HM Revenue & Customs

Off-payroll working rules from April 2020

Policy paper and consultation document
Publication date: 05 March 2019
Closing date for comments: 28 May 2019

COPY WITH COMMENTARY FROM DAVE CHAPLIN CONTRACTORCALCULATOR

(This is not a submission to the consultation)

CONTRACTOR CALCULATOR.CO.UK
your expert guide to contracting

Executive Summary

By Dave Chaplin, CEO of ContractorCalculator

For me, it's crazy that, almost two decades after the misguided IR35 legislation was introduced in April 2000, it has been resurrected under the guise of 'off-payroll'.

HMRC invented the concept of a 'deemed employee' almost two decades ago, in a drive to collect more tax, yet it has since struggled to track down these workers. Its track record of winning only 10% of court cases over the last decade demonstrates that there are far fewer of these individuals in operation than HMRC believes.

The Treasury's claim that it is losing money is based on an ideological flaw. It fails to acknowledge the 'freelance premium' - that individuals charge considerably more for their services, and get taxed on greater earnings, compared to what they earn when they are in full-time employment. That fact alone should blow IR35 out of the water, yet HMRC maintains that individuals are avoiding tax. This isn't true either: HMRC's own calculations demonstrate that 84% of the perceived tax loss where an individual is engaged via a personal service company (PSC) results from the hiring organisation not having to pay employer's National Insurance (NI). Despite this, HMRC continues to suggest that flexible workers are responsible for this shortfall.

In its drive to class as many flexible workers as possible as 'employed for tax purposes', HMRC has mispresented the laws on employment status. This has manifested itself in the Check Employment Status for Tax (CEST) tool, a simplistic status testing tool which has been labelled unfit for purpose by barristers, lawyers and tax experts. It has been a gross error of judgement to place the complexity of employment status law at the heart of every supply of labour in the flexible economy.

The poor guidance on the law has resulted in thousands of public sector workers being incorrectly or blanket assessed as 'employed for tax purposes'. With there being no appeals process as originally promised during the off-payroll rules consultation process, this has incentivised widespread adoption of tax avoidance schemes as workers seek ways to overcome paying effective tax rates that are significantly higher than those of employees.

The changes also saw vast numbers of highly skilled, flexible workers abandon the public sector and flexible working completely, resulting in delays to, and even abandonment of, projects due to acute skills shortages. Key services have been put under tremendous pressure as skilled knowledge-based workers seek assignments elsewhere, particularly in the NHS.

Many of those who remain now cost more to hire to compensate for the tax increase suffered due to incorrect status assessments. This results in more expensive projects and a poor deal for the taxpayer.

But those with no bargaining power or other options have been forced into being classed as 'employed for tax purposes' yet denied the equivalent rights that genuine employees receive, contrary to the government's Good Work Plan.

HMRC continues its attempts to justify IR35 using unsubstantiated figures and the Treasury is now making claims based on OBR figures that have a "Very high" uncertainty rating. That's statistician-speak for 'these figures are guesswork'.

So, what's the answer?

Firstly, I sympathise with the government's position. It wants to take the same sized slice of the tax pie from everyone who provides labour, irrespective of their employment status. Unfortunately, the tax system has this massive £60bn elephant in the room, called employer's National Insurance. This is, in all but name, a 'payroll tax', which firms that hire contractors do not have to pay.

Contractors, on the other hand, pay largely proportional taxes to those on a salary – following the April 2016 dividend tax regime changes, the historic tax advantages talked about are now ancient history in the tax world.

It is the tax differential paid by firms when hiring employees compared with the self-employed that needs to be closed. The day this finally happens, you will be unsurprised to discover that 'deemed employees' no longer exist in HMRC's eyes.

There are two simple ways to achieve this; either reduce employer's NI or introduce a new off-payroll tax, payable by anyone who engages somebody off-payroll. Government must just get on and do it, as opposed to creating stealth taxes based on the concept of 'deemed employment'.

The concept of a 'deemed employee' was a non-starter in 2000 and it's still one now, regardless of who conducts the assessment. Consider that an IR35 tribunal case in May 2018 took nine days of court time and 3,500 pages of evidence, just to determine the status – and we are still waiting nine months later for the decision. This highlights the mammoth task ahead of any firm required to make an accurate and fair assessment of each person they hire. Even then, the deemed status is just an opinion, and disagreements poison client-agency-supplier relationships, leading in some cases to the contractor suing their clients for misclassification.

I would urge anyone reading this to consider the potential damage this ideologically flawed and misguided legislation will do to the flexible economy and UK Plc as the UK attempts to find its feet post-Brexit.

Dave Chaplin
CEO, ContractorCalculator

CONTRACTOR CALCULATOR.CO.UK
your expert guide to contracting

Guide to reading the ContractorCalculator Commentary Boxes:

ContractorCalculator Comment:

Commentary from ContractorCalculator is in boxes like this.

If it is not in a box like this, then it forms part of the original consultation.

ContractorCalculator Comment:

The key messages from our commentary:

1. From April 2020 a firm which has an existing contractual agreement with a contractor, which they assess as within the legislation, will need to pay 13.8% employers National Insurance and 0.5% Apprenticeship Levy on top of those contractually agreed fees. The alternative is to terminate and try and renegotiate the contract.

2. Warning: Contractors that are assessed as "deemed employees" are likely to no longer want to provide services to that client, even if they are offered higher fees, for fear of historic tax risk.

3. Assuming that a contractor will agree to carry on working on an inside IR35 basis at no extra cost to the client is naïve, and that naivety will disrupt and damage projects.

4. There should be a legal obligation on the client to provide both the assessment results and the reasons for the status determination.

5. There needs to be an appealable decision in law, which can be quickly arbitrated by an independent body, so that bias doesn't factor into the equation.

6. Whilst employment status is central to any tax status, there will NEVER be certainty, irrespective of any process that is proposed.

7. The entire mechanism proposed for passing both the gross payments and money down the supply chain is a breeding ground for aggressive tax avoidance. The tax should be deducted at source, by the client.

8. For reasonable care to apply, clients should be required to assess all elements of case law. HMRC could consider publishing the list of 100 questions it asks when conducting its own IR35 status investigations.

9. Firms who assess existing workers as inside IR35 are in danger of heading to employment tribunals.

10. Firms who have contractors who travel and stay during the week to complete their work will struggle to retain contractors without considerable increases in the cost of hire.

11. CEST has always been defective, and given the short timeframe before April 2020, it is unlikely to be improved in any material way before then.

Subject of this consultation:	A consultation on the implementation of the reform of the off-payroll working rules from April 2020.
Scope of this consultation:	The government has announced that the reform to the off-payroll working rules introduced for engagements in the public sector in April 2017 will be extended to the private sector from 6 April 2020. This consultation seeks to understand how best to implement the reform in the larger and more diverse private sector.
Who should read this:	People who work through an intermediary (for example their own personal service company (PSC)), agencies, companies, partnerships and individuals who are engagers of people who work through their own intermediary. Public authorities receiving worker's services provided through an intermediary. Accountants and other agents representing people who work through intermediaries or representing engagers who pay workers engaged through intermediaries. HR managers and those who deal with recruitment processes and payroll.
Duration:	From 05 March 2019 to 28 May 2019.
How to respond or enquire about this consultation:	By email: offpayrollworking.intheprivatesectorconsultation@hmrc.gsi.gov.uk By post: Employment Status and Intermediaries Policy, 3C/15, 100 Parliament Street, Westminster, SW1A 2BQ
Additional ways to be involved:	In order to engage as wide an audience as possible, the government will hold workshops with invited stakeholders during the consultation period.
After the consultation:	A summary of responses will be published later this year. The consultation will inform the draft Finance Bill legislation, which is expected to be published in Summer 2019. The reform will come into force from 6 April 2020.
Getting to this stage:	A discussion document was published at Summer Budget 2015 to consider reforming the off-payroll working rules in response to widespread non-compliance. Following consultation, the off-payroll working rules for engagements in the public sector were introduced from 6 April 2017. At Budget 2018, following consultation the government announced that the reform to the off-payroll working rules would be extended to engagements in the private sector from 6 April 2020.
Previous engagement:	HMRC published a consultation document on 18 May 2018 seeking views on how best to address non-compliance with the off-payroll working rules in the private sector. This consultation ran until 10 August 2018. A summary of responses and fact sheet were published on 29 October 2018.

Contents

On request this document can be produced in Welsh and alternate formats including large print, audio and Braille formats

1. Introduction

The government announced at Budget 2018 that to increase compliance with the existing off-payroll working rules in the private sector, businesses will become responsible for assessing the employment status of the off-payroll workers they engage. This will bring the private sector in line with the public sector.

As with the reform in the public sector, these changes seek to increase compliance in the private sector with rules that have been in place since 2000, to make sure that they operate as intended. The reform does not introduce a new tax.

ContractorCalculator Comment:

"These changes seek to increase compliance in the private sector with rules that have been in place since 2000."

Chapter 10 (the off-payroll tax) is an entirely new piece of legislation, and differs significantly from the original Chapter 8 (IR35) legislation. The methods for tax calculation are different, the compliance responsibilities lay elsewhere, and the **onus for paying employment taxes has shifted** from being taken out of the contractor's fees, to being paid on top of the contractor's fees.

ContractorCalculator Comment:

"The reform does not introduce a new tax."

It does not introduce a new type of tax. The only commonality between Chapter 8 (original IR35) and Chapter 10 (the off-payroll tax) is that an assessment needs to be carried out.

Under the off-payroll tax, the 'fee-payer' (client or agency) must pay employment taxes on top of the payment made to the contractor. This means additional tax of employer's National Insurance (NI) (13.8%) and the Apprenticeship Levy (0.5%).

This cannot be legally deducted from the current contractually agreed fee with the contractor. Therefore, as things stand, it is a **new amount of tax** that needs to be paid by the fee-payer.

It is misleading comments such as this from HMRC which are believed to have encouraged many clients to adopt arrangements whereby employer's NI deductions are taken from contractor income, as they would have been under the Chapter 8 rules.

https://www.contractorcalculator.co.uk/umbrella_companies_deduct_employers_ni_lawfully_540110_news.aspx

Can umbrella companies deduct employer's NI lawfully?

Potentially unlawful practices among certain recruiters and umbrella companies, in response to the public sector IR35 reforms, have left many contractors unjustly funding the tax obligations of their recruiters and clients, including employer's national insurance (NI) contributions.

Further costs for hiring organisations are also likely. For existing contractors who are assessed as 'inside IR35', there is likely to be a renegotiation of rate required. This was evident in the immediate aftermath to the public sector changes – the Association of Professional Staffing Companies (APSCo) found that 45% of recruiters reported an increase in contractor rates following April 2017.

https://apsco.org/article/public-sector-bearing-brunt-of-new-tax-rules-3349.aspx

It is questionable how many contractors will even be prepared to continue working for their client if deemed to be caught by IR35, as it may present considerable historical tax risk. The threat is demonstrated by the fact that HMRC is currently pursuing BBC freelance broadcasters for an accumulative tax bill of several million pounds, after hundreds had their deemed IR35 status overturned shortly after the off-payroll rules were introduced to the public sector.

https://www.contractorcalculator.co.uk/nao_report_exposes_payroll_chaos_within_bbc_545910_news.aspx

NAO report exposes Off-Payroll (IR35) chaos within the BBC

Hundreds of broadcasters who followed BBC protocol to determine their employment status had it overturned by **HMRC's flawed Check Employment Status for Tax (CEST) tool**, following the introduction of the **Off-Payroll rules in the public sector**.

The government has listened to the views put forward by stakeholders during the previous consultation. As a result, the smallest organisations will not have to determine the employment status of the off-payroll workers they engage.

ContractorCalculator Comment:

“The government has listened to the views put forward by stakeholders during the previous consultation.”

