In summary:

GAAR

1. We note that the GAAR is a General Anti-Avoidance Rule, rather than just being concerned with "Abuse". As such it has a significantly wider scope than the UK’s recently-introduced GAAR. We are concerned that, as drafted, the GAAR could introduce significant uncertainty as well as additional compliance costs for many transactions that are not tax motivated. We believe that the Scottish Parliament should carefully consider both a clearance mechanism and the introduction of a GAAR Advisory Panel to provide important safeguards between the interests of taxpayers generally and the interests of individual taxpayers in obtaining certainty about their tax affairs and in undertaking legitimate tax planning. All these points will become more important if further taxation powers are transferred to Scotland.

Detailed Tax Administration provisions

2. Under this heading we include: Tax returns, enquiries and assessments (Part 6); Investigatory Powers (Part 7); Penalties (Part 8); Interest on payments (Part 9); Enforcement (Part 10); and Reviews and appeals (Part 11). In general we consider that the legislation has been well drafted; in many respects the provisions are easier to understand than the corresponding UK provisions. However, businesses, individuals, Revenue Scotland and the courts will all be left in doubt as to the extent to which the differences in wording are intended to lead to differences in effect. We think publication of a note on how the Bill's proposals differed from the UK equivalent legislation, and why, would be a great help.

3. Many provisions are left to regulations to be made by Scottish Ministers. Clearly for points of detail where taxpayer's rights and obligations are not unduly affected such an approach is appropriate. However many of the proposals listed in the Appendix below are basic requirements and should be set out in legislation, rather than left to regulations.

4. Our detailed comments are set out in the Appendix.
Appendix

General Anti-Avoidance Rule (GAAR) - Part 5

(1) We note that the Scottish Government has made a deliberate policy choice to introduce a General Anti-Avoidance Rule that "will take a wider and therefore more rigorous approach to tackling tax avoidance" than the UK General Anti-Abuse Rule that is noted to be "narrow in scope".

(2) It is important to reflect on the principles that led the UK to make that choice; essentially UK tax law has evolved to set out in detail the tax rules which apply in a wide range of commercial circumstances. Accordingly, a narrow anti-abuse rule ensures that the proscriptive legislation operates as intended. By contrasts a broader anti-avoidance rule works best with principles-based legislation and is much harder for the tax authority, taxpayers and the judiciary to apply in relation to more detailed law.

(3) We understand that there is a need to protect the tax system and that this needs to be balanced against the needs of taxpayers for certainty. In assessing the trade-off, the protection of the tax system should not overly impinge on commercial transactions. Our comments are aimed at increasing certainty for taxpayers so that commercial transactions are not discouraged.

(4) Arrangements are in scope of the counteracting measures if "it would be reasonable to conclude that obtaining a tax advantage is the main purpose or one of the main purposes, of the arrangement". This wide definition will potentially affect a large number of transactions. This is important in the context of the two currently devolved taxes to which the GAAR measures will apply but will be of much greater significance if Scotland acquires additional taxing powers, which might then be expected to come within the scope of this GAAR.

(5) It is important to emphasise why we consider that the Bill could affect a very large number of transactions. We would expect a taxpayer undertaking a significant transaction to consider its tax consequences in advance and it is common that there may be alternative approaches which could result in different tax results. It would be unusual for a taxpayer to choose an alternative that resulted in a greater tax liability in preference to an alternative that delivered a similar economic result and a lower tax liability. In this case though, it is possible that the GAAR could be applied notwithstanding that the transaction as a whole is not motivated by a tax purpose. We do not believe that the purpose of the GAAR should be to oblige taxpayers to arrange their affairs to pay the maximum tax possible; but we are concerned that this could be the effect. Even if the GAAR is applied so as not to impose an additional tax burden, the lack of certainty that this could introduce to a large number of transactions would be unfortunate. Our preference would be to use a "sole or main purpose" test, which we understand is the approach adopted by Australia.

