Finance Committee

3rd Report, 2014 (Session 4)

Stage 1 Report on the Revenue Scotland and Tax Powers Bill

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Finance Committee
3rd Report, 2014 (Session 4)

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Finance Committee

Remit and membership

Remit:

1. The remit of the Finance Committee is to consider and report on-

(a) any report or other document laid before the Parliament by members of the Scottish Government containing proposals for, or budgets of, public expenditure or proposals for the making of a tax-varying resolution, taking into account any report or recommendations concerning such documents made to them by any other committee with power to consider such documents or any part of them;

(b) any report made by a committee setting out proposals concerning public expenditure;

(c) Budget Bills; and

(d) any other matter relating to or affecting the expenditure of the Scottish Administration or other expenditure payable out of the Scottish Consolidated Fund.

2. The Committee may also consider and, where it sees fit, report to the Parliament on the timetable for the Stages of Budget Bills and on the handling of financial business.

3. In these Rules, "public expenditure" means expenditure of the Scottish Administration, other expenditure payable out of the Scottish Consolidated Fund and any other expenditure met out of taxes, charges and other public revenue.

(Standing Orders of the Scottish Parliament, Rule 6.6)

Membership:

Gavin Brown
Malcolm Chisholm
Kenneth Gibson (Convener)
Jamie Hepburn
John Mason (Deputy Convener)
Michael McMahon
Jean Urquhart

Committee Clerking Team:

Clerk to the Committee
Jim Johnston

Senior Assistant Clerk
Catherine Fergusson

Assistant Clerk
Alan Hunter

Committee Assistant
Thomas Williams
INTRODUCTION

1. The Revenue Scotland and Tax Powers Bill ("the Bill") was introduced on 12 December 2013 by John Swinney MSP, Cabinet Secretary for Finance, Employment and Sustainable Growth (CSFESG). The Finance Committee ("the Committee") was designated lead committee by the Parliamentary Bureau. The role of the Committee at Stage 1 is to consider and report on the general principles of the Bill.

2. The Committee issued a general call for evidence on 17 December 2013 and all submissions received are available on the Committee's web pages on the Scottish Parliament website. The Committee also heard oral evidence at its meetings over eight meetings between February and April 2014. The Committee is grateful to all those who provided evidence to the inquiry.

3. The Committee also received a report from the Delegated Powers and Law Reform (DPLR) Committee on the delegated powers provisions within the Bill and some of its findings are considered below.

4. The Committee was supported in its consideration of the Bill by its adviser, Professor Gavin McEwen. Professor McEwen and the Scottish Parliament Information Centre (SPICe) both prepared written briefings to inform the Committee’s scrutiny of the Bill.

Bill Purpose

5. The Policy Memorandum (PM) states that the Bill “puts in place a statutory framework which will apply to the devolved taxes and sets out the relationship
between the tax authority and taxpayers in Scotland, including the relevant rights, powers and duties”. 4

6. This Bill is the final of three pieces of legislation arising from the Scotland Act 2012. The two previous pieces of legislation, the Land and Buildings Transaction (Scotland) Act 2013 [LBTTA 2013] and the Landfill Tax (Scotland) Act 2014 [LFTA 2014], were considered by the Committee in 2012 and 2013.

Structure of the Report

7. A number of key issues emerged during Stage 1 scrutiny and each of these is considered in turn below:

- General anti avoidance rule (GAAR)
- Penalties
- Charter
- Revenue Scotland (RS) - Membership and Powers
- Tribunals and appeals
- Professional privilege for advisors

8. The Committee also considers a number of issues in relation to the PM and the Financial Memorandum (FM) throughout the report.

TAX AVOIDANCE AND THE GENERAL ANTI AVOIDANCE RULE

9. The Bill contains a General Anti-Avoidance Rule (the GAAR) which will apply to counter avoidance of all taxes administered by Revenue Scotland (RS). Paragraph 11 of the PM states that the Scottish Government intends this to be a broader measure than the UK General Anti Abuse Rule (UK GAAR) introduced by the Finance Act 2013:

"The Scottish GAAR would enable Revenue Scotland to take counteraction in a wider range of circumstances than the existing UK GAAR (which deals with tax abuse rather than tax avoidance). This is a result of the criteria used in the Scottish GAAR to define what constitutes a tax avoidance arrangement that is artificial. Revenue Scotland will need to demonstrate that obtaining a tax advantage is one of the purposes of a tax arrangement, and that the arrangement is artificial. Artificiality will be determined by reference to a set of tests set out in the Bill, including commercial substance.”5

10. Paragraph 59 of the PM states that the Scottish Government considers it important to tackle tax avoidance because:

- "tax avoidance reduces public revenues, and so will lead either to lower spending on vital public services or to an increase in tax rates generally, which must be paid by other taxpayers, to recoup tax avoided;
- there is a risk to the tax base if other taxpayers behave in a similar way;

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4 Policy Memorandum, paragraph 7
5 Policy Memorandum, paragraph 11
• there may be perceived unfairness to compliant taxpayers who continue to meet their liabilities as intended by the law; and
• tax avoidance can undermine public confidence in the tax system and lead to reduced rates of compliance."

11. Tax fraud and tax evasion can be tackled under common law but the Scottish Government considers that specific measures to counter tax avoidance are necessary. The PM states that tax avoidance arises:

"where a taxpayer seeks to reduce, delay or avoid the tax liability by taking action which the taxpayer believes is legal, but which the tax authorities regard as not in keeping with the spirit of or the intention behind the relevant tax legislation."\(^6\)

12. The Scottish Government links this definition of tax avoidance to that given by Lord Nolan in the case *IRC v Willoughby*. However, it is notable that the Scottish Government's definition is grounded on the tax authorities' views on whether the taxpayer's actions are in accordance with the spirit or intention behind the legislation. Lord Nolan on the other hand grounds his definition on a neutral judgment as to Parliament's intentions:

"The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability."\(^7\)

13. The question by whom and from whose perspective tax avoidance should be judged recurred throughout the evidence put before the Committee.

14. The Committee welcomes the approach to tax avoidance in the Bill.

**Tax avoidance arrangements - broad or narrow definition**

15. The Bill provides for the counteraction of tax advantages arising from tax avoidance arrangements that are artificial. Tax advantages are widely defined, as are tax avoidance arrangements. The latter are defined as arrangements where obtaining a tax advantage may reasonably be concluded to have been the main purpose, or one of the main purposes, of the arrangement. Before a tax avoidance arrangement can be counteracted, it must be determined to be artificial and a non-exhaustive set of tests of artificiality or otherwise is provided.

16. However, the professional bodies who provided evidence were strongly of the view that the "broad" Scottish GAAR created uncertainty for taxpayers. For example, ICAS argue in written evidence that there is "no certainty at the moment on the real impact of the GAAR, thus failing that maxim."

17. Much was made in evidence of the inclusion of the phrase, *or one of the main purposes*, in the definition of a tax avoidance arrangement. The Scottish

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\(^6\) Policy Memorandum, paragraph 59
\(^7\) Dicta of Lord Nolan in Inland Revenue Commissioners v Willoughby [1997] 4 All E.R. 65
Government suggests in the PM that some non-tax purpose could be attributed to arrangements that were essentially artificial tax avoidance:

“A feature of some tax avoidance schemes in the UK until now is that they have had apparently legitimate commercial or other purposes and taxpayers have sought to argue that the tax advantage obtained was secondary.”