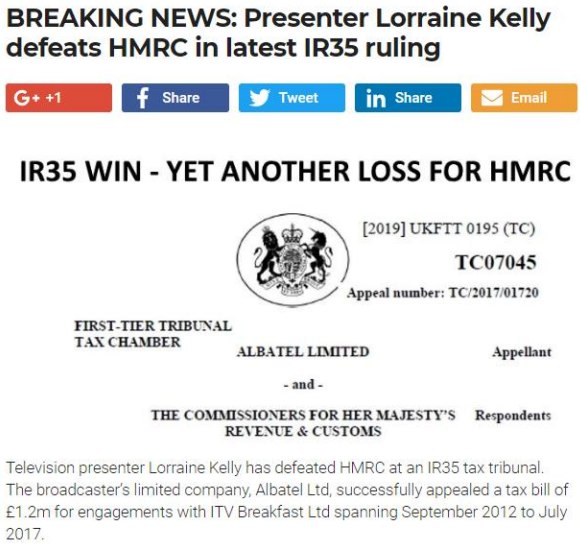
There were considerable concerns put forward by all parties, many of which have been ignored. These include contention with the evidence of widespread non-compliance among hirers in the public sector, and criticism of government’s one-sided public sector research, which failed to consult contractors.

https://www.contractorcalculator.co.uk/hmrc_payroll_ir35_consultation_responses_545510_news.aspx

The central issue with the off-payroll tax is the same as IR35 – it has at its core a complex employment status test – which is too difficult for firms to get to grips with.

HMRC is incapable of educating the thousands of private sector companies how to apply the law, as it has demonstrated by consistently losing tribunal cases, the most recent of which was described by the judge as “not a borderline case”.

https://www.contractorcalculator.co.uk/lorraine_kelly_defeats_hmrc_latest_ir35_ruling_548810_news.aspx



BREAKING NEWS: Presenter Lorraine Kelly defeats HMRC in latest IR35 ruling

+1 Share Tweet Share Email

IR35 WIN - YET ANOTHER LOSS FOR HMRC

[2019] UKFTT 0195 (TC)

TC07045

Appeal number: TC/2017/01720

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALBATEL LIMITED Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS Respondents

Television presenter Lorraine Kelly has defeated HMRC at an IR35 tax tribunal. The broadcaster's limited company, Albatel Ltd, successfully appealed a tax bill of £1.2m for engagements with ITV Breakfast Ltd spanning September 2012 to July 2017.

HMRC cannot be trusted to educate the private sector on IR35 for as long as it continues to misinterpret relatively basic concepts. HMRC maintains that mutuality of obligation (MOO) – a key test of employment – is present in every contractor engagement, despite having been proven wrong multiple times in court. In a recent tribunal defeat for HMRC, Judge Rupert Jones stated:

"HMRC's case is that where one part agrees to work for the other in return for payment, then this satisfies mutuality of obligation between the two parties. That would be true of every contract, both employment and for servicers, otherwise the contract would not exist at all."

https://www.contractorcalculator.co.uk/latest_contractor_ir35_tribunal_win_cest_flawed_541510_news.aspx

The government recognises the importance of providing organisations with sufficient time to prepare for and implement the reform. That is why, having listened to respondents to the previous consultation, the government has decided that the reform will not come into effect until 6 April 2020, giving medium and large-sized businesses longer to prepare.

ContractorCalculator Comment:

"The government has decided that the reform will not come into effect until 6 April 2020, giving medium and large-sized businesses longer to prepare."

Firms are nowhere near ready, and the final legislation will be unknown until November 2019, giving firms only five months to prepare.

The BBC, two years after the public sector was subjected to the off-payroll tax, is still struggling with status issues, as highlighted by BBC Director General Lord Hall, speaking at a Public Accounts Committee hearing in January 2019:

"HMRC should be thinking very hard about the difficulties created by rushing into something which was more global in nature, and which we still haven't worked through the consequences of now."

https://www.contractorcalculator.co.uk/bbc_chiefs_pin_problems_cest_547210_news.aspx

BBC chiefs pin problems on CEST after hundreds suffered unjust tax bills

HMRC's Check Employment Status for Tax (CEST) tool was exposed as a root cause of the continuing disruptions which led to hundreds of freelancers facing unjust retrospective tax bills at a **Public Accounts Committee (PAC)** meeting in Parliament yesterday.

It's also worth noting that the BBC's struggles came having received a large amount of assistance from HMRC in implementing the reform – significantly more than what an average private sector firm can expect to receive once the rules are implemented.

To accommodate firms budgeting, the final legislation must be established at least a year before it goes live.

In addition, HMRC will continue to work with stakeholders, including tax experts and businesses to explore enhancements to the Check Employment Status for Tax (CEST) service and associated guidance. Any enhancements to CEST and associated guidance will be available for customers to use before the reform comes into effect.

ContractorCalculator Comment:

HMRC continues to champion CEST's supposed accuracy, provided the right answers are put into it. Its claims were recently proven false when tested against the facts from the Albatel (Lorraine Kelly) case, and numerous other tribunal rulings.

https://www.contractorcalculator.co.uk/cest_exposed_hopelessly_unreliable_hmrcs_foi_543610_news.aspx

CEST exposed as hopelessly unreliable using HMRC's own test data obtained via FOI

HMRC's Check Employment Status for Tax (CEST) tool has been exposed as biased and hopelessly unreliable, after a comprehensive re-testing of HMRC's CEST test data obtained under FOI by ContractorCalculator, which HMRC and Treasury are consistently relying upon to back up their claims that the tool is accurate.

CEST's shortcomings are due to various reasons, notably its simplicity and its failure to acknowledge key employment status factors, including mutuality of obligation (MOO).

HMRC deliberately omitted key IR35 case law from CEST tool, reveals NHS webinar

HMRC admits that it assumes mutuality of obligation (MOO) is present in every public sector contractor engagement, and deliberately omitted this key test of employment from its Check Employment Status for Tax (CEST) tool on this basis.

Responses to HMRC's initial off-payroll private sector consultation were littered with calls for the tool to be either amended or withdrawn, while, in a letter to the Treasury, the Institute of Chartered Accountants in England and Wales (ICAEW) advised that CEST was not suitable for use in the private sector.

https://www.contractorcalculator.co.uk/Docs/20180919-ContractorCalculator-Offpayrollprivatsector-summaryofresponses.pdf

https://www.icaew.com/-/media/corporate/files/technical/icaew-representations/2018/icaew-rep-4018-modern-working-practices--off-payroll-working.ashx

HMRC's failure to address CEST means firms will be unable to accurately assess status and could unwittingly be building up significant tax risk on their balance sheets.

Not only will the resulting lack of certainty deter firms from hiring flexible workers, who are often key to company growth, it will make company formation in the UK a less attractive prospect for businesspeople at home and abroad.

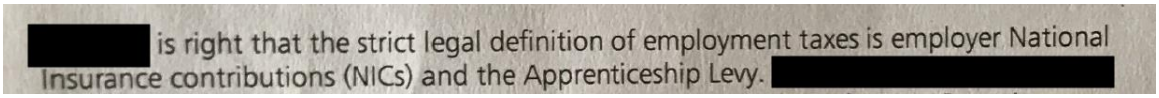
Background

The off-payroll working rules – commonly known as IR35 – are intended to ensure that individuals who work like employees pay broadly the same employment taxes as employees, regardless of the structure they work through.

ContractorCalculator Comment:

Individuals do not pay "employment taxes". According to law, employment taxes constitute employer's National Insurance (NI) (13.8%) and the Apprenticeship Levy (0.5%).

This was confirmed recently by the Treasury in a letter to an MP:


[redacted] is right that the strict legal definition of employment taxes is employer National Insurance contributions (NICs) and the Apprenticeship Levy. [redacted]

Under the new off-payroll tax, using HMRC's own calculations, of the total amount of extra tax payable, 84% will be payable by the hiring firm, with just 16% attributable to the contractor. This is because contractors who use limited companies are already paying taxes very close to those paid by a salaried employee.

https://www.contractorcalculator.co.uk/payroll_ir35_perceived_tax_avoided_hirers_hmrc_543210_news.aspx

The off-payroll tax is designed to claw back employer's NI contributions, which are being avoided by firms – because they do not pay this tax when they hire the self-employed.

However, the continued emphasis that HMRC places on retrieving tax from contractors is believed to have caused confusion, leading many public sector engagers to unlawfully make this deduction from fees paid to contractors.

The off-payroll working rules apply where an individual (the worker) provides their services through an intermediary to another person or entity (the client). The intermediary in this case is another individual, a partnership, an unincorporated association or a company. The most common structure seen is a PSC, which is the term we have used throughout this document. The term "client" is used throughout this document to identify the organisation or entity receiving the off-payroll worker's services. The term "worker" is used to refer to the individual providing the services to the client, however, this does not mean that they have the statutory "worker" employment status for employment rights purposes.

In April 2017, the government addressed non-compliance in the public sector by reforming the legislation for off-payroll workers in that sector. The public sector reform makes public authorities responsible for deciding whether the worker would have been regarded for income tax and National Insurance contributions (NICs) purposes as an employee if they were engaged directly. The public sector reform also makes the public authority or agency (the "fee-payer") that pays the worker's PSC, responsible

for accounting for and paying income tax and NICs under PAYE to HMRC, on behalf of the worker.

ContractorCalculator Comment:

"The public sector reform makes public authorities responsible for deciding whether the worker would have been regarded for income tax and National Insurance contributions (NICs) purposes as an employee if they were engaged directly."

This is a thinly-veiled attempt at trying not to reveal that the vast majority of the extra taxes due under the off-payroll tax are actually attributable to the hiring firm.

PAYE receipts and independent research on off-payroll working in the public sector suggest that this reform has been effective in increasing compliance in the public sector without impacting labour market flexibility.

ContractorCalculator Comment:

Information for the “independent research” was gathered within the first four months of the reform, and is not indicative of the last two years. As the BBC fiasco has demonstrated, organisations are still struggling with status matters two years on.

Regardless of its validity, the same independent research acknowledges that 32% of central bodies had reported struggles in filling contractor vacancies, raising questions over HMRC’s claim that labour market flexibility wasn’t impacted.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704931/Off-Payroll_Reform_in_the_Public_Sector.pdf

Claims of heightened compliance are tenuous at best, given the widespread reporting of incorrect blanket assessments – which were found to be rife in separate studies conducted by the Freelancer and Contractor Services Association (FCSA) and ContractorCalculator - and the fact that responses to FOIs by ContractorCalculator reveal that HMRC is not checking to see if correct assessments are being made.

https://www.fcsa.org.uk/legal-challenges-to-ir35-public-sector-reforms-seem-inevitable/

https://www.contractorcalculator.co.uk/nhs_survey_patient_care_services_crisis_ir35_537910_news.aspx

The fact that HMRC attributed an increased tax yield of £550m to the off-payroll tax – considerably more than its initial estimate of £410m – is indicative that many legitimately ‘outside IR35’ contractors are being subject to excessive taxation as a result of blanket assessments.

HMRC has also chosen to ignore a wealth of studies highlighting the damaging impact that off-payroll has had on public sector labour market flexibility. Among them, the Chartered Institute of Personnel and Development (CIPD) found that 52% of public sector hiring managers reported rising costs, delays and even project cancellations.

https://www.peoplemanagement.co.uk/news/articles/ir35-damaging-unintended-consequences-public-sector-employers

At Autumn Budget 2017 the government therefore announced that it would consult on options for addressing non- compliance in the private sector. This consultation was published on 18 May 2018 and closed on 10 August 2018. A copy of the consultation document, and the subsequent summary of responses can be found at https://www.gov.uk/government/consultations/off-payroll-working-in-the-private-sector

The consultation received 275 responses from a range of stakeholders, including individuals working through PSCs, businesses and agencies engaging off-payroll workers in this way and representative bodies. After considering the responses, the government announced at Budget 2018 that it would extend the reform to the off-payroll working rules already in operation in the public sector to engagements in the private sector from April 2020.

The consultation

As part of its response to the last consultation, the government committed to carrying out a further, detailed consultation on the proposed operation of the rules.

The April 2020 reform will use the off-payroll working rules in the public sector as a starting point. This means that clients will be required to make a determination of a worker's employment status and communicate that determination. In addition, the fee-payer (usually the organisation paying the worker's PSC) will need to make deductions for income tax and NICs and pay any employer NICs. Affected organisations should therefore familiarise themselves with the existing legislation at Chapter 10, Part 2 of the Income Tax (Earnings and Pensions) Act (ITEPA) 2003.

ContractorCalculator Comment:

"The fee-payer (usually the organisation paying the worker's PSC) will need to make deductions for income tax and NICs and pay any employer NICs."

