



Law Society
of Scotland

Consultation response

Devolved Taxes Legislative Working Group – Interim Report

April 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

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

Our Tax Law Sub-committee welcomes the opportunity to respond to the Devolved Taxes Legislation Working Group's Interim Report¹. We are pleased to have contributed to the Working Group to date via our representative and we previously responded to Scottish Government's consultation *Devolved Taxes: a Policy Framework*². We have the following comments to put forward for consideration.

General comments

While the current fully devolved taxes are Land and Buildings Transaction Tax (LBTT) and Scottish Landfill Tax (SLfT), we note that further taxes may be devolved over time. It is therefore important to consider the need for changes to be made in the future, designing a system which will be fit for purpose in the future both for existing devolved taxes and any other taxes which become devolved in the future.

Consultation questions

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?

We consider that an alternative legislative process for the devolved taxes would be appropriate. Tax law is a fast-moving area of the law and changes are frequently needed to resolve unintended consequences or respond to tax and non-tax changes which impact Scotland and Scottish taxpayers. This may include changes in commercial practice, in tax-payer behaviour and for anti-avoidance and anti-forestalling purposes.

¹ <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/114453.aspx>

² <https://www.lawscot.org.uk/media/362876/19-06-06-tax-consultation-devolved-taxes-policy.pdf> and <https://www.gov.scot/publications/devolved-taxes-policy-framework/>

A robust legislative process, with clear opportunities for consultation and scrutiny by stakeholders and the Scottish Parliament, is crucial. It is important that there is clarity and certainty in the law for taxpayers, advisors and others. Taxes should be precise in who they affect and should not inhibit economic or social transactions.

It is therefore important that any legislative process can accommodate new arrangements or changes which are well considered, consulted upon and subject to scrutiny, but also accommodate any changes which need to be made quickly.

2. If so, what is distinct about tax legislation that would require an alternative approach?

Please see our answer to question 1.

The primary purpose of tax legislation is to raise revenues from taxpayers by the state. It is important that the law is open to full and thorough scrutiny. As noted above, tax law is a fast-moving area of the law where changes are required on an on-going basis.

3. Why do you think the current legislative processes are inadequate for dealing with devolved taxes?

At present, there are a mix of legislative processes used in respect of devolved taxes. This can be confusing for taxpayers and their advisors, and lacks consistency and clarity. An example of this relates to the in-year LBTT rate changes announced in the 2018 Scottish Budget and brought into effect by way of affirmative SSI in January 2019. Anecdotally, we are aware that a number of taxpayers and advisors were unclear about the process by which this change was being made and when it would come into effect. A clear and standardised consultative and legislative process will bring greater clarity for all those involved in the tax system.

We believe that wherever possible, changes to tax legislation should be made by primary legislation and not by statutory instrument. Tax is a creation of statute, and the appropriate way to amend it is through statute.

Currently, limited legislative time for primary legislation and a lack of suitable vehicle for ongoing changes impacts upon the ability for changes to be made. The issue relating to LBTT group relief and share pledges identified at page 16 of the Interim Report is a good example of this. Although the legislation was amended by statutory instrument for future transactions, the primary legislation to make this change retrospective is still awaited. There are many other technical issues in relation to LBTT, including aspects of the Additional Dwelling Supplement, which merit amendment, but for which parliamentary time has not been available.

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?

Early consultation with stakeholders via Scottish Government's Tax Directorate is key to ensuring that new tax legislation is fit for purpose. For taxes dealt with at Westminster, there is a policy cycle which involves announcements at Budget, publication of draft legislation the following year for consultation and comment,

with the legislation being included in the following year's Finance Bill. The fact that stakeholders have had sufficient time to scrutinise draft legislation with officials can give a degree of comfort to parliamentarians that the technical aspects of the legislation will function as expected.

The same applies to changes to the legislation. These are identified from a number of different sources, including Revenue Scotland, taxpayers, and representative bodies. It is essential that sufficient time is given to stakeholders to input into the process. In addition, if there is a more settled timetable in relation to which changes can be made, this allows taxpayers and other stakeholders to raise matters requiring change in a timescale which could allow such change to happen.

We believe that an annual Finance Bill process would make it easier to schedule time for parliamentary scrutiny of the legislation and to ensure that adequate time was set aside to allow for parliamentary scrutiny. This could improve matters as compared with the current situation, where there is no set timetable.

5. Would a Finance Bill sufficiently address the tensions set out in this report?

We consider that a Finance Bill could address the tensions set out in the interim report.

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

We consider that a Finance Bill could cover technical, policy and rate changes.

We consider that such a Finance Bill should include all changes to the devolved legislation, both minor corrections and could cover technical changes, as well, policy changes and also rate changes. Any changes, with the exception of the introduction of a new tax (for example the Aggregates Levy), would be within the scope of the annual Finance Bill.

