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## Devolved Taxes Legislation Working Group – Interim Report

### Response by the Chartered Institute of Taxation

#### 1 Introduction

1.1 We welcome the opportunity to respond to the interim report of the Devolved Taxes Legislation Working Group ('the group'), which has been published for consultation. We have also welcomed the opportunity to participate in the work of the group, through our representative.

1.2 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

1.3 Our stated objectives for the tax system include:

- A legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences.
- Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
- Greater certainty, so businesses and individuals can plan ahead with confidence.
- A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
- Responsive and competent tax administration, with a minimum of bureaucracy.

1.4 We hope that the outcomes from the work of the group will place Scotland in a position to enable it to ensure that its tax system is able to achieve the above objectives. As the group is aware, we have previously called for an annual Finance Bill process in Scotland, for example in our submission to the Budget Process Review Group in 2017. This would provide a practical avenue for carrying out tax changes.<sup>1</sup>

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<sup>1</sup> <https://www.tax.org.uk/media-centre/press-releases/press-release-enhanced-scrutiny-tax-legislation-key-scottish-budget>; <https://www.tax.org.uk/media-centre/press-releases/press-release-new-income-tax-regime-requires-rethink-holyrood%E2%80%99s-fiscal>; <https://www.tax.org.uk/media-centre/press-releases/press-release-%E2%80%9Ctime-right%E2%80%9D-scottish-tax-policy-review>.

- 1.5 We would also draw attention to our submission in response to the Scottish Government consultation ‘Devolved taxes: a policy framework’ and in particular our comments on the proposed policy and legislative cycle.<sup>2</sup> That response was informed by CIOT, ATT and ICAS members in Scotland to a survey asking for views on the consultation document.
- 1.6 This response incorporates comments from the CIOT’s Low Incomes Tax Reform Group (LITRG), an initiative of the CIOT to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes.

## **2 Executive summary**

- 2.1 We believe there is a strong case for adopting an alternative legislative process for the devolved taxes. Moreover, we believe that there may be a case for extending the remit of any suggested alternative legislative process, such that it is able to cover all taxes for which the Scottish Parliament passes legislation, for example local taxes such as, Council Tax and Non-Domestic Rates.
- 2.2 We argue that tax is distinctive from other policy areas. While Scotland still receives a significant proportion of its funding from the Block Grant, taxes provide an increasing share of Scotland’s funding resources. Moreover, it places obligations on citizens in a way that other policy areas do not, and requires a more detailed and ongoing understanding of the law than many other areas of policy. It is particularly important, therefore, that there is an avenue available to make changes effectively and efficiently, to ensure the credibility of the tax system in Scotland.
- 2.3 We think that the current legislative procedures are inadequate for dealing with devolved taxes. The existing devolved taxes allow for certain changes to be made by secondary legislation, but the current procedures do not offer a sufficient balance between the competing needs of speed, scrutiny and responsiveness.
- 2.4 In combination with a new tax policy framework, a revised legislative procedure should be able to ensure significant consultation with stakeholders and engagement with the general public, as well as adequate parliamentary scrutiny.
- 2.5 In addition, we think any new policy and legislative framework should ensure that tax legislation is subject to systematic post-legislative scrutiny by the Finance and Constitution Committee. This should be with a view to determining both whether the policy is working and whether the legislation is working as intended in order to give effect to the policy.
- 2.6 Broadly, we think that either a Finance Bill or a Tax Bill would have the potential to address the tensions set out in the Interim Report. In either case, we think the Bill should have a guaranteed Bill slot in the annual parliamentary timetable.

## **3 1. Is there a case for adopting an alternative legislative process for the devolved taxes which can adequately address the tensions summarised in this report?**

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<sup>2</sup> Paragraphs 7.1 ff., 8.1 ff. and 10.1 ff. of *Devolved taxes: a policy framework – Response by the Chartered Institute of Taxation and the Low Incomes Tax Reform Group*: <https://www.tax.org.uk/policy-technical/submissions/devolved-taxes-policy-framework-ciot-and-litrg-response>

**2. If so, what is distinct about tax legislation that would require an alternative approach?****3. Why do you think the current legislative processes are inadequate for dealing with devolved taxes?****4. How do we ensure there is sufficient opportunity for robust parliamentary scrutiny and engagement with stakeholders and the wider public in any alternative approach?**