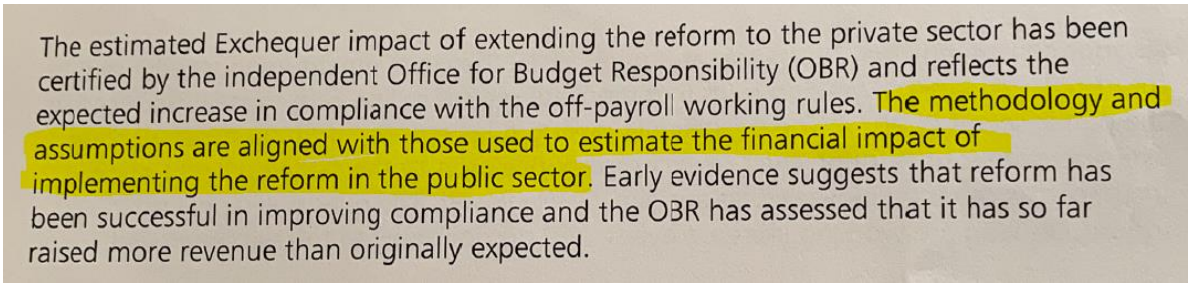
Having inferred multiple times that the bulk of the tax is retrievable from the contractor, the consultation finally concedes that the fee-payer is liable for the employment taxes.

The government is committed to learning from the public sector reform. It recognises that the needs of private sector organisations differ to those in the public sector and that the range of activities undertaken are substantially more wide-ranging, and therefore some changes are required. Other than the changes proposed to define small businesses in the private sector, the other changes the government is proposing in this consultation would equally apply to engagements in the public sector from April 2020.

ContractorCalculator Comment:

"It recognises that the needs of private sector organisations differ to those in the public sector."

This claim by HMRC is not consistent with messages coming from the Treasury, and a letter from Phillip Hammond says that the expected Exchequer Impact from the private sector reform has been modelled on the public sector, despite its inherent and wide-ranging differences.


The estimated Exchequer impact of extending the reform to the private sector has been certified by the independent Office for Budget Responsibility (OBR) and reflects the expected increase in compliance with the off-payroll working rules. The methodology and assumptions are aligned with those used to estimate the financial impact of implementing the reform in the public sector. Early evidence suggests that reform has been successful in improving compliance and the OBR has assessed that it has so far raised more revenue than originally expected.

This consultation is not intended to consider alternative approaches to tackling non-compliance with the off-payroll working rules. The government set out its position in respect of alternative proposals in the previous consultation document and the subsequent government response. This consultation is also not intended to consider the interaction between employment rights and being taxed like an employee.

There is currently no link between tax and employment rights. However, last year the government issued a consultation on employment status that explored the case for aligning the employment status definitions across tax and rights, including whether those deemed to be employees for tax purposes, such as those within the off-payroll working rules, should receive employment rights. This can be found at: www.gov.uk/government/consultations/employment-status.

On 17 December 2018 the government issued its Good Work Plan, setting out its vision for the future of the UK labour market. The government has recognised that having a separate framework for determining employment status for employment rights and tax can create confusion for individuals and employers. The government agrees that reducing the differences between the tax and rights frameworks for employment status to an absolute minimum is the right ambition, and will bring forward detailed proposals on how the frameworks could be aligned in due course. The Good Work Plan can be found at: www.gov.uk/government/publications/good-work-plan. Employment rights issues are therefore outside of the scope of this consultation but we will work with stakeholders to ensure that any potential changes and interaction between employment status for employment rights and tax are considered carefully.

ContractorCalculator Comment:

“This consultation is also not intended to consider the interaction between employment rights and being taxed like an employee.”

If an individual is classed as an employee in law, using employment status tests, then why should they not be treated like one with regards to both employment rights and tax?

To not align the two is entirely contrary to the government’s Good Work Plan. It also enables unscrupulous employers to oppress the low paid by engaging them in manners akin to employment, without providing them the necessary rights.

The government has mistakenly put forward the argument that the individual can still claim rights in court, which is an excessively onerous and often unrealistically expensive means of securing justice.

The government is currently consulting on changes to employment status. Given IR35 is reliant upon employment status law, it would be sensible to wait until those changes are decided, rather than causing further disruption the private sector in the very near future with yet more legislative change.

In the meantime the cost of non-compliance with the off-payroll working rules in the private sector is growing and will reach £1.3 billion a year by 2023/24. It is therefore right for the government to take action to address this in order to secure funds that could otherwise be spent on vital public services.

ContractorCalculator Comment:

The £1.3bn figure is simply incorrect, and has not been certified by the Office for Budget Responsibility (OBR), whose policy costings paper indicates a sum close to half this figure:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752208/Budget_2018_policy_costings_PDF.pdf

Exchequer Impact (£m)

	2018-19	2019-20	2020-21	2021-22	2022-23	2023-24
Exchequer impact	-5	-150	+1,165	+595	+635	+725

The OBR's actual estimate figure is £725m. **HMRC has overstated by £575m.**

Not only is HMRC wrong, but the OBR figure contains the highest uncertainty rating possible. This is due in large part to the fact that the OBR holds no data pertaining to the behavioural impact of the proposals, which is deemed the most important factor.

Budget 2018: Policy costing uncertainty ratings

	Measure	Data uncertainty	Behavioural uncertainty	Modelling uncertainty	Of which: most important[1]	Final rating
54	Off-payroll Working: extend reforms to private sector in 2020-21, excluding small businesses	High	Very High	Very High	Behaviour	Very High

Rating	Modelling	Data	Behaviour
Very High	Significant modelling challenges Multiple stages and/or high sensitivity on a range of unverifiable assumptions	Very little data Poor quality	No information on potential behaviour
High	Significant modelling challenges Multiple stages and/or high sensitivity on a range of unverifiable assumptions	Little data Much of it poor quality	Behaviour is volatile or very dependent on factors outside the tax/benefit system

The government is also alive to concerns expressed by a number of off-payroll workers, including: the lack of a legislative requirement to pass the determination (and reasons for the determination on request) down the labour supply chain; the absence of a statutory process to deal with status disagreements between the client and the off-payroll worker and/or fee-payer; and that businesses may use blanket decisions for the employment status of off-payroll workers in similar roles. The government intends to address these concerns as part of this consultation by refining the design of the

reform to help and encourage organisations to make the correct determination. The government also intends to introduce a framework for resolving disagreements over employment status decisions for off-payroll workers.

ContractorCalculator Comment:

Assessing IR35 status is similar to a car receiving an MOT. The difference, however, is that an MOT is a legally binding and objective fact, whereas an IR35 status determination is an opinion only. As a result, HMRC frequently challenges such assessments, even when it has a weak case with little chance of success (e.g. Albatel ruling).

A garage, when conducting an MOT, is required in law to test certain aspects of the car, and the garage then provides the car owner with all of the details of the testing. The same should apply to IR35 status tests, since the high-level elements have not changed since the Ready Mix Concrete case, the foundation for all status cases. And given that a detailed assessment has been made, there is no justification for not providing the worker with a copy of the assessment.

The legislation should make it clear which elements of a contract should be assessed, and the decision and detail should be mandatory requirement. The following elements should be mandatory to be assessed:

1. Personal service / substitution
2. Control: How, what, where, and when
3. Mutuality of obligation (employment MOO, not contractual)
4. Being in business on own account
5. Financial risk
6. Part and Parcel
7. Equipment
8. Intention of the parties

This would help to establish certainty and consistency while ensuring fewer contractors are subject to blanket assessments. All of this would lead to fairness in the tax system, something HMRC is very vocal about wanting to achieve.

This consultation is intended to provide organisations and off-payroll workers with greater certainty around how the off-payroll working rules will operate from 6 April 2020 and the obligations and responsibilities of the various parties involved in the labour supply chain. The government understands that many organisations will be keen to begin preparations and has therefore included in the education and support section of this document actions that affected organisations can take now to prepare for the reform.

ContractorCalculator Comment:

HMRCs aspiration for delivering certainty to the private sector with regards to status assessments is misguided, and unachievable.

Assessing status is notoriously complex and subjective. As an illustrative example, the BBC presenters' case in May 2018 had a court bundle of circa 3,500 pages and was heard over the course of nine days.

HMRC itself notoriously struggles to make correct status decisions, and has lost the vast majority of status cases that have reached court, including most recently the Albatel (Lorraine Kelly) case, which the Judge acknowledged wasn't even a borderline ruling.

To determine their IR35 status, contractors have traditionally sought contract reviews from qualified legal professionals costing upwards of £100. In preparation for the private sector changes, HMRC has provided a single page of guidance in this document, which is in no way sufficient to enable firms to accurately assess status.

Neither will private sector firms take any confidence from the fact that HMRC's recently published paper on mutuality of obligation (MOO) incorrectly defines the employment test.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722316/HMRC_paper_on_Mutuality_of_Obligation.pdf

The chaos and cost that this legislation is going to cause the private sector should not be underestimated.

Given the recent furore over the Loan Charge, and the watered-down impact assessment that accompanied its passage through Parliament, HMRC has demonstrated that it cannot be trusted to comment objectively on, and look after, the economic interests of the UK business sector. Therefore, an independent survey should be conducted to ascertain the likely level of disruption so that MPs can have an informed debate about the measures, before voting on them in Parliament.

Following this consultation

This consultation will inform the draft Finance Bill legislation intended to be published this summer. It will also provide public authorities with clarity on changes to the off-payroll working rules from April 2020 which they will also need to implement. HMRC will publish a full summary of responses as soon as possible following the conclusion of the consultation.

ContractorCalculator Comment:

The last summary of responses that HMRC published on this issue watered down and dismissed the widespread concerns that many stakeholders provided.

https://www.contractorcalculator.co.uk/hmrc_payroll_ir35_consultation_responses_545510_news.aspx

Therefore, it would serve the interests of both transparency and democracy if each response was published in the public domain.

The report should also be written by an independent body which can provide the necessary balance. Among the grievances ignored in HMRC's summary of consultation responses was the assertion by many that the taxman's consultation had cherry-picked information from its independent study into the public sector impact. These concerns were arguably vindicated by the rose-tinted manner in which HMRC's summary of responses portrayed stakeholder feedback.

Especially in light of HMRC's recent conduct with regards to the Loan Charge, including purporting false and misleading statements, the taxman cannot be trusted with the important task of providing a balanced response.

Imbalanced and glossed-over reports by HMRC do not adhere to the Civil Service Code, and are an affront to democratic principles.

2. Defining the scope of the reform

This chapter and the following chapters set out the government's proposals for how the rules should be refined to address concerns about how the reform is operating in the public sector, as well as meeting the needs of private sector organisations. It seeks the views of the organisations and individuals who will be operating the rules as to whether the proposals are likely to be effective. The changes proposed will apply to all public sector and medium and large-sized private sector clients.

Defining the scope

Having listened to concerns expressed by stakeholders about the capacity of clients to implement the changes, the government has decided that the smallest organisations will not be affected by the reform and will not need to determine the status of the off-payroll workers they engage.

The government intends to use the existing statutory definition within the Companies Act to determine whether or not a corporate client is small. This definition can be found at section 382 of the Companies Act 2006. An extract of the relevant provisions is set out below:

Companies Act definition of "qualifying as small"

The qualifying conditions are met by a company in a year in which it satisfies two or more of the following requirements —

1 Annual Turnover	*Not more than £10.2 million*
2 Balance sheet total	*Not more than £5.1 million*
3 Number of employees	*Not more than 50*

The advantage of this approach is that the majority of companies, as well as tax and accountancy professionals, are likely to already be familiar with this definition and to what extent it applies to their operations. The reform will apply to all corporates who do not qualify as small under the test set out in section 382 (including those small companies which are excluded from qualifying as small despite meeting the requirements).

Companies in small groups as defined by section 383 of the Companies Act will also qualify as small for the purposes of the April 2020 reform. In addition, anti-avoidance provisions will be considered as part of the design to ensure that parties connected to, associated with, or controlled by the client cannot take advantage of the provisions to exclude small private sector clients from having to consider the status of their off-payroll workers.

However, the government recognises that the Companies Act definition does not apply to non-corporate entities and that the balance sheet test in particular may not be suitable for all non-corporate clients. The government therefore proposes two options

for non-corporate entities which look only at the turnover and the number of employees of the organisation.

The first option is to apply the reform to unincorporated entities with 50 or more employees and to entities with turnover exceeding £10.2 million.

The second, is to apply the reform only to unincorporated entities that have both 50 or more employees and turnover in excess of £10.2 million.

The employee test will apply in the same way as the Companies Act test and will be met if the average number of employees employed over a year is 50 or more. The turnover test will also apply in the same way and will be met if the organisation's annual turnover exceeds £10.2 million. If either of these thresholds are exceeded the entity will be within the scope of the reform.