(6) We foresee that certainty for taxpayers will be a significant issue since the Bill does not provide explicitly for clearances. The Policy Memorandum explains that it is not thought that clearances are necessary for the two devolved taxes and that a clearance system would place significant additional administrative burdens on
Revenue Scotland. We note from the consultation that 72% of respondents favoured a narrowly-targeted GAAR and there was no support for a more widely-drawn provision. We expect that this response is a result of concerns that a widely-drafted GAAR will lead to uncertainty for taxpayers (and Revenue Scotland). By contrast, the UK GAAR was able to rule out clearances due to its design.

(7) The combination of a widely drafted GAAR and no clearance mechanism is also a potentially significant issue for compliance purposes particularly if additional taxes were to be brought into scope. The lack of a clearance mechanism means taxpayers who want to undertake a transaction which they are concerned may be thought by Revenue Scotland to be artificial are likely to incur additional compliance costs, both before the transaction (as noted above) and when considering how to file the tax return.

(8) Whether or not there is a clearance mechanism, it is essential that Revenue Scotland publishes guidance on the practical application of the GAAR. This should be updated as further experience is gained and as additional taxes come within its ambit. Although it may be implicit, in our view the UK GAAR - and not the Scottish GAAR - should apply to income tax devolved under the Scotland Act and we think that this Bill should make that clear.

(9) We note that operational safeguards such as a GAAR advisory panel would assist both Revenue Scotland and taxpayers to understand whether a particular course of action by a taxpayer is (for example) normally employed in reasonable business conduct. This is one important indicator that a transaction lacks commercial substance and is therefore within the scope of the GAAR. Review of Revenue Scotland’s guidance by such an advisory panel would be a valuable reference point for all in determining how the GAAR should be applied and therefore provide greater certainty. We would recommend that consideration is given to setting up an advisory panel.

(10) Revenue Scotland appears to have significant discretion over operation of the GAAR. We do not support giving those responsible for the assessment of tax wide discretion over whether or not tax should be levied. It is for Parliament to set out the law, the tax authority to collect tax in accordance with the law and for a Tribunal or Court to adjudicate on disputes between taxpayers and the tax authority. If an Authorised Officer decides that a transaction lacks commercial substance, in the absence of a GAAR advisory panel or other authority, it may be difficult for a taxpayer to convince the Officer otherwise and the court or tribunal is instructed to take into account Revenue Scotland guidance on the matter. This appears to give significant extra statutory powers to Revenue Scotland. We are concerned that there is too great a concentration of discretionary power in Revenue Scotland, which would be harmful both to taxpayers and the tax authority alike. How should a tax authority exercise discretion?

(11) Some of the terms used in the Bill are not familiar terms. One example is "legal substance" (s59(4)(b)). We recommend this concept be explained in the legislation.

(12) If the legislation gives an odd or counter-intuitive tax charge, and the taxpayer seeks to avoid this charge, we think this should not be within the scope of the GAAR,
even if artificial. Accordingly we think the law should make clear that arrangements should not be regarded as "artificial" if the tax paid is as would be expected given the economic effect of the transaction. This is similar to the spirit of s207(4) FA 2013.

(13) Additionally, s59(2)(a)(ii) provides that the policy objectives of the tax provisions in question should be taken into account when considering whether a tax avoidance arrangement is artificial. We think it possible that not all potentially difficult points would clearly fall within the policy objectives set out. (Some of the legislation replicates the SOL T legislation and the policy objective behind the original SOL T legislation may have become obscured with time). Thus the "policy defence" may not always help. It may help to make clear that relevant corresponding HMRC guidance and UK case law in relation to equivalent SOL T or other UK tax law could be used as a point of reference. This is also relevant to s62(3) of the Bill where a court or tribunal may take into account the "established practice" at the time a tax avoidance arrangement is entered into. Perhaps this is implicit in the "or anyone else", but if not then it should be made explicit.

**Tax returns, enquiries and assessments (Part 6,567 to 5109)**

(14) S69(1) (Duty to keep and preserve records) starts: "A person who is required ... ". This may not have the intended purpose if the taxpayer has not yet been issued with a return. The corresponding UK legislation is FA 1998 Sch18 para21(1) which starts "A company which may be required to deliver a company tax return ... ".

