



Low Incomes  
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A voice for the unrepresented



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## Framework legislation and Henry VIII powers

### Response by the Chartered Institute of Taxation and its Low Incomes Tax Reform Group and the Association of Taxation Technicians

#### 1 Executive Summary

- 1.1 Tax law in Scotland should be set out in primary legislation, especially where it relates to the exercise of powers setting out what is subject to tax and imposing obligations or burdens on citizens, to ensure sufficient scrutiny and transparency. As such, secondary legislation in Scotland should be reserved for operational and administrative matters in respect of tax law.
- 1.2 On that basis, in relation to tax law in Scotland, framework legislation and accompanying regulation making powers should only be used for setting out how the tax is administered. Similarly we do not think the use of Henry VIII powers is appropriate in respect of tax law.
- 1.3 It is difficult to scrutinise framework legislation, because by its very nature, the full import of measures that can result from it are unknown at the time given over to its scrutiny. In addition, there are significant challenges in relation to the accompanying secondary legislation. This is because a Scottish Statutory Instrument, once laid, has to be adopted in its entirety. It cannot be amended and must stand or fall as drafted.
- 1.4 Tax law is complex and technical, and it is not always possible for those drafting and scrutinising legislation to spot issues, deficiencies or interactions that mean the legislation does not quite operate as intended. This means there is often the need to amend the legislation once it is in force. We appreciate that retrospective legislation should be used with caution, but not making necessary changes to tax legislation may mean tax policy does not work as intended. This can lead to inequities, and even to a breakdown in trust in the tax system.
- 1.5 In relation to tax law, a better way of ensuring the Scottish Parliament has the ability to amend primary legislation would be to institute a regular tax legislative process, such as a finance or tax bill. We think this would offer an appropriate and timely opportunity to make changes to tax legislation, while ensuring the

need for robust scrutiny is met. The importance of an annual finance or tax bill will only increase as further tax powers are devolved to Scotland.

## 2 Introduction

- 2.1 We welcome the opportunity to respond to this inquiry into framework legislation and Henry VIII powers, which the Delegated Powers and Law Reform Committee of the Scottish Parliament has published. The focus of our response is tax legislation.
- 2.2 It is now almost ten years since the introduction of the first two fully devolved national taxes, the Land and Buildings Transaction Tax (LBTT) and Scottish Landfill Tax (SLfT), both of which came into effect on 1 April 2015. We continue to be concerned that the current processes used for introducing tax law and for making changes to tax law mean that the Scottish Parliament is at risk of failing in its responsibility to make good tax legislation. This risks failing to deliver the Scottish Parliament's tax policy intentions.
- 2.3 We believe that tax law should be set out in primary legislation, particularly where it relates to the exercise of powers setting out what is subject to tax and imposing obligations or burdens on citizens. Similarly, changes to that primary legislation should be made by primary legislation. Secondary legislation should ideally be used only for administrative matters. Questions have been raised as to why this should be the case, and why the current process of using Scottish Statutory Instruments (SSIs) is not sufficient for changing tax law. We discuss this further below.
- 2.4 The CIOT's stated objectives for the tax system include:
- A legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences.
  - Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
  - Greater certainty, so individuals can plan ahead with confidence.
  - A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
  - Responsive and competent tax administration, with a minimum of bureaucracy.
- 2.5 LITRG's seven principles for the tax system, set out in its paper 'A better deal for the low-income taxpayer',<sup>1</sup> are that it should be:
1. Clear and up to date
  2. Simple
  3. Equitable
  4. Just
  5. Accessible and responsive
  6. Joined up
  7. Inclusive

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<sup>1</sup> <https://www.litrg.org.uk/latest-news/reports/201204-better-deal-low-income-taxpayer>

