



Low Incomes
Tax Reform
Group



Chartered
Institute of
Taxation

30 Monck Street
London SW1P 2AP
T: +44 (0)20 7340 0550
E: post@ciot.org.uk

Welsh Government – Tax Devolution in Wales – Enabling changes to the Welsh Tax Acts

Response by the Chartered Institute of Taxation and our Low Incomes Tax Reform Group

1 Introduction

1.1 The Chartered Institute of Taxation (CIOT) and its Low Incomes Tax Reform Group (LITRG) respond jointly to the Welsh government's consultation: Tax Devolution in Wales – Enabling changes to the Welsh Tax Acts¹. The consultation considers how legislative changes to Welsh devolved taxes should be made in the following circumstances:

1. to stop avoidance or evasion of the devolved Welsh taxes,
2. to comply with international obligations,
3. in situations of exceptional need, such as in response to a tribunal or higher courts decision, or in response to national emergencies such as Covid-19, and
4. in specific circumstances where Welsh Ministers consider it expedient in the public interest to do so, in particular, in response to tax policy changes made by the UK government to 'predecessor' taxes (meaning one where there is an equivalent devolved tax eg Stamp Duty Land Tax (SDLT) is the 'predecessor' tax to Welsh Land Transaction Tax).

1.2 The Welsh government's preferred option is to introduce three regulation-making powers to enable Welsh ministers to make changes to the Welsh Tax Acts. The proposed powers are:

- 'Power 1' – proposed changes to have immediate, but temporary legal effect, with their permanent effect subject to approval by the Senedd following the standard period of scrutiny for provisional affirmative regulations (a period of not more than 28 days from the making of the regulations). Power 1 would be used to respond to situations 1-3 above.

¹ Tax Collection and Management (Wales) Act 2016, the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 and the Landfill Disposals Tax (Wales) Act 2017.

- ‘Power 2’ - proposed changes have immediate, but temporary legal effect, with their permanent effect subject to approval by the Senedd following an extended scrutiny period to allow for evidence sessions (a ‘super’ provisional affirmative procedure). This power would also be subject to a Senedd motion or ‘lock’ prior to its use. Power 2 would be used to respond to situation 4 above.
- ‘Power 3’ - a power to make draft affirmative regulations to amend the rules created by the use of power 1 or power 2.

1.3 We have omitted questions to which we are not responding.

2 About us

- 2.1 The Chartered Institute of Taxation is the leading professional body in the United Kingdom concerned solely with taxation. 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. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties.
- 2.2 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. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.
- 2.3 The CIOT’s 19,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.
- 2.4 The Low Incomes Tax Reform Group is an initiative of the Chartered Institute of Taxation 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.
- 2.5 LITRG works extensively with HM Revenue and Customs and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and 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.

3 Executive summary

- 3.1 Our starting point is tax law should be set out in primary legislation particularly in so far as it relates to the exercise of tax powers setting out what is subject to tax and imposing burdens on taxpayers. Secondary legislation should ideally be used only for administrative matters, and also for the setting of rates. This is to ensure proper scrutiny of legislation that results in the imposition of some kind of burden (compliance or financial) on taxpayers.

- 3.2 However, we consider the Welsh government's proposal to confer three regulation-making powers on Welsh ministers to enable changes to the Welsh Tax Acts provides a balance between the competing needs of speed, scrutiny and responsiveness at this point in the development of Welsh devolved taxes. In relation to power 1, we think there is a case for a further safeguard requiring a ministerial statement setting out the reasons for the use of the power and why it is considered necessary and appropriate including costs and consequences of not using the power. The proposed use of the regulatory powers should be subject to regular review and evaluation, and perhaps be time limited.
- 3.3 We recognise the challenges in introducing an annual Welsh finance bill and that currently the volume of legislative change required is probably insufficient to justify an annual finance bill process in Wales. There are however good reasons to keep this option under review. The legislative process should reflect the significance of the devolved tax system in raising revenue in Wales. The case for an annual Welsh finance bill will strengthen if devolved taxes provide an increased share of revenues to fund wider policy areas dealt with by the Welsh Parliament.
- 3.4 The consultation proposes that exceptionally it may be desirable or necessary for certain changes effected by the proposed powers 1-3 to have retrospective effect subject to a duty on Welsh ministers to publish a protocol on the use of retrospective legislation. This is, we think, a key principle: that any use of retrospection needs to be justified properly in the Welsh Parliament as retrospection typically undermines the principles of certainty and stability, and is open to human rights challenge insofar as it infringes taxpayers' legitimate expectations. We think any protocol should set out a general principle that includes a presumption against retrospection subject to certain very limited circumstances where the Welsh government could make the argument that retrospection should be used because it is considered necessary (rather than desirable). There have been instances of retrospective legislation by Westminster: some remain controversial but cases have been made that some were necessary to protect taxpayers or the public revenue from totally unintended and unexpected consequences of defective legislation.