When an organisation becomes, or ceases to be small in an accounting period, for the purposes of the off-payroll working rules that change will apply from start of the tax year following the end of that accounting period. This is the case regardless of whether the organisation is incorporated or unincorporated.

Example 1

ABC Cash and Carry is a partnership specialising in the wholesale of goods to local businesses. The partnership employs 40 employees in various roles and in its accounting period ending 31 December 2019 it has a turnover of £8.7 million. ABC Cash and Carry has recently launched a website which allows their customers to place orders online. They engage an off-payroll worker through Agency Ltd to manage their website on their behalf.

It is now 6 April 2020 and the partnership must now decide whether or not the reform applies to them.

ABC Cash and Carry has fewer than 50 employees and less than £10.2 million in turnover. The partnership is considered small for the purposes of the reform under both options and does not have to apply the rules.

Under option 1, if ABC Cash and Carry had employed 50 or more employees or had turnover of more than £10.2 million it would have been responsible for determining the status of the contractor and passing it on to Agency Ltd.

Under option 2, ABC Cash and Carry would need to have 50 or more employees and turn over in excess of £10.2 million in order to be within scope of the reform.

Example 2

After the end of their accounting period, ABC Cash and Carry files its accounts for the period 30 November 2019 to 30 November 2020.

ABC Cash and Carry has increased its customers since the start of the tax year. As a result, ABC Cash and Carry now has a turnover of £10.5 million and is now employing 52 employees. ABC Cash and Carry continues to engage an off-payroll worker through Agency Ltd to manage their website.

ABC Cash and Carry knows that it qualified as small for the full tax year from 6 April 2020 because its small entity status was assessed on the basis of its accounting period ending immediately before 6 April 2020.

ABC Cash and Carry is positive about its future growth and expects to maintain and build on its customer base over the next 6 months into the following tax year. If its expectations are realised and it continues to engage an off-payroll worker to manage its website, ABC Cash and Carry is aware that from the 6 April 2021, it will need to consider whether the off-payroll working rules should be applied to its off-payroll contractor.

The reform and all associated responsibilities will apply in full to public authorities and any private sector organisations that do not qualify as small. This means that an organisation is liable for any income tax and Class 1 employee NICs due on deemed payments of employment income until it has fulfilled its obligations. These organisations will also be liable for employer NICs due on those same payments. This is consistent with the liability faced by public sector clients who fail to operate the current rules in Chapter 10, Part 2 ITEPA 2003.

Question 1 – Do you agree with taking a simplified approach for bringing non-corporate entities in to scope of the reform? If so which of the two simplified options would be preferable? If not, are there alternative tests for non-corporates that the government should consider? Could either of the two simplified approaches bring entities into scope, which should otherwise be excluded from the reform? Is it likely to apply consistently to the full range of entities and structures operating in the private sector? Please explain your answer.

ContractorCalculator Comment:

Experts have warned that this exemption creates more problems than it solves. Among the issues raised have been the relative ease with which the exemption criteria can be manipulated and exploited by firms, and the impossible task of accurately determining company size in real-time.

https://www.contractorcalculator.co.uk/payroll_ir35_small_company_exemption_vulnerable_549110_news.aspx

Off-Payroll (IR35) small company exemption vulnerable to exploitation, warns JSA

G+ +1 | Share | Tweet | Share | Email

The **Off-Payroll rules' small company exemption** is at severe risk of being exploited by contractor clients in its current format, creating problems further down the supply chain. However, expected amendments to the rules could prove a barrier to company growth for some firms in the near future.

It would be more sensible to wait until the reforms to employment status have been completed, involving simplification, before rolling out the off-payroll reforms to the entire sector in one go.

3. Information requirements

Responsibilities of each party in the labour supply chain

In extending the reform to the private sector, it is necessary to consider the obligations and responsibilities of each party in the labour supply chain. It is important that each individual or entity involved is able to consider and apply the rules effectively. However, the government recognises the necessity to balance providing certainty with the need to minimise unnecessary administrative burdens for those implementing the reform.

ContractorCalculator Comment:

If government wants to “minimise unnecessary administrative burdens for those implementing the reform”, then why is it proposing this onerous game of pass-the-parcel?

Involving all supply chain intermediaries in the compliance process creates an unnecessary amount of administration, while inevitably prolonging the time that it takes for a status decision to reach the contractor. Not only this, but experts have warned that involving every intermediary increases the number of points at which one might encounter non-compliance, risking heightened tax avoidance.

The simple way to avoid this entire process is to require that the client be responsible for both making the status assessment and processing the tax accordingly.

Current position

Under the reformed rules in the public sector, clients have to provide a status determination to the party they contract with at the start of the contract. This has to be provided by the time the contract starts or before the off-payroll worker starts to provide their services.

Once a determination has been provided, the party the client contracts with has a legal right to ask for the reasons for that determination and in response, the client must provide those reasons in writing within 31 days of receiving the request. This right is intended to allow the party that the client contracts with to check the decision and to understand how the determination was reached.

Where the client either does not provide the determination, or the reasons for it within these timescales, the liability for any income tax and NICs due transfers to the client

until they do so. The client has an opportunity to correct this position and provide a determination and/or the reasons for the determination each time a new payment is made.

In practice the party that the client contracts with, passes the client's determination down the supply chain until it reaches the fee-payer. If the off-payroll working rules apply, the fee-payer is required to deduct income tax and NICs from any invoice amounts and to pay it to HMRC.

ContractorCalculator Comment:

To be clear, there is no lawful basis on which the fee-payer or client, can deduct employer's National Insurance and the Apprenticeship Levy from the contractual rate agreed with the contractor.

"NICs" consists of two parts:

1. Employee's NI – deducted from the rate/salary.
2. Employer's NI – paid on top of the rate/salary by the employer.

To enable the fee-payer to fulfil its responsibilities the off-payroll worker is required to inform a fee-payer of the nature of the structure they are working through. The off-payroll worker must also provide the potential fee-payer with information to allow it to correctly account for Pay As You Earn (PAYE).

Proposed changes

While the government believes that the existing rules have worked adequately in the public sector, responses to the previous consultation identified a small number of points that would benefit from further consideration as the reform is rolled out more widely. For example, there is currently no requirement for the off-payroll worker to be given a determination by a client directly, nor is there any legislative right for the off-payroll worker, or fee-payer to seek the reasons for the determination.

ContractorCalculator Comment:

"Seek reasons"?

<u>There should be a legal obligation on the client to provide both the assessment results and the reasons for the determination.</u>

By making it a mandatory requirement for the client to provide reasons for the assessment, third parties will be able to police the legal requirement that the client takes 'reasonable care'. This would result in fewer conflicts over deemed status between contractor and client, minimising the number of legal challenges made at the tax tribunals.

It's this lack of policing of the reasonable care requirement that is resulting in unfairness. If HMRC wants fairness in the tax system, then the requirement to provide reasons for the assessment needs to be mandatory.

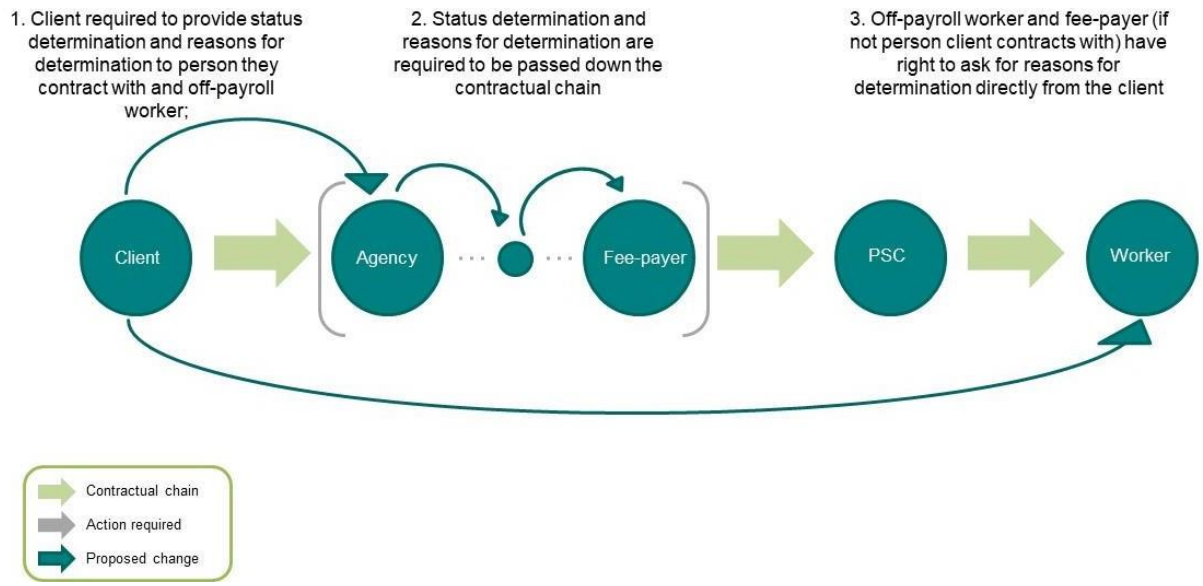
Ensuring information is shared appropriately

The government wants to ensure that the parties in the labour supply chain have sufficient information to allow them to comply with their obligations under the off-payroll working rules. However, the government is also keen to ensure that any new requirements do not impose a disproportionate administrative burden on organisations. This consultation is therefore intended to provide the government with sufficient information to allow it to strike the appropriate balance between these two principles.

The government considers it necessary to legislate to ensure that the determination – and the reasons for that determination – are cascaded to all parties within the labour supply chain, to ensure they comply with their obligations.

For off-payroll workers, the government considers that this could be achieved by requiring clients to provide the determination – and on request, the reasons for the determination – to the off-payroll worker directly. Changes would be made to legislation and guidance to be clear that the client must provide the off-payroll worker as well as the party they contract with (for example, an agency) the status determination for each engagement.

Illustration A: Determination and reasons for determination cascaded down the labour supply chain



Question 2 – Would a requirement for clients to provide a status determination directly to workers they engage, as well as the party they contract with, give off-payroll workers sufficient certainty over their tax position and their obligations under the off-payroll reform? Please explain your answer.

ContractorCalculator Comment:

There should be a mandatory requirement for clients to provide a copy of the assessment and the detailed reasons for the status determination directly to the contractor.

However, this can never provide the contractor with absolute certainty over their tax position, because the determination is not binding in law, as employment status is highly complex and subjective.

Whilst employment status is central to the reforms, there will NEVER be certainty, irrespective of any process that is proposed.

For fee-payers, although the current legislation does not explicitly require that the fee-payer be provided with the client's determination, the government understands that in the public sector this exchange of information takes place anyway.

ContractorCalculator Comment:

"The government understands that in the public sector this exchange of information takes place anyway."

This claim is laughable, given the widespread reports of blanket assessments within the public sector, and most notably the FCSA's survey findings that 50% of public authorities hadn't even conducted IR35 assessments for the contractors that they engaged.

https://www.fcsa.org.uk/legal-challenges-to-ir35-public-sector-reforms-seem-inevitable/

Nevertheless, the government intends to legislate to formalise the position, making clear to all parties the obligations on them as a result of the reform. This will require all recipients of a determination and the reasons for a determination to pass them on to the next person in the contractual chain at, or before, the time they make the first corresponding payment.

This proposal will ensure fee-payers who are further down the labour supply chain have the information they need to comply with the rules. It is the government's view that including a legislative requirement for the information flow to parties in the labour supply chain would address concerns raised by stakeholders about this issue.

Question 3 – Would a requirement on parties in the labour supply chain to pass on the client's determination (and reasons where provided) until it reaches the fee-payer give the fee-payer sufficient certainty over its tax position and its obligations under the off-payroll reform? Please explain your answer.

Question 4 - What circumstances might result in a breakdown in the information being cascaded to the fee-payer? What circumstances may result in a party in the contractual chain making a payment for the off-payroll worker's services but prevent them from passing on a status determination?

ContractorCalculator Comment:

As before, it will not deliver certainty, because the reforms are based on a complex employment status test, which even HMRC struggles to comprehend, as evidenced by decisive recent tax tribunal rulings, including the Lorraine Kelly case, and the Jensal Software case.

https://www.contractorcalculator.co.uk/contractor_defeats_hmrc_latest_ir35_case_540810_news.aspx

The pass-the-parcel approach to compliance opens the door to the proliferation of tax avoidance schemes, and is exactly how the Loan Schemes entered the scene again after April 2017.

