



Law Society  
of Scotland

# Consultation Response

## Amending HMRC's Civil Information Powers

October 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Tax Law sub-committee welcomes the opportunity to consider and respond to HMRC's consultation: Amending HMRC's Civil Information Powers<sup>1</sup>. The sub-committee has the following comments to put forward for consideration.

## General comments

We note HMRC's concerns regarding an increase in requests from overseas tax authorities and the lack of parity between UK and other jurisdictions' regimes for the provision of banking information. It is not clear that there is an evidence base for the proposed extension of powers, for example removing tribunal approval in the third party notice process or extending the scope of information notices.

It is important for HMRC to have suitable powers to enable proper and efficient administration of the UK tax system. Powers to access information and to enforce penalties are necessary in order to ensure compliance by tax-payers with the system. We consider it crucial that there is a balance between HMRC's information powers and taxpayers' rights to certainty and privacy. It is important that powers are exercised proportionately and that appropriate safeguards are in place.

## Consultation questions

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### **Question 1: Do you have any views on the suggested change to align third party notices with taxpayer notices?**

We consider that Tribunal approval is an important safeguard in respect of third party notices. Such approval may protect a taxpayer from requests from HMRC for information which is not 'reasonably

<sup>1</sup><https://www.gov.uk/government/consultations/amending-hmracs-civil-information-powers>

required'. We also consider that the safeguard of having to apply for Tribunal consent is necessary to protect the taxpayer in relation to a third party notice that does not relate to banking information. It is important that such safeguards are maintained.

The power to issue third party notices covers any third party. Given the wide scope, we do not think it is proportionate to remove the requirement for Tribunal approval in relation to all notices to third parties. The task of complying with a third party notice out with the scope of basic banking information may be particularly onerous. Tribunal approval can help to ensure that the information requested is necessary. This therefore can provide an important safeguard for third parties which may require to undertake significant work to adhere to the information request.

We note that the consultation suggests that if the requirement for Tribunal approval of a third party notice is removed, the third party would have a right of appeal against the notice "on the grounds that it is too onerous".<sup>2</sup> The consultation suggests that the process will be aligned with that for issuing taxpayer notices. We note however that a taxpayer notice which has not been approved by the Tribunal can be appealed on any basis. Even if the right of appeal for third parties is not limited to the ground that it is too onerous, we do not consider that the taxpayer has adequate protection - a third party is likely to be primarily concerned with the practicalities of providing the requested information rather than about whether HMRC is entitled to the information.

If HMRC has not applied to the Tribunal for consent to waive the requirement to notify the taxpayer, the taxpayer will receive a copy of the notice, but will have no right to appeal the notice. The taxpayer's only right of challenge will be by way of judicial review. We note that judicial review is referred to as a 'safeguard' for several jurisdictions.<sup>3</sup> In UK cases, judicial review alone may not amount to an effective safeguard for taxpayers due to the time constraints and cost of raising such proceedings when compared to an appeal to the Tribunal. We do not consider it appropriate to consider the effectiveness of safeguards in other jurisdictions without taking account of the wider context of the tax and legal system.

If the information is to be obtained without the taxpayer's knowledge, we consider that prior Tribunal consent to the whole notice would be an important safeguard for the taxpayer.

## **Question 2: Do you think any further internal processes, or safeguards, prior to issuing the notice, would be required?**

As referred to in our answer to question 1, we consider that Tribunal approval of notices is an important safeguard, particularly in cases where the taxpayer is not to be notified of the information sought by HMRC. Further internal processes are unlikely to be capable of replicating the level of independent scrutiny that is provided by the Tribunal. Such independent external oversight of third party notice requests is

<sup>2</sup> Paragraph 4.3

<sup>3</sup> Annex A.

necessary to provide an appropriate balance between taxpayers' rights and the administration of and compliance with the tax system.

We appreciate that there may be justification to depart from independent scrutiny in respect of overseas notices and we address this further below.

### **Question 3: Should there be any further restrictions on the type of information that could be requested under this notice?**

We consider that further consultation is required on appropriate further restrictions on the type of information that could be requested.