**3 Question 1. What is your understanding of what framework legislation is?**

- 3.1 As noted by the Committee, framework legislation sets out principles for a policy but does not provide substantial detail on the face of the bill as to how that policy will be given practical effect. Instead, it provides broad powers to fill in the detail at a later point, most often by Ministers through secondary legislation. Henry VIII powers allow Ministers to amend acts of parliament by secondary legislation, such as Scottish Statutory Instruments.
- 3.2 In terms of tax law, the regulation making powers can either be in a broad framework Act (see the Welsh Tax Acts etc. (Power to Modify) Act 2022)<sup>2</sup> or the regulation making power can be fairly narrow and contained in the relevant tax Act, as is the case for much Scottish tax legislation. For example, the Land and Buildings Transaction Tax (Scotland) Act 2013<sup>3</sup> contains regulation making powers to set different rates of tax.
- 3.3 Framework legislation is currently used in Scotland for tax law for two key reasons. Firstly, because it is a process that is used in other areas of Scottish law making, and secondly, because there has been an unwillingness to date to consider a more robust and regular process that could effect changes to existing tax law.

**4 Question 2. What, in your view, is the appropriate use of framework legislation? Can you give any specific or real-life examples? Are there criteria which make the use of framework legislation appropriate?**

- 4.1 In relation to tax law, we think framework legislation and accompanying regulation making powers should only be used for setting out how the tax is administered. For example, we think it is appropriate that the collection procedures for Scottish Landfill Tax are set out in regulations, rather than primary legislation (see Part 3 of the Landfill Tax (Scotland) Act 2014).<sup>4</sup>
- 4.2 In cases of operational and administrative procedures, using SSIs allows the legislation to keep up to date as appropriate with practical changes in procedure, which may come about because of technical and technological improvements.

**5 Question 3. What, in your view is inappropriate use of framework legislation? Can you give any specific or real-life examples? Are there criteria which make the use of framework legislation inappropriate?**

- 5.1 We believe as a general principle, that any exercise of power which sets out what is subject to tax and/or imposes obligations or burdens on citizens (such as to pay tax, or to pay penalties and interest for late or non-compliance) should be in primary legislation and laid before the full scrutiny process before being enacted. It is therefore inappropriate to use framework legislation and SSIs to create any tax obligations or to make any changes to existing tax law contained in primary legislation.
- 5.2 In addition to powers to determine and calculate a tax, our view is also that the principles of penalties should be contained in primary legislation, including the circumstances that can lead to a penalty, the level of penalties imposed, when taxpayers can appeal, and enforcement. Equally, provisions that ensure there are safeguards for taxpayers should be contained in primary legislation.

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<sup>2</sup> <https://www.legislation.gov.uk/asc/2022/2/contents>

<sup>3</sup> <https://www.legislation.gov.uk/asp/2013/11/part/3>

<sup>4</sup> <https://www.legislation.gov.uk/asp/2014/2/part/3>

5.3 The Revenue Scotland and Tax Powers Act 2014, when first put forward as a bill, contained regulation making powers for penalty provisions. Stakeholders raised significant concerns regarding this, such that the penalties were introduced in detail into the bill by way of amendments (see Chapter 2, Part 6 of Revenue Scotland and Tax Powers Act 2014).<sup>5</sup>

5.4 Framework legislation, with SSIs, should only be used for administrative and procedural matters.

**6 Question 4. Do you consider there to be any challenges associated with scrutinising or engaging with a piece of framework legislation? Any specific or real-life examples would be helpful if you can refer to them.**

6.1 It is difficult to scrutinise framework legislation, because by its very nature, the full import of measures that can result from it are unknown at the time given over to its scrutiny. In addition, it is likely that less scrutiny is given to the secondary legislation that accompanies framework legislation – partly due to the different parliamentary procedures and that secondary legislation may be considered to be of less importance.

6.2 There are significant challenges too because an SSI, once laid, has to be adopted in its entirety. It cannot be amended. So, if the draft is defective in any way, there is no means of altering or correcting it. The SSI must stand or fall as drafted. Whereas if a measure is in primary legislation it can be amended before being enacted, and this offers a process that provides for better legislation.

**7 Question 5. Thinking of the scrutiny of framework legislation, what practical changes could be made to assist parliamentarians and / or stakeholders in their roles?**

7.1 No comment.

**8 Question 6. Thinking of the scrutiny of secondary legislation resulting from framework legislation, what practical changes could be made to assist parliamentarians and / or stakeholders in their roles scrutinising and engaging with legislation?**

8.1 It is helpful when draft SSIs are shared with stakeholders for comment prior to being laid in the Scottish Parliament. While this does not guarantee that the SSIs will be correct, it does offer the opportunity for other views to be gathered as to the efficacy of the legislation before it is laid and should minimise the risk of the SSI delivering unintended consequences because of a drafting error.

