

# **Devolved Taxes Legislation Working Group**

**Interim Report**

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# 1. Introduction

## 1.1 Group membership

- Scottish Government officials
- Scottish Parliament officials
- Alan Bermingham, Chartered Institute of Public Finance and Accountancy
- Bill Dodwell, Office of Tax Simplification
- Charlotte Barbour, Institute of Chartered Accountants of Scotland (“ICAS”)
- Claire Murdoch, Scottish Fiscal Commission
- Isobel d’Inverno, Stamp Taxes Practitioners Group
- Joanne Walker, Chartered Institute of Taxation (“CIOT”)
- Neil Ferguson, Revenue Scotland
- Ronnie Brown, Law Society of Scotland
- Stephen Crilly, Revenue Scotland (until November 2017)
- Andrew Hewitt, Welsh Government (Observer)

## 1.2 Summary of the Working Group’s purpose

The Scottish Parliament’s new powers and responsibilities over taxation stemming from the Scotland Acts 2012 and 2016 have fundamentally changed public finances in Scotland. The revenues from these devolved taxes are used to support the funding of Scotland’s public services.

The fiscal and political context in which these tax powers operate is becoming increasingly complex, particularly as a result of the interdependencies between the Scottish and UK Budget processes. Furthermore, as these tax powers continue to evolve and with the potential for new taxes to be introduced, there is likely to be an increased demand for parliamentary time to consider tax legislation.

Since 2015, the Scottish Government and the Scottish Parliament have received representations as to the suitability of existing policy and legislative procedures for tax.

The [Budget Process Review Group](#) (“BPRG”) was established in 2016 to carry out a fundamental review of the Scottish Parliament’s budget process.<sup>1</sup> In its final report, published on 30 June 2017, it made a number of recommendations, two of which are directly relevant to the fully devolved taxes:

- **Recommendation 50:** The Group recommends that further work is undertaken by the Finance and Constitution Committee in consultation with

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<sup>1</sup> [www.parliament.scot/S5\\_Finance/Reports/BPRG\\_-\\_Final\\_Report\\_30.06.17.pdf](http://www.parliament.scot/S5_Finance/Reports/BPRG_-_Final_Report_30.06.17.pdf)

the Scottish Government, Revenue Scotland and others to explore options for alternative legislative processes for devolved taxes legislation, particularly where tax measures need to be introduced quickly or where minor amendments are needed to existing primary legislation.

- **Recommendation 51:** The Group recommends that the Scottish Government in consultation with the Finance and Constitution Committee examines the need for a Finance Bill and brings forward any recommendations by the end of the current Parliament.

In early 2019, the Scottish Parliament's Finance and Constitution Committee and the Scottish Government established the Devolved Taxes Legislative Working Group (the "Working Group") to take forward these recommendations.

The Working Group has met five times (between April and November 2019) and heard from a number of witnesses, including HM Revenue & Customs ("HMRC"), the Office of Tax Simplification, officials from the House of Commons, and officials from the Scottish Government and Scottish Parliament.

Through these evidence sessions, the Working Group has heard representations that tax is different to other parts of government policy or areas of the law because of its highly technical and cross-cutting nature.

The Working Group has considered a series of important factors in relation to the making of tax law. These include:

- the importance of full parliamentary scrutiny;
- adequate time being made available for consultation with stakeholders;
- flexibility in the legislative process to address issues quickly;
- recognition of the capacity of the Scottish Parliament and the volume of tax legislation under the current model;
- the relevant merits of making tax changes by primary or secondary legislation;
- sufficient time being allowed between legislation being passed/announced and it coming into force for Revenue Scotland to implement changes and for taxpayers and their advisers to prepare; and
- the role of the Scottish Fiscal Commission and the importance of independent forecasts of the effects of any changes.

The Working Group acknowledges that there are tensions between these factors and that there will be challenges and trade-offs in providing an appropriate balance between them. In particular, the Group has examined how tax devolution has worked in practice. One notable example is the introduction of the Additional Dwelling Supplement ("ADS") for Land and Buildings Transaction Tax in 2016 and subsequent primary and secondary legislation which has been introduced to amend

the initial primary legislation. The ADS is discussed in more detail in the case study in section 3.2.

This ADS example highlights the tension between the Scottish Government wishing to respond quickly to tax policy decisions taken by the UK Government and the need to ensure robust parliamentary and wider public scrutiny of the proposed response. While there may be a sound rationale for a quick response given the policy and/or budgetary implications this raises, it is important to allow sufficient time for consultation and scrutiny. As noted by the Finance Committee, there will be occasions “when a tension arises between the need to take swift decisions on tax matters and the consultative principle which underpins budgetary and legislative scrutiny within the Scottish Parliament.”<sup>2</sup> Given this, the Committee recognised the need to build an element of flexibility into the scrutiny process which balances the risk of not responding immediately to tax changes at a UK level with the risk of unintended consequences from making legislative changes without conducting a full consultation and full parliamentary scrutiny.