This entire mechanism is a breeding ground for aggressive tax avoidance.

Simplified Information flow

The government is aware that the solution above could be cumbersome if labour supply chains are long and complex. Where there are more parties in the labour supply chain, each party in the chain is a potential point of failure, which may result in the status determination not reaching the fee-payer. These cases may benefit from an alternative approach to "short-circuit" a lengthy supply chain and simplify information flow, with the fee-payer receiving the determination directly from the client. However, this would require the client to know the identity of the fee-payer.

In most cases the organisation paying the worker's PSC will be the fee-payer. However, where the organisation paying the worker's PSC is off-shore, the fee-payer responsibilities move up the labour supply chain to the next UK-based entity. The government is keen to seek views on how the client may be in a position to identify the fee-payer in order to provide the determination (and the reasons for the determination on request) to the party they contract with, the off-payroll worker and the fee-payer directly.

Question 5 – What circumstances would benefit from a simplified information flow? Are there commercial reasons why a labour supply chain would have more than two entities between the worker's PSC and the client? Does the contact between the fee-payer and the client present any issues for those or other parties in the labour supply chain? Please explain your answer.

Question 6 – How might the client be able to easily identify the fee-payer? Would that approach impose a significant burden on the client? If so, how might this burden be mitigated? Please explain your answer.

ContractorCalculator Comment:

These questions present a staggering naivety on the part of HMRC as to the commercial realities of the flexible workforce and supply chains.

A large firm beginning a new project may need 500 workers. It will outsource its recruitment to large agencies, who sub contract, and so on. The supply chain is complex, but necessary, to attract the talent required. The firm hires agencies to take care of everything – and will not want to get involved with this complex process.

The entire premise is flawed and is akin to pouring glue on the flexible workforce.

Working for a small organisation

Small organisations in the private sector will not be responsible for determining whether the engagement is within scope of the off-payroll working rules. Currently where an off-payroll worker provides their services to a private sector organisation, that off-payroll worker is required to consider whether Chapter 8, Part 2 ITEPA 2003 applies to that engagement. This will continue to be the case for off-payroll workers providing their services to small private sector clients after 6 April 2020.

Where a potential fee-payer has not received a determination it would not be required to make any deductions for income tax and NICs or pay employer NICs until such a time as they have received a determination.

Example 3

ABC Cash and Carry is a partnership specialising in the wholesale of goods to local businesses. The partnership employs 40 employees in various roles and it has a turnover of £8.7 million. ABC Cash and Carry has recently launched a website which allows their customers to place orders online. They engage an off-payroll worker: Philip Johnson, of PJ Web Services Ltd through Agency Ltd to manage their website on their behalf.

It is now 6 April 2020, the partnership must now decide whether or not the reform applies to them. ABC Cash and Carry has fewer than 50 employees and less than £10.2 million in turnover. The partnership is considered small for the purposes of the reform and does not have to apply the rules.

As the reform does not apply to ABC Cash and Carry, it has not provided a determination to Agency Ltd or to the off-payroll worker Philip Johnson. All payments made by ABC Cash and Carry to Agency Ltd for Philip Johnson's services are for the full invoice amount and are not accompanied by a client status determination.

Agency Ltd are therefore not required to make any deductions for income tax and employee NICs, or pay employer NICs on any payments made to PJ Web Services Ltd for Philip Johnson's services.

When PJ Web Services Ltd is calculating its tax liabilities it will need to consider whether the engagement held by Philip Johnson with ABC Cash and Carry would have been one of employment were it not for the existence of Philip Johnson's company PJ Web Services Ltd. If this is the case, then PJ Web Services Ltd would need to apply the reformed off-payroll working rules for engagements with small entities in the private sector, to be set out in Chapter 8, Part 2, ITEPA 2003.

As the worker's PSC is currently required to consider whether Chapter 8 applies to any private sector engagements, the government does not believe this requirement would result in an additional burden for the worker's PSC. Compliant PSCs should be doing this already in relation to private sector engagements.

Question 7 – Are there any potential unintended consequences or impacts of placing a requirement for the worker's PSC to consider whether Chapter 8, Part 2 ITEPA 2003 should be applied to an engagement where they have not received a determination from a public sector or medium/large-sized client organisation taking such an approach? Please explain your answer.

ContractorCalculator Comment:

No, because they should all be doing this anyway.

Addressing non-compliance

The government believes that the vast majority of organisations will comply with their obligations under the reformed off-payroll working rules. However, it will be necessary to have in place effective deterrents to ensure that there is no advantage for the small minority who may seek not to comply, or to enter into artificial or contrived arrangements with a view to circumventing the rules.

The existing rules in Chapter 10, Part 2 ITEPA 2003 provide for the liability for income tax and NICs to be transferred from one party to another in certain circumstances, for example where a client fails to provide a determination. The government believes that extending these existing provisions would provide an effective mechanism for preventing and addressing non-compliance with the rules following the April 2020 reform.

To ensure that any reform of the information sharing rules is effective and avoids imposing unnecessary administrative burdens, it would be helpful to understand in more detail how labour supply chains in the private sector are typically structured. For example, the government is keen to understand more about the length of a typical labour supply chain and the role of any intermediary parties in the chain, in particular where more than one agency or party exists between the client and the worker's PSC. The government is also interested in any differences between labour supply chains in different sectors and the reasons for these differences.

Question 8 – On average, how many parties are in a typical labour supply chain that you use or are a part of? What role do each of the parties in the chain fulfil? In which sectors do you typically operate? Are there specific types of roles or industries that you would typically require off-payroll workers for? If so, what are they?

ContractorCalculator Comment:

It is worrying that HMRC is asking such basic questions about proposals that will have such a widespread and damaging impact on industry.

Questions such as this demonstrate HMRC's extremely limited understanding of UK plc, which raises further questions over its willingness to pull the trigger on legislation which will have such a drastic impact on the labour market.

In order to ensure that the extended information requirements are effective the government also proposes to modify the rules that determine when the liability for income tax and NICs should be transferred.

Where HMRC does not receive the tax due, the government proposes that the liability should initially rest with the party that has failed to fulfil its obligations, until such a time that it did meet those obligations. This means that liability would move down the labour supply chain as each party fulfils its obligations. For example, if an agency in the chain failed to send on the determination that agency would be liable for any income tax and NICs due. Similarly, if a fee-payer, having received the determination failed to make deductions from any payments made to the worker's PSC then it would become liable.

ContractorCalculator Comment:

The whole transfer of liability is entirely unnecessary, and would also feasibly create further work for HMRC in identifying the liable party in the event that it suspects non-compliance. If the reforms are simplified, so that the client is responsible for both the assessment and the deduction of tax, this ceases to be an issue.

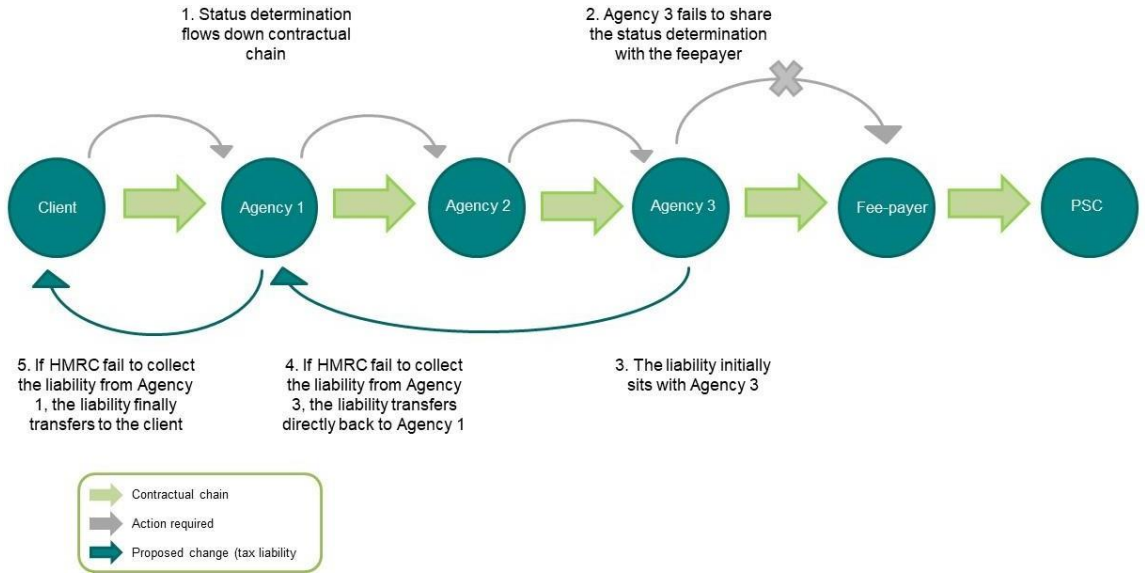
If HMRC were unable to collect the outstanding liability from that party, for example, because it ceased to exist, the government proposes that the liability should transfer back to the first party or agency in the chain. Where HMRC could not collect from the first party or agency it would ultimately seek payment from the client. This approach mirrors the approach taken in the agencies legislation and the legislation which applies to labour supply chains which feature non-UK employers.

It is the government's view that this approach is proportionate, as it is the business of the first agency in any chain to secure and provide its clients with labour, and so it is therefore best placed to ensure compliant behaviour from the parties in the chain below. The first agency is able to consider their contractual arrangements and who

they wish to contract with to provide the labour they have been contracted to supply. This means it has a number of options open to them, such as indemnifying themselves against non-compliant fee-payers, taking on fee-payer responsibilities themselves, or choosing to only work with reputable and compliant firms.

The advantages of this approach are that it would provide a clear incentive for all parties to comply with their obligations and to ensure a determination is passed fully down the chain. This approach would also encourage all parties to contract with reputable and compliant firms.

Illustration B: Liability flows down the labour supply chain as each party fulfils its obligations. Liability initially rests with party that has failed to fulfil its obligations, then transfers to Agency 1 and ultimately transfers to the client where HMRC cannot collect from Agency 1.



Question 9 – We expect that agencies at the top of the supply chain will assure the compliance of other parties, further down the labour supply chain, if they are ultimately liable for the tax loss to HMRC that arises as a result of non-compliance. Does this approach achieve that result?

ContractorCalculator Comment:

This idea of playing ‘pass-the-liability-parcel’ down the supply chain demonstrates a gross naivety about how UK business and supply chains work. It’s the type of naive ivory tower idea that would emanate from a first year student who had never worked in business.

To suggest that this approach will somehow enhance compliance is laughable. As is the suggestion that making agencies responsible for policing compliance among all parties within often convoluted supply chains, all in order to mitigate their own tax risk, won’t prove overly burdensome.

The practical reality is that every single entity in the supply chain will need to conduct its own assessment and due diligence. The process overheads are enormous. Firms will design processes to circumvent these requirements, which will ultimately lead to aggressive tax avoidance schemes entering the market.

Question 10 – Are there any unintended consequences or impacts of collecting the tax and NICs liability from the first agency in the chain in this way? Please explain your answer.

Question 11 - Would liability for any unpaid income tax and NICs due falling to the engager (if it could not be recovered from the first agency in the chain), encourage clients to take steps to assure the compliance of other parties in the labour supply chain?

Question 12 – Are there any potential unintended consequences or impacts of taking such an approach? Please explain your answer.

ContractorCalculator Comment:

See previous comments. The entire idea is a non-starter and a mess.

The government has also considered the alternative approach of including additional provisions in legislation that would seek to transfer the liability to the directors, office holders or associates of the fee-payer where HMRC is unable to collect the liability from the fee-payer.

Having considered this alternative approach, on balance the government thinks the approach set out above is:

- better able to drive behavioural change from those in the labour supply chain who have the most control;
- simpler in terms of liability only ever resting with one party in the labour supply chain at any one time; and
- an approach where liability follows obligations, providing opportunities to correct behaviour and failures every time a payment is issued.

ContractorCalculator Comment:

THE SIMPLE SOLUTION TO IR35

Perversely, the one aspect that HMRC is ruling out here has the seeds of an idea that would simplify IR35 considerably, meaning that these reforms would not need to be rolled out.

An alternative solution can be set out in three simple steps:

1. Cancel the roll out of the reforms to the private sector.
2. Put a reasonable care clause in the existing Chapter 8 legislation.
3. Include a debt transfer provision to the director of the PSC.

The above would strongly encourage proper assessments and correct tax treatment, while making it easier for HMRC to enforce and collect the tax it believes to be due.

