GAAR as a process and the process of discussing the GAAR

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In December 2010, Graham Aaronson QC, one of the UK’s leading revenue law barristers, was asked by the Exchequer Secretary to the Treasury, David Gauke, to conduct a study that would consider whether a General Anti-Avoidance Rule (GAAR) could deter and counter tax avoidance, whilst providing certainty, retaining a tax regime that is attractive to businesses, and minimising costs for businesses and HMRC: a demanding request. Mr. Aaronson’s report (the Report) was delivered less than just one year later, in November 2011.¹

The Advisory Committee appointed to assist Mr Aaronson consisted of three judges with considerable experience of deciding tax cases, one tax director of a major multinational company and two academics (one of whom is the writer of this note).² The Report was written by Mr Aaronson, and is very much his report, although it was informed by meetings and email correspondence with the Advisory Committee and considerable communication with others. The conclusions of the Report reflect the views of the Advisory Committee, subject to the reservation that the two serving judges, Sir Launcelot Henderson and Mr Howard Nowlan, are required by their positions to maintain strict public neutrality.

¹ All the relevant documents, including the terms of reference and the completed GAAR Study by Graham Aaronson (the Report), can be found at http://www.hm-treasury.gov.uk/tax_avoidance_gaar.htm [Accessed February 1, 2012]. The direct link to the Report is at http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf [Accessed February 1, 2012].
² The members of the study group were John Bartlett (Group Head of Tax, BP plc); Professor Judith Freedman of Oxford University; Sir Launcelot Henderson (Judge of the Chancery Division of the High Court of Justice); The Rt. Hon. Lord Hoffmann (formerly Lord of Appeal and Non-Permanent Judge of the Court of Final Appeal of Hong Kong); Howard Nowlan (formerly Tax Partner at Slaughter & May, and part time Judge of the First-tier Tax Tribunal); and Professor John Tiley CBE, QC of Cambridge University. This group, together with Mr Aaronson, was supported by a secretariat comprised of Jonathan Bremner (Pump Court Tax Chambers); and Zoe Leung-Hubbard (HMRC).
Appended to the Report is an illustrative draft GAAR. It is important to note the word “illustrative”, which is used throughout the Report with regard to this draft legislation and the associated guidance. The draft legislation was intended for discussion and not to be the last word on the subject. The Report began a process and was not intended to conclude it. It was indicated from an early stage that, if the Government did decide to proceed further with the idea of a GAAR, there would be a full public consultation and so there was never any question of the illustrative clauses being included in the 2012 Finance Bill.¹

Since the publication of the Report, there has been a considerable amount of interest in the proposals it contains. The response has been mixed, as was to be expected in a controversial area such as this.² The writer’s impression is that, initially at least, the response has been more positive than the reaction to the idea of a GAAR in 1998, when it was last discussed in depth by the practitioner community. That 1998 debate was stimulated by the publication of a report by the Tax Law Review Committee (TLRC), putting forward the suggestion that a sensibly targeted general anti-avoidance provision (with appropriate safeguards) would be preferable to the continued development of judicial anti-avoidance doctrines.³ It is no coincidence that the Chairman of the TLRC at that time was Graham Aaronson.⁴ The TLRC report stimulated the production of a paper from the Inland Revenue (as it then was) on the same topic,⁵ but the result was a proposal from the Inland Revenue that many, including the TLRC, considered did not contain the necessary checks and balances to safeguard the taxpayer and the idea was rejected.⁶

There may be a number of reasons why the issue has re-emerged onto the agenda. First, as the Report currently under discussion notes, the current state of the UK case law is far from clear. It was unclear in 1997 and the situation has got worse, not better. Over the years the Ramsay principle has been declared to be nothing other than an application of normal principles of statutory interpretation, and not a judicial doctrine at all.⁷ Nevertheless, when the courts are confronted by abusive schemes:

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¹This is clearly stated at http://www.hm-treasury.gov.uk/tax_avoidance_gaar.htm [Accessed February 1, 2012].
⁴The writer was a member of the TLRC then (and remains so).
“Judges inevitably are faced with the temptation to stretch the interpretation, so far as possible, to achieve a sensible result; and this is widely regarded as producing considerable uncertainty in predicting the outcome of such disputes.”