Some subsequent changes have been required to the ADS. While such changes are not unusual when legislating on tax, the Group recognises that they can have a significant impact on those affected. These changes also highlight further tensions in the existing legislative procedures. For example, the Land and Buildings Transaction Tax (Additional Amount-Second Homes Main Residence Relief) (Scotland) Order 2017 was laid to address the unintended consequences of the legislation to provide that the ADS was not chargeable where a couple bought a house in joint names to replace a previous main residence owned by only one of them. As the 2017 Order could not give retrospective effect to the relief, the Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Bill, a single issue bill, was therefore subsequently introduced to give retrospective effect to the amendments made by the 2017 Order. This is discussed in more detail in section 3.3.

This report does not seek to address these tensions at this stage, rather it highlights the opportunities and challenges of broad options for an alternative legislative process for tax and provides an opportunity for wider input to support the Working Group in its consideration of these matters.

### **1.3 Purpose of Interim Report**

The Working Group wants to ensure there is an opportunity for wider engagement on the potential options and is, therefore, publishing this interim report for consultation. This interim report does not reflect agreed findings of the Working Group but instead

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<sup>2</sup> [www.parliament.scot/parliamentarybusiness/CurrentCommittees/96666.aspx#a1](http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/96666.aspx#a1) (paragraph 11)

represents a range of relevant contributions and views that we will consider alongside the responses to the consultation, in our final report.

The Working Group's final report and recommendations will be provided to the Minister for Public Finance and Digital Economy, the Cabinet Secretary for Finance, Economy and Fair Work, and the Finance and Constitution Committee.

The aim of this interim report is to highlight and seek views on some of the key advantages and challenges of different legislative options for devolved taxation. A full list of consultation questions can be found in [Annex A](#).

## 2. Current Approach to Tax Legislation in Scotland

Currently, primary and secondary legislation for fully devolved taxes is subject to the same scrutiny procedures as legislation on other policy areas in the Scottish Parliament. This section provides a general overview of fully devolved taxes and the Scottish approach to taxation as well as information on the primary and secondary legislative procedures that apply to scrutiny of tax legislation in the Scottish Parliament.

### 2.1 Devolved Tax Powers

The Scotland Act 2012 (“2012 Act”) fully devolved the power to the Scottish Parliament to introduce taxes on land transactions and on waste disposal to landfill in Scotland. On 1 April 2015, Stamp Duty Land Tax (“SDLT”) and Landfill Tax ceased to apply in Scotland and were replaced by the Scottish Parliament with:

- Land and Buildings Transaction Tax (“LBTT”); and
- Scottish Landfill Tax (“SLfT”).

The 2012 Act also provided powers for new taxes to be created in Scotland and for additional taxes to be devolved. This paved the way for the devolution of the power to introduce taxes on the carriage of passengers by air and on the commercial exploitation of aggregate through the Scotland Act 2016. Although the Air Departure Tax Bill was passed and enacted, these taxes are yet to be introduced (primarily due to state aid related issues) and therefore Air Passenger Duty and Aggregates Levy, while still payable in Scotland, remain reserved taxes.

Once fully implemented, these taxes are forecast to generate revenue of over £1bn, just over 3.2% of the Scottish Budget. The table below sets out the Scottish Fiscal Commission’s (and, for Aggregates Levy, the Office of Budget Responsibility’s)<sup>3</sup> latest revenue forecasts for these fully devolved taxes.<sup>4</sup>

**Summary of tax forecasts informing the Scottish Budget**

£ million	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23	2023-24	2024-25
Land & Buildings Transaction Tax	557	553	616	655	691	724	759	794
<i>Residential</i>	258	262	279	310	336	359	382	405
<i>ADS</i>	95	98	126	127	131	134	138	141
<i>Non-Residential</i>	204	193	211	218	224	231	239	248
Scottish Landfill Tax	148	143	109	87	12	14	15	15
Scottish share of Air Passenger Duty	275	286	295	307	320	336	352	369
Scottish Aggregates Levy (OBR forecast)	55	57	58	60	63	66	69	n/a

<sup>3</sup> [https://obr.uk/docs/dlm\\_uploads/DevolvedMarch2019.pdf](https://obr.uk/docs/dlm_uploads/DevolvedMarch2019.pdf)

<sup>4</sup> [www.fiscalcommission.scot/wp-content/uploads/2019/11/Scotlands-Economic-and-Fiscal-Forecasts-May-2019-Chapter-0-Summary-Charts-and-Tables.xlsx](http://www.fiscalcommission.scot/wp-content/uploads/2019/11/Scotlands-Economic-and-Fiscal-Forecasts-May-2019-Chapter-0-Summary-Charts-and-Tables.xlsx)

In 2014, the Revenue Scotland and Tax Powers Act 2014 (“RSTPA”) was also passed by the Scottish Parliament. This Act established Revenue Scotland as the tax authority with the responsibility for the collection and management of the devolved taxes and set out the powers and framework through which Revenue Scotland would operate in exercise of its statutory functions.

The scope of the Working Group is limited to tax powers as set out in this section. However the options considered in this report will also apply to any future national taxes that are devolved or created in the years ahead.

## 2.2 Scottish Approach to Taxation

The Scottish Approach to Taxation is founded upon four key principles.<sup>5</sup> These are:

- **Proportionate to the ability to pay** – the tax system should be progressive, with those who are able to pay more tax contributing a greater share;
- **Certainty for the taxpayer** – individuals and businesses should have confidence in the tax system when making financial decisions;
- **Convenience** – the tax system should be as simple as possible and easy to understand and comply with; and
- **Efficiency** – tax policy should be designed to ensure that it is cost-effective to administer.