### **Question 4: Do you think there should be a separate rule for third party notices for banking information?**

While we generally consider it beneficial to have consistency in the law, we consider there would be merit in third party notices relating to banking information to operate on separate rules to notices to other third parties. This may assist in addressing concerns in relation to requests from overseas tax authorities.

We note that most requests from overseas tax authorities involve banking information.<sup>4</sup> Financial Information Notices (FIN) may be used to cover this type of information. We are of the view that the requirement for Tribunal approval for FINs should only be removed for such notices arising from requests from overseas tax authorities. We note the uncertainty around whether banking information constitutes a statutory record and highlight that there are often differing views between HMRC and taxpayers on this matter. Independent oversight in domestic cases will help to provide an effective safeguard, particularly where views differ.

We also consider that non-FINs should retain the requirement for Tribunal approval in both domestic and overseas cases.

It will be important that if the requirement for Tribunal approval is removed for overseas requests, HMRC carefully scrutinise overseas requests and reject them where adequate supporting details have not been supplied.

<sup>4</sup> Paragraph 4.7

**Question 5: Should this power be subject to any restrictions or safeguards? If so, please state the restrictions or safeguards.**

As referred to above, we consider that in respect of domestic cases, the requirement for Tribunal approval should be retained. We also consider that there should be a right of appeal for third parties on the basis that a request they have received is onerous, for example the information relates to too many years.

If, however Tribunal approval for third party notices is removed for domestic cases, as well as those arising from requests from overseas tax authorities, there should be additional safeguards or restrictions in domestic cases where the request for information is to a bank. Obtaining information about a taxpayer via their bank may be an intrusive process and could affect their access to banking facilities. A possible safeguard would be to require HMRC to issue a formal taxpayer notice, requesting the banking information from the taxpayer before a third party notice could be issued to the bank. This would ensure that a taxpayer was made aware that if they do not provide the relevant information, information would be requested from their bank.

**Question 6: Do you have any other ideas for options that could deliver both the objective of speeding up the process and providing appropriate safeguards?**

We have no comment to make.

**Question 7: What are your views on extending information powers in this way?**

We are not in a position to answer this question fully. We do not consider that sufficient explanation for these proposals is provided in the consultation document. We note that the proposed extension would make HMRC's powers particularly wide in scope, and there is the potential for powers to extend beyond third parties who have provided a service to the tax payer. It is not clear what is meant by "all its tax functions"<sup>5</sup>. Any extension should be limited to cases where there is a clear need for HMRC to have additional information powers.

We suggest that further consultation on these proposals would be appropriate.

**Question 8: Do you have any views on amending the legislation in this way?**

We welcome clarity in the law and therefore support amendment of the wording of the legislation to clarify that HMRC assesses a daily penalty following permission having been granted by the Tribunal.

<sup>5</sup> In paragraph 4.13

## **Question 9: Should the increased daily penalties apply to all Schedule 36 information notices?**

The extent of non-compliance is not clear from the consultation document, although it is noted that:

“The majority of recipients of information notices comply in a timely manner. However, there are a small minority who do not comply”.<sup>6</sup>

It is not clear therefore if there is a sufficient evidence basis for extension of the increased daily penalties to all Schedule 36 information notices. We recognise that such harmonisation would simplify the current penalty regime. In the event that this change is enacted, it would be appropriate for the Tribunal's approval to continue to be required before a daily penalty can be charged.

## **Question 10: Do you have any views on making amendments to prevent the third party from notifying the taxpayer in this way?**

This may be appropriate in circumstances where notification to the taxpayer could prejudice an assessment or the collection of tax. We suggest that this is aligned with cases in which the Tribunal agrees that HMRC does not have to inform the taxpayer due to possible prejudice to the collection of tax. Consideration should be given to the interaction with the data protection regime, particularly in relation to subject access requests.

## **Question 11: What form of sanction should be imposed on the third party for a breach of this rule?**

We do not suggest any particular form of sanction. It is important that sanctions are reasonable and proportionate to the breach. A scale of penalties would allow cases to be dealt with based on the relevant circumstances, however, it is important that there is certainty in the provisions and so we suggest that if such an approach is taken, penalties are limited in range.

**For further information, please contact:**

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<sup>6</sup> Paragraph 2.8