18. The professional bodies argued on the other hand that tax costs and savings were factored into many perfectly innocent transactions and the phrase consequently created uncertainty for taxpayers by extending the scope of the GAAR more widely than necessary. The CIOT provided the following example:

"If I was going to say to you, convener, that you should operate as a company because of certain circumstances or as a sole trader because of other circumstances, I would want to be sure that there would be no risk of the authorities saying under the general anti-avoidance rule, 'There was a tax benefit in you going one route rather than another.'"

19. Witnesses also suggested that a lack of certainty may affect investment decisions. ICAS, referring to their committee examining Scottish taxes, said:

"Generally, their concerns are that, if more certainty is not given, businesses that are looking at property development or transactions or which are considering an investment might, in the absence of certainty, take their business south of the border rather than invest in Scotland.”

20. The professional bodies suggested narrowing the GAAR through, for example, restricting the definition of tax avoidance to cases where a tax advantage was the sole or main purpose of an arrangement. Alternatively, there was a desire to restrict the GAAR to cases of abuse as defined in the UK GAAR. The CIOT state in written evidence:

"We are concerned that the use of the phrase 'one of the main purposes' means that there is a very low threshold for deciding that a transaction is concerned with avoidance and so within the ambit of the GAAR. We can see that the link to 'artificial' in s59 is helpful but would have preferred the test to be phrased in terms of 'sole or main purpose [being avoidance]'.”

21. However, the Committee’s Adviser points out in his briefing on the Bill that the exact same phrase is found in the UK GAAR:

"the initial difference between the UK GAAR and section 58 seems purely terminological in that the UK legislation refers to tax arrangements and section 58 to tax avoidance arrangements. Both apply where the main purpose, or one of the main purposes, of the arrangement is obtaining a tax advantage. The differences between the UK and the Scottish provisions arise, first, in the contrast between the definition of abusive in the UK rule

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and artificial in the Scottish rule, and, second, in the absence of an advisory panel in the Scottish legislation."

22. Essentially the first stage, or gateway, test in both the UK GAAR and the Scottish GAAR is the same, the sole difference being the insertion of the word, avoidance, where the UK GAAR uses the neutral term, tax arrangement. Dr Heidi Poon points out in written evidence that: "The legislative structure...of the Scottish GAAR has much in common with the UK GAAR, notwithstanding the crucial difference in focus of the Scottish GAAR being on 'avoidance' to give it a wider scope than the construction of 'abuse' under the UK GAAR."

23. Dr Poon challenges the view that a widely drawn GAAR may be inherently less certain than a narrow one:

"My experience from sitting on the tax tribunal...is that however widely or narrowly drawn a GAAR is, the process of constructing what the law is trying to say and applying it to the facts of the case must still be gone through. A higher or lower degree of certainty is not conferred by whether the GAAR is widely or narrowly drawn—certainty is not created at that level"\textsuperscript{10}

24. She suggests that legislation which is based on rules such as in the UK "allows people to find loopholes."\textsuperscript{11} In her view a "higher or lower degree of certainty is not conferred by whether the GAAR is widely or narrowly drawn—certainty is not created at that level. A more principles-based approach would give more certainty than drawing a GAAR widely or narrowly."\textsuperscript{12}

25. She went on to explain what she meant by a principles based approach thus:

"If you start with rules, you end up with more rules in order to close the loopholes, but a more principles-based approach allows more scope for a GAAR to interpret the legislation on the basis of the principles that are its starting point. That will impinge on how other areas of tax are going to be legislated on."\textsuperscript{13}

26. This view was supported by Justine Riccomini who suggested that the Bill "should be fit for purpose for Scotland and not just copied and pasted from the UK legislation."\textsuperscript{14}

27. The CSFESG informed the Committee that the approach to the Scottish GAAR is a principles based one:

"It is possible to be very specific and prescriptive about what is in and what is out, but the danger of such an approach is that it creates the incentive to find ways of operating at the margins. The principles-based approach that is

enshrined in the bill is designed to signal very clearly that that type of practice will be unacceptable.¹⁵

28. He also emphasised:

"I have made it clear that we intend to take the toughest possible line on tax avoidance—I mean “avoidance” and not just the most extreme cases of abuse. With that in mind, the bill provides, in a general anti-avoidance rule, power for revenue Scotland to take robust action against artificial tax avoidance schemes. We chose to provide two definitions of artificiality to ensure that our approach is as comprehensive as possible."¹⁶

29. The Committee supports the provisions within the Bill for a more broadly drawn GAAR and is not of the view that a more narrowly drawn GAAR would create more certainty for tax payers.

30. The Committee also notes that part of the certainty that may be provided by a more widely drawn GAAR is a reduction in the need for additional targeted anti-avoidance rules (TAARs) on the basis, as noted by Dr Poon, that “If you start with rules, you end up with more rules in order to close the loopholes”.

31. The Committee would welcome clarification from the Scottish Government as to whether the GAAR as drafted, together with principles based drafting of any future Scottish taxes, will mitigate the need for TAARs in respect of those taxes.

Artificial Tax Avoidance - Condition A

32. The greater breadth of the Scottish GAAR lies in the introduction of the tests for artificiality as opposed to the narrower test for abuse in the UK GAAR. The first test of artificiality in the Scottish GAAR, condition A, is a simplified version of the definition of an abusive tax arrangement. The core of the test is whether the arrangement is a reasonable course of action in relation to the relevant tax provisions. The UK legislation requires that it could not reasonably be regarded as a reasonable course of action, a principle known as the double reasonableness test. However, the Bill Team pointed out that the Scottish Government deliberately moved away from the double reasonableness test:

"We have consciously stepped away from the UK double reasonableness test simply because it seems to be unnecessarily complicated. I am not entirely sure what a double reasonableness test adds, or in whose eyes the reasonableness is."¹⁷

33. The Committee suggests that in keeping condition A in the Scottish GAAR simple, it is important that the requirement for an objective view of what is reasonable is protected and invites the Scottish Government to respond to this point.

Artificial Tax Avoidance - Condition B

34. Even if a tax avoidance arrangement meets the test of being a reasonable course of action in relation to the relevant tax provision, it has also to clear the hurdle of commercial substance set out in condition B in section 59(3). Subsection (4) sets out four examples which might indicate lack of commercial substance. These can be paraphrased as not reasonable business conduct, form inconsistent with the substance, elements of the transaction offset one another, and circular transactions. These four are all recognisable characteristics of tax avoidance schemes which have been the subject of litigation in the past.

