: HMRC, *Promoters of Tax Avoidance Schemes Guidance* (September 2015), available at: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/454865/PO\\_TAS.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454865/PO_TAS.pdf)> accessed 31 September 2017.

<sup>301</sup> HMRC, *Follower notices and accelerated payments* (July 2015), available at: <<https://www.gov.uk/government/publications/follower-notices-and-accelerated-payments/follower-notices-and-accelerated-payments>> accessed 31 September 2017

<sup>302</sup> For Accelerated Payment Notices and Partner Payment Notices, see: Finance Act 2014, s. 219-227, 230-231. For Follower Notices, see: Finance Act 2014, Part 4, Chapter 2.

<sup>303</sup> *R (Davies) v HMRC; R (Gaines-Cooper) v HMRC* [2010] EWCA Civ 83, (2010) STC 860 ('*Gaines-Cooper* (CA)').

<sup>304</sup> *Gaines-Cooper* (n 237) [25].

The importance of the extent to which thousands of taxpayers may rely upon guidance, of great significance as to how they will manage their lives, cannot be doubted.<sup>305</sup>

Public rulings should obviate the need for taxpayers to individually consult HMRC, thereby reducing costs.<sup>306</sup> Thus, whilst it is certainly true, as Greg Weeks has suggested, that poorly drafted general soft law places risk on the taxpayer,<sup>307</sup> it also places a financial burden on the public authority concerned. Given budgetary constraints and the need generally to allocate resources in an efficient manner, avoiding this eventually is undoubtedly in HMRC's interests.

#### 4.1.3. A rule to distinguish between soft law and public rulings

The process for producing a public ruling will evidently be time-consuming and resource intensive. But HMRC produces several documents almost on a daily basis.<sup>308</sup> Additionally, there is an almost infinite number of soft law instruments promulgated by HMRC which may not become formal publications. It is obvious that it is not feasible for all these pieces of soft law to be processed through the new framework. Even in Australia, there is a trend away from using Rulings Panels in the preparation of rulings.<sup>309</sup> The question then is how is it decided which pieces of soft law should be subjected to this more rigorous process, and which should not.

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<sup>305</sup> *Gaines-Cooper* (CA) (n 303) [12].

<sup>306</sup> On this, see: Rebecca Williams, 'The Multiple Doctrines of Legitimate Expectations' (2016) 132(4) LQR 639, 651-652.

<sup>307</sup> Weeks, *Soft Law and Public Authorities* (n 235) 118.

<sup>308</sup> See HMRC, *Latest Documents*, available at:

<<https://www.gov.uk/government/latest?departments%5B%5D=hm-revenue-customs>> accessed 31 September 2017.

<sup>309</sup> Part IV. 3.3.1 Scrutiny, see text at n 106.

A simple answer is given to this. In keeping with the idea that general soft law ought to act as a guide to taxpayers rights and obligations under the law, the rule should be that general soft law which has a significant impact upon the rights and obligations of taxpayers should be processed through the rulings regime. This can be by reason of introducing new rights and obligations, amending them or removing them.

A secondary question arises then as to who makes the decision as to what has a significant impact? The decision should reside ultimately with HMRC, after having consulted the 'Working Together' Group as should arise at Stage 1 in the process as set out above. HMRC will be armed with the most relevant information, will be the best-placed body in the State, and accordingly most institutionally competent, to decide upon the extent to which changes will have a significant impact on taxpayers.<sup>310</sup> Moreover, in practice HMRC does already decide to consult on changes to rules which have a significant impact on taxpayers.<sup>311</sup> The rule itself would be legally enforceable in theory, but in reality the courts would and *should* apply a significant degree of deference to HMRC's decision.<sup>312</sup> Although this may appear to allow the fox to guard the henhouse, it is worth restating that it is materially in HMRC's interests to engage with the new programme and that HMRC is already *de facto* committed to such a structure.<sup>313</sup>

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<sup>310</sup> On deference to public authorities generally, see: Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (CUP 2012).

<sup>311</sup> Take the example of changes to IR35 for instance which concerns intermediaries. See: HMRC, *Intermediaries Legislation (IR35): discussion document* (July 2015).

<sup>312</sup> In *Hely-Hutchinson*, Whipple J stressed that the Court should not substitute its decision for that of HMRC (*Hely-Hutchinson* (n 38) [75]).

<sup>313</sup> See generally Part IV. 4.1.2. The success of the programme: contribution from Parliament, the Government and HMRC.

It would nevertheless be desirable for some level of oversight however. The Adjudicator's Office and the Ombudsman could perform this role. Taxpayers could complain in the usual manner to these bodies<sup>314</sup> about particular decisions not to produce public rulings and instead issue ordinary general soft law. The complaints could then be assessed by the impartial bodies and address any queries requiring answers to HMRC. The other option would be to rely upon the National Audit Office ('NAO') in its annual report of HMRC to investigate how HMRC has operated the rule. However, the triumvirate of the Comptroller & Auditor General, NAO and Public Accounts Committee is better equipped to deal with value-for-money issues whilst on the other hand,<sup>315</sup> the quasi-political route through the Ombudsman and Adjudicator's Office has greater potential of holding HMRC to account on issues in respect of general soft law.<sup>316</sup> Of course ideally there would be the introduction of a new body which could provide oversight of this sort. As this thesis focuses upon pragmatic change, this will not be recommended. Needless to say, if the proposals of others were to be taken up<sup>317</sup> and a new body introduced which could perform this task, then scrutiny of HMRC's decisions not to produce more public rulings should fall within the remit of that body.

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<sup>314</sup> Note that the process is to first complain to the Adjudicator's Office and if still dissatisfied to complain to the Ombudsman. See: Adjudicator's Office, *The Role of the Adjudicator* (August 2017), 1 available at: <<http://www.adjudicatorsoffice.gov.uk/pdf/ao1.pdf>> accessed 31 September 2017.

<sup>315</sup> See generally Part III. 4.2. Comptroller & Auditor General, National Audit Office and Public Accounts Committee.

<sup>316</sup> See generally Part III. 6. Cometh the hour, cometh the Ombudsman?

<sup>317</sup> Judith Freedman's idea of Joint Parliamentary Select Committee on Taxation comes to mind. See: Judith Freedman, 'Managing Tax Complexity: The Institutional Framework for Tax Policy-Making and Oversight' in Chris Evans, Richard Krever, Peter Mellor (ed), *Tax Simplification* (Kluwer Law, 2015) 275. See also: House of Lords Select Committee on Economic Affairs, *Tackling Corporate Tax Avoidance* (n 23) [119]-[124].

A final question arises as to what forms of soft law should HMRC choose to process through the rulings regime? Importantly, all forms of general HMRC soft law, from that contained in Manuals to that in Guidance, should be considered for promulgation through the rulings regime if there is a significant impact. Most obviously appropriate for public rulings are those forms of soft law which require a greater degree of legal analysis. Thus, substantive general soft law and explanatory general soft law would be unlikely to benefit greatly from the rulings regime, as with advisory general soft law which applies to a class of taxpayers, unless the law in question is complex or difficult to administer. Interpretative general soft law would be more likely to benefit than the three above categories. It might be queried whether concessionary general soft law or administrative soft law which seeks to grant HMRC discretion on how to proceed could be appropriately processed through the rulings regime. In both, there is a potential conflict with legislative intent: in the former, HMRC should not seek to produce rulings inconsistent with the underlying law and in the latter, the legislative intention is that the decision on how to proceed should be taken by HMRC rather than some other body. Neither in fact would result in a conflict with legislative intent. In the case of the latter, it should be recalled that the decision is ultimately left with HMRC as to the scope and substance of the public ruling. The intermediate steps merely seek to provide a framework within which issues can be alleviated, but do not prevent HMRC from exercising control over the final ruling which is produced (whilst still having regard to the flexibility principle explained above).<sup>318</sup> The issue is more complicated in respect of