4 Question 1 *Do you consider Emergency or 'fast-track' Bills to be appropriate legislative processes to make immediate or very quick changes to the Welsh Tax Acts?*

Question 2 *Can you suggest any changes to the Emergency or 'fast-track' Bill process to make them better suited to make immediate or very quick changes to the Welsh Tax Acts?*

- 4.1 The consultation considers the use of existing procedures in the form of an Emergency or fast track Bill as an alternative to the Welsh government's preferred option of three regulatory powers. As the consultation notes, the process for developing and passing primary legislation in Wales can take between 12-18 months. An Emergency or fast track Bill could be used to make changes more quickly using existing expedited processes in the Senedd. The use of both procedures in Wales to date has been rare. Although the consultation notes there are limited examples of the UK government using expedited processes to make changes to the tax legislation, the UK position differs because the annual Finance Bill already follows a faster route through Parliament than most Bills. The Senedd has no equivalent to the Finance Bill process.
- 4.2 The consultation (at 2.18) points to the Land and Buildings Transaction Tax (LBTT) (Amendment) (Scotland) Bill 2016, introducing additional dwelling supplement (ADS) from 1 April 2016 (to match the UK's introduction of the SDLT higher rates) as an example of the use of an expedited Bill. Although the truncated process meant the legislation was implemented quickly in order to protect a perceived threat to protect revenue, there was

a need for subsequent amendments (through secondary legislation: The Land and Buildings Transaction Tax (Additional Amount-Second Homes Main Residence Relief) (Scotland) Order 2017; Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018.) and there remain a number of issues with the legislation today. The need for amending legislation and the remaining issues are at least in part because the legislation was drafted rapidly and there simply was not the time to scrutinise and work through the legislation to understand where practical issues might arise, or identify where the legislation did not quite fulfil the policy intention. (In passing, retrospection may be one route to resolving the remaining difficulties though it would of course have been preferable had there been more time to draft and consult on the original legislation.)

- 4.3 The example highlights the tension between introducing a tax change quickly and ensuring the legislation has adequate scrutiny such that it is effective. That tension is heightened where a relatively complex tax change such as the introduction of ADS is introduced in this way as opposed to a more straightforward change that does not involve detailed technical legislative amendments. In evaluating the tensions between scrutiny and speed, one of these needs may outweigh the other depending on the type of legislative change under consideration and, in particular, the motivation for that change.
- 4.4 This route offers the advantage of certainty through primary legislation. The disadvantages of a truncated process include limited scrutiny and restricting the ability to consult. Implementation of change will also not be concomitant with UK changes. Although tax effects of any change could potentially, with Senedd approval, be applied with retrospective effect (within the limits set out in our response to question 14 below) we recognise there may be uncertainty as to what law applies until the legislation receives Royal Assent.
- 4.5 Although not directly relevant to how changes are made we observe that the combined political and technical nature of taxation tends to act as a barrier to effective upfront scrutiny. That places more weight on the importance of effective and routine post-legislative review of whether substantive measures are achieving their objectives at an acceptable cost, and the Senedd should hold the Welsh government to account accordingly.