35. The Law Society of Scotland raise some concerns in respect of the use of the terms commercial substance and business conduct in condition B. A taxpayer's personal affairs may well include matters falling with the definition of tax avoidance arrangement which may be neither commercial nor a business matter without being artificial or contrived:

"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."\(^{18}\)

36. The CSFESG was questioned about the example of incorporation of a business as an everyday circumstance where a reduction in tax may well be one of the main purposes of the transaction but would not in most cases be thought to be unacceptable behaviour. He responded that the tests of artificiality and commercial substance (conditions A and B) are sufficient to distinguish the acceptable from the unacceptable in such a case:

"We have put in two essential factors to specify the approach on the general anti-avoidance rule. One is artificiality, which is not very relevant to the example that John Whiting cited. The other is commercial substance, which will be closely connected to incorporation as a consideration."\(^{19}\)

37. He concluded, therefore, that incorporation of a business will not generally be an unreasonable course of action with respect to the relevant tax provisions, nor will it generally lack commercial substance and hence should not fall foul of the GAAR.

38. The Committee recommends that the references to commercial substance in subsection (3) & (4) of section 59 need to be broadened to cover non-commercial transactions that have real economic consequences for the taxpayer and the reference to reasonable business conduct in subsection (4)(a) extended to include personal conduct.

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\(^{18}\) The Law Society of Scotland, Written submission paragraph 26

\(^{19}\) Scottish Parliament Finance Committee. Official Report, 2 April 2014, Col 3946/7
Additional Certainty

39. As noted above, one of the main issues raised by witnesses was the need for additional certainty in relation to the GAAR. Four specific mechanisms were identified as potentially supporting more certainty for the taxpayer:

- Advisory Panel;
- RS Guidance;
- Disclosure of Tax Avoidance Schemes (DOTAS);
- Pre-clearance of transactions.

Advisory Panel

40. A number of witnesses supported the introduction of an advisory panel similar to the UK GAAR. For example, the CIOT state in written evidence that:

“We note that the UK GAAR has an Advisory Panel and we think that this should be emulated in Scotland. The aim would be to help RS develop guidance, ensure the Scottish GAAR is applied with commercial experience and generally build confidence in its application among taxpayers.”

41. In particular, the professional bodies expressed concern that the application of condition B requires judgement as to commercial substance and reasonable business conduct. This is in addition to the requirement to judge what is a reasonable course of action in relation to tax provisions in condition A. Not only will Officers of Revenue Scotland make these judgements in the first instance but, if the taxpayer challenges those judgements, the ultimate decision will be made by members of the Tribunals or Court of Session and, under section 62(2), the court must take into account any guidance published by RS. In the UK GAAR, provision is made for an advisory panel to provide both commercial experience and an external perspective when making such judgements. The Law Society of Scotland:

“support a more independent view of what is reasonable in the circumstances. That is why we recommend having an expert panel of some description to give advice on what is available. That would not necessarily lead to any change in the bill. The guidance around it is particularly important.”

42. The CIOT were asked how the role of the UK advisory panel fitted with the requirement for objective reasonableness. The CIOT responded:

"I make it clear that the advisory panel has not formally pronounced on the UK general anti-abuse rule—as far as I know, no cases have gone before it. However, in principle, the intention is to ensure that—as you put it well—reasonableness is judged reasonably, to keep peddling that word."

43. The Low Income Tax Reform Group (LITRG) which represents tax payers who cannot afford professional advice also support the introduction of an advisory

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20 Chartered Institute of Taxation, Written submission paragraph 20
panel but emphasise the need for panel Members to have commercial experience. The Committee’s Adviser supports this view:

“the introduction of an advisory panel of independent persons with relevant financial and commercial experience would help ensure that Conditions A and B are judged in an unbiased way.”

44. He suggests that whether a course of action is reasonable in relation to a tax provision requires knowledge and experience of the relevant areas of commerce and business as well as knowledge of the legislation and the principles behind it.

45. However, both UNISON and the STUC suggest that the panel membership should be more wide ranging. The STUC state that:

"we believe that any advisory panel should, as Unison says, be not only created 'in a transparent way' but drawn from a broad enough range of people to ensure that the public can have faith that all considerations are being taken into account." 23

46. The LITRG also stressed the advisory nature of the panel:

"At the end of the day, revenue Scotland will draw up the guidance and decide what the GAAR will and will not cover; an advisory panel is there to advise." 24

47. The CSFESG suggested that such a measure would send the wrong message to the public:

"If we are discussing solutions such as having an independent review panel, it feels as if we are trying to devise a mechanism to undermine the principle that we are all trying to develop, which is to attack tax avoidance—we are almost trying to approve of, condone or find a way of accepting tax avoidance initiatives." 25

48. He considered that the appeal provisions were sufficient protection for a taxpayer who believed that RS had come to the wrong decision. 26

49. The Committee recognises the need for additional protection for taxpayers and considers the issue further in the section below on RS guidance. However, the Committee does not support the introduction of an advisory panel. 27

RS Guidance

50. The importance of good and regularly updated guidance on the application of the GAAR, with or without the benefit of an advisory panel, was emphasised by a

27 Gavin Brown MSP dissented from this sentence.
number of witnesses. ICAS explained the impact of guidance issued by HMRC on the UK GAAR and the role of the advisory panel in that process:

"That guidance was universally welcomed by practitioners, because it described succinctly what the rule is intended to do—it is game changing, to use that expression. The guidance also went into detailed worked examples to show why the law would be considered to apply in particular circumstances."\(^{28}\)

51. ICAS would support the introduction of similar guidance in Scotland. The Law Society of Scotland state that “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.”

52. The LITRG, indicated that unrepresented taxpayers could be protected from uncertainty by “ensuring that the guidance is extremely good and kept up to date.”\(^{29}\)

53. **The Committee, in recognising the need for additional protection for taxpayers, recommends that RS is required to consult widely on a draft of its guidance on the application of the GAAR prior to its initial publication and on subsequent substantive revisions.**

**Disclosure of tax avoidance schemes (DOTAS)**

54. The UK Government introduced rules in 2004, nine years before introducing the GAAR, requiring promoters of tax avoidance arrangements to disclose these in advance to HMRC. While not eliminating tax avoidance schemes, it greatly speeded up the identification of such schemes allowing quicker counteraction.

55. The PM states that the Scottish Government “does not think that a DOTAS arrangement is necessary” for Scottish Landfill Tax due to the nature of the tax and that further consideration is being given to “a DOTAS-type regime” in relation to Land and Buildings Transaction Tax (LBTT). The PM indicates that Ministers may bring forward amendments at Stage 2 to “bring forward such a scheme”.

56. Both Unison and the STUC are in favour of the introduction of DOTAS into the Bill while Dr Poon views a DOTAS regime as a natural partner of a GAAR:

"If they know that something is there, they can take a look at it. If they do that sooner, less time is spent on it, and it is better for the authority because, if the scheme is discovered years later, time bars may apply. For multiple reasons, the GAAR and DOTA schemes should go hand-in-hand."\(^{30}\)

57. The CSFESG stated in evidence to the Committee that while he does “not want to put in place mechanisms that undermine what is in the Bill” there is a

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“specific issue” in relation to LBTT. To address this the Government are considering a “prior clearance approach.”

Pre-clearance of transactions

58. Another method of providing more certainty for the taxpayer is a system of advance clearance on whether RS would seek to apply the GAAR or not. This approach was supported by a number of witnesses. For example, the CIOT stated in written evidence that “a clearance system for taxpayers concerned about the applicability of the GAAR would clearly be helpful and welcome.” The Law Society of Scotland have a similar view: “We have advocated a formal pre-transaction clearance procedure and regret to note that this has not been adopted.”