In addition to these principles, the Scottish Government takes the toughest possible approach to **tackling tax avoidance** in relation to the fully devolved taxes. The Scottish General Anti-Avoidance Rule allows Revenue Scotland to take counteraction against arrangements which it considers to be artificial, even if the arrangements operate within the letter of the law.

Another cornerstone of the Scottish Approach to Taxation is **engagement** with people, communities and businesses. Taxes do not just support public services, they also allow the Government to support business and encourage growth through economic development, skills investment and major infrastructure. So everyone is a stakeholder.

## 2.3 Devolved taxes policy framework

The Scottish Government received representations from stakeholders on the current tax policy process and in its [Programme for Government 2018-19](#),<sup>6</sup> it committed to

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<sup>5</sup> These principles were first articulated by Adam Smith in ‘The Wealth of Nations’, 1776.

<sup>6</sup> [www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2018/09/delivering-today-investing-tomorrow-governments-programme-scotland-2018-19/documents/00539973-pdf/00539973-pdf/govscot:document](http://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2018/09/delivering-today-investing-tomorrow-governments-programme-scotland-2018-19/documents/00539973-pdf/00539973-pdf/govscot:document)

establishing a more structured process to engagement, legislation and delivery around the fully devolved taxes.

In March 2019, the Scottish Government launched the consultation [Devolved taxes: a policy framework](#) which set out proposals for a new approach to the engagement, consultation and provision of information for the devolved taxes.<sup>7</sup> It also contained proposals for a tax policy-making cycle, which would provide stakeholders with further opportunities to contribute to tax policy-making. The analysis of responses to this consultation is now [available to view](#).<sup>8</sup>

Together, the devolved taxes policy framework and the findings and recommendations of the Working Group will pave the way for a new approach for Scotland's devolved taxes.

## 2.4 Primary legislation

The Scotland Act 1998 sets out the requirements for the legislative process in the Scottish Parliament. The legislative process comprises of three stages:

- **Stage 1:** general debate on the Bill and an opportunity for members to vote on its general principles,
- **Stage 2:** the consideration of, and an opportunity for members to vote on, the details of the Bill at Committee,
- **Stage 3:** a final stage at which the Bill is debated, with possibility of further amendments, by the whole Parliament and can be passed or rejected.

After a Bill has been passed by Parliament, there is a four-week period during which it can be referred to the Supreme Court by the Advocate General, Lord Advocate or the Attorney General if it is believed to be outside the law-making powers of the Scottish Parliament. During the same period, a UK Government minister can make an order preventing the Bill from becoming law in certain circumstances, including if they have reasonable grounds to believe that it would adversely affect the operation of the law as it applies to reserved matters or would be incompatible with international obligations. If this four week period expires without a reference or order, the Bill can then be sent for Royal Assent, which usually takes around a week. The Bill therefore becomes an Act usually around five weeks after being passed by the Parliament.

Once a Bill has received Royal Assent, it becomes an Act of the Scottish Parliament. It might normally be expected that a Bill may take around nine months to proceed from introduction in the Parliament to Royal Assent. Indeed, the average time a Bill has taken in Parliamentary Session 5 (from 12 May 2016) is 310 calendar days. It

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<sup>7</sup> <https://consult.gov.scot/financial-strategy/devolved-taxes-policy-framework/>

<sup>8</sup> <https://consult.gov.scot/financial-strategy/devolved-taxes-policy-framework/>

should be noted however, that there is considerable flexibility in how the arrangements are implemented depending on the circumstances, and the process of scrutiny of a Bill has sometimes been (much) shorter or longer.

The bulk of the time required for the parliamentary process is normally spent at Stage 1. This is the stage at which the lead committee will engage with those likely to be directly affected by the proposed Bill, those likely to have a lead role in implementing it and other stakeholders. While there may have been public consultation during the policy development phase, the introduction of a Bill in the Parliament is the first point at which the final shape of the proposed legislation is public. Committees have evolved an approach that usually involves an open public invitation for views, a series of oral evidence sessions and other visits, events and public engagement activities.

The Scottish Parliament normally considers between 14 and 16 Government Bills each year. The Government's annual legislative programme is announced each September in the Programme for Government. This takes into account internal resources, parliamentary committee capacity and overall parliamentary time. In addition to Government Bills, Committees can also be required to consider Members' Bills and other non-Government Bills. At present, the only Bill which is designated an annual slot is the Budget Bill.

## 2.5 Secondary legislation

Secondary (or subordinate) legislation is law that Government Ministers can make under powers granted to them by primary legislation. In passing a Bill, the Parliament is agreeing the main principles or framework for legislation on a particular subject and, in doing so, usually also agreeing that certain matters (usually more minor matters, administrative detail, or points that may need updated frequently but which do not affect the main principles) can be dealt with by secondary legislation.