4. Helping organisations to make the correct status determination and ensuring reasonable care

Addressing status determination disagreements between the client and the off-payroll worker and/or fee-payer

The government recognises concerns raised during the summer consultation about the absence of a process to challenge status determinations. A number of respondents to that consultation also expressed concern that organisations may make blanket determinations of the employment status of off-payroll workers working in similar roles.

ContractorCalculator Comment:

The status determination needs to be appealable in court - not just challenged. It must be an appealable decision, with an independent arbitrator.

The government is clear that the off-payroll working rules should be applied properly and consistently with due consideration given to the facts of a particular engagement. Employment status for tax is determined by the contractual terms and conditions, and the actual working practices of an engagement. Where a role and contract have been previously assessed as inside the off-payroll working rules, an organisation can be in a position to determine the status of the role at the time of advertising. Whether the assessment is made before the role is advertised or later, organisations will be required to take reasonable care in making decisions.

ContractorCalculator Comment:

HMRC's proposals concerning assessments do not align with the law, once again demonstrating the taxman's limited understanding of IR35.

The full factual matrix needs to be considered. This is not possible unless the individual is known and consulted, with their individual circumstances factored into the equation.

An assessment for every individual worker needs to be conducted. Making an assessment "before the role is advertised" cannot be considered to be taking reasonable care.

Applying a decision to a group of off-payroll workers with the same role, terms and contractual conditions can be appropriate in some circumstances. However, HMRC is

clear that it is not right to rule all engagements to be within or outside of the rules irrespective of the contractual terms and actual working arrangements. HMRC has not seen evidence to suggest widespread blanket decisions are being made in the public sector but where reasonable care has not been taken to reach these decisions, the liability for paying the income tax and NICs can transfer to the public authority.

ContractorCalculator Comment:

HMRC has been presented with copious evidence demonstrating that blanket assessments are taking place.

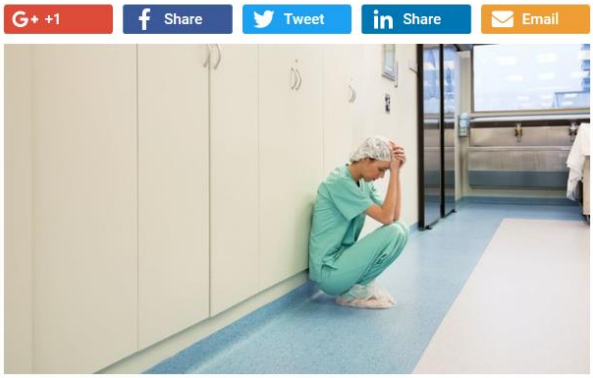
Not only this, but HMRC's IR35 team has been exposed for delivering misleading webinars to the NHS actively encouraging Trustees to conduct blanket assessments of their locums.

https://www.contractorcalculator.co.uk/leaked_hmrc_webinar_taxman_misled_nhs_ir35_544810_news.aspx

This has resulted in the widespread adoption of this non-compliant approach within the NHS, where a study by ContractorCalculator and the Independent Health Professionals Association (IHPA) found that 60% of locums had been subject to blanket assessments, with 50% having been pressured into joining an umbrella company.

https://www.contractorcalculator.co.uk/nhs_survey_patient_care_services_crisis_ir35_537910_news.aspx

NHS survey: patient care services in crisis as IR35 reforms take their toll



The excessive tax burden that contingent NHS workers have been subjected to as a result has led many to engage in tax avoidance schemes, in many cases unwittingly. This is an issue which has been warned of in both mainstream and industry press.

https://www.thetimes.co.uk/article/steer-clear-of-too-good-to-be-true-payroll-schemes-5bbms69xb

https://www.contractorcalculator.co.uk/nurses_agencies_umbrella_loan_schemes_538610_news.aspx

To reiterate, HMRC's position on role-based assessments is legally flawed, and has demonstrably damaging behavioural effects.

The government understands that in some circumstances an off-payroll worker or fee-payer may disagree with a client's status determination. This could include believing that the full circumstances of the engagement have not been considered, or because they think the client has not taken reasonable care in reaching that determination.

ContractorCalculator Comment:

The full circumstances of the engagement MUST be considered.

It would be very dangerous for any client to process a contractor as outside IR35 without an individual assessment. Though it has actively encouraged this approach in the public sector, HMRC argues in court that this kind of transference of assumption about status from one person (or role) to another is “careless” and does not constitute reasonable care. This then opens a route to not only challenge the position, but also to extend the normal four year enquiry window to six years.

The advice from HMRC is akin to suggesting a garage should not have to MOT check the next Ford that arrives, because they have already checked a Ford.

Insurers that are preparing products for the off-payroll reforms will not insure anything other than an individual assessment.

HMRC is, perhaps unwittingly, leading the flexible workforce into a trap.

The government thinks strengthening the existing rules by requiring the client to directly provide the off-payroll worker and the fee-payer with the reasons for the status determination on request will go some way to address this concern.

It may be that the client has provided the reasons for their determination together with their status determination to the party they contract with. In this circumstance under the proposals set out above, those in the labour supply chain will be obligated to pass both down the labour supply chain until it reaches the fee-payer and the off-payroll worker should have received both items from the client directly.

Where, for whatever reason, the fee-payer or off-payroll worker have not received the reasons for the status determination together with the status determination, the government thinks it is appropriate to provide the off-payroll worker and the fee-payer with the right to seek the reasons for the status determination directly from the client. This would be the first step in seeking to resolve status disagreements.

ContractorCalculator Comment:

There should be a mandatory obligation to provide, and a right to seek, reasons. The detail required in those reasons should be specified, namely a full assessment consisting of the factors described earlier.

In addition to this right to receive a determination and the reasons for the determination, it may be necessary for a process to be put in place to allow for determinations to be challenged. The government believes that the most effective approach would be for clients to develop and implement a process to resolve disagreements based on a set of requirements set out in legislation.

ContractorCalculator Comment:

A client checking their own homework is not the most effective way. It's like asking a burglar to judge their own crime. A contractor can never be confident of a fair evaluation when their appeal is being processed by the party with whom they are disputing.

There needs to be an appealable decision in law, which can be quickly arbitrated by an independent body, so that bias doesn't factor into the equation.

The introduction of a client-led status disagreement process would allow organisations to tailor the process to fit in with their wider business processes, while maintaining a level of consistency across all organisations. As a minimum the government would expect any process to include the consideration of evidence put forward by the off-payroll worker and/or fee-payer, advising the party of the outcome of that consideration and the reasons for that outcome. The introduction of this stage would be the second step in seeking to resolve status disagreements, providing additional assurance to off-payroll workers and fee-payers that the client has not taken an arbitrary approach to determining status and has considered any evidence they may have to the contrary.

ContractorCalculator Comment:

“The introduction of a client-led status disagreement process would allow organisations to tailor the process.”

Enabling clients to tailor a dispute process to suit their own needs will introduce inconsistency, and once again, open the door for widespread aggressive tax avoidance.

A tight framework relating to assessments and process would be legislatively required to ensure consistency and accuracy across the whole market.

If legislative requirements introduced by HMRC are as vague as this proposal, they will be easily circumvented by clients, and will therefore prove unenforceable.

This consultation introduces a variety of ways in which individuals can raise their concerns about their status determination directly with the client that issued it. It is the government’s view that this dialogue will inevitably result in the client taking reasonable care when reaching its final view on the status determination of the engagement. The government believes that the introduction of a client-led status disagreement process will mean that fewer off-payroll workers will need to use end of year processes to challenge the status determination. Instead, more workers and clients will reach the correct position in real time.

ContractorCalculator Comment:

“It is the government’s view that this dialogue will inevitably result in the client taking reasonable care when reaching its final view on the status determination of the engagement.”

This view demonstrates a complete lack of understanding of the real world of commerce. Should a contractor challenge an assessment, in many cases the client will simply issue the contractor an ultimatum: either they accept the contract as being ‘inside IR35’, or the contract is withdrawn.

There needs to be a tight legislative framework, with penalties, enforceable at tribunal, or arbitration if the process is not followed.

Such a process should really be administered by HMRC. The fact that HMRC has proposed a dispute mechanism whereby it foregoes any involvement shows the off-payroll tax for what it is – an effort by HMRC to outsource its job under the guise of legislative reform.

Question 13 – Would a requirement for clients to provide the reasons for their status determination directly to the off-payroll worker and/or the fee-payer on request where those reasons do not form part of their determination impose a significant burden on the client? If so, how might this burden be mitigated? Please explain your answer.

ContractorCalculator Comment:

No, it would not be burdensome. They should have already done the full assessment based on the full factual matrix, including the individual. The assessment should have stated the reasons.

Question 14 – Is it desirable for a client-led process for resolving status disagreements to be put in place to allow off-payroll workers and fee-payers to challenge status determinations? Please explain your answer.

ContractorCalculator Comment:

Possibly, but it depends what it is. Simply saying “we are not changing our mind” every time is not a process.

Question 15 – Would setting up and administering such a process impose significant burdens on clients? Please explain your answer.

ContractorCalculator Comment:

Not necessarily, because they could outsource it, although this would introduce additional costs.

The government considers requiring clients to set up such a process would not place a disproportionate administrative burdens on these organisations. Public sector and medium/large-sized private sector organisations are likely to already have relatively sophisticated HR processes in place either in-house or sub-contracted to relevant service providers for managing workplace disputes.

ContractorCalculator Comment:

HMRC's position is naive. A workplace dispute is not the same as a hiring dispute. A workplace dispute does not involve complex supply chains.

Clients would have frequent disputes with contractors who have not yet signed a contract. If they disagree, the client would then have to begin the entire hiring process again. The majority of 'inside IR35' assessments are going to be challenged.

This consultation and the ideas proposed are based on assumptions rather than a reflection of the realities of how businesses operate.

Question 16 – Does the requirement on the client to provide the off-payroll worker with the determination, giving the off-payroll worker and fee-payer the right to request the reasons for that determination and to review that determination in light of any representations made by the off-payroll worker or the fee-payer, go far enough to incentivise clients to take reasonable care when making a status determination?

ContractorCalculator Comment:

No. The proposals need to be more descriptive. They need to state exactly what is to be examined as part of a status assessment. See earlier comments on how to do this.

Every possible case law factor needs to be considered. This in itself may prove onerous for clients, but it is the only way to ensure fairness and to guarantee that clients are genuinely taking reasonable care.

HMRC could consider publishing the list of 100 questions that it asks when conducting its own status investigations. That level of transparency could be very useful and help introduce fairness.

5. Other matters

Accounting for tax, NICs and the Apprenticeship Levy when payments are made to the worker's PSC

As is currently the case for engagements in the public sector, where the rules apply, the fee-payer will be treated as an employer for income tax, NICs and Apprenticeship Levy purposes. The fee paid to the PSC is to be treated as a payment of the off-payroll worker's employment income when it is paid. The amount treated as the off-payroll worker's employment income will be the VAT exclusive amount paid to the worker's PSC. For income tax, NICs and Apprenticeship Levy purposes, the worker will be treated as having an employment with the fee-payer.

ContractorCalculator Comment:

"For income tax, NICs and Apprenticeship Levy purposes, the worker will be treated as having an employment with the fee-payer."

This means employer's National Insurance of 13.8% will be payable on top of the fees paid to the contractor, along with 0.5% for the Apprenticeship Levy.

Agencies and firms need to be aware that any existing arrangements involving client, agency and worker will not have catered for this extra tax cost, and that the arrangement will need to be renegotiated.

HMRC's own guidance is very explicit on this:

https://www.gov.uk/government/publications/off-payroll-working-in-the-public-sector-reform-of-the-intermediaries-legislation-technical-note/off-payroll-working-in-the-public-sector-reform-of-the-intermediaries-legislation-information-for-agents

7. Secondary Class 1 (employers') NICs
Because the fee payer has a liability to pay secondary Class 1 NICs, they are likely to wish to renegotiate the fee with the intermediary to reduce the rate for the job. They cannot lawfully deduct the secondary NICs from a fee that has been agreed, but could, depending on the contractual terms, negotiate a lower fee.

Some clearer warnings about this need to be made to all parties NOW, to ensure firms are prepared for April 2020 and do not face a cliff-edge 'no-deal' scenario with contractors, causing disruption to critical projects.