Matters such as the following could be included:

- Keeping legislation up to date and making changes to level the playing field in response to changes in UK taxes such as SDLT or LTT
- Revisiting measures in the Revenue Scotland and Tax Powers Act 2014 (RSTPA) and other legislation that may not work as originally intended or may benefit from revision (for example penalties, and making recent LBTT group relief and share pledges changes retrospective)
- Clarifying definitions (for example the meaning of residential and non-residential land)
- Accommodating changes in the nature of commercial transactions or in types of buildings being constructed (for example the new models of assisted living or co-living which were not envisaged when the legislation was originally introduced)
- Amendments to the boundaries of Additional Dwelling Supplement
- Amendments needed to accommodate the UK leaving the EU

We consider it would involve a great deal of unnecessary complexity if all the spending matters currently included in the Budget Bill were also included in the proposed Finance Bill and as such, we would not be in favour of this.

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?

We consider that the existing Parliamentary procedures for Public Bills could be applied for a Finance Bill. This would help to ensure that there was sufficient opportunity for scrutiny.

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

We consider that such a Bill would require to be introduced annually given the technical and policy changes would be included as well as any changes to tax rates.

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

We consider it would make sense for a Finance Bill is to be introduced alongside the Scottish Budget so that tax and spend are considered together. This would also allow announcements about tax rates to be made at the same time as the Budget measures are announced.

We consider it would be most appropriate for the Finance Bill to include technical taxation measures as well as rate changes, with the spending matters dealt with in a separate Budget Bill.

A Finance Bill aligned to the budget process could provide an opportunity for measures to be legislated for quickly before the beginning of a financial year, where this is necessary, in time for the change to be implemented. It is important to recognise however that the time available for scrutiny of a Finance Bill may be limited. Unless measures are consulted upon as part of a regular cycle of consultation and policy development in advance of legislation, introduction of measures in a Finance Bill is unlikely to provide an opportunity for full consultation and robust scrutiny by stakeholders, therefore may require amendment after introduction if changes are required or unintended consequences created.

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

See our answer to Question 4.

An opportunity for early engagement and consultation with taxpayers, agents, and stakeholders by way of an early, regular and robust consultation process would be most suitable. This would ideally mean that measures to be included in a Finance Bill had already been subject to consultation and scrutiny before introduction of the legislation.

11. Would a Tax Bill sufficiently address the tensions set out in this report?

We consider that a Tax Bill could address some of the tensions set out in the report, however the main issue with a Tax Bill as set out in the interim report would be the difficulty of separating technical or care and maintenance changes to tax legislation from policy changes. We do not see the merit of a separate technical Tax Bill.

12. What should be the scope of this Bill?

We consider that such a Bill dealing with changes to the devolved legislation would require to include all tax changes, both minor corrections and technical changes, and policy changes. It is difficult to draw a distinction between changes and new measures. We therefore consider it appropriate that any changes to the devolved taxes, with the exception of the introduction of a new tax (for example the Aggregates Levy), should be within the scope of the Bill (whether it is called a Tax Bill or a Finance Bill). We do not believe it is practical to deal with some types of changes a technical Tax Bill, with other tax policy changes being dealt with in separate legislation.

A Tax Bill would presumably only differ from a Finance Bill in that rates would not be included.

13. Do you agree that it could be challenging to distinguish between purely technical changes or "care and maintenance" changes and policy changes?

Yes, as referred to in our answer to question 12, we agree that it could be very challenging to distinguish between technical or 'care and maintenance' changes and policy changes.

Policy is a continuum, at one end of which there are matters which are clearly policy, for example whether to introduce a 2% surcharge for the purchase of non-residential land by non-UK residents, similar to the surcharge which was announced at UK Budget 2020 for SDLT.

At the other end are relatively minor changes to tax legislation, for example to correct some drafting in the legislation which has been found not to work as intended. For example, in order to claim LBTT Sub-sale Development Relief, significant development has to take place within five years (see Land and Buildings Transaction Tax (Scotland) Act Schedule 10A). That five-year period should run from the date the purchase of land is completed, as no-one can carry out development on land they do not own. The legislation currently states that the five-year period runs from the date the initial purchaser contracts to sell the land to the end-purchaser which could may appear to be many years before the purchase is completed. We consider that a technical amendment to the legislation to correct this point is required, but although it is a minor and technical change, it cannot be said that no policy issues are involved.

Rather than spending time trying to identify whether tax changes are technical/care and maintenance changes or policy changes, we consider it would make more sense to deal with the whole range of different tax changes in a single Finance Bill.

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?

