Introduction
1. The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

2. These comments have been prepared on behalf of the Society by members of our Tax Law committee ('the committee'). The committee welcomes the opportunity to respond to the Scottish Parliament’s call for evidence on the Revenue Scotland and Tax Powers Bill and has the following comments to make.

General Comments
3. We acknowledge that the Bill attempts to strike a balance between meeting the immediate needs for existing devolved taxes; and establish the framework which could be extended to more, or all, taxes in due course. In striking this balance, we would urge strongly that priority is given to creating an effective system for the taxes already devolved, rather than attempting to be comprehensive. The restricted legislative time and resources available makes this by far the preferable course.

4. We also acknowledge that the constraints mentioned in the previous paragraph make it inevitable that fairly significant amounts of tax administration legislation will be made under delegated powers. While this is inevitable, it does seem that the Bill attempts to be comprehensive on some aspects (e.g. investigatory powers); and is much more limited in relation to others (e.g. penalties). While accepting the inevitability of a varying approach, it remains the view of the committee that where possible vital matters of tax administration should always be dealt with by primary rather than secondary legislation.

5. Consequently, this qualifies our views on much of the Bill. We therefore feel that at this stage, the Bill cannot be said to have passed Adam Smith’s tests of certainty and convenience. Whether it is efficient and proportionate can only fall to be judged when the complete picture is available.

6. We are wholly in agreement with establishing Revenue Scotland as a non-ministerial department independent of the Scottish government. We note that the Chief Executive is not to be a member of Revenue Scotland. At the time of the consultation, it was proposed that the Chief Executive would be the Accountable Officer for Revenue Scotland. Given that, it is our view that the Chief Executive should sit on the Revenue Scotland board. The role of Accountable Officer does not appear to have carried through to the Bill itself.
Part 2: Revenue Scotland

7. Section 3(2) – we think that the functions of Revenue Scotland should specifically include providing information and assistance to taxpayers, rather than simply having them encompassed in the term “other persons”.

8. Section 4 – we wonder whether it is appropriate that Revenue Scotland is empowered to delegate any of its functions to the two Agencies mentioned. We appreciate the need for wide delegation of powers, but we wonder whether it should be as universal as this.

9. Section 4(6) – in keeping with the number of other provisions, the restriction on the publication of information based on the subjective views of Revenue Scotland seems to vest too much discretion in it.

10. Section 8(3) – again, this gives very wide latitude to Ministers in what they publish.

11. Section 10 – while we support a Charter for Revenue Scotland, we question whether it is in fact appropriate in that such a Charter should also cover those dealing with Revenue Scotland. See further below on “taxpayer duties”.

Part 3: information

12. Section 15(3)(c) – is it appropriate that the restriction on confidentiality extends to civil proceedings in general? Should these not be restricted, as otherwise any court action, by anyone, would seem to allow confidentiality to be breached.

13. Given the likely introduction of an over-arching Scottish tribunal, our preference remains for UK tax tribunals to deal with any cases in the interim. However, the reasons given in paragraph 56 of the policy memorandum for not doing so are noted. We welcome the fact that the arrangements for the proposed Scottish tax tribunal are similar to those of the UK tax tribunals which will have the advantage of familiarly for taxpayers. We do question the purpose of section 29 which appears to suggest that a person whose tax liability might be affected by the outcome of a tribunal hearing is not incapable of acting as a member of the Tax Tribunal.

Part 4: the Scottish Tax Tribunal

14. Section 28 – the first appeal process seems to envisage moving from a First Tier Tribunal possibly consisting of more than one person to Upper Tribunal of a single member. While obviously the qualifications and experience of the members of the different tribunals will be distinct, this does not sem the ideal line of appeal, as it is unusual to have an appeal from a larger to a smaller panel.

15. Section 29 – we feel that this needs to be changed; the heading to this section does not reflect its content. But in any event, we wonder whether this is substantively correct. While it is appreciated that a member of a Tax Tribunal should not be disqualified simply by reason of being a taxpayer in relation to the tax in question, we think that this is too broad; and that a Tax Tribunal member both could and should disqualify himself or herself from participating in relation to an appeal in which he has a direct interest, which certainly could be one of the circumstances envisaged in section 29(1).
16. Section 31 – we wonder whether the need for permission to appeal to the upper tribunal is in fact appropriate; we think that this is much more appropriate only for a second appeal.

17. Also with regard to Section 31, we note that the new system of appeals will bring Scotland into line with England and Wales, in that there will now potentially be four forums for appeal (First Tier Tribunal, Upper Tribunal, Court of Session sitting as the Court of Exchequer and Supreme Court). We do not consider that tax appeals in Scotland have suffered unduly from having one less layer than those in England and Wales and wonder whether perhaps further thought should be given to this.