- 3.1 We believe there is a strong case for adopting an alternative legislative process for the devolved taxes. Moreover, we believe that there may be a case for extending the remit of any suggested alternative legislative process, such that it is able to cover all taxes for which the Scottish Parliament passes legislation, for example local taxes such as, Council Tax and Non-Domestic Rates.
- 3.2 In the first place, as noted in the Interim Report itself, the Scottish Parliament has new powers and responsibilities over taxation as a result of the Scotland Acts 2012 and 2016. It is now no longer a parliament that deals almost exclusively with spending, but one that must have the capacity and ability to deal with both revenue-raising and spending. As detailed in the Final Report of the Budget Process Review Group, the parliamentary processes and mechanisms have developed incrementally since 1999;<sup>3</sup> prior to this, there has been no overall review of how these are working and whether they are the best options available.
- 3.3 The current arrangement of the parliamentary timetable means that, with capacity to consider only 14-16 Government Bills per annum, (with one slot guaranteed for the Budget Bill), changes to existing tax legislation face stiff competition for a Bill slot.
- 3.4 Arguably this should not be the case, because tax is distinctive from other policy areas. While Scotland still receives a significant proportion of its funding from the Block Grant, taxes provide an increasing share of revenues. So, tax is important in enabling Scotland to pay for the other policy areas dealt with by the Scottish Parliament. Moreover, it places obligations (in relation to compliance and payment of tax) on taxpayers in a way that other policy areas do not, and requires a more detailed and ongoing understanding of the law than many other areas of policy. By way of example, if we take another area of policy that affects many people in their daily lives, such as the Road Traffic Acts and Highway Code, in general it is necessary to have a detailed understanding of the law in order to pass the test. Thereafter, however, most people, provided they drive sensibly, are unlikely to have to reacquaint themselves with the finer details of the law. In contrast, individuals in Self Assessment for income tax have to complete a fairly long form and answer several questions requiring numerical values – moreover, those values have to be precise and accurate, otherwise a penalty may arise, and often there are complex statutory rules that determine how the taxpayer calculates those values. In addition, they have to adhere to deadlines in terms of submission of forms and payment of tax, otherwise a penalty may arise. Even individuals within Pay As You Earn (PAYE) need to understand when they need to report extra income or how to appeal against an incorrect PAYE code. The obligations for other taxes, whether for individuals or businesses, similarly require accurate numerical calculations, made according to complex laws. This is regardless of their size (for businesses) or wealth (for individuals). It is particularly important, therefore, that there is an avenue available to make changes effectively and efficiently, to ensure the credibility of the tax system in Scotland. Otherwise, a tax system that for example, does not reflect the current environment, treats (or appears to treat) taxpayers unfairly or for which the legislation does not match the policy intent, risks being undermined. In the longer-term this could place Scotland's tax revenues at risk.

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<sup>3</sup> Budget Process Review Group – Final Report (30 June 2017), paragraphs 169 ff.