59. The PM states that the Bill does not include a statutory clearance scheme as it is not viewed as being necessary for the devolved taxes and due to the additional administrative burden which would be placed on RS. However, taxpayers will be able to ask RS for an opinion on whether a proposed arrangement would fall foul of the GAAR.

60. The CSFESG told the Committee that he is “not sympathetic to the suggestion for a pre-clearance arrangement” on the same basis as his reasoning against an advisory panel. He went on to explain that the Bill is “also about signalling a change in culture” and therefore he would “not want to put in place mechanisms that undermine what is in the Bill.”

61. The Committee notes that the PM refers to a DOTAS-type regime for LBTT but that the CSFESG refers to a prior clearance approach. The Committee would welcome further clarification in relation to the planned approach to LBTT.

Priority of the GAAR

62. Dr Poon informed the Committee that, while the format of Part 5 of Bill follows the UK GAAR quite closely, there is no provision similar to section 212 of the Finance Act 2013. There are a number of rules in the UK legislation which take priority over other tax rules. In addition, the provisions of international double tax arrangements take priority over domestic tax rules. Section 212 provides that the UK GAAR takes priority over any other priority rules in the legislation including the one which gives priority to double tax arrangements. This prevents such priority rules being employed in abusive arrangements to circumvent the GAAR. Dr Poon told the Committee

"If a scheme has managed to deploy a priority rule in income tax but the [UK] GAAR has judged it to be abusive, the GAAR can override the scope of the priority rule that has allowed the scheme to be legal. If the Scottish GAAR does not have that priority rule, and a similar situation arises, how will you resolve it?"

32 The Law Society of Scotland, Written submission paragraph 22
63. Even if there are currently no priority rules in devolved tax legislation, and no international agreements covering the devolved taxes, the Committee recommends that the CSFESG consider introducing a rule to give the GAAR priority over any other legislative measures and international double tax arrangements. This would reinforce the overriding importance of the anti-avoidance measure.

PENALTIES

64. The PM states that the Scottish Government's intention in providing for penalties in the Bill is to promote compliance and deter non-compliance. Three types of financial penalty apply to listed non-compliant behaviours. The types of penalties, in order of seriousness, are fixed, daily and percentage based. Criminal offences are also created in respect of concealing, destroying or disposing of a document required to be produced by an information notice or after notification that an information notice is likely to be issued. While an alternative approach would be to adopt identical penalty amounts, timescales and processes for all devolved taxes, the Government has decided to allow for differentiation. The intention is to provide a broad statutory framework in the Bill and to bring forward regulations to provide the nature, amounts and timescale of penalties for each tax.

Primary versus secondary legislation

65. The main concern of witnesses in relation to the Bill's penalty provisions concerned achieving an appropriate balance between primary and secondary legislation. For example, the CIOT stated:

"Our concern is that the real rules should be in primary legislation and, in that respect, we home in on certain aspects of the penalty provisions. Penalties are a key part of legislation, and taxpayers should know when they are going to be penalised."35

66. They accepted that secondary legislation is subject to parliamentary scrutiny, but considered that penalties were sufficiently important to appear in the primary legislation:

"Secondary legislation can cover how the penalties will be applied mechanically, but the circumstances of the penalties should be in primary legislation together with the welcome powers on how they can be mitigated and when they can be suspended."36

67. This view is fully supported by ICAS:

"The circumstances in which a penalty is payable should be on the face of the bill, and the amounts should be on the face of the bill, too. To me, the only things that should be in regulations are the procedure and the administrative side. Everything else should be in the bill."37

68. Asked what specific matters relating to penalties, other than the amounts, should be in primary legislation, LITRG said:

"We would like, for example, provision for the amounts of reduction to be included, making clear the circumstances in which a penalty might be reduced, by what proportion the penalty would be reduced and any conditions for such a reduction. That would give the taxpayer a sense of consistency, fairness and certainty."  

69. LITRG also considered that primary legislation should include the factors to be taken into account in determining a penalty, such as whether a failure is deliberate or negligent, the amount of tax involved, whether a time limit has been missed and if so the reason for and the length of any delay.

70. The Bill Team reported that the issue of whether more should be in primary legislation would be considered further:

"We accept that we need to look at that again in the light of points that have been made... The ideal would be to provide clarity in the bill so that everyone can see the four corners of the penalties and the amounts from 1 April next year, and also to provide flexibility for adjustment in the light of experience, which is where the order-making powers come in."

71. This was confirmed by the CSFESG:

"We have come to the conclusion that the provisions in the bill on penalties are not as clear and consistent as they could be. We will look further at that question in the light of the committee’s report."

72. The Delegated Powers and Law Reform Committee (DPLRC) state in their report on the Bill that Ministers “will bring forward amendments at Stage 2 specifying all initial penalty amounts on the face of the Bill.” Any subsequent changes to penalty amounts will be set out in secondary legislation, subject to the affirmative procedure.

73. The Committee welcomes the commitment from the CSFESG to bring forward amendments at Stage 2 to include more detail and greater consistency in relation to penalties on the face of the Bill including specifying all penalty amounts. In doing so the Committee invites the Cabinet Secretary to consider the views of the LITRG that “the principles of penalties should be contained in primary legislation.” This should include the circumstances that can lead to a penalty, the amounts of penalties, when taxpayers can appeal and enforcement.

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Penalty collection

74. The Committee also heard concerns, based on HMRC’s experience, against a too rigorous imposition of small fixed penalties. Several witnesses cautioned against too swift and automatic penalties, particularly for first time offenders or where there was no tax at stake. The Law Society of Scotland referred to penalties for late returns where there is, in fact, no tax payable:

“No system can operate without the tax authority seeing things where there is no tax payable, but it is extremely galling, to say the least, that in situations where, for example, a return is made late but there is no tax payable, a penalty is then levied on a non-existent tax for an administrative error.”\(^\text{41}\)

75. The Law Society’s view was that, where no tax was involved, penalties for administrative failure should only arise on a second or subsequent occasion. They went on to point out that there is no effective redress in the case of small penalties where the taxpayer considers that there is reasonable excuse for the offence. The effort and cost of challenging a £100 penalty are simply not worth it.\(^\text{42}\)

76. Justine Riccomini made the point that the issuing of penalties can be automated but human input is needed when people appeal against them or submit reasons why they cannot pay. If penalties are levied for one-day lateness and payment expected within 30 days, there is a risk that RS may have to expend considerable effort in seeking to collect small amounts of money. She suggests the “time period should be extended to 60 or 90 days. We are talking about the payment of a penalty rather than payment of the tax itself.”\(^\text{43}\)

77. Dr Heidi Poon informed the Committee that penalty cases are consuming considerable amount of administrative and tribunal time. She pointed out that the administrative cost of penalties can be disproportionate to the amount that might end up being collected, when we consider the time and human effort that would be needed.\(^\text{44}\)

78. The Committee recommends that the penalty regime should encourage people to pay on a timely basis but should be proportionate and avoid creating an unnecessary administrative burden for RS.