5 Question 3 *Although the Welsh Government does not currently consider an annual Welsh Finance Bill to be a proportionate mechanism to make changes to the Welsh Tax Acts, we would be interested in your views on the potential to introduce such a Bill in the future. When would be the right time? How might this work? How should this link to the Welsh budget process?*

- 5.1 The CIOT responded to the Devolved Taxes Legislation Working Group interim report.² We recognise that the considerations in Scotland differ in some respects to Wales. We also recognise the challenges in introducing an annual Welsh finance bill (as comprehensively examined in the consultation) and that currently the volume of legislative change required is probably insufficient to justify an annual finance bill process in Wales.
- 5.2 There are however good reasons to keep this option under review. The legislative process should reflect the significance of the devolved tax system in raising revenue in Wales. Currently Wales receives a far more significant proportion of its funding from the block grant. The case for an annual Welsh finance bill will strengthen if devolved taxes provide an increased share of revenues to fund wider policy areas dealt with by the Welsh Parliament. Tax is distinctive from other policy areas in placing obligations (in relation to compliance and payment of tax) on taxpayers in a way that other policy areas do not. Increasing levels of

² <https://www.tax.org.uk/policy-technical/submissions/devolved-taxes-legislation-working-group-interim-report>

change and a widening tax base may signal the need for an annual finance bill with a regular timetable of consultation with stakeholders and engagement with the Welsh public prior to the introduction of draft legislation into the Senedd.

5.3 A Welsh finance bill would assist in raising the profile of devolved taxes improving engagement with Welsh parliamentarians, stakeholders and the Welsh public through media commentary and the annual cycle including consultation on draft legislation.

5.4 There may also be a case for extending the remit of a future annual finance bill process in Wales to cover all devolved taxes for which the Welsh Parliament passes legislation including Council Tax and Non-Domestic Rates.

6 **Question 4** *Do you agree that arrangements are needed, beyond those already available, to enable amendments to the Welsh Tax Acts to be introduced promptly in particular circumstances?*

6.1 We consider there is currently a reasonable case for a mechanism to enable amendments to be made promptly in the circumstances specified that adequately balances the competing needs of scrutiny and speed.

7 **Question 6** *Do you consider the principle of using regulation-making powers appropriate to give effect to these changes (as compared to using primary legislation or some other means such as the UK government's PCTA process)?*

7.1 Our starting point is tax law should be set out in primary legislation particularly in so far as it relates to the exercise of tax powers, providing for what is subject to tax and imposing burdens on taxpayers. Secondary legislation should ideally be used only for administrative matters, and also for the setting of rates. This is to ensure proper scrutiny of legislation that results in the imposition of some kind of burden (compliance or financial) on taxpayers.

7.2 However, we consider the Welsh government's proposal to confer three regulation-making powers on Welsh ministers to enable changes to the Welsh Tax Acts provides a balance between the competing needs of speed, scrutiny and responsiveness at this point in the development of Welsh devolved taxes. However, the introduction of new devolved taxes in Wales with a consequential expansion of the tax base could mean the principle of using regulatory powers rather than primary legislation becomes inappropriate for the reasons noted at paragraph 5.2 above. The use of the regulatory powers should be, in any case, the subject of regular review and evaluation, and perhaps time-limited.

7.3 We note also that paragraph 3.10 of the consultative document confirms the Welsh government does not propose to use the proposed three regulatory powers to make 'routine policy changes' to the devolved taxes. Existing regulatory powers provide for changes to parts of the Welsh Tax Acts through the provisional affirmative, draft affirmative or negative procedures. However, there are parts of the legislation where it was not considered appropriate or necessary at the time of enactment to take specific regulation-making powers. Therefore, there may still be circumstances where the Welsh Tax Acts cannot be changed by either the existing or proposed regulatory powers.

8 **Question 7** *Are there any risks with using a regulation-making powers to give effect to these changes? Please describe using examples if possible.*