- 3.5 The list in section 3.1 of the Interim Report sets out in fairly comprehensive terms the aspects of tax that mean it requires an alternative approach, and we agree that they are all important factors.<sup>4</sup> As an overarching point, we emphasise that changes to tax legislation are required on a frequent basis and even once a tax has been implemented, it cannot be considered to be complete or set in stone.
- 3.6 We think that the current legislative procedures are inadequate for dealing with devolved taxes. The existing devolved taxes allow for certain changes to be made by secondary legislation. This offers some degree of speed, but can sacrifice scrutiny, and also results in changes being dealt with in a piecemeal fashion. If primary legislation is amended by several pieces of secondary legislation, it can be difficult to follow, particularly if there is no consolidated version available. In terms of scrutinising the draft legislation, one major concern with secondary legislation is that once laid, it cannot actually be amended. Thus, if the draft that is laid is defective, even in a minor way, it cannot be altered to ensure that it is correct – secondary legislation can only stand or fall as drafted.
- 3.7 Moreover, while secondary legislation can make prospective changes to the law, it cannot make retrospective changes. For retrospective changes, primary legislation is necessary. In certain cases, it can be agreed that a retrospective change to the tax law is necessary, for example, if there is agreement that the original legislation did not implement the tax quite according to the policy intention. This happened for example in the case of relief from the Additional Dwelling Supplement (ADS) for married couples buying a new main residence in joint names where the previous main residence was in the name of only one of them.<sup>5</sup> It was agreed that it had not been intended that such taxpayers would be caught by the ADS, and therefore it was appropriate for the relief to be available retrospectively from the date of introduction of the ADS. However, it should be noted that the ADS had taken effect on 1 April 2016 and it was only in June 2018 that the retrospective primary legislation took effect. Thus it took a long time to resolve this issue – this was in part because of the need to find parliamentary space for a single-issue Government Bill to deal with it. It was also an inefficient process in that prospective secondary legislation was passed in 2017 to deal with the issue from summer 2017 onwards, but those affected prior to that had to wait until summer 2018 for the issue to be remedied. So parliamentary time and capacity was used twice, for both secondary and primary legislation to deal with essentially the same issue.
- 3.8 In order to ensure sufficient opportunity for robust parliamentary scrutiny and engagement with stakeholders and the wider public in any alternative approach, the tension between the need for scrutiny and the need for speed should be noted. It may be that one of these needs outweighs the other depending on the type of legislative change in question and in particular, the motivation for that change.
- 3.9 Some guidance can be drawn from the report ‘Better Budgets – Making tax policy better’.<sup>6</sup> For example, ensuring that there are clear statements about what a policy or piece of legislation is aiming to achieve could improve consultation and public engagement, as well as assist parliamentary scrutiny. In general, the following ‘Steps’ set out in chapter 4 of the Better Budgets report are relevant to this issue and may be of assistance in consideration of this question:
- Step 2 Establish clear guiding principles and priorities for tax policy
  - Step 3 Extend the road-map approach

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<sup>4</sup> Devolved Taxes Legislation Working Group – Interim Report (February 2020), paragraph 3.1.

<sup>5</sup> Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018.

<sup>6</sup> Better Budgets – Making tax policy better – Chartered Institute of Taxation, Institute for Fiscal Studies, Institute for Government (January 2017), chapters 3.1 and 3.2.

- Step 4 Start consultation at an earlier stage
- Step 5 Develop more active approaches to consultation
- Step 6 Prepare the ground for future reform – and engage the public
- Step 9 Enhance Parliament’s (and the public’s) ability to scrutinise tax proposals
- Step 10 Institutionalise and enable evaluations of tax measures

- 3.10 With many changes, it will be possible to ensure significant consultation with stakeholders and engagement with the general public prior to the introduction into the Scottish Parliament of draft legislation, as set out in the Scottish Government’s consultation ‘Devolved taxes: a policy framework’.<sup>7</sup> There could also be a consultation on the draft legislation, for example the UK Government publish their Finance Bill in draft following the Budget. In addition to trying to fit in oral evidence sessions and written calls for evidence, roundtables of the type organised in respect of VAT and the ADS by the Finance and Constitution Committee would be helpful in gathering evidence, raising awareness of issues and stimulating thoughtful debate.
- 3.11 An aid to effective scrutiny and consultation in respect of legislation would be the inclusion in legislative Explanatory Notes of details of how the legislation differs from the UK legislation. In addition, Explanatory Notes should also set out where and how the tax measures in question interact with welfare benefits and social security.
- 3.12 Simply having an alternative legislative process for tax with a regular annual timetable would also assist in raising its profile, thus improving engagement from parliamentarians, stakeholders and the general public. Such a cycle might also allow for the gathering of views prior to the publication of any draft legislation.
- 3.13 In addition to pre-legislative scrutiny, it is important not to forget the importance of post-legislative review and evaluation.<sup>8</sup> Tax legislation should be subject to systematic post-legislative scrutiny by the Finance and Constitution Committee. This should be with a view to determining both whether the policy is working and whether the legislation is working as intended in order to give effect to the policy.