THE CHARTER

79. Section 10 of the Bill requires RS to prepare a Charter which must include standards of behaviour and values for RS and the taxpayer respectively. The provision for a Charter was widely welcomed amongst witnesses but there were two areas suggested for improvement. The first is the lack of reciprocity between RS who are simply to aspire to the standards of behaviour and values while taxpayers are expected to aspire to them. The second is in respect of the lack of rigour in the obligation to publish the Charter as RS considers appropriate, to

review it from time to time, and to revise it when it considers it appropriate to do so.

**Reciprocity of obligation**

80. The wording of section 10(2) gives the impression that more is expected under the charter of the people of Scotland than is expected of RS. As the Bill team put it:

"The language has given an impression that we did not intend it to give. On the one hand it says, 'Here is what revenue Scotland will hope to do,' and on the other, it says, 'Here is what revenue Scotland expects the taxpayer to do.'" 45

81. Witnesses noted that the charter will be an important document in communicating with taxpayers who are unlikely to read legislation. As the LITRG put it:

".... the charter is to set out and frame the relationship between the taxpayer and revenue Scotland, so we think that there should be expectations on both sides and that it should provide a balance, showing what the taxpayers’ rights and responsibilities are and what revenue Scotland’s rights and responsibilities are." 46

82. The CSFESG confirmed that the obligations of RS and the taxpayer with respect to standards of behaviour and values will be made equivalent. 47

83. **The Committee welcomes the commitment of the CSFESG to bring forward amendments at Stage 2 to ensure a reciprocity of obligation within the charter.**

**Publication**

84. As it stands complete discretion is given to RS in the matter of publishing the Charter, reviewing it and revising it. As our adviser put it:

"There is no requirement in section 10 for RS to consult with stakeholders in preparing or revising its charter. Given the importance of such a charter in regulating the relationship between RS and the public, the committee may wish to consider whether a statutory duty to consult would be appropriate." 48

85. While in a changing world it may be inappropriate to specify precisely how the charter should be published, the requirement should be to make it readily available to all taxpayers and not simply to publish as RS considers appropriate.

86. Setting standards is of little value unless performance against the standards is reviewed. As John Whiting of the CIOT said:

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"The charter should regularly be reported on, with an obligation for revenue Scotland—probably signed off by the members of revenue Scotland—to lay a report before the Parliament on how the charter is going. There should be observations on how the tax authority is operating and how taxpayers are responding to it."\(^{49}\)

87. The Committee welcomes the commitment from the CSFESG to bring forward amendments at Stage 2 to oblige RS to consult on preparing and updating the Charter.

REVENUE SCOTLAND - MEMBERSHIP AND POWERS

88. Concerns around RS and its powers focussed on four areas - membership of RS, independence, delegation of powers, and reporting. There was no disagreement with the establishment of RS as a non-ministerial department.

Membership of RS Board

89. A number of witnesses suggested that there would be advantage in the chief executive of RS, and perhaps some other executives, in being members of RS contrary to Schedule 1, paragraph 8(2). The Bill Team explained the Scottish Government’s thinking behind this provision:

"If the chief executive and other members of the executive team were members of the board, there is a danger that it would become much more difficult for the board to hold the chief executive to account."\(^{50}\)

90. While some witnesses were happy with the proposed structure and others were indifferent, the CIOT and ICAS, for example, were strongly in favour of the Chief Executive being a member of RS. The presence of the Chief Executive, and perhaps his or her deputy, on the Board was viewed as ensuring that the Board is fully engaged in the operations of RS and that the executive and non-executive members of the Board work as a team. It was suggested that in commercial companies it is normal for key members of the executive team to be on the board and John Whiting, as a non-executive member of the Board of HMRC, spoke of the benefits of executives and non-executives working together on that Board:

"The CIOT thinks that it is much better to have the chief executive and, potentially, the chief operating officer—the senior members of the executive, if you like—of Revenue Scotland as part of the governing body. In the terminology of schedule 1, they should be members...... From my experience of being a board member at HMRC, that structure works. We are trying to take a regular team approach, with people who know, trust, and deal with one another regularly. That does not stop us challenging."\(^{51}\)

91. ICAS concurred:


\(^{50}\) Scottish Parliament Finance Committee. Official Report, 19 February 2014, Col 3651

\(^{51}\) Scottish Parliament Finance Committee. Official Report, 5 March 2014, Col 3750/1
"Revenue Scotland is going to be primarily operational and, if it is to have a proper handle on how operations are running, the chief executive needs to be on the board of Revenue Scotland as a member of Revenue Scotland. It would all pull together much better if the board had that mixture of executive and non-executive members. That is what most businesses do. A complete board of non-executives is often at one remove, which does not seem to make sense."

92. Eleanor Emberson considered that either structure would be effective provided it was understood by the parties concerned:

"I think that it can be made to work either way. I was previously the chief executive of a non-ministerial department and was a member of the board of that organisation, but I have also seen models work well in which the board holds the chief executive to account."

93. The CSFESG explained the thinking behind the structure in the Bill:

"... members of the executive being part of the board might create difficulties just through proximity and board members feeling that they are very much part of the same team as the chief executive, which might mean that the element of challenge that is required is eroded."

94. While noting that the proposed structure gave the board the ability - without any discomfort - to have discussions that did not involve the chief executive, the CSFESG was of the view that either structure could work. The important issue for the Scottish Government is that:

"board members are able to properly and fully exercise their responsibility to challenge executive recommendation and practice, and to take the appropriate decisions at board level about the operation of revenue Scotland."

**Ministerial Guidance**

95. The fact that Ministers may not give directions to nor otherwise seek to control RS was welcomed. Some witnesses queried whether a clear distinction could be made between direction and guidance to which RS must have regard. The safeguard in the Bill is that guidance must be published unless Ministers decide that publication would be prejudicial to RS in exercising its functions.

96. The ICAEW proposed that where guidance is not published there should be independent verification, perhaps by the President of the Tax Tribunals, to ensure that it does not amount to a direction. The CIOT asked for examples of when guidance by Ministers should not be published. Justine Riccomini considered that

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there was no justification for any exemption from publication as we are dealing with a taxation system, not national security:

"There should be complete openness and freedom of information in all aspects of revenue Scotland’s work, and HMRC’s work, for that matter. I cannot see that there is anything that presents some sort of national security issue."\(^{56}\)

97. The CSFESG assured the Committee that publication of Ministerial guidance would be the default option but wished to retain the power to give confidential guidance, for example, in relation to operational matters and avoidance measures.

98. **The Committee recommends that where guidance is not published that the CSFESG writes to the Committee explaining the reasons for this.**

**Delegation of powers**

99. Witnesses recognised the good sense of delegation of powers to Registers of Scotland and SEPA, but some expressed concerns that such delegation should not extend to all powers. The Faculty of Advocates stated:

"Certain powers are inherently the powers of a taxing authority, such as the power to levy a penalty, to make an assessment and the like, and we may have to be careful about permitting a taxing authority carte blanche, as it were, to delegate whatever it likes to somebody else."\(^{57}\)

100. Some witnesses suggested that in the exercise of delegated powers, RoS and SEPA should be explicitly bound to act within the limitations of RS's powers and the Charter. For example, the LITRG stated:

"The concern, based on experience elsewhere, is that when functions are delegated to another organisation, that organisation might not act in a way that Revenue Scotland would deem appropriate."\(^{58}\)

101. They appreciated that it was implicit that other organisations, such as SEPA and Registers of Scotland to whom these powers will be delegated, would not be able to exceed the powers. But in setting up the framework for RS there is the opportunity to make the limitation explicit.