- 8.1 A proliferation of multiple changes via regulatory powers risks making the primary legislation difficult to follow because of the amount of cross-referencing required if the primary Act is not consolidated. We responded to the Welsh government's consultation on 'The future of Welsh law: classification, consolidation, codification' that looks at tackling the issues of inaccessibility caused by the volume of legislation and the way that legislation has been amended, re-amended and re-made over time. Although there have been only five sets of regulations in relation to devolved taxes in Wales since their introduction in April 2018 (four relating to landfill disposal tax and most recently, The Land Transaction Tax (Temporary Variation of Rates and Bands for Residential Property Transactions) (Wales) Regulations 2020), in Scotland, for example, there has been a much larger number (19 for Land and Building Transaction Tax; 17 for Landfill Tax; 13 for the Revenue Scotland and Tax Powers Act). As we note above extensive use of the regulatory powers to amend the Welsh devolved taxes is likely to be a strong indicator of the need to re-consider whether the regulatory powers remain appropriate.
- 8.2 Moreover, while secondary legislation can make prospective changes to the law, it cannot generally effect retrospective changes.³ We note that the consultation at 3.27 proposes that if primary legislation is taken forward in relation to the powers, any use of the powers on a retrospective basis would be subject to a protocol. We assume therefore that it is envisaged the Bill to enable the regulations for powers 1-3 would specifically provide for the powers to be exercised with retrospective effect subject to the protocol. We consider the use of retrospective legislation and our concerns that it should be strictly limited at questions 13 and 14.
- 8.3 In terms of scrutinising the draft legislation, one major concern with secondary legislation is that once laid, it cannot actually be amended. Thus, if the draft that is laid is defective, even in a minor way, it cannot be altered to ensure that it is correct – secondary legislation can generally only stand or fall as drafted. We note the proposal for power 3 to amend regulations made under powers 1 and 2 during the scrutiny period with effect from the date the initial changes came into temporary force to address this risk.

9 **Question 8** *Do you agree that power 1 should only apply to changes needed to respond to tax avoidance or evasion activity, compliance with international obligations, or, to address cases of exceptional need? If not in what circumstances should it not apply, and which additional situations should it apply?*

Question 9 *Do you agree that a Senedd motion for power 1 should not be necessary for the Welsh Ministers to make provisional affirmative procedure regulations under power 1?*

³ For retrospective changes, primary legislation is generally necessary with parliamentary space to pass that legislation. This can mean parliamentary time and capacity is used twice, for both secondary and primary legislation to deal with essentially the same issue. This happened for example in Scotland in the case of relief from the Additional Dwelling Supplement (ADS) for married couples buying a new main residence in joint names where the previous main residence was in the name of only one of them. It was agreed that it had not been intended that such taxpayers would be caught by the ADS, and therefore it was appropriate for the relief to be available retrospectively from the date of introduction of the ADS. However, it should be noted that the ADS had taken effect on 1 April 2016 and it was only in June 2018 that the retrospective primary legislation took effect. Thus it took a long time to resolve this issue – this was in part because of the need to find parliamentary space for a single-issue government Bill to deal with it.

9.1 Power 1 would enable Welsh ministers to make regulations amending the Welsh Tax Acts (with immediate but temporary effect pending approval by the Senedd in 28 days) in response to:

- tax avoidance or evasion activity,
- comply with international obligations, or,
- such other circumstances where it is necessary and appropriate to address cases of exceptional need, for example in response to a tribunal or higher courts decision.

9.2 We consider the use of this power in the circumstances described seems reasonable with the caveat that the circumstances in which power 1 can be used leaves quite a wide discretion particularly in relation to the undefined term ‘tax avoidance’ and the broad description under the third category.

- tax avoidance or evasion activity,
- comply with international obligations, or,
- such other circumstances where it is necessary and appropriate to address cases of exceptional need, for example in response to a tribunal or higher courts decision.

Although these circumstances are limited we think there is a case for a further safeguard requiring a ministerial statement setting out the reasons for the use of the power and why it is considered necessary and appropriate including costs and consequences of not using the power. We would be happy to contribute to any further consultation on this issue.

10 Question 10 *What length of period do you consider to be appropriate to provide adequate scrutiny time for changes to be made under power 2?*

Question 11 *Do you agree that the use of power 2 should be subject to a Senedd ‘lock’?*

Question 12 *Do you agree that power 2 should only apply to changes needed to respond to UK budget changes that impact on the resources available to the Welsh Government? If you think it should apply to more circumstances, please set these out.*

10.1 Power 2 would enable Welsh ministers to make regulations to amend the Welsh Tax Acts (with immediate but temporary effect pending approval by the Senedd) in specific circumstances where they consider it expedient in the public interest to do so, in particular in response to tax policy changes made by the UK government which have material impact on the block grant mechanism.

10.2 The length of the period for adequate scrutiny by the Senedd depends on the complexity of the changes: it is difficult to be definitive. We agree that the scrutiny period should be commensurate with the nature of changes and should allow for relevant committees to take evidence and for stakeholders to be consulted.