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<sup>318</sup> Part II. 3.1.2. How 'structuring discretion' advances the case for soft law, see text at n 270.

concessionary general soft law. Whilst HMRC should generally not seek to depart from the law as prescribed by Parliament, it should be recalled that Parliamentary sovereignty also requires HMRC to act in accordance with the ideal of good administration. Thus, binding HMRC to a position which is founded upon a Revenue legal error can be justified.<sup>319</sup> Further it should be noted that the public rulings regime seeks to provide safeguards to ensure that the ruling is consistent with the underlying law. Finally, it should be recalled that there is a distinction between concessions which depart from the strict law but can be nevertheless justified by recourse to legitimate interpretation or to HMRC's managerial discretion and those that cannot. To this end, it is not the case that all concessionary soft law is inconsistent with the underlying law. Pulling these points together, it becomes clear that concessionary general soft law could be subjected to the public rulings process. The rulings process provides safeguards to ensure that there is not an inconsistency with the underlying law, something which does not exist at present for concessionary general soft law. Thus, the process provides an advantage over the status quo. Further, if the eventual ruling were nevertheless to be inconsistent with the underlying law, then its existence would be justified by the ideal of good administration.

Ultimately however it must be accepted that although in principle all forms of general soft law could be processed through the public rulings regime, HMRC will be unlikely to seek to relinquish the de facto discretion that it has acquired in respect of broadly drafted anti-avoidance provisions. An alternative forum for checking whether transactions or structures would be caught by anti-

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<sup>319</sup> See above Part IV. 2.1.2.1. Permissibility of Binding advice.

avoidance law already exists in the form of the GAAR regime (albeit that this relates to the specific GAAR rather than all existing anti-avoidance provisions). To date however HMRC has used this regime just once.<sup>320</sup> Accordingly, whilst HMRC could in principle seek to process through the public rulings regime general soft law which it has promulgated to deal with anti-avoidance provisions, it is unlikely to do so in practice. The same could equally be said in relation to discretionary powers that HMRC has acquired to deal with avoidance such as in respect of APNs and that the body would be unlikely to seek to process general soft law stipulating how the body will operate the discretionary power if it is broadly satisfied with the status quo. The thesis has no answer to this particular problem other than to reiterate that HMRC, the government and Parliament have an interest in buying in to the regime.<sup>321</sup>

#### 4.1.4. Interim Remarks

The introduction of binding public rulings in the UK is a proposal which is desirable normatively by reason of the enhancement of quality, accessibility, scrutiny and reliability of general soft law, but one which is also practically achievable. There would need to be the establishment of the Public Rulings Panel, as well as minor legislative amendments, but otherwise, the fundamental pillars for this regime are already in place. The framework for consultation and production of soft law in the form of rulings would simply be regularised into 10 formal Stages. The successful implementation of the regime will rely upon the

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<sup>320</sup> HMRC, *GAAR Advisory Panel opinion: employee rewards using gold bullion* (August 2017), available at: <<https://www.gov.uk/government/publications/gaar-advisory-panel-opinion-employee-rewards-using-gold-bullion>> accessed 31 September 2017.

<sup>321</sup> See generally Part IV.4.1.2. The success of the programme: contribution from Parliament, the Government and HMRC.

engagement of Parliament, the Government and HMRC, but as the foregoing analysis has set out, there is much cause for optimism in terms of compliance by these parties.

However, not all general HMRC soft law could possibly be processed through the public rulings regime and so it was decided that the cutoff point should be all pieces of general HMRC soft law which have a significant impact upon taxpayers rights and obligations, with oversight in turn being provided by the Adjudicator's Office and the Ombudsman. No change to the status or powers of the Adjudicator or Ombudsman is envisaged, but rather simply that the bodies would adapt their roles so as to provide supervision of HMRC decisions not to produce rulings. The question which follows from this is, what should be done in relation to general HMRC soft law which falls on the other side of this divide?

#### **4.2. Proposals in respect of soft law not having a 'significant impact'**

The pragmatic objective of this thesis is to produce reforms which can augment the quality, accessibility, scrutiny and reliability of forms of general HMRC soft law. The rulings regime proposal will immeasurably improve this soft law as against these normative benchmarks, but this more rigorous process can only apply to a modest amount of the general HMRC soft law promulgated every year. A package of reforms could be introduced in respect of this remaining general HMRC soft law which is not considered to have a 'significant impact' upon taxpayers' rights and obligations. The proceeding discussion will seek to break these down according to our overarching benchmarks.<sup>322</sup> It will be

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<sup>322</sup> Although scrutiny was the third normative criterion tested against general HMRC soft law in Part III of this thesis, it is considered first here as scrutiny has already been demonstrated to be a

highlighted herein additionally that the introduction of the public rulings regime will have a beneficial read across general HMRC soft law generally.

#### **4.2.1. Recommendations in respect of the four normative benchmarks**

##### **4.2.1.1. Recommendations in respect of scrutiny**

The current scheme for the production of general HMRC soft law is not without merit entirely in terms of the scrutiny which is afforded. The steps to increase participation through the consultative framework and in particular the engagement of representative groups through the ‘Working Together’ initiative are to be commended. HMRC should continue to operate through these channels and ensure that the process for producing publications is as transparent as possible.

The lack of a formal scrutinising mechanism was one of the chief criticisms that this thesis has made.<sup>323</sup> Although it was cited that the oversight which can be afforded by the Adjudicator’s Office and the Ombudsman could not comprehensively plug the holes in the existing framework, it was suggested that they could work in tandem with any new institution. As set out above, complaints about failure to put some pieces of soft law through the rulings regime should be diverted through this quasi-legal channel. With that in mind, a further recommendation is that complaints about soft law more generally in relation to quality, accessibility or reliability should be processed through the Adjudicator’s Office, who will then adjudicate the complaints and put pressure

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major component of the Australian framework and is integral to improving upon deficits in terms of quality, accessibility and reliability.

<sup>323</sup> See generally Part III. 4. Analysis of the scrutiny afforded to HMRC soft law.

on HMRC to correct the issues. If the complainant is still unhappy after referring the issue to the Adjudicator's Office, she can issue the complaint to the Ombudsman.<sup>324</sup> Importantly, the representative bodies, the 'Working Together' Groups and the Public Rulings Panel should also process their complaints through the Adjudicator's Office and the Ombudsman thereafter.

The effectiveness of the Ombudsman in applying pressure to correct issues of quality, accessibility and reliability as set out earlier in this thesis equally applies in the case of the Adjudicator's Office as the roles, powers and influence of the bodies are almost identical in respect of general HMRC soft law.<sup>325</sup> The newly appointed Adjudicator Helen Megarry, a qualified solicitor, is eminently placed to perform this role accordingly and apply the necessary scrutiny to complaints issued in respect of general soft law by taxpayers, and in particular, the representative bodies, the 'Working Together' Group and the Public Rulings Panel.

Finally, the tribunals (access to the tribunals on issues of general HMRC soft law will be recommended to be freed up below)<sup>326</sup> and courts should take a more positive role in checking general HMRC soft law. The cases of *Malone v UK*,<sup>327</sup> *Silver v United Kingdom*,<sup>328</sup> and *R (Purdy) v Director of Public Prosecutions* ('Purdy')<sup>329</sup> and *R (Nicklinson) v Ministry of Justice* ('Nicklinson')<sup>330</sup> in particular, highlight the role that can be played by judges in ensuring that HMRC's general

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<sup>324</sup> The Adjudicator is simply the prior step to the Ombudsman. See: Adjudicator's Office, *The Role of the Adjudicator* (n 314) 1.