102. The STUC also had concerns over potential conflict between the other statutory responsibilities of SEPA and RoS and their delegated powers:

"As you will see from our submission, we are not against the idea of delegating authority to SEPA and to Registers of Scotland, but some care has to be taken in relation to the overall guidance and objectives of those organisations."\(^{59}\)


103. Eleanor Emberson considered that a non-statutory formal scheme of delegation would be sufficient to meet concerns. Such schemes for SEPA and Registers of Scotland will be laid before the committee before the commencement of live operations. Independently of the detail of such schemes, the responsibility for the exercise of the powers remains with RS who may be held to account. She stated:

"I am therefore comfortable with the way in which the bill is drafted. It gives us room to set down, outwith the legislation, a formal scheme of delegation that we can share both with the committee and publicly to ensure that people know its terms."^60

104. The Committee notes that the Delegated Powers and Law Reform Committee had no comment on the delegation of functions by RS. The Committee will consider the non-statutory formal scheme when it is introduced.

Reporting

105. The importance of reporting on performance to Parliament and the public was emphasised by a number of witnesses. ICAS state in written evidence that:

"The Bill is silent on the requirements and processes under which Revenue Scotland will, or may be, accountable to the Scottish Parliament and it might be expected that appropriate provisions would be included in the Bill."^61

106. Reporting to the public in the form of guidance on procedures and interpretation of tax law is equally important as stated by LITRG in written evidence:

"For the unrepresented taxpayer, RS guidance will explain the tax system and the approach of RS – they are unlikely to read the legislation behind the guidance. It is essential that RS guidance is written with the unrepresented taxpayer in mind as its audience."^62

107. Guidance must be easy to understand but it must not simplify the law to the extent that is misleading or incorrect. Taxpayers should be able to rely on RS guidance, provided they have acted in good faith. LITRG also emphasized in written evidence the importance of broad based access; a website alone is insufficient: "It is essential that RS considers properly how to ensure that unrepresented taxpayers in particular can obtain RS guidance easily."

108. Audit Scotland pointed out in written evidence that the obligation to prepare accounts and be subject to audit derived from RS's proposed status as an office holder in the Scottish Administration. Consequently, it is important that, subject to Parliamentary approval of the Bill, the appropriate order under the Scotland Act

^61 Institute of Chartered Accountants, written submission, paragraph 14
^62 Low Incomes Tax Reform Group, written submission, paragraph 27
1998 should be made with effect from the date of commencement of the RSTP Act.

TRIBUNALS AND MEDIATION

Tribunals

109. The Bill provides for two tribunals, a first-tier tax tribunal (FTT) and an upper tax tribunal (UTT) to hear appeals against decisions of RS in respect of devolved taxes. The PM explains the Government's intention that these be transferred into the Scottish Tribunals structure when it is ready in mid-2016. The Bill provides for the tribunals' establishment and operation in the period from the commencement of the devolved taxes on 1 April 2015 until transfer is possible.63

Members sitting in the UTT

110. The Bill provides in section 28 that decisions of the UTT will be made by a single member. This is in contrast with the FTT where there may commonly be up to three members sitting. The Faculty of Advocates queried whether it was appropriate to limit the UTT to a single member where the decision appealed against was made by a panel, whose members may have had a range of expertise relevant to the case:

".....the committee might wish to consider whether it would be appropriate to allow the upper tribunal to sit with more than one member. Otherwise, one will have the odd situation in which a decision by three people will be subject, on appeal, to a decision by a single individual."64

111. The Law Society of Scotland shared this concern:

"There is something that just smells a little wrong about perhaps going from two or three experts to one person—someone who is no doubt highly qualified but not necessarily an expert in the area—as a mechanism for appeal."65

112. The CSFESG indicated willingness to consider the matter further:

"whether or not the tribunal had sufficient breadth of overview and whether more members were required, that is a point of detail that I am happy to consider in the light of the evidence that the committee has heard."66

113. The Committee welcomes the commitment from the Cabinet Secretary to examine this issue further and asks that he reconsiders the number of members sitting in the UTT.

Appeals from the UTT to the Court of Session

114. As is customary in tax appeals, an appeal from the UTT to the Court of Session (sitting as the Court of Exchequer) (CoS) may only be made on a point of

63 Policy memorandum, paragraph 46
law. In addition, subsection 33(4)(b) requires that permission for such an appeal can only be made where the appeal would raise an important issue of principle or practice or there is some other compelling reason for such permission. The Faculty of Advocates expressed concern that the requirement for the issue to be of general importance would prevent a litigant with a good case on a matter of importance to him from appealing to Scotland’s supreme court:

"It is important for the committee to understand that the test that will be applied will deliberately exclude a well-founded appeal—even a well-founded appeal in which it is reasonably clear that there is a seriously good point to be argued."

115. They suggest that this restriction on appeals going to the CoS is not required on grounds of potential overload. Across the whole range of taxes, the Faculty of Advocates suggested that the number of cases going to the UK First-tier Tax Tribunal is 50 to 60 per annum of which very few would relate to Stamp Duty Land Tax or Landfill Tax. They state:

"Broadening the possibility to appeal to the Court of Session would not open any floodgates in a way that would have a material impact on the inner house workload."

116. In response to questioning from the Committee on this point the CSFESG accepted “unreservedly that the appeal mechanism must be fair and must be seen to be fair, in the interests of taxpayers as well as revenue Scotland.”

117. The Committee recommends that vigorous approach to tax avoidance must be balanced by a fair appeal system and invites the CSFESG to reconsider the restrictive rule governing appeals to the CoS.

Judicial review
118. Chapter 6 of the Bill provides that the CoS, on receipt of a petition for judicial review, may remit it to the UTT. A petition for judicial review is a request that the court exercise its supervisory jurisdiction. In tax matters, judicial review is the remedy where the revenue authority has acted in an unreasonable way or has exceeded its powers but has made no decision which is appealable under the tax legislation.

119. LITRG explained the importance of judicial review and illustrated this with reference to recent consultations with the UK Ministry of Justice and negotiations with HMRC. Under the Bill, judicial review is only available on petition to the CoS, although it may then be remitted to the UTT. On the grounds of keeping the cost of judicial review as low as possible, LITRG would like individuals to have access to judicial review at the level of the tax tribunals:

"We would like judicial review to be extended so that cases can be heard in the lower courts and in tribunals—for example, the tax tribunals, which

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would be less costly. At the moment, it is very costly for an individual to take a case to judicial review."\(^{71}\)

120. **The Committee asks whether any consideration has been given to allow taxpayers to have access to judicial review at the level of tax tribunals.**

*Names of the Tribunals*

121. Section 19 establishes the tribunals with the names the First-tier Tax Tribunal for Scotland and the Upper Tax Tribunal for Scotland. The Faculty of Advocates expressed concern that these names are too similar to the names of the existing UK tribunals, the First-tier Tribunal and the Upper Tribunal. They suggested that it was inevitable that some taxpayer, perhaps unrepresented, will start proceedings in the wrong jurisdiction:

"It will simply create a procedural mess if an appeal is started in the wrong jurisdiction and the forms sent to the wrong address. It will have to be sorted out in one way or another. To avoid that confusion, I wondered whether different names might be chosen....."\(^{72}\)

122. A similar point arises with potential confusion over references to the Acts providing for devolved taxes. The two current Acts are designated the 2013 Act and the 2014 Act by section 216 of the Bill. The Faculty of Advocates point out:

“...that, if further taxes come within the competence of the Scottish Parliament, there is likely to be more than one act per year that concerns a tax.”