Therefore much of the detail of an Act (for example concerning timing, implementation or the mechanism for updating) is often left to [secondary legislation](#).<sup>9</sup> This includes:

- providing the details of how a law will be applied;
- bringing a specific section or sections of an Act into force;
- specific to tax, setting the rates and bands for the devolved taxes.

The main types of secondary legislation which apply to devolved taxes are:

- **Negative** instruments, which normally deal with less significant policy matters. Once laid in the Scottish Parliament, the Parliament has 40 days in which to

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<sup>9</sup> [www.parliament.scot/visitandlearn/100539.aspx](http://www.parliament.scot/visitandlearn/100539.aspx)

pass a resolution annulling the instrument. It is normally the case that such an instrument will only come into force after this annulment period is over. A negative instrument will come into force unless it is annulled by the Parliament.

- **Affirmative** instruments are normally concerned with more significant matters. Parliament must vote to approve the instrument before it can come into force. Where existing devolved tax Acts have granted secondary legislation powers to add, modify or remove reliefs, these are subject to the affirmative procedure.
- **Provisional affirmative** instruments allow secondary legislation that has to be approved by the Parliament to come into force immediately. The legislation then requires to be approved by the Parliament within a specified period of time (28 days in the devolved tax Acts), or it ceases to have effect. The Scottish Government has used this procedure recently to make changes to the rates and bands for LBTT as that is what the LBTT Act provided for.

The Scottish Parliament scrutinises subordinate legislation and can approve or reject it. Unlike primary legislation (Bills), the content of a piece of subordinate legislation cannot normally be amended or changed during its parliamentary passage, it must be accepted or rejected as a whole.

This [guide](#) provides more information on various types of secondary legislation in the Scottish Parliament and the respective procedures that apply to them which is discussed further in section 5 of this document.<sup>10</sup>

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<sup>10</sup> [www.parliament.scot/PublicInformationdocuments/Guide\\_to\\_SSIs.pdf](http://www.parliament.scot/PublicInformationdocuments/Guide_to_SSIs.pdf)

### **3. Is there a case for an alternative approach?**

#### **3.1 Is tax legislation distinctive?**

One of the core questions the Working Group is considering is whether tax is different to other parts of government policy or areas of the law, and thus requires an alternative legislative process.

The Working Group has heard some general representations as to why tax legislation is distinctive and in particular, has noted that tax legislation experiences a frequency and volume of legislative change that is greater than most other policy areas for a number of reasons. These reasons include:

- the need to protect the revenue that supports the funding of public services in Scotland. This requires clear and effective tax legislation.
- taxes operate in the context of a changing wider sector. The legislation may therefore need to respond to tax and non-tax changes, including in the regulatory environment, commercial and economic changes, and changes in taxpayer behaviour, for example, forestalling;
- it is important that the Scottish Government can respond swiftly to cases of tax avoidance or evasion;
- the need to change tax legislation in light of operational experience or Tax Tribunal decisions, where matters are open to interpretation and unintended consequences are identified that do not fit with the policy intention;
- tax and tax legislation are highly technical in nature, and there can be a need for timely changes so that legislation continues to achieve its intended effects; and
- tax policy is often used as a lever to support other government policies, particularly to tackle environmental issues.

Reflecting the BPRG recommendations, the Working Group is considering the most effective and efficient ways in which policy makers and Parliament can deal with the volume and frequency of change to tax legislation, recognising the need to respond quickly, a particular need to make 'minor' amendments to existing primary legislation and the extent to which the current legislative procedures (as set out in section 2) provide for this.

The Working Group has considered a series of important factors that are relevant to these issues. These include:

- the importance of full parliamentary scrutiny;
- adequate time being made available for consultation with stakeholders;
- flexibility in the legislative process to address issues quickly;

- recognition of the capacity of the Scottish Parliament and the volume of tax legislation under the current model;
- the relevant merits of making tax changes by primary or secondary legislation;
- sufficient time being allowed between legislation being passed/announced and it coming into force for Revenue Scotland to implement changes and for taxpayers and their advisers to prepare; and
- the role of the Scottish Fiscal Commission and the importance of independent forecasts of the effects of any changes.

These factors often manifest themselves in practice as competing priorities. The Working Group has recognised that given some of these often unavoidable constraints, it may not always be possible to satisfy every one of them in full.

### **3.2 Where tax measures may need to be introduced quickly**

It is possible that in future years there will be tax decisions announced by the UK Government at either its Autumn Budget or Spring Statement which could have financial and behavioural impacts on Scotland's budget and devolved taxes. This could require legislative changes relating to Scotland's devolved taxes to be implemented, sometimes at short notice. Following representation from stakeholders and as noted by the BPRG, this has led to consideration as to whether alternative legislative processes for the devolved taxes may be needed (see case study below relating to the introduction of the Additional Dwelling Supplement).

## Case study: LBTT – Additional Dwelling Supplement

### Introduction of SDLT Higher Rates for Additional Dwellings

In the Autumn Statement on 25 November 2015, the UK Government announced that an additional 3% of SDLT would be applied to anyone acquiring an additional residential property with effect from 1 April 2016.

A consultation was published on 28 December 2015 and closed on 1 February 2016. The final policy design was confirmed in the Budget on 16 March 2016 and draft legislation was included in the Finance Bill 2016. The Provisional Collection of Taxes Act 1968 provided the interim authority for tax to be collected from 1 April 2016. It was not until 15 September 2016 that the Finance Bill received Royal Assent and came into law.