<sup>325</sup> See generally, Part III. 6. Cometh the hour, cometh the Ombudsman?

<sup>326</sup> Part IV. 4.2.4. Reliability, see text at n 384.

<sup>327</sup> *Malone v UK* (1985) 7 EHRR 14.

<sup>328</sup> *Silver v United Kingdom* (1983) 5 EHRR 347.

<sup>329</sup> *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345 (HL).

<sup>330</sup> *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2014] 3 WLR 200.

soft law satisfies the normative requirements of quality, accessibility and reliability.<sup>331</sup> Meanwhile, the non-intervention of Green J in *Privacy International v HMRC* ('*Privacy International*')<sup>332</sup> was shown to be inconsistent with *Purdy* and *Nicklinson*, inconsistent with his own reasoning and was criticised in principle.<sup>333</sup> The learned judge ought to have applied pressure to HMRC to correct its general soft law so that the circumstances in which HMRC may depart from its duty of confidentiality were more clearly elaborated upon, thereby helping taxpayers to understand better the scope of their right to confidentiality in respect of their tax affairs. The courts are entitled to make formal directions and, as arose in *Purdy* and *Nicklinson* should do so where there are clearly issues in relation to the soft law.

The tribunals, which have the added advantage of being staffed with tax experts, can also positively influence general HMRC soft law. This was witnessed for instance in a series of First-Tier Tribunal decisions wherein Geraint Jones QC held it unfair that HMRC failed to notify late paying taxpayers that penalties were accruing.<sup>334</sup> This was notwithstanding the fact that the relevant statutory provisions imposed no such duty explicitly on HMRC.<sup>335</sup> In his view, the objective of the legislation was that of compliance and not revenue-raising.<sup>336</sup> Although this line of argument was overturned by the Upper Tribunal on the basis of

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<sup>331</sup> See generally: Part II. 3.1.1 How the rule of law advances the case for soft law.

<sup>332</sup> *Privacy International v HMRC* [2014] EWHC 1475, [2015] STC 948.

<sup>333</sup> Part III. 2.2. The problem of soft law being Insufficiently clear, see text at n 103.

<sup>334</sup> *HOK Limited v The Commissioners for HMRC* [2011] UKFTT 433 (TC); *Sunset Travel Limited v The Commissioners for HMRC* [2012] UKFTT 471 (TC).

<sup>335</sup> *Hok* (n 334) [10]; *Sunset Travel* (n 334) [16].

<sup>336</sup> *Hok* (n 334) [10].

jurisdiction,<sup>337</sup> HMRC did nevertheless change its practice on the matter so that notifications about penalties would be sent out to late paying taxpayers more frequently. This change was set out in HMRC soft law.<sup>338</sup> This is a clear example of the ability of the tribunals to intervene in respect of HMRC practice so as to force the body to produce general soft law which better informs taxpayers of their rights and obligations under the law.<sup>339</sup>

The use of explicit directions by the courts and tribunals contrasts with the informal 'nudge' approach which is purported to have been adopted in *R (Wilkinson) v IRC* ('*Wilkinson*')<sup>340</sup> and was certainly adopted in the *Vestey* cases.<sup>341</sup> This informal approach does not have the desired effect of forcing HMRC to take action.<sup>342</sup> What can be adduced accordingly is that if the courts and tribunals are to have any tangible impact in the area of general soft law, their directions to HMRC need to be explicit. When intervention should occur is a matter of discretion generally for the courts and tribunals, outside the specific circumstances in which the failure to promulgate sufficiently clear and accessible general soft law amounts to an infringement of human rights as in *Purdy* and *Nicklinson*. The courts and tribunals can however be guided as to when they should direct HMRC on its general soft law. In such relevant cases, the following considerations, derived from this thesis, should be taken into account:

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<sup>337</sup> *Revenue and Customs Commissioners v Hok Limited* [2012] UKUT 363 (TCC) [55], [2013] STC 225.

<sup>338</sup> *Royal Institute of Navigation v R & C Commrs* [2012] UKFTT 472 (TC) [26]-[27].

<sup>339</sup> *ibid* [28].

<sup>340</sup> *R (Wilkinson) v IRC* [2005] UKHL 30, [2006] STC 270.

<sup>341</sup> *Vestey v IRC* [1980] AC 1148; *Vestey v IRC (no. 2)* [1979] Ch. 198 (HC) 202; *Vestey v IRC (no. 1)* [1979] Ch. 177.

<sup>342</sup> See generally Part III. 4.3.2. Relationship with HMRC.

- ***Whether the production by HMRC of general soft law, or amendment of existing general soft law, would better inform taxpayers as to their rights and obligations under the law.*** This was highlighted in Part II as being at the core of the normative case for the production of general soft law. In particular, the courts and tribunals should take into account the scale of the ambiguity of the underlying law or existing soft law at issue, as in the case of *Malone v UK*<sup>343</sup> and as recommended in the case of HMRC's general soft law on its duty of confidentiality.<sup>344</sup> The courts and tribunals should also take into account the degree to which the absence of general soft law or sufficiently clear general soft law infringes upon taxpayers' rights. This was a notable concern in the cases of *Purdy* and *Nicklinson* in respect of the right to respect for family and private life, and was also a concern in the case of property rights (although not expressed in such terms) in respect of Geraint Jones QC's intervention in relation to general HMRC soft law on penalty notifications (as the effect was to extract taxpayers' property, ie money, through penalties).
- ***Whether HMRC's existing general soft law is inconsistent with the law.*** General soft law which conflicts with the underlying law is problematic for several reasons as stressed throughout the thesis. For instance, it can undermine the principle of Parliamentary sovereignty, but can also have a significant detrimental impact upon taxpayers' rights as it can jeopardise a taxpayer's legitimate expectations claim.<sup>345</sup> Courts often repeat that in general a taxpayer's only legitimate expectation is to be taxed in accordance with the law.<sup>346</sup>
- ***Whether HMRC's existing general soft law undermines the ability of taxpayers to rely upon it by virtue of having unnecessary caveats, qualifications and provisos.*** As stressed in this thesis, the addition of qualifying language to general soft law can undermine the ability of taxpayers to rely upon it.<sup>347</sup> Taxpayers are left to seek further assurances from HMRC about their taxing situation, or to dispute the underlying substantive matters through the courts and tribunals (thereby ignoring the general soft law). This undermines the utility of soft law in the first place which is supposed to obviate the need for further steps on

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<sup>343</sup> *Malone v UK* (1985) 7 EHRR 14.

<sup>344</sup> Part III. 2.2. The problem of soft law being Insufficiently clear.

<sup>345</sup> Part III. 5.2.1. The doctrine of ultra vires: the Achilles' heel of legitimate expectations?

<sup>346</sup> Part III. 5.2.1.1. The orthodox position.

<sup>347</sup> See Part III. 5.2.2.2. Is there anything devoid of relevant qualification?

the part of the taxpayer.<sup>348</sup> Further, unnecessary qualifying language deprives taxpayers of the prospect of claiming a legitimate expectation, as there can only arise a legitimate expectation where the soft law is clear, unambiguous and devoid of relevant qualification.<sup>349</sup>

- ***Whether HMRC's general soft law has retrospective elements.*** If this is the case, courts should enquire as to whether this results in comparative unfairness or whether taxpayers have already relied to their detriment upon the soft law.<sup>350</sup> However, if courts and tribunals have made findings that the retroactive elements are unlawful, then they should go one step further and direct HMRC to amend its soft law accordingly.