**4 5. Would a Finance Bill sufficiently address the tensions set out in this report? If so,**

**6. What should be the scope of the Finance Bill (ie should it just cover tax issues or also the items currently included in the Budget Bill)?**

**7. Should the Finance Bill be subject to the normal legislative procedures for Public Bills or is there a need for bespoke procedures for such a Bill which would require changes to the Parliament’s standing orders?**

**8. How often and when should the Finance Bill be introduced?**

**9. How would such a Finance Bill interact with the budget process and the Budget Bill?**

**10. How do we ensure there is sufficient opportunity for robust parliamentary scrutiny and engagement with stakeholders and the wider public?**

<sup>7</sup> Devolved taxes: a policy framework (March 2019) – <https://consult.gov.scot/financial-strategy/devolved-taxes-policy-framework/>

<sup>8</sup> Better Budgets – Making tax policy better – Chartered Institute of Taxation, Institute for Fiscal Studies, Institute for Government (January 2017), chapter 3.6.

- 4.1 We think that a Finance Bill has the potential to address the tensions set out in the interim report and to provide an alternative legislative process for the devolved taxes.
- 4.2 It may be advisable for a Finance Bill to include tax issues only, although as we note in paragraph 3.1 above, we think this could be extended to cover all tax powers held by the Scottish Parliament, not purely those relating to devolved taxes. We would expect a Finance Bill to interact with the Budget and the Budget Bill, in that we would expect it to include rates and bands for the coming tax year, but keeping the Finance Bill and Budget Bill separate might allow for more focused scrutiny and for the two not to be totally interdependent. The one thing we would not expect a Finance Bill to include would be a wholly new tax, as we understand that the aim is to continue to have a separate standalone Act for each new devolved tax.
- 4.3 We think that the normal legislative procedures for Public Bills should be appropriate for a Finance Bill, but like the Budget Bill, we think it should have a guaranteed slot in the annual parliamentary timetable.
- 4.4 A Finance Bill should be annual and it should be introduced into the Scottish Parliament following the Budget. However, this should not preclude the publication of legislative clauses in draft prior to this for consultation if a legislative change is planned for inclusion. Although we would suggest it should be annual, this is to enable the making of necessary changes, motivated by reasons such as those set out in section 3.1 of the Interim Report. We would caution against the use of the existence of an annual Finance Bill as a motivation to allow tax measures to proliferate. The aim should be for a Finance Bill that includes necessary annual updating changes, required legislative amendments and measures that have been consulted on properly in advance.
- 4.5 We think that the interaction between the Finance Bill and the budget process / Budget Bill should extend to timing, as it is appropriate that tax measures are considered alongside the budget process, as they provide some of the funds that will be used for the spending side. However, we do not think that the passing of either Bill should be dependent on the passing of the other.
- 4.6 In respect of ensuring scrutiny, consultation and engagement, we would refer to our comments in paragraphs 3.8 ff. above. A potential benefit of having a regular Finance Bill slot would be an increase in media commentary, which would also hopefully lead to an increase in taxpayer awareness, both of the process and the tax system in Scotland.
- 5 11. Would a Tax Bill sufficiently address the tensions set out in this report? If so,**
- 12. What should be the scope of this Bill?**
- 13. Do you agree that it could be challenging to distinguish between purely technical changes or ‘care and maintenance’ changes and policy changes?**
- 14. Should the Bill be subject to the normal legislative procedures for Public Bills or is there a need for bespoke procedures for such a Bill which would require changes to the Parliament’s standing orders?**
- 15. How often and when should the Bill be introduced?**
- 16. How would such a Bill interact with the budget process and the Budget Bill?**
- 17. How do we ensure there is sufficient opportunity for robust parliamentary scrutiny and engagement with stakeholders and the wider public in any alternative approach?**