### Additional Dwelling Supplement

In the Scottish Budget on 16 December 2015, the Scottish Government announced an equivalent 3% LBTT surcharge which would also take effect from 1 April 2016.

The Scottish Government rationale in introducing the supplement was that the absence of a similar supplement in Scotland would have made it more attractive to invest in buy-to-let properties and second homes in Scotland compared to other parts of the UK, further obstructing the property market for first-time buyers and home movers. There could also have been budgetary implications of not introducing a similar supplement in Scotland.

The Land and Buildings Transaction Tax (Amendment) (Scotland) Bill was introduced on 27 January 2016. The timeline for the Parliamentary process was truncated to 6 weeks (compared to the current average Bill time of 44 weeks), in part so that the legislation could be in place for 1 April 2016 but also as a result of the dissolution of Parliament on 23 March 2016 in advance of the 2016 Scottish Parliament elections. The Bill was passed on 8 March 2016, before receiving Royal Assent on 24 March 2016.

The tension between the Scottish Government's desire to act quickly and the impact this had on parliamentary scrutiny is highlighted by this example. The Finance and Constitution Committee noted this in its [Stage 1 Report](#):

*"In essence there is a need to balance the risk of not responding immediately to tax changes at a UK level with the risk of unintended consequences from making legislative changes without conducting a full consultation and full parliamentary scrutiny."<sup>11</sup>*

<sup>11</sup> [www.parliament.scot/S4\\_FinanceCommittee/Reports/FIS042016R03.pdf](http://www.parliament.scot/S4_FinanceCommittee/Reports/FIS042016R03.pdf)

Tax legislation may also need to be introduced quickly to mitigate the risks associated with forestalling (i.e. if the effect of providing advance notice would pose a significant risk to revenues and markets). This is particularly relevant for transaction taxes, where taxpayers have more flexibility around bringing transactions forward, or as the case may be, delaying them until after a tax change has taken effect.

Whilst changes to the rates and bands for devolved taxes can be introduced immediately via a provisional affirmative order (subject to Parliamentary approval) this is not the case for changes which require primary legislation.

### **3.3 Where minor amendments are needed to existing primary legislation**

There are a range of reasons why minor amendments may be regularly required for tax legislation, that may not necessarily be needed, or needed in a similar frequency, in other areas of legislation, including:

- to address anti-avoidance issues;
- to deal with issues which were not identified when the legislation was first introduced (this is a normal aspect of tax legislation);
- to deal with unintended consequences of tax legislation;
- to address issues arising from Tribunal cases; and  
to ensure there is clarity and certainty in the law for taxpayers, advisors and others.

Since 2015, a number of amendments have already been made to LBTT, SLfT and the RSTPA, a full list of which is contained in [Annex B](#).

An example of this was in 2017 when the Scottish Government introduced the Land and Buildings Transaction Tax (Additional Amount-Second Homes Main Residence Relief) (Scotland) Order 2017 to provide a relief for couples buying a new main residence in joint names where the previous main residence was in the name of only one of them.

The Scottish Parliament then passed the Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018, a single issue bill, to allow the changes to apply retrospectively as the secondary legislation powers in the LBTT (ADS) Act did not have the scope to achieve this without primary legislation. The Bill was introduced on 13 November 2017 and received Royal Assent just over seven months later on 22 June 2018.

The narrow scope of the subsequent Act led to a number of representations from stakeholders that such changes could be dealt with more efficiently. There was also

discussion during the stage 3 debate about whether an alternative legislative process for tax may be required. The Cabinet Secretary for Finance and the Constitution, Derek Mackay MSP, noted that:

*“Tax is complex and it is inevitable that, at times, amendments will be required or desirable to improve operation, or for other reasons.”*

James Kelly MSP (Scottish Labour) went on to say that:

*“Some of the responses that were made to the consultation on the bill introduced other issues relating to how we, as a Parliament, might better manage taxation. It is right to look at such issues—particularly given that, as we now have increased tax powers, more such technical issues might come up and require to be tidied up.”<sup>12</sup>*

In this instance, the requirement for full parliamentary scrutiny to make only a minor change highlighted the inflexibility in the legislative process to address issues such as this quickly and in a manner which makes best use of Parliament’s time and capacity.

There are a number of other areas which have already been identified where change by primary legislation is required. For example a change was made by The Land and Buildings Transaction Tax (Group Relief Modification) (Scotland) Order 2018 (SI 2018 No. 222) to ensure that companies which had granted security to banks by way of share pledge were able to claim group relief. In evidence to the Finance and Constitution Committee on 13 June 2018, the Cabinet Secretary for Finance and the Constitution, Derek Mackay MSP, referred to the widespread calls for the change to be made retrospectively, and stated that:

*“I can confirm that if the order is approved by the Scottish Parliament, the Scottish Government intends to introduce legislation to make the change in question retrospective in effect at an appropriate future opportunity.”<sup>13</sup>*

As of the date of this interim report, no opportunity has yet presented itself to introduce this legislation.