We consider it desirable that the normal legislative procedures for Public Bills be applied for a such a Bill but coupled with adequate time for consultation on proposed changes and also on draft legislation before the Bill was introduced to the Parliament. This would help to ensure that there was sufficient opportunity for scrutiny.

15. How often and when should the Bill be introduced?

We consider that such a Bill should be introduced annually, although recognising that in some years, the Bill may be limited in content. There are currently a considerable number of legislative changes which are required to address issues which have already been identified. But it is in the nature of tax legislation that other issues will continue to arise in the future and it is essential to ensure that the process for dealing with the devolved tax legislation in Scotland is able to deal with the "work in progress" nature of tax, and also to deal with external circumstances.

16. How would such a Bill interact with the budget process and the Budget Bill?

We consider that such a Bill should complement the Scottish Budget although need not necessarily be introduced at the same time. It is important that there is sufficient time for stakeholders and the Parliament to consider and scrutinise both Bills.

In the event that a Tax Bill is introduced alongside the draft Scottish Budget, this would help to ensure cohesion between the tax raising and spending plans and would likely mean that measures could be implemented timeously for the new tax year. It is important that there is sufficient time for the measures to be scrutinised before commencement of the tax year.

In the event that a Tax Bill is introduced at a separate time from the Budget (sometime between Spring and December in any given year), consideration would be required as to how the changes proposed in the Bill will match with the tax year. The changes could be ready to be implemented at the start of the following tax year. This could mean that there would be a delay of up to 12-months (depending on the time at which the Bill is introduced) from the introduction of the Bill to implementation.

It is helpful to consider a system which allows tax changes to take place immediately, subject to subsequent confirmation by primary legislation. The Provisional Collection of Taxes Act, used by the UK Government for such situations, would allow changes to have effect as soon as they were announced. This would ensure that where necessary, changes could be made at the same time as the rest of the UK but reduce the time pressure on having primary legislation in force by then. A Provisional Implementation Act may be a suitable alternative.

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?

We consider that the model used by UK Government, and similar consultation cycle consulted upon in the *Devolved Taxes: Policy Framework Consultation* may provide a suitable mechanism for engagement with stakeholders and the wider public.

Consideration requires to be given as to how changes that are wished or needed are identified. Those who work with the legislation are likely to identify matters which they think may require changing – including Revenue Scotland, stakeholder bodies, the Scottish Parliament and MSPs, and the public at large. There may also be matters arising from Tribunal decisions (and there have already been examples of changes which have been made to the RSTPA as a direct result of Tribunal Decisions³). Changes may not be agreed among all stakeholders and/or the wider public.

Consultation would be merited, allowing Scottish Government's Tax Directorate to test the issues, including their nature, extent and reasons for the concerns, as well as potential solutions. Any proposal for changes will need to be considered by policy makers, perhaps either by the Finance and Constitution Committee, a sub-group of that Committee, or a separate new Tax Committee.

18. Is the current use of Secondary Powers appropriate for making changes to the devolved tax legislation?

We consider that tax changes are most appropriately made in primary legislation. Tax legislation places obligations on citizens in order to generate revenue for the state. It is important that legislation can be fully consulted upon and scrutinised before introduction. Secondary legislation has limited scope for scrutiny compared to primary legislation.

19. If not, what do you think are the limitations with the current use of secondary powers?

Particular limitations of the use of secondary powers are their application to retrospective changes and the fact that the instrument may only be approved or rejected in whole – there is no scope for changes to be made to the instrument once laid.

20. Is there sufficient opportunity for effective parliamentary, stakeholder and wider public scrutiny if changes to tax legislation are made by secondary legislation?

As referred to in our answer to question 19, the 'all or nothing' nature of secondary legislation makes it challenging to ensure scrutiny as the legislation progresses through Parliament. It is advantageous where

³ The Revenue Scotland and Tax Powers Act 2014 Amendment Regulations 2020 which amended the penalty provisions following the Upper Tribunal decisions in *Revenue Scotland and Michael Robert Harrison & Sharon Ross* [2019] UT 36 and *Revenue Scotland and Begbies Traynor (Central) LLP* [2019] UT 35

legislation is consulted upon before being introduced as this supports opportunities for public and stakeholder scrutiny.

21. What are your views on the balance between using primary and secondary legislation for tax legislation?

Primary legislation allows for greater scrutiny by stakeholders, including taxpayers and their representatives, and the Parliament than secondary legislation. Where possible, it is preferable that tax legislation is introduced or amended by primary legislation where it imposes obligations on taxpayers. Secondary legislation may be used to deal with administrative aspects of the tax system.

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

As noted in our answer to question 21, we consider that secondary powers are appropriate for administrative matters relating to measures set out in primary legislation.

For further information, please contact:

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