**9 Question 7. What views do you have on Henry VIII powers? In particular, are there any contexts in which you consider their use to be particularly appropriate or inappropriate?**

9.1 In relation to tax law, we do not think the use of Henry VIII powers is appropriate. As noted elsewhere in our response, tax law should be set out in primary legislation, and should be amended by primary legislation, especially where it imposes burdens on citizens.

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<sup>5</sup> <https://www.legislation.gov.uk/asp/2014/16/part/6/chapter/2>

- 9.2 There is a tension between introducing a tax change quickly and ensuring adequate scrutiny, so that the legislation is effective. While Henry VIII powers offer the ability to make changes quickly, they do not offer the space for consultation and scrutiny that tax legislation, which can often be complex, requires.
- 9.3 We think that in relation to tax law, a better way of ensuring the Scottish Parliament has the ability to amend primary legislation would be to institute a regular tax legislative process, such as a finance or tax bill.
- 9.4 By way of background, we understand that the Scottish Government and Scottish Parliament have received representations since 2015 about the suitability of the existing legislative procedures in respect of tax legislation. The Finance and Constitution Committee established the Budget Process Review Group in 2016 to carry out a fundamental review of the Scottish Parliament's budget process. The final report, published 30 June 2017 included recommendations:
- That the Finance and Constitution Committee, Scottish Government and Revenue Scotland should explore options for alternative legislative processes for devolved tax legislation, especially where there is a need to introduce measures quickly or there is a need for minor amendments to primary legislation;
  - The Scottish Government and Finance and Constitution Committee should examine the need for a Finance Bill and bring forward recommendations by the end of the current Parliament.
- 9.5 The Devolved Taxes Legislative Working Group (DTLWG) was established in 2019 to take these recommendations forward.
- 9.6 The issue of how to amend primary tax legislation was carefully considered by the DTLWG that was set up jointly by the Scottish Government and the Scottish Parliament's Finance and Constitution Committee in the 2016-21 parliamentary session. The DTLWG issued an interim report in early 2020,<sup>6</sup> but the group has not met since the start of the coronavirus pandemic. We recognise that the issue of what might be the best legislative process for tax law is not easy to resolve. Nevertheless, we believe it is important that the DTLWG should be reinstated and its work continued.
- 10 Question 8. What, if any, additional safeguards might alleviate any concerns you have about the granting and / or use of Henry VIII powers?**
- 10.1 No comment.
- 11 Question 9. Do you have any general comments or views on framework legislation or Henry VIII powers? The Committee would be particularly interested in any evidence you have on the prevalence of framework legislation (in any jurisdictions you are familiar with), whether this has changed over time, and any views you have on the definition of framework legislation.**

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<https://webarchive.nrscotland.gov.uk/20240327040739/https://archive2021.parliament.scot/parliamentarybusiness/CurrentCommittees/114453.aspx>