The UK tax code is now even longer and more complex that it was in 1998. A very large number of unallowable purpose tests or targeted anti-avoidance rules (TAARS) have been added to the legislation, with no safeguards for the taxpayer who is confronted by them. This has added considerably to the uncertainty. The Disclosure of Tax Avoidance Schemes legislation seems to be having some success in curbing avoidance, but practitioners and HMRC are aware that artificial schemes continue to be sold.

Overarching all this, the zeitgeist is right for a new approach. The public reaction to tax avoidance at a time of austerity has been picked up by the politicians, who are keen to be seen to be taking action. This in itself would not be justification for legislation, but coupled with the other factors listed it adds to the seriousness of the GAAR debate. Moreover, this is not only a reaction by politicians. For the boards of companies which are daily subjected to media and internet criticism and for the tax directors who serve them, it could be helpful to have legislation in place. Instead of having to deal with a collection of cases, which go one way and the other over the years and even in the same year, those dealing at the sharp end with pressure to engage in artificial schemes for competitive reasons will have legislation on the statute book indicating Parliamentary intention to curb such activity. The law rather than public pressure would be providing the signposts and it is the role of the law to do this. In her note on the GAAR in this Review below, Helen Lethaby suggests that a GAAR may simply serve to legitimise a discretion that the courts are already exercising. In this writer’s view, a GAAR can and will do more than this, but even if legitimisation were the only outcome, then this would be a worthwhile one, since the current lack of legitimacy means that the courts find themselves unable to develop the case law in a way that gives rise to predictable and coherent outcomes.

The Report recommends a narrow GAAR, aimed at the most “egregious” schemes. There may be some concern about whether such schemes can be accurately targeted, but, unsurprisingly, the aim of targeting the GAAR has found favour with practitioners, although it has the effect of making the proposal less attractive to those looking at the matter from a different perspective,
and HMRC might consider the focus to be too narrow. Much of the detailed criticism of the Report so far has taken the shape of a debate about whether the targeting in the illustrative clause is adequate.\(^{16}\) It is clearly vital that such discussion takes place, involving those who are likely to be engaged in working with and interpreting any legislation that comes forward, and these detailed comments will no doubt be helpful as the discussions move to their next stage.

It is important, however, to understand this part of the discussion in context. Although many meetings have been held, including several between invited groups and HMRC, this is only an informal consultation stage on a Report that is not the public consultation document. Indeed, the Report seems to have been used quite deliberately to flush out views without HM Treasury or HMRC having to commit themselves to anything. *The Tax Consultation Framework\(^{17}\)* recognises that such informal consultations may take place, particularly at the early stages of tax policy development, but it should be transparent and it cannot take the place of the promised formal public consultation. It would also be contrary to the spirit of the *Tax Consultation Framework* if the limited consultation being conducted now were to colour views so much that either there was no public consultation or that such consultation took place on the terms of those who had lobbied one way or the other. It is important that subsequent public consultation is a genuine attempt to seek the views of a wider range of commentators and not only those organisations who have been consulted already.\(^{18}\) It is also important for all concerned to recognise that the draft legislation in the Report is illustrative only, and if improvements are needed then these can be made at this stage. That is the purpose of discussion documents; the fact that changes are desirable does not mean the entire project should be abandoned.

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It is still possible that, following the current informal consultation, there would be a decision to take this debate no further, although this seems unlikely in the light of political buy-in to the idea of a GAAR.\(^{19}\) The more likely result is that a public consultation will be announced in the 2012 Budget, based on a new document produced by HMRC and HM Treasury. It is to be hoped that any such document would not propose a GAAR without adequate safeguards for the taxpayer, as happened in 1998, since this would then be rejected by the tax community and would not take us any further forward. If this were to happen, HMRC could of course continue to introduce TAARS with no safeguards at all, although they would lose an important opportunity to progress a more sensible approach to tax legislation and to slow down the cat and mouse game of scheme creation and scheme blocking that takes place at present.