#### **4.2.1.2. Recommendations in respect of quality**

General soft law lacks its requisite quality where it is insufficiently clear and where it is inconsistent with the underlying law. Engagement with taxpayers and representative bodies helps to militate against these issues. Increasing transparency accordingly and having a safeguard in the form of the Adjudicator's Office investigating HMRC on the back of complaints from taxpayers, representative groups, the 'Working Together' Group and the Public Rulings Panel, are highly useful steps. This will allow for greater pressure to be applied to HMRC to correct its general soft law which is inconsistent with the underlying law, or which is lacking in clarity. A further element will be increased attention which the courts and tribunals additionally will pay to general HMRC soft law.

Furthermore, the introduction of the public rulings regime in the UK will have an impact on the quality overall of general soft law. As highlighted already, it is in the arena of concessions that there is greatest likelihood for general soft

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<sup>348</sup> See *Gaines-Cooper* (CA) (n 303) [12].

<sup>349</sup> On which, see Part III. 5.2.2.2. Is there anything devoid of relevant qualification?

<sup>350</sup> Part IV. 4.2.1.3. Recommendations in respect of accessibility, see text at n 381.

law to go beyond the limits of the underlying law.<sup>351</sup> ESCs which depart in a substantial manner from the law however are most likely to be processed through the rulings regime.<sup>352</sup> To this end, the most significant threat to consistency with the law is neutralized in the new system.

In terms of more tangential reforms which can be recommended in this area, the thesis proposes the introduction of benchmarks against which general HMRC soft law can be adjudged when it is being promulgated. These benchmarks could then focus the mind of the writer upon the quality of the soft law. Thus, the following questions (which in turn should be enshrined generally in HMRC internal soft law) should be answered during HMRC's ordinary promulgation process within its departments:

- ***Is the soft law consistent with the law?***
- ***Is the soft law sufficiently clear so that it allows the ordinary taxpayer to better understand their rights and obligations under the law?***
- A related question is ***whether the soft law contains unnecessary qualifying language?*** It goes without saying that caveats, qualifications and provisos restrict the clarity of general soft law. This in turn will undermine the utility of the soft law, as taxpayers are not given a sufficiently clear picture as to their rights and obligations under the law.

A more general recommendation as regards the quality of general soft law and its relationship with the legislative process must be made. With the existence of general soft law and in particular with the presence of a public rulings regime, the temptation for legislation to be drafted more broadly and in more generalised terms, knowing that general soft law or the rulings regime

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<sup>351</sup> Part III. 2.1. The problem of soft law being inconsistent with the law.

<sup>352</sup> Part IV. 4.1.3. A rule to distinguish between soft law and public rulings, see text at n 317.

could step in to fill the gaps, as has occurred in the anti-avoidance context for instance.<sup>353</sup> This creates issues in terms of reliability for taxpayers if the general soft law in fact is concessionary and also creates a problem for the rule of law in that the law lacks the requisite certainty. It further denudes Parliament's role and responsibility in respect of levying taxes. This is problematic from the perspective of elected politicians who are responsible for raising the funds necessary for the running of the State. By neglecting to pass sufficiently clear laws which can be relied upon to provide estimates as to revenues raised, the politicians can be held to account for failure to raise sufficient funds, but without having a clear idea as to what amounts can be raised.

#### *4.2.1.3. Recommendations in respect of accessibility*

The three critical issues identified in this thesis in relation to accessibility are non-publication, retrospection and mingling. As for publication, the interaction between HMRC, the Working Together Group, the Public Rulings Panel, the courts, tribunals, and taxpayers will generally help to bring to light important issues on which HMRC should make its stance known. The transparency of the regime and the ability of these groups to place pressure on HMRC to bring to the fore unpublished general soft law are key facets to this end. The channeling of complaints by these bodies through the Adjudicator's Office and the Ombudsman will improve upon this area also. These two offices are particularly well placed to apply pressure on HMRC to either publicise its internal soft law, or even to produce general soft law in the first place. The

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<sup>353</sup> See for instance above Part III.2.1. The problem of soft law being inconsistent with the law, see text at n 55.

evidence that the quasi-legal avenue can be an effective tool as regards the former has already been identified earlier in this thesis.<sup>354</sup> As for the latter, the soft law *Putting things right: how to complain - Factsheet C/FS*<sup>355</sup> demonstrates the utility of the quasi-legal route.<sup>356</sup> The factsheet owes its genesis to investigation and pressure placed upon the Inland Revenue by both the Ombudsman and the Select Committee on the Parliamentary Commissioner for Administration in the 1970s. Sir Norman Price, then Chairman of the Board of the Inland Revenue, wrote to the Select Committee in 1975 to reveal that the concerted pressure had forced him to reconsider the Board's previous policy, which was a blanket refusal to cover the expenses of taxpayers. The review led him to the conclusion that the rigidity of the policy created severe unfairness in those instances where the taxpayer's costs arose directly out of a serious error on the part of the Board itself. The Chairman acknowledged that this could occur in various different circumstances, ranging from cases where no responsible official, acting in good faith with proper care, could reasonably have made such an error to cases where the original action was based upon a pardonable error, but which manifests itself into something much more serious if it persists. As a result, the Chairman decided that as a matter of principle, the Board should consider compensation in cases of this kind and accordingly a new practice

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<sup>354</sup> See Part III. 6.2.1.3. Publication and Part III. 6.3.2. Supervision of HMRC soft law and holding the body to its soft law.

<sup>355</sup> HMRC, *Putting things right: how to complain - Factsheet C/FS* (February 2015), available at: <<https://www.gov.uk/government/publications/putting-things-right-how-to-complain-factsheet-cfs>> accessed 31 September 2017.

<sup>356</sup> For another instance of achieving systemic change, see: Parliamentary Commissioner for Administration, *Annual report for 1995* (HC 1995/96, 296) [54].

emerged.<sup>357</sup> The policy was thereafter elaborated upon in Statement of Practice A31<sup>358</sup> and is now to be found in HMRC Guidance.<sup>359</sup>

One particular area of concern in relation to non-publication of general soft law is in relation to HMRC Manuals. Redactions in HMRC Manuals for instance are commonplace.<sup>360</sup> The relevant information is removed and in its place is the line: 'This content has been withheld because of exemptions in the Freedom of Information Act 2000'. It is not clear on what ground the information in the HMRC Manuals is exempted under the Freedom of Information Act 2000 ('FOIA 2000').<sup>361</sup> In light of HMRC's vague guidance on the scope of its duty of confidentiality, and its contradictory approach to the legality of disclosures of taxpayer information, an argument can be made that some of the information redacted in HMRC Manuals under the guise of protections under FOIA 2000 might not be exempt under the Act. It is recalled that in *Privacy International*, the Court held that HMRC had misconceived its duty of confidentiality and hence that a blanket refusal to the request of the claimant in the case was unlawful.<sup>362</sup>

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<sup>357</sup> Select Committee on the Parliamentary Commissioner for Administration, *First report from the Select Committee on the Parliamentary Commissioner for Administration* (HC 1974-75, 454) 78-79.

<sup>358</sup> Statement of Practice A31, see: <<https://www.gov.uk/government/publications/obsolete-statements-applicable-to-individuals-income-tax-and-interest-on-tax/obsolete-statements-applicable-to-individuals-income-tax-and-interest-on-tax>> accessed 31 September 2017.

<sup>359</sup> HMRC, *Putting things right: how to complain - Factsheet C/FS* (n 355).

<sup>360</sup> See for instance, HMRC, *AGL6200: Aggregates Levy Guidance* (August 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/aggregates-levy/agl6200>> accessed 31 September 2017; HMRC, *APD6600: Air Passenger Duty* (October 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/air-passenger-duty/apd6600>> accessed 31 September 2017; HMRC, *AWRS60300: Alcohol Wholesaler Registration Scheme* (July 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/alcohol-wholesaler-registration-scheme/awrs60300>> accessed 31 September 2017; HMRC, *ARTG6010: Appeals reviews and tribunals guidance* (August 2016), available at: <<https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg6010>> accessed 31 September 2017.