123. They suggest adopting the convention used for UK tax legislation of the initials of the act followed by the year, e.g. ITTOIA 2005.\(^{73}\)

124. In response to questioning from the Committee on these points the CSFESG agreed to consider bringing forward amendments at Stage 2 to avoid any confusion.

125. **The Committee welcomes this commitment.**

*Costs of the Tribunals*

126. Dr Poon, who is a member of the UK First-tier Tribunal, queried the estimate of £135,000 annual running costs in the financial memorandum for the tribunals. She considers that the estimate of an average of two days sitting per month over four years for both tribunals was reasonable but she wonders whether sufficient allowance has been made for associated fees and expenses. The general guideline for writing up decisions is one day for every day of hearing. In complex cases, additional time for pre case reading and one and a half days writing up time per day of hearing may be claimed. Depending on where the hearing is held, travel, subsistence and accommodation costs may be payable to the members. Her concern is:

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"whether the costing of £135k annual running costs have covered all the necessary constituent elements, especially in respect of the variable component for the time incurred by the presiding member at the pre-hearing and post-hearing stages that will be translated into fees."

127. The Committee asks whether the estimated costs within the FM cover associated fees and expenses.

Mediation and the Ombudsman

Mediation
128. The PM states that where a review by RS staff fails to settle a disputed matter to the satisfaction of a taxpayer, RS may offer mediation by an independent third party in appropriate cases, as an alternative to recourse to the tribunal. If mediation is offered and fails to resolve the case, the case may still proceed to the tribunal. The alternative of training RS staff to act as mediators was considered. HMRC currently offer such in-house mediation. The Government concluded that it would be difficult to provide appropriately qualified mediators that were demonstrably independent of the decision making process.

129. The option for mediation was generally welcomed, for example, by COSLA and ICAS. The Bill provides for mediation but does not specify how a mediator is to be appointed or how the mediation is to be governed or conducted. The PM indicates that the mediator will be an independent third party appointed by RS.

130. Dr Poon points out in her written submission that “mediation can be much more cost-effective than settling the dispute through the tribunal route, and should be encouraged and properly supported.” However, she also states that “for the mediation process to work effectively, the independence of the mediator from Revenue Scotland is paramount.” She suggests that:

"More details on how the independence of the mediator (eligibility, criteria of selection, terms of service) is assured will give this important policy direction more weight and facilitate its promotion to the public."

131. The In-Court Adviser and Mediation Service at Edinburgh Sheriff Court may be able to provide support in the development of a mediation service for RS.

132. The Committee invites the Scottish Government to provide further details in relation to the appointment process for mediators and how the independence of mediators from RS will be assured.

The Ombudsman
133. In addition to the right to request a review, mediation or make an appeal, RS’s status as a non-ministerial department brings it within the ambit of the Scottish Public Service Ombudsman (SPSO), providing members of the public with an independent complaints procedure. RoS and SEPA are already within the scope of the SPSO.

74 Dr Heidi Poon, written submission, paragraph 25
134. The SPSO state in written evidence that clear guidance for the public will be needed to help them decide whether a complaint to the SPSO or an appeal under the Bill’s provisions is appropriate. They also point out that although they do not anticipate a significant number of complaints arising from the actions of RS, given the availability of review, mediation and appeal, there is no provision in the FM for any additional costs to the SPSO.75

135. The Committee asks whether any consideration has been given to potential additional costs for the SPSO.

PROFESSIONAL PRIVILEGE

136. Section 116 of the Bill provides RS with investigative powers including the power to request information from third parties by means of an information notice. Paragraph 90 of the PM notes that the Bill restricts this power in some circumstances for auditors and legal advisers. The PM refers to the fact that UK legislation extends this privilege to communications between a tax adviser and his client but rejects this approach on the grounds that it would unduly hinder efforts to tackle tax avoidance. There is general acceptance of the protection in the Bill for the working papers of an auditor but the Committee has received divergent views on the protection provided in section 130 for privileged communications between legal advisers and clients.

137. ICAS, ICAEW and the CIOT all argue that the protection provided to communications between a legal adviser and clients should be extended to communications between tax advisers and clients, at least to the extent that tax advisers are members of professional bodies who regulate their conduct and require their members to be qualified. The essential argument they put forward is that a legal practitioner and an accountant or tax adviser providing tax advice to a client are performing exactly the same function. If there are good grounds to protect the communications in the case of legal practitioners, there are equally good grounds to protect the communications of other professional tax advisers. CIOT argue:

“"We therefore think that, if there is an argument for some form of privilege, it should attach to certain circumstances and to anyone who is properly qualified and who gives advice in that area."76

138. If some tax advisers are privileged and some are not, there will not be a level playing field and that may ultimately restrict the availability of good advice for taxpayers. As CIOT explained:

""Are we arguing that privilege ought to be extended to everyone? No, we are not. We are trying to highlight the fact that there is an unlevel playing field and that it is in everybody’s interests that, in the same way as if they want an expert plumber, if people want tax advice they should get somebody who is properly qualified and regulated."77

75 Scottish Public Services Ombudsman, written submission
139. In discussion, both ICAS and CIOT were clear that they were not seeking legal professional privilege across the board but simply parity in the area of tax advice. ICAS noted:

"We are looking at the powers in relation to certain information notices only. We are talking about accountants and tax advisers coming up in a fairly contained area... I suspect that lawyers apply legal privilege to things other than tax advice that do not cause a particular concern, but we are considering tax, so it is a lifting up but in a fairly defined and narrow area."78

140. The Faculty of Advocates and the Law Society of Scotland had a different perspective on this. They saw no reason to extend legal professional privilege beyond its current boundaries and disputed the suggestion that the legal profession was benefitting from an unfair advantage. The Faculty noted:

"If the intrinsic nature of the privilege is that it is legal professional privilege, the logic is that it is a privilege that attaches to advice sought and taken from regulated legal professionals."79

141. The Law Society of Scotland claimed that most clients are not seeking aggressive tax advice and will not differentiate between a lawyer and an accountant on the basis of privilege. They were not aware of a competitive advantage for lawyers:

"We are not aware of people flooding to lawyers’ offices rather than accountants' offices to take tax advice because legal privilege exists. Accountants get more than their fair share of tax advisory work."80

142. Both sides considered that the recent Prudential case before the Supreme Court [SC [2013] UKSC 1] supported their view point. The Faculty of Advocates referred to it as a case in which the court decided not to extend the scope of legal professional privilege to accountants.81 ICAS and CIOT pointed out that the court concluded that the court should not extend legal privilege to other tax advisers but that parliament should consider whether to do so.