- 11.1 The Scottish Parliament has an increasing number of tax powers, and tax revenues from devolved taxes form a growing part of the Scottish Government's budget. We think the legislative process should reflect the current and growing significance of the devolved tax system in raising revenue in Scotland.
- 11.2 We think that tax law should be set out in primary legislation, particularly where it relates to the exercise of tax powers setting out what is subject to tax and imposing obligations and burdens on citizens. Secondary legislation should ideally be used only for administrative matters.
- 11.3 Questions have been raised as to why this should be the case, and why the current process of using SSIs is not sufficient for changing tax law. One key reason is to ensure proper scrutiny of legislation that results in the imposition of some kind of burden (whether compliance or financial) on citizens. We do not think that the current processes provide an adequate balance between the competing needs of speed, scrutiny and responsiveness. We would therefore like to see the introduction of a legislative process that enables the regular maintenance of, and amendment to, the devolved taxes. This could be an annual finance bill or tax bill process.
- 11.4 Since 2015, the CIOT, LITRG and other stakeholders have suggested a number of key amendments to devolved tax legislation<sup>7</sup>. The absence of a regular legislative process for amending primary tax legislation has meant that there has not been a clear or timely opportunity to make the required changes. There are a limited number of bill slots available in the parliamentary calendar, so unless there is a major tax policy being introduced, it is currently unlikely that there is a chance for amendments to existing tax legislation to be made by primary legislation. The Aggregates Tax and Devolved Taxes Administration (Scotland) Bill, which is currently awaiting Royal Assent, is the first devolved tax act to pass through the Scottish Parliament since the Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018. This means that citizens, stakeholders, Scottish Government and Revenue Scotland have been waiting for up to six years for the opportunity to make several amendments.
- 11.5 An annual finance or tax bill process would provide a regular mechanism for making tax policy and tax policy amendments. This would mean there is no need to wait for a parliamentary slot and would allow inequities to be alleviated more quickly – it would provide an appropriate and timely opportunity to make legislative change. This would help to ensure the tax system is viewed as fair, building trust in the tax system. Having to await the next piece of primary tax legislation, as is currently the case, means a lack of certainty for taxpayers, stakeholders and policymakers as to when necessary changes are likely to be made.
- 11.6 We use the Aggregates Tax and Devolved Taxes Administration (Scotland) Bill<sup>8</sup> to illustrate why we would welcome such a process. Part 1 of the bill contains the main aspects of Scottish Aggregates Tax. Part 2 however, largely consists of amendments to the Revenue Scotland and Tax Powers Act 2014, with the intention of supporting the efficient and effective collection of tax. These amendments have to be made by primary legislation. As there is no regular legislative process available for making such amendments to tax legislation, it has been necessary to wait for a bill slot or the chance to include them in another bill that concerns tax. This has finally resulted in their inclusion in a bill that primarily concerns Scottish Aggregates Tax.
- 11.7 Part 2 of the Aggregates Tax and Devolved Taxes Administration (Scotland) Bill also includes a long-awaited amendment to the Land and Buildings Transaction Tax (Scotland) Act 2013. (section 57A). This is thanks to joint work between the Law Society of Scotland and the Scottish Government. Assuming that Royal Assent is

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<sup>7</sup> Please see para 11.12 for an example of a key amendment for ADS.

<sup>8</sup> <https://www.parliament.scot/Bills-and-Laws/Bills/S6/aggregates-tax-and-devolved-taxes-administration-scotland-bill>

given, and the provision enters into law, it will have been a tortuous path since the issue was first raised by stakeholders, including CIOT, in 2017.

- 11.8 The provision relates to the fact that the wording of the 2013 Act resulted in denying group relief to taxpayers where there was a share pledge in place. In 2018, the Scottish Parliament passed an SSI, The Land and Buildings Transaction Tax (Group Relief Modification) (Scotland) Order 2018,<sup>9</sup> which rectified the position for transactions taking place on or after 30 June 2018 (the date it took effect). However, the SSI could not give the amendments retrospective effect. Although it is our understanding that the intent of the Scottish Government was to legislate for the amendments to have retrospective effect, no action was taken, until the opportunity presented by the Aggregates Tax and Devolved Taxes Administration (Scotland) Bill was seized.
- 11.9 Two additional key Land and Buildings Transaction Tax amendments were put forward by the Law Society of Scotland. These were debated at Stage 2 of the Aggregates Tax and Devolved Taxes Administration (Scotland) Bill. However, unfortunately the decision was then subsequently made that these two further amendments would not be included in the final Bill. This means that while the opportunity has been taken to deal with the group relief and share pledge issue, work will need to continue with the Scottish Government to progress the other amendments in the future. The lack of a finance or tax bill means there is uncertainty as to when the next opportunity to legislate for these amendments will arise.
- 11.10 In 2018, the then Cabinet Secretary for Finance and the Constitution, Derek Mackay, stated that ‘It would be nice to have a finance bill like the one at Westminster that is able to do a lot of tidying up when there might be unintended consequences and anomalies or when refinement might be required. That would be a great place for such issues to be addressed in the future.’ This took place during a meeting of the Finance and Constitution Committee on 7 February 2018, in respect of the agenda item concerning stage 1 of the Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Bill.
- 11.11 Although we think that retrospective legislation that imposes or increases a tax burden should be used with extreme care and justified in detail, we think that there is a case for retrospection to correct an obvious anomaly that is causing harm to citizens, or to correct unintended deficiencies or consequences that emerge as the tax law starts to operate in practice. Tax law is complex and technical, and it is not always possible for those drafting and scrutinising legislation to spot issues, deficiencies or interactions that mean the legislation does not quite operate as intended.
- 11.12 An example where such correction has been necessary in Scotland relates to the Additional Dwelling Supplement (ADS). This was introduced in 2016 by the Land and Buildings Transaction Tax (Amendment) (Scotland) Act 2016.<sup>10</sup> Once in place, it was soon noted that the legislation as drafted did not allow relief from the ADS to couples where title to the former main residence was in the sole name of one of the couple and the couple then jointly bought a new main residence prior to selling the current main residence. The Scottish Government agreed that this was not what they had envisaged. This was rectified for future transactions by the Land and Buildings Transaction Tax (Additional Amount – Second Homes Main Residence Relief) (Scotland) Order 2017.<sup>11</sup> But primary legislation was required in order to make the change retrospective, to ensure that couples who purchased properties prior to the SSI could also obtain relief. This was provided by the Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018.<sup>12</sup>