18. Section 33(4)(b)(i) – the need for there to be “an important issue of principle or practice” before an appeal to the Court of Session seems somewhat excessive. If there are arguable grounds of appeal should that not be enough?

19. Sections 34/35 – we note that the primary remittance by the Court of Session appears to be to the Upper Tribunal. We wonder if this should simply be to the Upper or First Tier Tribunal as appropriate, in that particularly in relation to re-finding matters of fact, one would presume that it was much more likely and appropriate that the remittance would be to a First Tier Tribunal.

20. In Section 35(4) - the word “an” appears to be missing from before the word “appeal”.

21. Section 44 – while this may reflect existing law, it would seem much more appropriate that formally no expenses should be awarded in the First Tier Tribunal unless one or other party has acted “wholly unreasonably”. There is a strong perception of “unfairness of arms” when taxpayers contemplate taking appeals in taxation matters and the removal of the possibility of expenses being awarded – in either direction - in the First Tier Tribunal would be a very desirable development.

**Part 5: The General Anti-Avoidance Rule**

22. We are concerned at the lack of certainty inherent in the GAAR provisions. We have advocated a formal pre-transaction clearance procedure and regret to note that this has not been adopted. While reference is made to the possibility of informal approaches, Revenue Scotland is not obliged to respond to the same nor would any response be formally binding upon it. Absent a clearance procedure, it is essential that extensive guidance is produced in advance by Revenue Scotland as to the circumstances in which they consider artificial tax avoidance arrangements would exist. It is also regrettable that, in the first instance, Revenue Scotland will, essentially, sit as judge and jury on its own decisions. Under the UK model, an independent panel with expertise – both in the law and in practice – in the particular field sits in judgement. While not wishing to denigrate the quality of the Scottish tax tribunal, the UK approach of calling upon experts in this way is likely to lead to a better quality of decision.

23. Within the GAAR there is reference to “reasonableness” without clarification as to from whose perspective this is tested. By way of example, if a tenant may be negotiating a lease of premises for five years but may not be certain whether he
wants to occupy for longer – it will depend on how well the business develops. He could take a lease for five years with an option to extend, or a lease for say 15 years with break clauses at 5 years and 10 years. Although the LBTT payable in both cases will be the same at the end of the day, since LBTT will be payable on the actual length of the lease, taking the shorter lease with an option to extend would delay the payment of LBTT and this is likely to be the main reason why the tenant would choose the shorter lease with options to extend. Could this be caught by the GAAR? It is to be hoped that Revenue Scotland guidance will make it clear that it is not. There are many similar examples where taxpayers or their advisers may be concerned that the GAAR would apply.

24. Clear and detailed guidance confirming that a range of commonly encountered commercial transactions are not considered to be caught by the GAAR will be absolutely essential to allow the GAAR to operate without introducing too much taxpayer uncertainty which in turn could put Scotland at a competitive disadvantage. Such guidance will also need to be updated frequently to take into account changes to the way in which commercial transactions are undertaken as a result of changing economic circumstances. We believe there should be a requirement in the Bill for Revenue Scotland to produce guidance about the types of transactions which are accepted as according with established practice and which therefore would not be caught by the GAAR.

25. Section 58 – the omission of what has been termed the “double reasonableness” test along with the input of any GAAR panel as compared to arrangements in the rest of the UK, coupled with the alternative definitions of “artificial” in Section 59 does raise questions as to the extent of the GAAR.

26. Section 59(3) – it needs to be made clear that “commercial substance” is extended to include personal arrangements. A very good and simple example would be where an individual taxpayer intends to make a gift; such a “transaction” obviously has no “commercial substance”, but may nevertheless be an entirely reasonable thing to do. It should not be affected (on its own) by any interpretation of a general anti-avoidance GAAR. For the same reason, we would suggest that Section 59 (4) (a) is extended to include “business or personal” conduct.

27. With regard to Section 59(2)(b) we think that it needs to be clarified exactly when it could be assumed that there are shortcomings in the relevant legislation. This would have to be clear from the policy of the legislation, rather than a realisation after the event that the legislation as enacted did not go as far as might have been intended by some.

28. It is understood that Revenue Scotland intends to produce a disclosure procedure (“DOTAS”) during the passage of this Bill. Again, if that is the case, it is regrettable that this is not available for scrutiny at this juncture.

Part 6: Tax returns, enquiries and assessments
29. Generally, the provisions regarding returns enquiries and assessments appear sensible. We do question the introduction of a general unjustified enrichment defence for Revenue Scotland across all devolved taxes when, to date, the same has been restricted to specific taxes in the UK context.
30. Section 68 – we question whether this section should in fact be there, particularly in the absence of a similar imposition of duties on Revenue Scotland. As is noted in sub-section (2), and expanded upon in the Explanatory Notes, in fact most or all of those duties will arise under a specific piece of legislation in any event and it does not seem reasonable to impose such duties on taxpayers in a separate “headline” provision.