(15) S76 gives Revenue Scotland three years from the filing deadline to open an enquiry, which is longer than the UK equivalent, 12 months. There is nothing about "white space disclosure", which is perhaps understandable given the litigation this has led to. However, three years is a long period for taxpayers to be uncertain as to whether Revenue Scotland wishes to open an enquiry.

(16) S84(2) states "A closure notice must be given no later than 3 years after the relevant date". In principle we support rapid investigation of returns and closure of enquiries based on the information supplied and the taxpayer's explanations. However in some cases three years may not be long enough. We note that there is no equivalent time limit in the UK legislation.

**Investigatory Powers of Revenue Scotland (Part 7, s110 to s147)**

(17) S116 enables Revenue Scotland to require production of information from third parties in certain circumstances. The geographic scope of this provision is not clear. In particular could an information notice be issued to a person not resident in Scotland with no permanent establishment there? Some clarity on this point would be helpful.

**Penalties (Part 8, 5148 to s181)**

(18) S157 sets out the reasonable excuse defence for late payments or filing of returns. This is perhaps best described as a restricted reasonable excuse defence. We think TMA 1970 s118(2) is preferable. It is a more general version which does not include an equivalent to s157(3)(a) (insufficiency of funds) or (b) (reliance on
another person). We don't think either of these should be included. In the case of (a), we think this is an artificial exclusion which should be omitted. In the case of (b) we think this is implicit so does not need to be mentioned.

(19) S174 comprises a reasonable excuse defence for failure to comply with, for example, an information notice. As with s157 (noted above) this includes a "restricted" reasonable excuse defence. For the reasons noted above we prefer a reasonable excuse defence based on TMA 1970 s118(2).

**Interest on payments due to or by Revenue Scotland (Part 9. S182 to 185).**

(20) S185(2) enables Scottish Ministers to make regulations about rates of interest, including the amounts. This is similar to the UK approach, but it's not clear why the legislation can't set out how rates should be determined, at least in principle. For example compare this approach to s187 (fees for payment); in that case s187(3) in summary limits the fees charged by Revenue Scotland for use of a payment method to be reasonable having regard to the costs incurred by Revenue Scotland.

**Enforcement of payment of tax (Part 10, s186 to 5196).**

(21) S192 enables Revenue Scotland to require, in summary, third parties in business to be required to provide contact details of Revenue Scotland debtors. This could be quite onerous: in particular as there is: (i) no limitation to Scottish companies or companies which have a permanent establishment in Scotland (in general the geographic scope of the Revenue Scotland and Tax Powers Bill in this respect is not clear); (ii) no requirement to provide relevant information to the third party to help then get the contact details; (iii) no limitation to contact details which cannot readily be ascertained by other means from information held by the designated officer.

(22) The right of appeal (5194) is restricted to "unduly onerous" grounds, which we think is too narrow, as other reasonable grounds of appeal exist, as mentioned in the previous paragraph.

**Mailers left to regulation in Parts 6 to 11**

(23) The Bill includes a number of provisions which are left to regulations to be made by Scottish Ministers. Clearly for points of detail where taxpayer's rights and obligations are not unduly affected such an approach is appropriate. However many of the proposals noted below are basic requirements and should be set out in legislation, rather than left to regulations. In particular provisions, such as s73(2), which allow the Scottish Ministers to make regulations which may modify any enactment, including the Revenue Scotland and Tax Powers Act itself, seem far too wide.
Some of these provisions are listed below.

(a) S73 (date by which tax return must be filed) and s74 (date by which the taxpayer can amend returns);
(b) 73(2) "Regulations under subsection (1) may modify any enactment (including this Act)";
(c) S113(2) (definition of what is and is not a business);
(d) S150(2) (penalties for failure to make returns);
(e) S150(4) enables such regulations to modify any enactment;
(f) S151(2) (penalties for failure to pay tax on time);
(g) S151(4) enables such regulations to modify any enactment;
(h) S160(7)(penalties, including the amounts);
(i) S162(4) (penalties for errors attributable to another person, including the amounts);
(j) S163(3) (penalties for failure to take reasonable steps to notify Revenue Scotland within 30 days of an under-assessment, including the amounts);
(k) S181 (2) (penalties for failure to register for tax, including the amounts); and
(l) S210(2) (postponement of payment of tax during a review or appeal).