The reform requires the fee-payer to operate the rules for tax, NICs, and the Apprenticeship Levy in the same way as for a normal employee. The off-payroll worker is legally required to provide their National Insurance Number, tax code and identity details to enable the right tax to be deducted.

On or before the fee-payer makes payment to the worker's PSC, the fee-payer has to complete the normal Real Time Information (RTI) process and notify HMRC of the

amount of the taxable earnings and the tax and NICs deducted.

ContractorCalculator Comment:

Employee's National Insurance is a deduction.

Employer's National Insurance is payable on top of the contractor's fees.

As in the public sector reform, statutory payments and other employment rights will not be affected by the proposed reform to the off-payroll working rules from April 2020. This means that the deemed employment relationship does not result in employment rights or statutory payments obligations for the deemed employer or fee-payer.

ContractorCalculator Comment:

"The deemed employment relationship does not result in employment rights or statutory payments obligations for the deemed employer or fee-payer."

This is a matter for the courts. As demonstrated in a recent employment tribunal case, in which the claimant secured a pay-out of roughly £15,000 on the basis that his working arrangement was one of employment, clients would be naïve to assume that classifying workers as 'employed for tax purposes' won't have significant repercussions.

https://www.contractorcalculator.co.uk/15k_tribunal_award_contractor_signals_trouble_ir35_546410_news.aspx

£15k tribunal award to contractor signals trouble for IR35 extension

An individual has won a pay-out of roughly £15,000 in an employment tribunal (ET) case, which could spell trouble for firms who fail to comply with the **Off-Payroll rules**, should they arrive in the private sector.

It is negligent for HMRC to advise firms that they will not face the danger of employment tribunals if they assess contractors as inside IR35.

Treatment of employer NICs for Employment Allowance purposes

As is the case for the public sector reform, all employer NICs paid as a result of deemed employment income are excluded liabilities for the purposes of the Employment Allowance. If an organisation only has secondary Class 1 NICs liabilities arising from the payment of deemed employment income they would not be able to claim the Employment Allowance against these liabilities. If an organisation has a mix of employees and off-payroll workers, only the secondary Class 1 NICs liabilities arising from payments of earnings made to the employer's direct employees would be qualifying liabilities for Employment Allowance purposes.

Dealing with student loans

Although the fee-payer is treated as the employer for the purposes of income tax, NICs, and the Apprenticeship Levy, as per the public sector reform, the fee-payer will not be required to make deductions for student loans purposes.

ContractorCalculator Comment:

Ironically, this creates a tax loophole which could enable ex-students to avoid paying their fair share of tax, which is vital to fund education.

Provisions to address double taxation

Existing provisions dealing with double taxation will continue to apply following the April 2020 reform. This means that broadly speaking the worker's PSC is able to set the amount of the deemed payment against the amount of remuneration from the worker's PSC on which tax liabilities arise. The corporation tax computation should be adjusted so that the worker's PSC cannot claim a double deduction for the costs associated with the engagement.

5% allowance

As with public sector engagements the worker's PSC will no longer be permitted to deduct a 5% allowance in relation to engagements with medium and large-sized clients.

ContractorCalculator Comment:

This is very bad indeed for the mobility of the flexible workforce.

Let's take a real-life example, of a contractor who currently provides their expertise on government nuclear projects.

The contractor is on £450 per day. They travel during the week to work at a crucial defence site in Berkshire, and they stay four nights per week in a Travelodge, which is £40 per night. The total cost per week for their travel and accommodation is £350. For a year this is £18,200 – which is 18% of their earnings spent on travel and accommodation.

https://www.contractorcalculator.co.uk/offpayrollsummary.aspx

Using the above calculator, we see that the contractor will need to increase their rate by £120 per day, in order to earn the same money as before, including funding the expenses out of post-tax earnings.

This calculation also assumes that the client/agency is paying its own employment taxes, and not passing them onto the contractor, which has often proven not to be the case in the public sector.

The contractor will not work at the site if they do not receive this rise, because they can find work closer to home.

This is a 26% increase in rate, just to fund the expenses.

It gets worse, for the client.

The client/agency ('fee-payer') must also pay extra monthly employer's NI (13.8%) of £1,041 and Apprenticeship Levy (0.5%) of £41 on top of the contract rate. These additional annual employment taxes due from the hirer amount to £12,994.

The total cost of hiring the contractor, including all taxes and funding of the increased rate arising from the expenses issue, is now £646 per day.

The increased total cost for the client would be 43%.

Provisions to address special situations and avoidance behaviour

Existing provisions to address anti-avoidance will also continue to apply. Where the agency or third party that would be the fee-payer is offshore, the liability moves to the next person above them in the contractual chain which is in the UK. If only the client is in the UK then they will be the liable party. Where a party in the contractual chain, including the client is outside the UK but the off-payroll worker performs services in the UK, fee-payers must still deduct tax and NICs.

Provisions dealing with circumstances where the off-payroll worker, or parties, or companies connected to, associated with or controlled by the off-payroll worker are inserted into the labour supply chain will also continue to apply. These provisions prevent the worker's PSC from manipulating the labour supply chain in order to circumvent the legislation.

Other anti-avoidance provisions will also be considered as part of the design to ensure that clients cannot abuse the provisions to exclude small private sector clients from the reform.

ContractorCalculator Comment:

Firms create new spin-off companies all the time, so it's difficult to envisage how HMRC can properly police abuse of the small company exemption. It's a gaping loop hole.

It is expected that agencies, where present in the supply chain, will be made responsible for reporting the company size of the end-clients. This is likely to further incite clients to misrepresent their affairs, while introducing additional difficulties for HMRC in its efforts identifying abuse of the exemption.

https://www.contractorcalculator.co.uk/payroll_ir35_small_companys_exemption_547310_news.aspx

Off-Payroll (IR35) small company's exemption fraught with difficulty, says JSA

Proposals by HMRC – to include a small company's exemption from applying the Off-Payroll rules in the private sector – threaten to add further complications, while encouraging firms to circumvent the legislation.

How the off-payroll working rules should be applied in relation to "contracted out" services

The off-payroll working rules require a worker to personally perform, or be under an obligation to personally to perform, services for another person ("the client"). This condition will not be met where the client has contracted-out the services to a third party, e.g. an outsourcing company, in such a way that the third party does not as part of that service provide their client with the labour of the workers.

For engagements in the public sector, if a public authority has contracted-out the services to a third party in the private sector, the public authority is not required to consider whether the off-payroll working rules apply. Conversely, had the public authority entered in to a contract for labour supply it would be required to consider whether the off-payroll working rules applied.

In these circumstances, under the current rules, even the third party who engages a worker's PSC to perform the services for the public authority, is not required to consider whether the off-payroll working rules apply.

From April 2020, the position for the public authority will not change. The public authority will still not be required to consider whether the off-payroll working rules apply because it has not entered into a contract for labour supply. A private sector organisation that has contracted-out services in this way will also not be required to consider the legislation. In the circumstances described above, the third party is the client that has engaged the worker's PSC. The third party will be required to consider whether the off-payroll working rules apply, and if they do, it will be responsible for deducting and paying the appropriate tax and NICs.

ContractorCalculator Comment:

This is a relatively simple mechanism by which firms will be able to circumvent the rules. Lots of mini 'consultancies' will suddenly appear. It's already happening.

How the off-payroll working rules should be applied in relation to other tax legislation

Agency legislation: where an agency contracts directly with the worker as an employee and operates tax and NICs, or engages them on a self-employed basis but operates tax and NICs under agency rules, then the off-payroll working rules do not apply. (See Chapter 7, Part 2 ITEPA 2003).

Umbrella companies: where an umbrella company employs the worker directly as an employee and does not contract with the worker's PSC, the off-payroll working rules do not apply. Some umbrella companies do not employ the worker directly and continue to contract with the worker's PSC - so these arrangements should be checked. If the worker's PSC continues to receive payments for the off-payroll worker's service through their PSC then the off-payroll working rules continue to apply.

Managed Service Company legislation: where the conditions in the off-payroll working rules apply, these rules will take precedence over the managed service company rules in Chapter 9, Part 2 ITEPA 2003.

Construction Industry Scheme: where the conditions in the off-payroll working rules apply, these rules will take precedence over the rules in the construction industry scheme.

Pensions

The rules within Chapter 8 allow the PSC to make contributions to the worker's pension as an employer would, tax and NICs free. This facility was removed when Chapter 10 was introduced in order to simplify the calculation fee-payers would need to administer.

Under the new rules workers are able to claim all the income tax relief due on pension contributions. However, these contributions will no longer qualify for NICs relief, as tax and employee NICs will have been deducted from their contract fee by the fee-payer. We are considering legislative options that allow fee-payers to make contributions free of tax and NICs to the workers personal pension.

Making pension contributions would effectively give fee-payers a deduction on the amount on which they will be required to pay employers NICs. This is because the pension contribution reduces the gross pay before tax and employers NICs are calculated.

ContractorCalculator Comment:

If the person is classed as an employee in law then all rights to pensions should be included as part of that.

Question 17 – How likely is an off-payroll worker to make pension contributions through their fee-payer in this way? How likely is a fee-payer to offer an option to make pension contributions in this way? What administrative burdens might fee-payers face which would reduce the likelihood of them making contributions to the off-payroll worker's pension?

Other issues

Question 18 – Are there any other issues that you believe the government needs to consider when implementing the reform? Please provide details.

ContractorCalculator Comment:

1. HMRC has a terrible track record contesting IR35 status at tribunals over the past decade, including a comprehensive defeat in the most recent high profile case involving Lorraine Kelly. How can HMRC be trusted to understand and correctly apply the law which it has consistently demonstrated in court that it does not fully understand?

2. There is no evidence to support HMRC's claim that a third of all contractors should be classed as inside IR35. Instead, its poor record in the courts would suggest that HMRC significantly overestimates the prevalence of non-compliance.

3. The estimates relating to the Exchequer impact of the proposals have a very high uncertainty rating, and wrongly rely upon the assumption that the private sector will behave the same as the public sector. Given the level of distrust in HMRC/HMT, particularly in the midst of the Loan Charge debacle, the model should be published and subject to market scrutiny, so that the OBR can obtain more balanced input, enabling MPs to make decisions based on a more objective truth.

4. The vast majority of the extra tax that where a contractor is classed as 'caught by IR35' will be due from the client. The rough figure is 84%. Firms will need to plan for this considerable extra cost, and it would be responsible for HMRC/HMT to be more transparent and communicate this impact more clearly than they are currently.

5. The inability to claim expenses and the removal of the 5% allowance will result in firms struggling to recruit high skilled contractors from further afield, without paying almost 50% more for the necessary talent. This potential impact needs to be explained to businesses, so that they can prepare.

6. HMRC's calculations relating to off-payroll, and the tax comparison, should take into account the fact that contractors are typically paid more than their permanent counterparts, resulting in an increase in the comparable tax yield. Similarly, any tax projections should account for the decrease in pay likely if someone moves into an employed role.

7. CEST should be independently tested. The testing process, and its results, should be fully transparent and made available for public scrutiny.

8. The 'pass-the-parcel' proposals with regard to compliance requirements and liability will breed widespread aggressive tax avoidance and create an unnecessary administrative burden for all involved.

9. Anyone classed in law as an employee should get full employment rights, as per the government's Good Work Plan.

10. An independent appeals process should be created, accessible at the point of determination. This will help ensure fairness in the tax system, and prevent unscrupulous firms from misclassifying lower paid workers.

11. Independent research should be conducted to ascertain, after two years, the impact of the April 2017 reforms on the public sector.

12. Prior to any legislative change in the private sector, independent research should be conducted to ascertain the likely impact of the proposed changes.

6. Education and support for organisations and individuals

Check Employment Status for Tax (CEST) service

The CEST service was launched in 2017. HMRC developed the CEST service to help clients decide:

- the status of their off-payroll workers; and
- whether the off-payroll working rules apply.

CEST was rigorously tested and is able to determine employment status in 85% of cases. HMRC continues to work with stakeholders to identify improvements to CEST and wider guidance to ensure it meets the needs of the private sector.

Enhancements will be tested with stakeholders before the reform is implemented.

ContractorCalculator Comment:

There is no formal evidence that CEST was rigorously tested. Multiple FOI requests from ContractorCalculator have sought HMRC's testing documentation, yet all the taxman has presented to date is a single page list of 24 employment status cases which it claims CEST was tested against.