<sup>361</sup> See generally, Freedom of Information Act 2000 ('FOIA 2000'), Part II.

<sup>362</sup> *Privacy International* (n 332). See also Part III. 2.2. The problem of soft law being Insufficiently clear.

Conversely in *R (Ingenious Media and McKenna) v HMRC*<sup>363</sup> however, HMRC contended that it had a relatively broad power to disclose information.<sup>364</sup> The inconsistency in HMRC's approach to the boundaries of its duty of confidentiality opens up the possibility that it has an equally inconsistent approach to the scope of the exemptions in relation to FOIA 2000. This is because there is an intimate relationship between the information protected by both. For instance, both sets of rules cover information provided in confidence,<sup>365</sup> cover information which contains personal information,<sup>366</sup> and both allow for disclosure of information otherwise protected where the disclosure is in the 'public interest'.<sup>367</sup> Moreover, CRCA 2005, s. 23 makes it explicitly clear that information which cannot be disclosed as a result of HMRC's duty of confidentiality is also exempt under the FOIA 2000 if its release would identify, either expressly or by implication, the taxpayer concerned. Furthermore, there is evidence too of information in HMRC Manuals being redacted under the guise of being exempted by the FOIA 2000 which is not in fact exempted. A section of HMRC's Statutory Payments Manual was previously redacted owing to a purported exemption under the FOIA 2000. A subsequent Freedom of Information request however revealed that the information had been redacted in error.<sup>368</sup>

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<sup>363</sup> *R (Ingenious Media and McKenna) v HMRC* [2013] EWHC 3258, [2014] STC 673; upheld: EWCA Civ 173, [2015] STC 1357; overturned: [2016] UKSC 54, [2016] 1 WLR 4164.

<sup>364</sup> *Privacy International* (n 332) [60].

<sup>365</sup> FOIA 2000, s. 41; CRCA 2005, s. 18.

<sup>366</sup> FOIA 2000, s. 40; CRCA 2005, s. 22.

<sup>367</sup> See for instance FOIA 2000, ss 22, 30, 31, 36, 38, 39, 40, 42, 43 and CRCA 2005, s. 20.

<sup>368</sup> *Request for redacted information from SSP manual*, available at: <[https://www.whatdotheyknow.com/request/request\\_for\\_redacted\\_information](https://www.whatdotheyknow.com/request/request_for_redacted_information)> accessed 31 September 2017.

There is precedence for the relevant body, namely the Information Commissioner's Office,<sup>369</sup> to investigate whether undisclosed HMRC soft law is actually exempted under the FOIA 2000. On 18 September 2006 there was a complaint to the Commissioner about the way a taxpayer's request for information under the FOIA 2000 had been handled.<sup>370</sup> The complainant specifically asked the Commissioner to investigate the refusal by HMRC to disclose the information that the body held which supported its interpretation of the Taxes Management Act 1970, s. 95(2) that a repayment (whether actually made or not) represents a negative amount of tax payable. The complainant had requested a copy of the relevant section of the HMRC Manual or other guidance notes that were used to determine the penalty that that HMRC sought to impose. The Commissioner in turn contacted HMRC on the 29 January 2007 to ask for a copy of the information being withheld and any further representations HMRC wished to make. HMRC responded on 7 February 2007 enclosing a copy of the withheld information, which consisted of legal advice, an email chain and worked examples to clarify the advice given. HMRC clarified the purpose of the advice received and referred the Commissioner to its previous responses to the complainant for its arguments in maintaining the exemption. The Commissioner was satisfied thereafter that the information was properly exempted under FOIA 2000. Although the information which was exempted did not in the end come from an HMRC Manual, the process highlights the ability of the Information Commissioner to assess whether HMRC is properly applying FOIA 2000.

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<sup>369</sup> FOIA 2000, ss. 47-49.

<sup>370</sup> Information Commissioner's Office, *Decision Notice FS50133903* (March 2007).

To this end, it is recommended that there should be a review of the instances in the Manuals where information is redacted purportedly on the basis of FOIA 2000 exemptions. At the time of writing, there were 5,272 such instances. As this would be overly burdensome for the Information Commissioner's Office to investigate, it is instead recommended that HMRC departments should conduct reviews into the Manuals they produce, in liaison with HMRC's Freedom of Information Team. Such a review was already undertaken in relation to the Statutory Payments Manual by the Statutory Payments Technical Team and the Freedom of Information Team following the aforementioned Freedom of Information request which identified the erroneous redaction of information.<sup>371</sup> The Information Commissioner's Office should thereafter investigate a random sample of the redacted information remaining in HMRC Manuals to check whether the information should indeed still be redacted.<sup>372</sup> If dissatisfied, the Information Commissioner's Office should then conduct a more comprehensive review.

As for the other accessibility issues of retrospection and mingling, more minor remedial action is recommended. In respect of HMRC's approach to retrospection, it is suggested that HMRC take a less stringent approach than that which it currently adopts. As it stands, HMRC will retrospectively change its soft law where it turns out to be incorrect in law unless the taxpayer can demonstrate significant detrimental reliance or where the taxpayer's case is

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<sup>371</sup> See above n 368.

<sup>372</sup> This is a similar process to that conducted for the 'Park' report: National Audit Office, *Settling large tax disputes* (June 2012).

closed.<sup>373</sup> In the High Court judgment in the case of *Hely-Hutchinson*<sup>374</sup> however, Whipple J held that it is within HMRC's powers also to refrain from changing general soft law retrospectively, even if the soft law is incorrect, where this would cause comparative unfairness. In other words, HMRC should not make distinctions in treatment between similarly placed taxpayers. Although the decision was overturned by the Court of Appeal, the Court therein did not reject Whipple J's decision that comparative unfairness in addition to detriment is a relevant consideration.<sup>375</sup> It is suggested that HMRC accordingly revisit its approach and adopt a less restrictive stance on the basis of *Hely-Hutchinson*. Furthermore, as a means of properly equipping it with the information to make an informed decision as to the comparative unfairness or otherwise of a retrospective change of policy, HMRC should consult affected parties (as occurred in the case of the change of policy in relation to the tax treatment of unremitted foreign income or gains used as collateral for a loan enjoyed in the UK).<sup>376</sup>

In terms of mingling, the processing of concessions through the rulings regime will have a beneficial impact generally on this problem. It is recalled that it is the mingling of concessionary elements within other pieces of general soft law which is most problematic in terms of accessibility.<sup>377</sup> The removal of concessions where possible from the general bulk of general HMRC soft law to be processed instead into public rulings will accordingly be beneficial. A further

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<sup>373</sup> Part III. 5.2.1.2 Mansworth v Jelley and the Guidance affair.

<sup>374</sup> *Hely-Hutchinson* (n 38).

<sup>375</sup> *HMRC v Hely-Hutchinson* [2017] EWCA Civ 1075, [2017] WLR(D) 517 [37]-[45].

<sup>376</sup> Part III. 4.4. Consultation with taxpayers, see text at n 354.

<sup>377</sup> Part III. 3.3. Mingling of the categories of advice.

step in this direction would be for HMRC, in its continuing analysis of ESCs in the aftermath of *Wilkinson*, to move pieces of soft law which are found to contain concessionary elements into the list of published ESCs. Additionally, the published list of ESCs should also highlight in its introduction that HMRC will generally not be bound by concessions which are incorrect in law, unless the relevant circumstances arise, such as the case being closed, significant detriment being present or comparative unfairness arising. Although a minor shift, it would at least render taxpayers informed as to the risk that they take by relying upon concessions.