31. Section 71(2) – We see no reason why the proof required by this provision should absolutely require documentary evidence.

32. Section 72 – While we appreciate that the regulations under this section are still to be made, we question the principle that the preservation of records is required for land transactions which are not notifiable. While we can appreciate the need for this in relation to transactions at or near any level of notifiability (for example), here will be numerous very small land transactions where such record keeping would be an unreasonable expectation.

33. Section 76 – We wonder whether the 3 year time limit is in fact appropriate as, particularly when combined with the wide scope of the GAAR, uncertainty may continue for a considerable length of time, even for a fully compliant taxpayer. More generally, time limits and periods stated perhaps need to be consolidated, as there are instances of the appropriate time limit being variously 2, 3 and 5 years. Doubtless there are good reasons for differing periods both for the taxpayer and the tax authority, but a move to harmonise all or most such periods would be welcome.

34. Section 93 (1) – Does there need to be a definition of partner in this context, as the word is one of very general meaning? (It is assumed that business partner is meant, but perhaps this should be stated.

35. Section 94 (2) – This appears to envisage situations brought about deliberately other than those involving fraud; we would have thought that it was only the latter that should permit the 20 year time limit for assessment.

36. Section 101 – We question whether it is appropriate to have a general defence of unjust enrichment when this is not the position under UK revenue law i.e. it is only permitted in relation to specific taxes.

Part 7: Investigatory Powers
37. Section 137(23) – We wonder whether the “relevant person” should be extended to mean the owner (rather than the occupier) in at least some cases.

Part 8: Penalties
38. The penalty regime again seems sensible but it will be the application of these provisions which will be the true measure of their fairness and further details have yet to be provided.

39. Section 150/penalties generally – we think that the opportunity should be taken to make it clear that penalties should not be exacted where a taxpayer’s failings have led to no loss of tax. This is currently a serious problem in relation to
relatively small penalties in UK legislation (the £100 penalty for SDLT being a very good example), where the costs of putting forward even an overwhelmingly reasonable excuse can far exceed the amount of penalty involved. We do however appreciate that in situations where there is no tax loss will still require to be “policed”; we would therefore suggest that it is appropriate to impose a penalty only in relation to a second or subsequent “offence” where this is no loss of tax.

40. Section 156(2)(b) – We think that the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another should indeed be special circumstances. There are copious provisions in the Bill to prevent “unjustified enrichment” of the taxpayer; we see absolutely no reason why they should not be balanced by provisions against unjustified enrichment to the tax authority.

41. Section 160 – We would welcome clarification as to whether the penalties here can apply directly to agents; the interaction with Section 162 in this respect also requires to be clarified.

Part 9: Interest
42. The interest provisions appear appropriate but, again, without knowing the rates of interest it is difficult to provide definitive comment.

Part 10: Enforcement of Payment of Tax
43. Section 187 – while detail will be in regulations, we question whether this is appropriate in most circumstances. Commercial charges to the recipient of funds for the collection, transmission and handling of money are common and we see no reason why in the general case Revenue Scotland should be empowered to pass on those fees in addition to tax when payment is made by a taxpayer, unless payment is by abnormal means.

44. Section 190(4) – A certificate should only comply with the provisions stated if the contents of it have been inserted reasonably; it should not be possible to obtain a summary warrant simply on the basis that there is a certificate which meets the requirements, unless the onus is put on Revenue Scotland as to the accuracy of the contents of that certificate.

Part 11: Reviews and Appeals
45. While agreeing that a review process is potentially worthwhile, we would observe that the same has not proved to be of significant value in the UK sphere. The fact the taxpayer has the option to dispense with the same and proceed straight to the tribunal is worthwhile. We also note that under section199 “a person aggrieved by an appealable decision” may request a review by Revenue Scotland. This could mean that persons other than the taxpayer could request a review, and we question whether this is the intention.

46. We welcome the option of mediation where a review does not settle the matter in question. The Policy Memorandum refers to the fact that independent mediators would be used – we believe this, and other details relating to mediation, should be dealt with in more detail in the Bill.
47. Section 210 – we note that the default position is that tax must be paid prior to any review or appeal. We think that this should not apply at all in relation to reviews; with regard to appeals, we question whether this is appropriate at the level of the First Tier Tribunal. We think that provisions about interest and potentially penalties should be sufficient to protect the revenue authority, whereas the burden of paying a disputed tax assessment may in fact be fatal to the taxpayer’s business or personal circumstances.

Schedules
48. Schedule 2, paragraph 12 – We note that this in effect leads to automatic re-appointment of Tribunal members other than in rather extreme circumstances. We wonder if this was intended.

49. Schedule 2, paragraph 16 – We wonder about the reference to “gratuities” in this provision and whether in fact “gratuities” properly so-called are ever an appropriate term for reward for the work of a member of a Tax Tribunal.