In light of this experience, the Working Group is keen to hear views both on the need for alternative legislative mechanisms for devolved taxes and potential solutions to address the tensions that have been set out in this section. The rest of this report therefore sets out options considered by the Group and the challenges and opportunities each presents.

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<sup>12</sup> [www.parliament.scot/parliamentarybusiness/report.aspx?r=11398&mode=pdf](http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11398&mode=pdf)

<sup>13</sup> [www.parliament.scot/parliamentarybusiness/report.aspx?r=11607](http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11607)

### **3.4 Questions**

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

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

## 4. Finance Bill

The Working Group has considered the merits of a Finance Bill in Scotland, which would largely replicate the UK Finance Bill. This section therefore provides information on the UK Finance Bill and what a Scottish Finance Bill may look like in the context of the fully devolved taxes.

### 4.1 Overview

The UK [Finance Bill](#) is the principal form of tax legislation in the UK.<sup>14</sup> The proposals announced in the UK Budget statement form the basis of a future Finance Bill, usually following a period of consultation and the publication of draft legislation. There are also measures announced in the UK Budget which are implemented on Budget Day itself or in the Finance Bill immediately following the Budget.

The Finance Bill is an annual process, partly because Income Tax and Corporation Tax are annual taxes which must be renewed by legislation each year, but also in recognition of the scale of the change that is required to the UK tax code each year.

The Finance Bill is used for setting tax rates and bands, introducing new taxes, making changes to address technical issues to ensure the tax legislation works as it should and all other matters relating to the administration of the tax system. In this respect, and because it is dealing with many different taxes, it can often be lengthy, running into hundreds of clauses, and can be published in several volumes.

Since 2017, the UK Government has moved to an Autumn Budget. The Finance Bill is now introduced to Parliament following the Budget in the autumn and the aim is for it to reach Royal Assent before the start of the following tax year. As there was no Budget in 2019, it is expected that there will be two Budgets in 2020. The first of those UK Budgets will be presented in March 2020 and the UK Government will introduce the first Finance Bill following that. That Bill is expected to include the clauses consulted upon in 2019.

Taken together with HM Treasury's new approach to tax policy making, the change in [Budget timetable](#) has ensured that tax changes are announced well in advance of the start of the tax year in which they will take effect, giving professionals and parliamentarians more time to scrutinise proposed changes and taxpayers more time to prepare.<sup>15</sup>

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<sup>14</sup> <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN00813>

<sup>15</sup> [www.gov.uk/government/publications/the-new-budget-timetable-and-the-tax-policy-making-process/the-new-budget-timetable-and-the-tax-policy-making-process](http://www.gov.uk/government/publications/the-new-budget-timetable-and-the-tax-policy-making-process/the-new-budget-timetable-and-the-tax-policy-making-process)

The Working Group heard evidence that the involvement of tax professionals and other stakeholders in consultation and the detailed review of draft legislation is a very significant factor in ensuring that tax legislation is fit for purpose. This has gone a long way to allaying previous concerns around the standard of scrutiny given to tax legislation enacted through the Finance Bill.

#### **4.2 Current Scottish provision compared to UK provision**

In Scotland, the Budget Bill is a Bill consistent with the description of a Budget Act, as defined in section 29(3) of the Public Finance and Accountability (Scotland) Act 2000. Budget Acts are Acts authorising the use of resources by the Scottish Government, authorising payments out of the Scottish Consolidated Fund, enabling sums otherwise payable into the Fund to be applied for other purposes, and governing maximum amounts of expenditure and borrowing by certain statutory bodies. The PFA Act has not been amended in light of the Parliament's additional tax raising powers arising from the 2012 and 2016 Scotland Acts, and remains solely related to spending.

There is no process in the Scottish system equivalent to that in the UK system whereby the House of Commons can change tax law immediately where required. The procedure involves the House of Commons passing a resolution modifying tax law along with a declaration that it is expedient in the public interest that the resolution should have statutory effect "as if contained in an Act of Parliament" (Provisional Collection of Taxes Act 1968, s. 1) until the next Finance Bill is passed giving the modifications permanent effect.

Despite having significant secondary legislation powers, in practice the UK Government makes most changes to tax through the Finance Bill, including the addition of reliefs and changes to the rates and bands. This is also the case for UK Landfill Tax and UK Air Passenger Duty, where the annual inflationary increases in rates are done in the Finance Bill.

The rates and bands for LBTT and Scottish Landfill Tax are announced as part of the Scottish Government's annual Budget. However, the statutory authorisation for raising the taxes is through secondary legislation powers and is only required if the rates and bands are amended in the Budget. In practice, this process takes place alongside the budget scrutiny process, however, it could in principle take place more than once a year and at any time throughout the year should the Scottish Government wish to make further amendments to the rates and bands.

If the Scottish Parliament adopted a similar approach to the UK Finance Bill, tax measures could be introduced quickly and minor amendments could be made to existing primary legislation. However, if it is considered that there is a need for a regular primary legislation slot for tax matters, then consideration would have to be

given to when and how that should be managed in the budget cycle, and consideration given to whether the Budget Bill should be changed so that it becomes a Finance Bill. It should be recognised that how effective scrutiny can be ensured in such a process would have to be considered. Any changes to the nature of the Budget Bill would require primary legislation to be achieved. The exploration of this option further highlights the tension between the competing objectives, as discussed in section 1.2.