HMRC should also consider how soft law publications are produced. There currently appears to be little by way of coherent framework for the production of soft law instruments which in turn leads to issues stemming from miscategorisation such as leaving taxpayers unknowingly in a risky position.<sup>378</sup> It is unclear also whether legal advice is sought routinely in respect of general soft law, which in turn will lead to errors of law being made and muddled, unclear soft law publications. This affects both the quality of soft law and also its reliability, given that where errors are made in general soft law the taxpayer's ability to use the doctrine of legitimate expectations is highly diminished. To this end, it is recommended that HMRC review its internal processes for the production of general soft law instruments and consider whether a coherent and consistent approach can be adopted which would allow for internal legal review.

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<sup>378</sup> See above Part III. 3.3. Mingling of the categories of advice, see text at n 147.

#### 4.2.1.4. Recommendations in respect of reliability

It has been stated that there are four primary limitations to the reliability of general HMRC soft law.<sup>379</sup> The first was the *ultra vires* hurdle itself: that taxpayers could never be certain when they could rely upon general HMRC soft law, as giving effect to the treatment promised in the soft law might be *ultra vires* HMRC. Given that this is not a barrier *per se* to the jurisdiction of the Adjudicator's Office and the Ombudsman, it is recommended that taxpayers should be made more explicitly aware of the possibility of having the complaint resolved by these bodies. The relevant HMRC soft law, such as the Administrative Law Manual which advises taxpayers on the consequences of advice being incorrect<sup>380</sup> and HMRC's general guidance on when taxpayers can rely upon information provided by HMRC,<sup>381</sup> should be amended accordingly.

The second hurdle is the level of clarity necessary in order for a legitimate expectation to arise. In part, this problem will be alleviated by the other proposals in this thesis which seek to enhance the clarity of general HMRC soft law (such as directing HMRC's mind to the issue when promulgating, but also by applying external pressure from various actors such as the Public Rulings Panel, 'Working Together' Group, the Ombudsman, Adjudicator's Office, courts and tribunals). The inclusion of caveats, provisos and qualifications however also prevents the soft law from acquiring the requisite clarity. This is related to the

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<sup>379</sup> See above generally Part III. 5.2. Inaptness of the doctrine in tax law.

<sup>380</sup> HMRC, *ADML 1300 Incorrect Advice to Customers: When incorrect advice can be binding* (March 2016) <<https://www.gov.uk/hmrc-internal-manuals/admin-law-manual/adml1300>> accessed 31 September 2017.

<sup>381</sup> HMRC, *When you can rely on information or advice provided by HM Revenue and Customs* (n 290).

third hurdle, which is that HMRC does not wish to relinquish control over who can rely upon its general soft law. As occurred in Australia after 1998,<sup>382</sup> HMRC should be encouraged to refrain from using caveats, provisos and qualifying language. Where there are cases of genuine doubt, of course HMRC should not be forced to take a firm position. However, if the fear is that unscrupulous taxpayers could use the soft law for the purposes of abusing the tax system, then there is an array of other tools which can be used to combat such behavior, such as DOTAS, POTAS, the GAAR, Accelerated Payment Notices, Partner Payment Notices and Follower Notices.<sup>383</sup>

The fourth hurdle is not having sufficient access to the courts and tribunals to actually argue the case that a legitimate expectation as to treatment has arisen. The First-tier Tribunal is, for the most part, prevented from hearing public law claims.<sup>384</sup> However, the result is duplicative, is divorced from reality and can result in injustice for the unsophisticated lay taxpayer.<sup>385</sup> Following from this, it could be argued that the First-tier Tribunal should be entitled to hear public law claims generally. In order to articulate this argument, it is first worth recalling that the First-tier Tribunal is a creature of statute and so can only hear such issues as Parliament has prescribed.<sup>386</sup> But what is the reason underpinning this restriction and not allowing the First-tier Tribunal to consider public law

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<sup>382</sup> After the *Bellinz* (n 190) judgment in 1998, the use of qualifying language was reduced, see O'Connell (n 60) 16.

<sup>383</sup> Part IV. 4.1.2. The success of the programme: contribution from Parliament, the Government and HMRC.

<sup>384</sup> Part III. 5.2.4. Access to Justice, see text at n 480.

<sup>385</sup> *ibid.*

<sup>386</sup> *LH Bishop v HMRC* [2013] UKFTT 522 (TC) [27], [2013] STI 3433 (Judge Mosedale).

claims generally? The Leggatt Review,<sup>387</sup> which precipitated the formalization of the tribunals regime in 2007, did little to elaborate upon why First-tier Tribunals such as the tax tribunal should not be entitled to deal with issues of judicial review. The Review notes merely that it was suggested in the case of the VAT and Duties Tribunal that it might usefully exercise a judicial review function at first instance.<sup>388</sup> This was rejected however '[i]f only for reasons of the greater complexity of the procedure'.<sup>389</sup> In *Oxfam v HMRC* ('*Oxfam*'),<sup>390</sup> Sales J posited that Parliamentary Intention to allow certain public law claims could be distilled from the fact that the determination of a public law issue may go towards the determination of tax due.<sup>391</sup> In *Noor v HMRC*<sup>392</sup> meanwhile, the Upper Tribunal disagreed and stated that if Parliament had intended for the First-tier Tribunal to have such jurisdiction then it would have made this expressly clear.<sup>393</sup> Although this renders the state of the law unclear, it more importantly highlights to us the lack of insight that can be garnered on the restriction from the Review which precipitated the tribunals' reforms and from judicial interpretation.

But what normative reasons might there be for not allowing the First-tier Tribunal to hear public law claims. An important reason for restricting the jurisdiction of the First-tier Tribunals is practicality. Tribunals are intended to be cost effective and efficient means of dealing with disputes.<sup>394</sup> Allowing judicial review claims wholesale would place an extreme burden upon the tribunal

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<sup>387</sup> Andrew Leggatt, *Tribunals for Users: One System, One Service* (March 2001).

<sup>388</sup> *Ibid* [6.8].

<sup>389</sup> *Ibid*.

<sup>390</sup> *Oxfam v HMRC* [2009] EWHC 3078, [2010] STC 686.

<sup>391</sup> *ibid* [63].

<sup>392</sup> *Noor v HMRC* [2013] UKUT 071 (TCC), [2013] STC 998.

<sup>393</sup> *Ibid* [29], [76]-[78].

<sup>394</sup> Leggatt Review (n 387) [1.11]-[1.13].

system. As set out by Judge Mosedale in *LH Bishop v HMRC*,<sup>395</sup> Parliament cannot have intended for challenges to, effectively, the fairness of a provision to be brought in an unrestricted manner.<sup>396</sup> By limiting such claims to judicial review, and therein having a permission filter to weed out unmeritorious claims, it could be said that there is merit in preventing the tribunal from hearing public law issues without limit.<sup>397</sup> If High Court control over the filtering system could be maintained however (in a manner which will be specified below), then this argument is rendered redundant. The High Court could still then decide upon which claims have sufficient merit and ought to proceed. The second potential reason for restricting the ability to hear public law claims is the problem of ‘complexity’ highlighted in the Leggatt Review. The formalisation of the tribunals’ regime was intended to introduce a clear, streamlined approach to appeals through the tribunals.<sup>398</sup> Allowing public law claims to be raised in the First-tier Tax Tribunal only, but not in for instance in the case of Immigration or Employment, undermines this consistency and adds complexity to the regime. A counterargument however is that the current set-up creates unnecessary complexity for the ordinary taxpayer who may have to participate in two separate sets of proceedings in different courts. Furthermore, some public law claims can already be brought in the First-tier Tribunal, as set out immediately below. There is also the possibility, as arose in *Gaines-Cooper*, that the resolution of the issues in one set of proceedings, which takes place after another set of

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<sup>395</sup> *R (Capital Accommodation (London)) v HMRC* [2012] UKUT 276 (TCC), [2013] STC 303.