For those who argue against a GAAR on the grounds of uncertainty, continuing as we are now would hardly be a good result, because the current uncertainty would not decrease—indeed it would probably increase. Helen Lethaby\(^{20}\) argues that one can at least hazard a guess under *Ramsay\(^{21}\)* as to what page one is on, but that the proposed GAAR would leave taxpayers and their advisers without a map or a compass. Some would argue the opposite—at present there

\(^{16}\) See, for example Lethaby, above fn.15.


\(^{18}\) If this does not happen, HMRC risks being accused of giving certain groups privileged access which runs completely counter to the ideas in the *Consultation Framework*.

\(^{19}\) Above fn.14.

\(^{20}\) Lethaby, above fn.15.

\(^{21}\) Above fn.9.
may be a map based on previous case law but it is a very changeable map, if it exists at all. A
piece of legislation would at least provide the co-ordinates, even if the detail remained to be
completed. And the Report makes proposals about the process that could be adopted to help fill
in those co-ordinates in a more inclusive and coherent way than can possibly be done by case
law. The proposed Advisory Panel, and its potential role in developing guidance, is particularly
important in this respect, and could indeed be a model for other areas of taxation. This is not
fully developed in the Report but, it is submitted, is well worth further attention. In this sense
the Report proposes a GAAR that is about improved process. It suggests ways to constrain and
control the use of discretion by HMRC and by the courts; a discretion that already exists under
our current system, and without such safeguards. No system will eliminate discretion completely
(and if it did it would probably be a tax avoider’s charter). What is needed is a process for dealing
with the discretion that exists.22

Additionally, some critics argue that a GAAR would not result in the removal of very much
specific anti-avoidance legislation, at least in the first instance. Even if this is true, a GARR
might slow down the production of new, specific provisions and, more importantly, TAARS.
Had a GAAR been introduced in 1998 would we really have had so many TAARS now? It may
be hard to go back now but we can at least improve matters for the future as a start towards
simplification.

Critics of the Report have suggested that there are preferable alternatives to a GAAR, although
most of these are also problematic.23 One thing we can probably all agree is that, if we had perfect
legislation based on sensible underlying principles, we should not need a GAAR. Whilst this
writer is all in favour of improving legislation (who would not be?) and has supported
principles-based legislation,24 as well as more radical change to the tax system, nationally and
internationally, she is not expecting such changes across the board overnight, and in the meantime
we need to tackle the current difficulties as best we can. The GAAR proposed in the Report
would not solve every problem with the tax system, of course, but it would tackle some egregious
issues. What is more, if the GAAR was to refer to a reasonable exercise of choices of conduct
under the relevant tax provisions, as does the draft appended to the Report, or used another phrase
to convey the same idea, it should help to focus legislators working on specific legislation on
the need to make their objectives clear. They would know that, if they did not do this, the GAAR
might not operate in respect of that legislation, and that would be an important influence on
future drafting.

There is much discussion still to take place on the Report and on any public consultation
document issued by the Government during 2012. In addition to work on the precise wording
of the legislation, the overseas experience of operating GAARs and their surrounding processes
needs to be examined further to ensure that we have taken on board all the lessons we can learn
from that. Much work was done on this behind the scenes by Graham Aaronson and the Study
Group and the overseas experience informed their discussions, but this should also form part of

and the Rule of Law (Amsterdam: IBFD, 1997); J. Freedman, “Defining Taxpayer Responsibility: In Support of a

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the further debate. In many other jurisdictions there have been developments since their GAARS were last covered in this Review and further articles on this topic are planned for a future issue of this Review.

This Report should be seen as part of an evolutionary reform process. Any resulting GAAR should also be seen not merely as a rule (or a principle, as the writer would prefer it to be thought of) but as part of a process of providing a framework for discretion; a process involving taxpayers, the courts and HMRC.

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