### **4.3 Questions**

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

- 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) ?
- 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?
- How often and when should the Finance Bill be introduced?
- How would such a Finance Bill interact with the budget process and the Budget Bill?
- How do we ensure there is sufficient opportunity for robust parliamentary scrutiny and engagement with stakeholders and the wider public?

## 5. Tax Bill

### 5.1 Overview

The Working Group discussed the merits of a Tax Bill in Scotland which would contain provisions to allow for corrections or changes to existing tax legislation to be made. The main distinction from a Finance Bill is that a Tax Bill would not include changes to the rates and bands of taxes which can currently be dealt with under existing subordinate legislation powers.<sup>16</sup> In this respect, a Tax Bill would not necessarily be predicated on the Budget and therefore could be introduced at another point in the year, or less frequently.

The Working Group is considering whether such a Bill could apply to ‘care and maintenance’, and technical and administrative changes, as opposed to more wholesale policy changes i.e. the introduction of incentive based reliefs. Through discussions it became clear that there would be difficulties in drawing a distinction between the various types of change as there can be differing views on what would constitute a technical change as opposed to a policy change. This would mean that the scope of any Tax Bill would have to be carefully defined and consideration given as to whether a different scrutiny process from other Bills would need to apply.

Prior to the UK Government’s move to a single [Autumn Budget and the introduction of the policy and consultation process](#),<sup>17</sup> there were suggestions made at a UK level for separating tax changes into two separate processes. In 2003, the [Working Party on the Institutional Processes for the Parliamentary Scrutiny of Tax Proposals and for the Enactment of Tax Legislation](#) noted that:

*“Over the years, it has frequently been suggested that the government should separate its tax proposals into two Bills: the first containing measures that, for administrative or practical reasons, need to be enacted within a short time of their Budget announcement, the remaining measures proceeding in the second Bill at a pace consistent with the requirements of proper scrutiny. Governments have resisted these proposals, on the grounds that there is no easy way to separate tax measures into two Bills and that Parliamentary time may not be forthcoming for a second Bill which is not subject to any special time constraints.”<sup>18</sup>*

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<sup>16</sup> Existing secondary legislative powers would continue to be used to set rates and bands.

<sup>17</sup> [www.gov.uk/government/publications/the-new-budget-timetable-and-the-tax-policy-making-process/the-new-budget-timetable-and-the-tax-policy-making-process](http://www.gov.uk/government/publications/the-new-budget-timetable-and-the-tax-policy-making-process/the-new-budget-timetable-and-the-tax-policy-making-process)

<sup>18</sup> [www.ifs.org.uk/comms/budd03.pdf](http://www.ifs.org.uk/comms/budd03.pdf)

The Institute for Government, the Institute for Fiscal Studies and the Chartered Institute of Taxation also made reference to this in their joint publication '[Better Budgets: making tax policy better](#)'.<sup>19</sup> They argued that the highly technical nature of tax law should be acknowledged by splitting the Finance Bill in two: a short, annual bill with the necessary changes for that year, and a technical bill, running to a different timetable, allowing more time for consultation and amendment.

The Working Group has heard that the need for a separate bill process in the UK to deal with technical changes has been offset by the move to the Autumn Budget and the embedding of HM Treasury's tax policy-making cycle where draft legislation is now usually published several months before it is formally introduced to Parliament. However, the underlying principles and objectives of such a Bill i.e. recognising the constraints on parliamentary capacity and the time available for scrutiny, remain relevant to the issues the Working Group is seeking to address.

## 5.2 Questions

**Would a Tax Bill sufficiently address the tensions set out in this report? If so,**

- What should be the scope of this Bill?
- Do you agree that it could be challenging to distinguish between purely technical changes or "care and maintenance" changes and policy changes ?
- 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?
- How often and when should the Bill be introduced?
- How would such a Bill interact with the budget process and the Budget Bill?
- How do we ensure there is sufficient opportunity for robust parliamentary scrutiny and engagement with stakeholders and the wider public in any alternative approach?

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<sup>19</sup> [www.instituteforgovernment.org.uk/sites/default/files/publications/Better\\_Budgets\\_report\\_WEB.pdf](http://www.instituteforgovernment.org.uk/sites/default/files/publications/Better_Budgets_report_WEB.pdf)

## 6. Secondary Powers

### 6.1 Overview

The Working Group has also discussed the merits of a more expansive use of secondary powers for tax legislation in Scotland which. The devolved tax Acts already contain a significant number of delegated powers. For example, the Scottish Government can, by secondary legislation, set the taxes rates and bands and add/modify/remove reliefs.

In this respect, it looked at the concept of a broad order making power. Such powers are rare in tax legislation but do exist although they are seldom used. One notable example is section 109(1) of the Finance Act 2003 for Stamp Duty Land Tax (“SDLT”), which is the very wide, general power to make changes by subordinate legislation. It provides:

*“The Treasury may if they consider it expedient in the public interest make provision by regulations for the variation of this Part in its application to land transactions of any description.”*

The power in section 109(1) is subject to the provisional affirmative procedure, with a 28 day approval period. Any changes made using this power will remain in effect for 18 months, after which primary legislation is required to give the changes permanent effect.