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<sup>9</sup> <https://www.legislation.gov.uk/ssi/2018/222/contents/made>

<sup>10</sup> <https://www.legislation.gov.uk/asp/2016/11/contents>

<sup>11</sup> <https://www.legislation.gov.uk/ssi/2017/233/contents/made>

<sup>12</sup> <https://www.legislation.gov.uk/asp/2018/11/contents>

- 11.13 Having a legislative mechanism to make changes to devolved taxes becomes increasingly important as plans progress to introduce a number of new devolved taxes. As noted above, it is not always possible for those drafting and scrutinising legislation to identify every possible interaction or complexity. This may be particularly so with the Scottish Aggregates Tax given the level of cross border transactions. We also have the Visitor Levy (Scotland) Bill, the Scottish Building Safety Levy and the potential Cruise Ship Levy on the horizon. If after introduction, anomalies, complexities or unintended consequences arise then an annual finance bill would provide a clear and transparent method to make necessary changes.
- 11.14 There are additional benefits of an annual finance or tax bill process. Such an annual process would mean there is a regular timetable and mechanism to encourage engagement with key stakeholders on operational and policy concerns with tax legislation. It gives key stakeholders more of a chance to consider draft legislation. It also provides clarity on where to find changes to the Scottish tax system for those trying to navigate the devolved tax system. It builds the profile of a devolved tax system, improving transparency and understanding. Furthermore, it would allow the Scottish Government and Scottish Parliament to make changes to tax policy, rates and bands.

## **12 Acknowledgement of submission**

- 12.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Association of Taxation Technicians, the Chartered Institute of Taxation and The Low Incomes Tax Reform Group are included in the List of Respondents when any outcome of the consultation is published.

## **13 About us**

### ***CIOT***

- 13.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 13.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.
- 13.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.
- 13.4 Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

### ***LITRG***

- 13.5 LITRG is an initiative of the CIOT to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of



those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low income workers, pensioners, migrants, students, disabled people and carers.

- 13.6 LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.

**ATT**

- 13.7 The Association is a charity and the leading professional body for those providing UK tax compliance services. Our primary charitable objective is to promote education and the study of tax administration and practice. One of our key aims is to provide an appropriate qualification for individuals who undertake tax compliance work. Drawing on our members' practical experience and knowledge, we contribute to consultations on the development of the UK tax system and seek to ensure that, for the general public, it is workable and as fair as possible.
- 13.8 Our members are qualified by examination and practical experience. They commit to the highest standards of professional conduct and ensure that their tax knowledge is constantly kept up to date. Members may be found in private practice, commerce and industry, government, and academia.
- 13.9 The Association has more than 10,000 members and Fellows together with over 7,000 students. Members and Fellows use the practising title of 'Taxation Technician' or 'Taxation Technician (Fellow)' and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.

The Chartered Institute of Taxation

The Low Incomes Tax Reform Group

The Association of Taxation Technicians

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