<sup>396</sup> *ibid* [143]-[146].

<sup>397</sup> *Ibid*.

<sup>398</sup> See for instance Leggatt Review (n 387) [6.2].

proceedings, may make the earlier proceedings unnecessary.<sup>399</sup> Allowing the First-tier Tribunal to consider the relevant issues could help reduce the complexity and duality of litigation, as the Tribunal would be well placed to decide which issues ought to be resolved first, as set out immediately below also. A third reason might be that the First-tier Tax Tribunal is not institutionally competent to consider public law issues. The Tribunal is not staffed by Administrative Court judges and so would be ill-placed to consider public law claims. This argument however is particularly weak when the scope of issues currently considered by the First-tier Tribunal is viewed. Just like Administrative Court judges in judicial review cases, the Tribunal must consider the compatibility of taxing provisions with human rights<sup>400</sup> and with EU Law.<sup>401</sup> When so doing, the Tribunal must engage in that distinctly public law concern of proportionality analysis. The Tribunal may also in some instances review HMRC's exercise of discretion<sup>402</sup> and the 'reasonableness' of HMRC actions.<sup>403</sup> These are both also matters of public law. Moreover, a number of First-tier Tribunal judges are also Upper Tribunal Judges. This is important as the Upper Tribunal does have express competence to hear judicial review cases either directly in certain circumstances, or after referral from the Administrative Court. To this end, the persons who are expressly permitted to hear judicial review cases in one capacity have sufficient

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<sup>399</sup> *Gaines-Cooper* (n 237) [6].

<sup>400</sup> *LH Bishop* (n 386) [190].

<sup>401</sup> See for instance *Trinity Mirror v HMRC* [2014] UKFTT 355 (TC), on appeal [2015] UKUT 0421 (TCC), [2016] STC 352.

<sup>402</sup> *LH Bishop* (n 386) [139].

<sup>403</sup> John Avery Jones, 'The reform of the tax tribunals: a story of uncompleted business' (2006) BTR 282, 291.

expertise to do so and would still have that expertise if it so happens that they were to hear the matters in a different context.

Furthermore, there are many practical advantages to allowing the First-tier Tribunal to consider public law claims. There is a 'clear public benefit' to allowing the tribunal to consider the public law point in this case as it is a specialist tribunal, thereby well-positioned to make judgments about the fair treatment of taxpayers by HMRC, and it avoids the cost, delay and potential injustice and confusion associated with proliferation of proceedings.<sup>404</sup> It further ensures that all issues relevant to determine the one thing HMRC and the taxpayer are interested in are resolved on one occasion in one place.<sup>405</sup> As has already been noted, having the one tribunal hear arguments on two separate points, one going to substance and the other going to legitimate expectations, allows the tribunal to consider whether findings of fact are necessary for determining both points, or whether a finding on one point will vitiate the need to make a finding on the other and vice versa.<sup>406</sup>

Therefore, there is a strong argument, both in principle and in practice, in favour of expanding the jurisdiction of the First-tier Tax Tribunal. The relevant legislation should be amended accordingly so as to allow taxpayers to make public law claims in the First-tier Tax Tribunal.<sup>407</sup> Currently, judicial review cases concerning public law claims such as legitimate expectations may be transferred to the Upper Tribunal where the High Court considers it 'just and

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<sup>404</sup> *Oxfam* (n 390) [70].

<sup>405</sup> *Ibid.*

<sup>406</sup> Part IV. 4.1.1.1. The Framework: From Identification to Post-publication challenges, see text at n 237.

<sup>407</sup> Tribunals, Courts and Enforcement Act 2007, principally Chapter 2 "*Judicial Review*".

equitable' to do so.<sup>408</sup> It is envisaged that this proposal should take effect in a similar manner. In this way, the High Court can retain control over the filtering process. The High Court however should consider it just and equitable to transfer legitimate expectation claims for the aforementioned reasons of practice and principle. The Tribunal in turn may then act as another set of eyes on HMRC's actions in respect of general soft law and as with the courts should play an active scrutinising role in ensuring that the soft law accords with the ideals of quality, accessibility, and reliability. It is acknowledged that this reform will not alleviate to a great extent issues highlighted earlier in this thesis which restrict access by taxpayers to the courts, such as cost or the cumbersome nature of starting two sets of proceedings.<sup>409</sup> This incremental change will nevertheless improve the oversight of general HMRC soft law and enhance its reliability by providing taxpayers with a further avenue for legal remedies.

It is envisaged that this system could integrate well with the process recommended for appeals in relation to public rulings.<sup>410</sup> The most complicated issue which could arise would be a three-tiered dispute before the First-tier Tribunal revolving around the substantive law, the application of a ruling, and a legitimate expectation in respect of some assurance, all relating to the same substantive provision. For instance, a dispute might arise in relation to a taxpayer's residence. The taxpayer might contend that on the basis of the application of the substantive law she is not resident in the UK. The taxpayer

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<sup>408</sup> Supreme Court Act 1981, 31A. On which, see: *R (Hankinson) v HMRC* [2009] EWHC 1774, [2009] STC 2158.

<sup>409</sup> Part III. 5.2.4. Access to Justice, see text at n 480.

<sup>410</sup> Part IV. 4.1.1.1. The Framework: From Identification to Post-publication challenges, see text at n 227.

might also contend that she can rely upon a ruling to this effect. The taxpayer might finally contend that she had a legitimate expectation that she was not resident, on the basis of some HMRC soft law publication on residence. All of these arguments might then be placed before the First-tier Tribunal in the same hearing. Although this might seem complicated at first glance, it is less so on closer inspection. The resolution of any one of these issues in favour of the taxpayer will resolve the immediate dispute. Having the First-tier Tribunal, being equipped with all the relevant facts, decide the case is again much more preferable to dual proceedings arising before the Tribunal, on the substantive dispute, and the Administrative Court on the public law dispute. The Tribunal can decide which argument has greatest merit; can resolve what findings of fact are necessary for the expedient resolution of the case; and can choose to stay issues which would be irrelevant upon resolution of other issues. This is essentially the same argument used above to underline the utility of having public law claims decided in the First-tier Tribunal in the first place.

#### **4.2.2. Interim Remarks**

Although it would be practically impossible to subject all pieces of general HMRC soft law to the rigorous public rulings regime, there is nevertheless an assortment of recommendations which could be adopted for general soft law. The combination of the 'Working Together' Group, Public Rulings Panel, representative bodies and taxpayers generally in conjunction with the Adjudicator's Office and Ombudsman will add considerably to the quality, accessibility, scrutiny and reliability of general HMRC soft law. Buttressing these efforts should be the courts and tribunals taking a more active role. These

entities will place HMRC under pressure to ameliorate the issues arising in respect of its general soft law.

At the same time, it is noteworthy that the introduction of the rulings regime will have a beneficial effect even on the pieces of general soft law which will not become rulings. For instance, the Public Rulings Panel, primarily established to deal with public rulings, will nevertheless have an influential, deliberative role in relation to general HMRC soft law which is not processed through the rulings regime. The fact that problematic concessions meanwhile will be purged, to an extent, from the body of general HMRC soft law will have a beneficial impact in respect of both quality and accessibility.