- 5.1 We think that a Tax Bill has the potential to address the tensions set out in the interim report and to provide an alternative legislative process for the devolved taxes.
- 5.2 We would expect a Tax Bill to include all tax changes, except:
- the introduction of wholly new taxes (which we would expect to have their own separate act comparable to the Land and Buildings Transaction Tax (Scotland) Act 2013) and
  - the rates and bands of tax for a tax year (which we would expect to be included, as now, in secondary legislation, or as in the case of Scottish income tax, in the Scottish Rate Resolution).
- 5.3 We agree that it would be challenging, if not impossible, to distinguish between purely technical changes and policy changes. The Interim Report (page 22) refers to the Better Budgets report. However, within the discussion of how to improve Finance Bill scrutiny in the Better Budgets report,<sup>9</sup> it is clear that when talking about the possibility of having two separate bills, the discussion is about having rates and allowances only in the Finance Bill and all other tax changes in a technical tax bill. That is, by ‘necessary tax changes’, the Better Budgets report is referring to the required rate setting that is necessary on an annual basis in order to ensure the UK taxes function. It is not suggesting that an attempt should be made to distinguish between ‘technical’ amendments and ‘policy’ changes. In fact, the suggested split is more akin to our suggestion in paragraph 5.2 above.
- 5.4 We think that a Tax Bill would ideally be introduced annually, on the basis that this would enable the making of tax changes, motivated by reasons such as those set out in section 3.1 of the Interim Report. As with a Finance Bill, we think that a Tax Bill should have a guaranteed slot in the annual parliamentary timetable.
- 5.5 Since a Tax Bill would not include the rates for the tax year ahead, unlike a Finance Bill, it would not be essential for it to be timed so as to directly interact with the Budget Bill. This would not preclude the Tax Bill from including tax changes announced as part of the budget process, and indeed we would expect the new tax policy framework to link to the Tax Bill, in terms of timing and in terms of ensuring sufficient consultation in relation to tax changes.<sup>10</sup>
- 5.6 In respect of ensuring scrutiny, consultation and engagement, we would refer to our comments in paragraphs 3.8 ff. above.
- 6 18. Is the current use of Secondary Powers appropriate for making changes to the devolved tax legislation?**
- 19. If not, what do you think are the limitations with the current use of secondary powers?**
- 20. Is there sufficient opportunity for effective parliamentary, stakeholder and wider public scrutiny if changes to tax legislation are made by secondary legislation?**
- 21. What are your views on the balance between using primary and secondary legislation for tax legislation?**

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<sup>9</sup> Better Budgets – Making tax policy better – Chartered Institute of Taxation, Institute for Fiscal Studies, Institute for Government (January 2017), chapter 4, page 49.

<sup>10</sup> Devolved taxes: a policy framework (March 2019) – <https://consult.gov.scot/financial-strategy/devolved-taxes-policy-framework/>

**22. What additional use of Secondary Powers would you suggest for devolved tax legislation?**

- 6.1 In general, we think that tax law should be set out in primary legislation, particularly in so far as it relates to the exercise of tax powers, setting out what is subject to tax and imposing burdens on taxpayers. Secondary legislation should ideally be used only for administrative matters, and also for the setting of rates. This is to ensure proper scrutiny of the legislation that results in the imposition of some kind of burden (compliance or financial) on taxpayers.
- 6.2 We think secondary powers have the following limitations that are of concern in terms of using them for making changes to devolved taxes legislation (also see paragraphs 3.6 and 3.7 above). In the first place, it is not possible to amend an item of secondary legislation once it has been laid in the Scottish Parliament. This means that the instrument can only stand or fall. If a drafting error is discovered during the period of scrutiny, the only options are to allow the instrument to stand with the error intact or to make the instrument fall in its entirety. If the instrument is allowed to stand with the error intact and comes into force, it can then be amended at a later date by a further instrument.
- 6.3 From a practical point of view of trying to read and understand the legislation, the use of secondary legislation to amend primary legislation can make this difficult, particularly if there is a proliferation of separate items of secondary legislation. It takes time for a consolidated document to appear on [legislation.gov.uk](http://legislation.gov.uk).
- 6.4 Secondary legislation can only make changes that take effect from the date the instrument comes into force, that is, prospectively. On occasion, retrospective legislation is warranted in respect of tax, and secondary legislation cannot provide for a retrospective amendment. This resulted in the cumbersome double procedure that took place when amending the Land and Buildings Transaction Tax in order to provide relief from the Additional Dwelling Supplement for certain married couples, as set out on page 15 of the Interim Report.
- 6.5 We acknowledge that certain types of secondary legislation, such as instruments subject to the 'super-affirmative' procedure, provide for a significant amount of parliamentary scrutiny. Nevertheless, they do not address the other concerns that we have in relation to secondary legislation.
- 6.6 We would not suggest any additional use of secondary powers for devolved tax legislation.

**7 Acknowledgement of submission**

- 7.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

**8 The Chartered Institute of Taxation**

- 8.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT

has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 19,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation

26 March 2020