Though HMRC claimed CEST returned the same outcome as the tribunals in 22 of these cases, a re-testing of CEST by ContractorCalculator found that the tool returned the correct outcome for the correct reasons in just 58% of the cases in question.

https://www.contractorcalculator.co.uk/cest_exposed_hopelessly_unreliable_hmrcs_foi_543610_news.aspx

HMRC claims that CEST provides an answer 85% of the time, but has been careful not to assert that this is an accurate determination, rendering this comment largely

meaningless. CEST's credibility has also been undermined by multiple IR35 legal experts, in large part due to its failure to consider key areas of case law, including mutuality of obligation (MOO).

https://www.contractorcalculator.co.uk/hmrc_key_ir35_case_law_cest_tool_537610_news.aspx

When tested against the recent Lorraine Kelly tribunal case, in which the Judge concluded that Kelly was not caught by IR35, CEST returns the incorrect outcome.

https://www.contractorcalculator.co.uk/lorraine_kelly_ir35_hmrcs_cest_biased_inaccurate_549010_news.aspx

A National Audit Office (NAO) report found that CEST was used to assess the status of 663 BBC freelancers upon its introduction. Though the majority had previously been assessed as self-employed by the BBC's internal review process, developed in liaison with HMRC, CEST determined 92% to be 'employed for tax purposes'. This raises further questions over the tool, suggesting that its results are skewed towards deeming users to be employed.

https://www.nao.org.uk/report/investigation-into-the-bbcs-engagement-with-personal-service-companies/

ContractorCalculator is involved with ongoing tribunal cases where CEST has given an outside IR35 result, yet HMRC plans to challenge contractors in court, offering little substance to its initial pledge to stand by the results issued by the tool, creating further uncertainty for its users.

CEST only asks 16 questions to ascertain an individual's status. This is woefully short of the number required. HMRC's investigations send out requests including more than 100 questions, which are to be answered in the first round of the investigation.

Insurers will not offer any financial protection against determinations made using CEST, and a former HMRC tax inspector has stated that use of the tool is not sufficient to warrant the off-payroll legislation's 'reasonable care' requirement.

https://www.contractorcalculator.co.uk/cest_reasonable_care_ex_hmrc_tax_inspector_544010_news.aspx

CEST does not provide certainty or reasonable care, says ex-HMRC tax inspector

HMRC's Check Employment Status for Tax (CEST) tool does not fulfil the 'reasonable care' requirement set out within the Off-Payroll legislation, and so is unable to provide its users with any form of tax certainty.

Stakeholder concerns

There are currently concerns about CEST's ability to:

- take account of existing employment status for tax case law and the resulting possibility to not give an accurate employment status determination in some cases
- reflect the complex nature of the private sector.

ContractorCalculator Comment:

This is misleading.

Employment status case law is the same for the public sector and private sector. To suggest that CEST needs enhancing because the private sector is different to the public sector has no basis in reality or law.

This comment appears simply to be an admission by HMRC that CEST requires amending, yet calculated as to avoid acknowledging that the current version is not fit-for-purpose.

HMRC response

HMRC is currently working with stakeholders to deal with these concerns. HMRC is looking to:

- enhance the service to help customers make employment status decisions;
- improve CEST guidance so organisations can confidently make employment status determinations that people working through intermediaries will be able to see and understand
- develop an education and support package for those affected to help them prepare for, and implement changes to the off-payroll working rules.

ContractorCalculator Comment:

This is all meaningless. CEST is fundamentally flawed and needs to be withdrawn immediately. It does not work, and is inaccurate and heavily biased. Improving guidance on CEST is a pointless exercise as long as these fundamental issues with CEST remain.

CEST has always been defective, and given the short timeframe before April 2020, it is unlikely to be improved in any material way before then.

Education and support package

HMRC will tailor this package to:

- give relevant information to those who will need to apply the off-payroll working rules, such as: HR directors, hiring managers, and off-payroll workers so they can act on the changes in time for April 2020
- meet the needs of different users. For example clients will be pointed towards specific guidance on making the status decision, fee-payers to guidance on operating payroll, and off-payroll workers will have easy access to guidance specific to them, such as how to apply the existing rules when providing their services to small clients.

ContractorCalculator Comment:

These objectives, whilst admirable, are naïve.

The BBC, for example, just one organisation, is still suffering considerable problems two years on from the implementation of the reforms in the public sector.

https://www.contractorcalculator.co.uk/bbc_chiefs_pin_problems_cest_547210_news.aspx

The private sector is significantly more diverse than the public sector. HMRC does not have the resources to educate the private sector at all.

Actions for businesses to take now to prepare for the reform

The government understands that many organisations will be keen to begin preparations.

Organisations affected by the reform should take the following actions now to prepare for the reform:

1. Identify and review their current engagements with intermediaries, including PSCs and agencies that supply labour to them
2. Review current arrangements for the use of contingent labour, particularly within the organisation functions that are more likely to engage off-payroll workers
3. Put in place comprehensive, joined-up processes (assess roles from a procurement, HR, tax and line management perspective) to get consistent decisions about the employment status of the people they engage
4. Review internal systems, such as payroll software, process maps, HR and on-boarding policies to see if they need to make any changes

This consultation document should give organisations and individuals certainty around:

- how the off-payroll working rules will work from 6 April 2020 and
- the obligations and responsibilities of all parties involved in the labour supply chain.

ContractorCalculator Comment:

The off-payroll reforms have been proposed. They are not yet law. There is widespread industry and political opposition to them.

Firms are not ready for the proposals outlined, and have been given little chance to prepare.

7. Summary of Consultation Questions

Question 1 – Do you agree with taking a simplified approach for bringing non-corporate entities in to scope of the reform? If so, which of the two simplified options would be preferable? If not, are there alternative tests for non-corporates that the government should consider? Could either of the two simplified approaches bring in to scope entities which should otherwise be excluded from the reform? Is it likely to apply consistently to the full range of entities and structures operating in the private sector? Please explain your answer.

Question 2 – Would a requirement for clients to provide a status determination directly to off-payroll workers they engage, as well as the party they contract with, give off-payroll workers sufficient certainty over their tax position and their obligations under the off-payroll reform? Please explain your answer.

Question 3 – Would a requirement on parties in the labour supply chain to pass on the client's determination (and reasons where provided) until it reaches the fee-payer give the fee-payer sufficient certainty over its tax position and its obligations under the off-payroll reform? Please explain your answer.

Question 4 - What circumstances may result in a breakdown in the information being cascaded to the fee-payer? What circumstances might result in a party in the contractual chain making a payment for the off-payroll worker's services but prevent them from passing on a status determination?

Question 5 – What circumstances would benefit from a simplified information flow? Are there commercial reasons why a labour supply chain would have more than two entities between the worker's PSC and the client? Does the contact between the fee-payer and the client present any issues for those or other parties in the labour supply chain? Please explain your answer.

Question 6 – How might the client be able to easily identify the fee-payer? Would that approach impose a significant burden on the client? If so, how might this burden be mitigated? Please explain your answer.

Question 7 - Are there any potential unintended consequences or impacts of placing a requirement for the worker's PSC to consider whether Chapter 8, Part 2 ITEPA 2003 should be applied to an engagement where they have not received a determination from a public sector or medium/large-sized client organisation taking such an approach? Please explain your answer.

Question 8 – On average, how many parties are in a typical labour supply chain that you use or are a part of? What role do each of the parties in the chain fulfil? In which sectors do you typically operate? Are there specific types of roles or industries that you would typically require off-payroll workers for? If so, what are they?

Question 9 – The intention of this approach is to encourage agencies at the top of the supply chain to assure the compliance of other parties, further down the chain, through which they provide labour to clients. Does this approach achieve that result?

Question 10 – Are there any potential unintended consequences or impacts of collecting the tax and NICs liability from the first agency in the chain in this way taking such an approach? Please explain your answer.

Question 11 - Would liability for any unpaid income tax and NICs due falling to the client (if it could not be recovered from the first agency in the chain), encourage clients to take steps to assure the compliance of other parties in the labour supply chain?

Question 12 – Are there any potential unintended consequences or impacts of taking such an approach? Please explain your answer.

Question 13 – Would a requirement for clients to provide the reasons for their status determination directly to the off-payroll worker and/or the fee-payer on request where those reasons do not form part of their determination impose a significant burden on the client? If so, how might this burden be mitigated? Please explain your answer.

Question 14 – Is it desirable for a client-led process for resolving status disagreements to be put in place to allow off-payroll workers and fee-payers to challenge status determinations? Please explain your answer.

Question 15 – Would setting up and administering such a process impose significant burdens on clients? Please explain and evidence your answer.

Question 16 – Does the requirement on the client to provide the off-payroll worker with the determination, giving the off-payroll worker and fee-payer the right to request the reasons for that determination and to review that determination in light of any representations made by the off-payroll worker or the fee-payer, go far enough to incentivise clients to take reasonable care when making a status determination?

Question 17 – How likely is an off-payroll worker to make pension contributions through their fee-payer in this way? How likely is a fee-payer to offer an option to make pension contributions in this way? What administrative burdens might fee-payers face which would reduce the likelihood of them making contributions to the off-payroll worker’s pension?

Question 18 - Are there any other issues that you believe the government needs to consider when implementing the reform? Please provide details.

8. The Consultation Process

This consultation is being conducted in line with the Tax Consultation Framework. There are 5 stages to tax policy development:

Stage 1 Setting out objectives and identifying options.

Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.

Stage 3 Drafting legislation to effect the proposed change.

Stage 4 Implementing and monitoring the change.

Stage 5 Reviewing and evaluating the change.

This consultation is taking place during stage 2 of the process. The purpose of the consultation is to seek views on the detailed policy design and a framework for implementation of a specific proposal, rather than to seek views on alternative proposals.

How to respond

A summary of the questions in this consultation is included at chapter 3.

Responses should be sent by 28 May 2019, by e-mail to offpayrollworking.intheprivatesectorconsultation@hmrc.gsi.gov.uk or by post to: Employment Status and Intermediaries Policy, 3C/15, 100 Parliament Street, Westminster, SW1A 2BQ

Please do not send consultation responses to the Consultation Coordinator.

Paper copies of this document or copies in Welsh and alternative formats (large print, audio and Braille) may be obtained free of charge from the above address. This document can also be accessed from HMRC's GOV.UK pages. All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

When responding please say if you are a business, individual or representative body. In the case of representative bodies please provide information on the number and nature of people you represent.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018, General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Revenue & Customs.

Consultation Privacy Notice

This notice sets out how we will use your personal data, and your rights. It is made under Articles 13 and/or 14 of the General Data Protection Regulation

Your Data

The data

We will process the following personal data:

Name
Email address
Postal address
Phone number
Job title

Purpose

The purpose(s) for which we are processing your personal data is: *Off-Payroll Working in the Private Sector*

Legal basis of processing

The legal basis for processing your personal data is that the processing is necessary for the exercise of a function of a government department.

Recipients

Your personal data will be shared by us with HM Treasury.

Retention

Your personal data will be kept by us for six years and will then be deleted.

Your Rights

- You have the right to request information about how your personal data are processed, and to request a copy of that personal data.

- You have the right to request that any inaccuracies in your personal data are rectified without delay.

- You have the right to request that any incomplete personal data are completed, including by means of a supplementary statement.

- You have the right to request that your personal data are erased if there is no longer a justification for them to be processed.

- You have the right in certain circumstances (for example, where accuracy is contested) to request that the processing of your personal data is restricted.

Complaints

If you consider that your personal data has been misused or mishandled, you may make a complaint to the Information Commissioner, who is an independent regulator. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF
0303 123 1113
casework@ico.org.uk

Any complaint to the Information Commissioner is without prejudice to your right to seek redress through the courts.

Contact details

The data controller for your personal data is HM Revenue & Customs. The contact details for the data controller are:

HMRC
100 Parliament Street
Westminster
London SW1A 2BQ

The contact details for HMRC's Data Protection Officer are:

The Data Protection Officer
HM Revenue & Customs
7th Floor, 10 South Colonnade
Canary Wharf, London E14 4PU
advice.dpa@hmrc.gsi.gov.uk

Consultation Principles

This call for evidence is being run in accordance with the government's Consultation Principles.

The Consultation Principles are available on the Cabinet Office website: http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance

If you have any comments or complaints about the consultation process please contact:

John Pay, Consultation Coordinator, Budget Team, HM Revenue & Customs, 100 Parliament Street, London, SW1A 2BQ.

Email: mailto:hmrc-consultation.co-ordinator@hmrc.gsi.gov.uk

Please do not send responses to the consultation to this address.