Finally, it is worth briefly enumerating at this juncture the more specific recommendations suggested:

- The Adjudicator's Office and Ombudsman should consider taking a more active role in respect of complaints about general soft law in terms of assessing quality, accessibility and reliability. No change to the status or powers of the Adjudicator or Ombudsman is envisaged, but rather simply that the bodies would adapt their roles so as to check general HMRC soft law for these features. It is envisaged that the representative bodies, the 'Working Together' Groups and the Public Rulings Panel should also process their complaints through the Adjudicator's Office and the Ombudsman thereafter.
- The jurisdiction of the First-tier Tribunal should be widened so as to entitle it to hear public law claims;
- The courts and tribunals should additionally use their position to formally direct HMRC to correct general soft law issues. When so doing, the courts and tribunals should have regard to the benchmarks in relation to quality and accessibility listed at Part IV. 4.2.1.1. Recommendations in respect of scrutiny;
- When promulgating general soft law, HMRC should have regard to the questions in relation to quality and accessibility listed at Part IV. 4.2.1.2. Recommendations in respect of quality.

- Laws should not be drafted broadly and in generalised terms, as currently occurs in the anti-avoidance context, with the intention of later cutting the scope through general soft law.
- Redactions in HMRC's manuals should be investigated by the responsible HMRC departments, with a review in the form of an analysis of a random sample thereafter conducted by the Information Commissioner's Office;
- HMRC should make it clear that retrospective changes to general soft law will not occur where to do so would cause comparative unfairness;
- Where concessionary elements are found in HMRC's general soft law, the soft law should be moved to the published list of ESCs. Additionally, the list should contain a caveat at the start explaining HMRC's approach to retrospection;
- HMRC should review its internal processes for the production of general soft law instruments and consider whether a coherent and consistent approach can be adopted which would allow for internal legal review;
- HMRC should take further steps to ensure that taxpayers are fully aware of the possibility of having complaints resolved by the Adjudicator's Office and Ombudsman;
- HMRC should move away from using caveats, provisos and qualifying language in its general soft law.

### 4.3. Interim Conclusion

The mandate of the Aaronson Report, which was commissioned in December 2010, was to assess whether a GAAR could be framed so as to be effective in the UK tax system and, if so, how the provisions of the GAAR might be framed.<sup>411</sup> The same approach should be followed here: of setting out a clear framework, within which the relevant actors can operate, setting out obligations in order for the introduction of the proposals to be as smooth as possible. There must also be an accompanying 'buy-in' on the part of the relevant actors in order to ensure that effect is given to the substance of the proposals.

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<sup>411</sup> Aaronson Report (n 212) 10.

In light of this, the foregoing Section has set out proposals not just concerning those pieces of general soft law which ought to become binding public rulings, but also in relation to general soft law which should not be processed through such a regime. In terms of the former, three matters were analysed: how the regime should operate in the UK, whether it would be successful and where to draw a line as to what pieces of general soft law should become rulings, given that subjecting all general HMRC soft law to the more rigorous regime would be an impossibility. For the latter meanwhile, a catalogue of recommendations was offered which should help to shore up the remaining inadequacies of the UK system for general soft law in respect of quality, accessibility, scrutiny and reliability.

Even if all the proposals recommended in this Section are accepted however, that should not be the end of the story. There is a need for the system to grow organically and to be amended if necessary to adapt to as yet unforeseen exigencies. The regime will need to be monitored particularly in the early years and thereafter at regular intervals in order to safeguard its proper development. The evolution of the rulings system in Australian into its current highly respectable state is due in no small part to the constant scrutiny that it has been placed under there by the Treasury, the IGT and the JCPAA.<sup>412</sup> The other proposals in respect of general HMRC soft law will equally be in need of supervision to ensure that they are both put into effect and are effective. To this end, the final recommendation is that the Adjudicator's Office should prepare a report at regular intervals, more frequently in the early years, on the

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<sup>412</sup> See generally Part IV. 3.3. Performance of the public rulings regime.

performance of both the rulings regime and general HMRC soft law in respect of quality, accessibility, scrutiny and reliability. It will already be equipped with a significant amount of information by reason of its place as first recipient of complaints about the operation of both the rulings regime and general soft law. Accordingly, its report should draw upon the complaints that have been received and how these perform against the normative benchmarks. The Ombudsman can help in the preparation of the report by passing to the Adjudicator's Office information regarding the complaints that were referred to the body during the relevant period. The performance of HMRC in respect of the remaining remedial issues such as mingling, retrospection, the use of caveats can easily be gleaned from a cursory glance at HMRC's general soft law publications and should equally be drawn upon in the report.

## **5. Conclusion to Part IV**

The purpose of Part IV has been to produce a set of proposals for reform in respect of the system governing general HMRC soft law in order to better align with the ideals of quality, accessibility, scrutiny and reliability. This was developed over four stages. The first was the establishment of a framework within which general soft law could be produced in a more 'crisp' manner and satisfy more optimally our normative benchmarks. The second step was deciphering what would work within this framework and what would not, using evidence from the experiences in Australia with such a model. The third was to synthesize the lessons both from the previous step and more generally from the thesis into a range of proposals. This was broken down into two limbs: one

dealing with those pieces of general soft law which could be processed through a more rigorous framework developed in light of the two previous steps; the other dealing with those remaining pieces of general soft law which could not.

Most fundamentally, these reforms have been driven by pragmatic considerations and seek to the greatest extent possible merely to develop upon pre-existing foundations. Some flexibility has accordingly been necessary so as to allow the relevant participants in the regime, namely HMRC, the Government, Parliament, in addition to the 'Working Together' Group, Public Rulings Panel, representative bodies and taxpayers generally, to become more comfortable with the proposed reforms. Thus, overly prescriptive recommendations have been avoided where possible, as in the case of the rule for distinguishing between that which should become a ruling and that which should remain general HMRC soft law. The vision is for the new regime to grow organically and to, in turn, be able to respond to particular problems not envisaged in this thesis. As such, should the proposals be adopted, it would be highly beneficial for the efficacy of the regime to be routinely scrutinised. The Australian rulings regime was not developed overnight, nor will the optimum regime for general HMRC soft law come without trial, error and reboot.

## PART V. CONCLUSION

Lady Hale, who spent a decade working at the Law Commission, in a recent speech reflected on the nature of law reform:

First you have to decide what the law is, then you have to decide how it should be changed, and then you have to persuade Parliamentary counsel to find the words to express this clearly and precisely enough for the parties and judges who will have to apply it in future<sup>1</sup>

Leaving aside the final part of the quote for the moment, the thesis follows a similar formula. Deciding upon what the law 'is' required an examination of the purpose and scope of general HMRC soft law and the framework currently in place in relation to it. Deciding upon how the law ought to be changed required an analysis of the normative underpinnings which should inform reform and an assessment of other models. The thesis thereafter sought to set out a package of reforms and elaborate in detail upon how these reforms would take effect in practice, with references where applicable to the necessary legislative changes which would have to be made. These were expressed in a form which can be adopted by HMRC and HM Treasury, but did not provide reforms in a manner tantamount to draft legislation as envisaged by Lady Hale.

The primary concern of this thesis meanwhile has been to provide a substantial and significant contribution to the body of knowledge about general HMRC soft law, that occupies the intersection of the study of tax administration

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<sup>1</sup> Lady Hale, 'Legislation or judicial law reform: where should judges fear to tread?' (Society of Legal Scholars Conference 2016, Oxford, 7 September 2016) 14, available at: <<https://www.supremecourt.uk/docs/speech-160907.pdf>> accessed 31 September 2017.

and public law and which has attracted relatively little scholarship. This has taken the form of three substantive Parts: Part II set out a theoretical framework; Part III assessed current problems in the UK in respect of general HMRC soft law against this framework; Part IV proposed a package of solutions which can be adopted in order to better comply with the theoretical framework. Further work can seek to develop upon the foundations laid by these Parts in respect of the theory, description of problems and proposed solutions. As regards each substantive Part and as a consummate whole accordingly, the thesis takes the important first step of setting out the building blocks upon which there can be further development.

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