The UK Government used [used this power in 2006 to amend the Finance Act 2003 to tackle SDLT tax avoidance schemes](#).<sup>20</sup> The changes were then given permanent effect six months later in the Finance Act 2007. In general, however, changes to UK tax legislation are made by primary legislation.

In addition to the procedures set out in section 2.5, the Working Group also heard about the use of super-affirmative procedures. This is an enhanced form of the affirmative procedure which requires a period of “pre-legislative scrutiny” involving formal consultation on draft legislation followed by approval by a vote in the Parliament before it can come into force.

The Working Group heard representations on whether it was appropriate to use secondary legislation for tax, on the basis that the exercise of power which imposes obligations on taxpayers should be set out in primary legislation and subject to the full scrutiny process before being enacted; what is taxed should be in primary legislation; and regulation making powers should only be used for how the tax is

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<sup>20</sup> [The Stamp Duty Land Tax \(Variation of the Finance Act 2003\) Regulations 2006](#)

administered. A further issue with secondary legislation is that the Parliament can only vote in favour or against secondary legislation - there is no possibility of amending the secondary legislation. Moreover, a concern was raised that legislation would lose clarity if its measures were split between primary and secondary legislation. It is easier to review and confirm provisions, and to comply with the legislation, if they are grouped together. In addition, there may also continue to be a need for further primary legislation in respect of the existing tax Acts.

## **6.2 Questions**

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

- If not, what do you think are the limitations with the current use of secondary powers?
- Is there sufficient opportunity for effective parliamentary, stakeholder and wider public scrutiny if changes to tax legislation are made by secondary legislation?
- What are your views on the balance between using primary and secondary legislation for tax legislation?
- What additional use of Secondary Powers would you suggest for devolved tax legislation?

## 7. How to Respond

The Group would welcome a response on all or any of the questions within this report as well as any general comments on the legislative process for the devolved taxes.

The deadline for submissions is **27 March 2020**.

All responses should be sent electronically (in Word format – no confirmatory hard copy required) to [finance.constitution@parliament.scot](mailto:finance.constitution@parliament.scot). Written responses will be handled in accordance with the [Parliament's policy for handling written evidence](#) received in response to calls for evidence. All written evidence received may be published by the Parliament and will be treated as a public document. If you wish to submit evidence in confidence or anonymously please read the policy at the link above.

The Group will then report to the Finance and Constitution Committee and Scottish Ministers with its findings.

## 8. Annex A – 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 ?**
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?
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 (i.e. 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?
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?
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?
22. What additional use of Secondary Powers would you suggest for devolved tax legislation?

## 9. Annex B – Devolved Tax Changes to Date

### LBTT legislative changes to date

Year	Amendment	Type of Legislation
2015	The Land and Buildings Transaction Tax (Sub-sale Development Relief and Multiple Dwellings Relief) (Scotland) Order 2015	Scottish Statutory Instrument
2015	The Land and Buildings Transaction Tax (Tax Rates and Tax Bands) (Scotland) Order 2015	Scottish Statutory Instrument
2015	The Land and Buildings Transaction Tax (Open-ended Investment Companies) (Scotland) Regulations 2015	Scottish Statutory Instrument
2016	Land and Buildings Transaction Tax (Amendment) (Scotland) Act 2016	Act of the Scottish Parliament
2017	The Land and Buildings Transaction Tax (Additional Amount-Second Homes Main Residence Relief) (Scotland) Order 2017	Scottish Statutory Instrument
2018	Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018	Act of the Scottish Parliament
2018	The Land and Buildings Transaction Tax (First-Time Buyer Relief) (Scotland) Order 2018	Scottish Statutory Instrument
2018	The Land and Buildings Transaction Tax (Group Relief Modification) (Scotland) Order 2018	Scottish Statutory Instrument
2018	The Land and Buildings Transaction Tax (Tax Rates and Tax Bands etc) (Scotland) Amendment Order 2018	Scottish Statutory Instrument

### SLfT legislative changes to date

Year	Amendment	Type of Legislation
2015	The Scottish Landfill Tax (Qualifying Material) Order 2015	Scottish Statutory Instrument
2015	The Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2015	Scottish Statutory Instrument
2015	The Scottish Landfill Tax (Exemption Certificates) Order 2015	Scottish Statutory Instrument
2015	The Scottish Landfill Tax (Administration) Amendment Regulations 2015	Scottish Statutory Instrument
2016	The Scottish Landfill Tax (Qualifying Material) Order 2016	Scottish Statutory Instrument
2016	The Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2016	Scottish Statutory Instrument

2017	The Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2017	Scottish Statutory Instrument
2017	The Scottish Landfill Tax (Administration) Amendment Regulations 2017	Scottish Statutory Instrument
2018	The Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2018	Scottish Statutory Instrument
2019	The Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2019	Scottish Statutory Instrument

#### **RSTPA legislative changes to date**

<b>Year</b>	<b>Amendment</b>	<b>Type of Legislation</b>
2018	The Revenue Scotland and Tax Powers Act 2014 (Ancillary Provision) Order 2018	Scottish Statutory Instrument