143. The CSFESG has explained his concerns that it may be difficult to draw a line between unqualified tax advisers who do not belong to a professional body and those who are qualified members of professional bodies. He would not want to extend privilege to the former. He stated that:

"However, we will consider whether there is a way of making progress on that question, although I fear that it might be administratively demanding. We have tried to strike a fair balance by recognising legal professional privilege, which is a well-established principle, but I think that it would go..."

too far to extend privilege to anyone who presents themselves as a tax adviser.”

144. The Bill Team stated that they could go back and “see whether it was possible to narrow the scope of the protection that solicitors are accorded” and “we could delineate where the privilege did or did not apply.” The Committee welcomes the Government’s undertaking to look at this issue further.

FINANCIAL MEMORANDUM

145. The FM sets out the estimated costs for the establishment of RS and the administration of the devolved taxes to a total of £20.2 million, comprising £16.7 million estimate that was initially provided to the Parliament in June 2012 (and was also been referenced in the FMs for both LBTT and LfT) and £3.5 million estimated for new activity.

146. The new activity is described in the FM as being increased investigation and compliance activity, IT development, the establishment of the Scottish Tax Tribunals and running costs to SEPA associated with compliance activity from illegal dumping. Asked about the reasons for the inclusion of these additional costs, Revenue Scotland stated—

“we would argue that it would be worthwhile to invest some more money in improving our compliance effort both at revenue Scotland and, as you will have seen from the figures, at SEPA. That investment should more than pay for itself in the extra tax receipts that we would get.”

147. In terms of additional compliance activity costs for SEPA, the FM sets out costs to SEPA of £210,000 per year for the processing and administering of SLfT from illegal dumping. The FM links this additional investment to the potential for reducing the ‘tax gap’ in relation to SLfT collection, noting that “additional resources directed at investigation could identify additional illegal waste sites and therefore additional tax liability.” The Committee asked SEPA whether it would be possible to quantify what level of additional revenue might be achieved as a result of the additional investment. In response SEPA explained—

“It is very difficult to say, but I can give you an idea of the potential scale. We are dealing with individual sites that might each have a seven-figure liability. It is very difficult to quantify, and it has not been quantified before because there has been no liability. However, we believe that we are talking about a multimillion-pound figure.”

148. In its Stage 1 report on the Landfill Tax (Scotland) Bill, the Committee asked the Government for clarification as to whether the resources allocated to Revenue

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86 Financial Memorandum, paragraph 35
Scotland, i.e. the £16.7 million figure, included additional resources for SEPA to identify and deal with illegal sites. In response to that question, the Government stated that—

“...Revenue Scotland expects to allocate some of the funding available for compliance activity to SEPA to support its work... Identifying and dealing with illegal landfill sites is currently part of SEPA’s current environmental activities, for which they receive, grant funding, and in future will be part of their tax compliance activity.”

149. The Committee asks the Scottish Government to explain why the additional compliance costs to SEPA of £210,000 were not included in the FM for the Landfill Tax (Scotland) Bill.

CONCLUSION

150. The Committee supports the general principles of the Bill and emphasises that it will continue to monitor closely the establishment of Revenue Scotland and the implementation and delivery of the devolved taxes.

88 Scottish Government response to the stage 1 report
ANNEXE A: REPORTS FROM OTHER COMMITTEES

Delegated Powers and Law Reform Committee
The Delegated Powers and Law Reform Committee’s report to the Finance Committee on the Revenue Scotland and Tax Powers Bill is available at: 25th report, 2014 (Session 4): Revenue Scotland and Tax Powers Bill

ANNEXE B: INDEX OF ORAL EVIDENCE SESSIONS

Please note that all oral evidence and associated written evidence is published electronically only, and can be accessed via the Finance Committee’s webpages, at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29822.aspx

4th Meeting, 2014 (Session 4) Wednesday 5 February 2014
Professor Sir James Mirrlees.

5th Meeting, 2014 (Session 4) Wednesday 19 February 2014
Colin Miller, Tax Management Bill Team Leader, and John St Clair, Senior Principal Legal Officer, Scottish Government; Nicky Harrison, Chief Operating Officer, Revenue Scotland.

6th Meeting, 2014 (Session 4) Wednesday 26 February 2014
Crawford Beveridge, Chair, and Professor Andrew Hughes Hallett, Member, Fiscal Commission Working Group; Professor John Kay.

7th Meeting, 2014 (Session 4) Wednesday 5 March 2014
Elspeth Orcharton, Director, Corporate and International Taxation, and Charlotte Barbour, Head of Taxation, The Institute of Chartered Accountants of Scotland; John Whiting, Tax Policy Director, Chartered Institute of Taxation.

8th Meeting, 2014 (Session 4) Wednesday 12 March 2014
Philip Simpson, Advocate, and James Wolffe, QC, Dean of Faculty, Faculty of Advocates; and Alan Barr, Partner, Brodies LLP, The Law Society of Scotland; Isobel d'Inverno, Convener of the Tax Law Committee, The Law Society of Scotland.

9th Meeting, 2014 (Session 4) Wednesday 19 March 2014
Dave Moxham, Deputy General Secretary, Scottish Trades Union Congress; Joanne Walker, Technical Officer, Low Incomes Tax Reform Group.

10th Meeting, 2014 (Session 4) Wednesday 26 March 2014
Dr Heidi Poon, Tribunal Member and Tax Law Lecturer, The University of Edinburgh; Justine Riccomini, Independent HR and employment taxes consultant.

11th Meeting, 2014 (Session 4) Wednesday 2 April 2014
Eleanor Emberson, Director of Financial Strategy and Head of Revenue Scotland, Scottish Government; John Kenny, Head of National Operations, Scottish
Environment Protection Agency; John King, Director of Registration, Registers of Scotland; John Swinney, Cabinet Secretary for Finance, Employment and Sustainable Growth; Eleanor Emberson, Director of Financial Strategy and Head of Revenue Scotland, and Colin Miller, Tax Management Bill Team Leader, Scottish Government.

ANNEXE C: INDEX OF WRITTEN EVIDENCE

Written submissions—

- Audit Scotland (196KB pdf)
- COSLA (848KB pdf)
- Chartered Institute of Taxation (322KB pdf)
- Deloitte LLP (173KB pdf)
- Fiscal Commission Working Group (418KB pdf)
- Justine Riccomini (205KB pdf)
- Faculty of Advocates (216KB pdf)
- Heidi Poon (173KB pdf)
- ICAEW Scotland (226KB pdf)
- ICAS (251KB pdf)
- KPMG (346KB pdf)
- Low Incomes Tax Reform Group (236KB pdf)
- Pricewaterhouse Coopers LLP (226KB pdf)
- Professor John Kay (147KB pdf)
- Professor Sir James Mirrlees (119KB pdf)
- Reform Scotland (236KB pdf)
- Scottish Property Federation (211KB pdf)
- Scottish Public Services Ombudsman (211KB pdf)
- STUC (88KB pdf)
- The Law Society of Scotland (157KB pdf)
- UNISON Scotland (268KB pdf)
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