10.3 Given the public interest test, we think the Senedd ‘lock’ on the exercise of power 2 is appropriate.

10.4 We agree that power 2 should be limited to changes needed to respond to UK budget changes that impact on the resources available to the Welsh Government and should not extend to routine policy changes which

should be subject to consultation and public engagement in accordance with the Welsh government's tax principles.

11 Question 13 *Do you consider the use of retrospective legislation to make changes to tax laws appropriate in certain circumstances? If so, under which circumstances?*

Question 14 *Are there any particular points that you think should be included or addressed in the protocol document?*

11.1 The consultation proposes that exceptionally it may be desirable or necessary for certain changes effected by the proposed powers 1-3 to have retrospective effect.

The most important feature of a tax system for all taxpayers, probably even more so than low taxes, is certainty. Retrospection typically undermines the principles of certainty and stability.

11.2 There is a case for retrospection to correct an obvious anomaly that is harming taxpayers. An example is the amendments to LBTT through secondary legislation in Scotland in 2017 to correct the ADS position for couples where the title to the former main residence is in the sole name of one of the couple and the couple then jointly buy a new main residence prior to selling their current main residence. The later Act applied these changes retrospectively to the start date for ADS of 1 April 2016 in accordance with the Scottish government's original policy intention to treat the couple as one economic unit to determine both if the ADS applies and whether ADS should be repaid. Retrospection has also been used at Westminster to combat organised tax avoidance. The least controversial such circumstances have been when an announcement is made that legislation would be amended in the next Finance Bill backdated to the date of announcement: the announcement serves to avoid taxpayers developing expectations of the more favourable tax treatment sought by the avoidance scheme. It has also been used, for example, to reconfirm previously established interpretations of the law that were shared across a whole marketplace or section of the population, but which the courts had unexpectedly found to be erroneous.

11.3 Retrospective measures should be used with extreme care and justified at length. Paragraph 3.27 notes that if legislation is taken forward in Wales, it is proposed that it would include a duty on Welsh ministers to publish a protocol on the use of retrospective legislation, a draft of which would be published alongside a Bill. This is, we think, a key principle: that any use of retrospection needs to be justified properly in the Welsh Parliament.

11.4 We think any protocol should set out a general principle that includes a presumption against retrospection subject to certain very limited circumstances where the Welsh government could make the argument that retrospection can be used because it is considered necessary (rather than desirable).

11.5 In considering what should be included in the protocol document it is important to draw out what is meant by retrospection. There are broadly two ways in which tax legislation can act on past events, often referred to as 'retrospective' and 'retroactive'. Retrospective legislation is legislation that is retrospective in the full sense of the term, in that the legislation imposes (or reduces) a tax charge on income earned, gains realised or transactions concluded at a time before the legislation was announced. Retroactive legislation or 'quasi-retrospective legislation' imposes a tax charge on income arising or a gain realised after the date when the legislation enters into force, but that income or gain arises from transactions entered into (or at least commenced) before the legislation. An example would be where a particular investment is acquired because it is subject to an attractive tax regime; the law is subsequently changed so that the attractive elements of the

tax regime are removed and future income or gains from the investment are more heavily taxed. In effect, the taxpayer is 'locked in' to the new, higher tax charge.⁴ Governments cannot guarantee the law will never change to affect the future and must be left free to do so. However, it would be useful for the Welsh government expressly to recognise that even very simple tax changes can have a retroactive effect and to give some thought to the principle of legitimate expectation in this context.⁵

11.6 Although there may be justification for the use of retrospective taxation in limited circumstances where there is open discussion and agreement that there is an anomaly in the legislation in need of correction, the situation is more complex where retrospective legislation may be beneficial to one group of taxpayers, but harmful to another. In such circumstances there will be a need to consider suitable transitional provisions or some form of opt-out.

11.7 The protocol should set out clearly the process for making a ministerial announcement in relation to the introduction of retrospective legislation through the proposed powers. We think that such announcements should:

- be carefully targeted;
- give precise details of timings of the imposition or change;
- include sufficient detail so that taxpayers and advisers are in no doubt as to the target; and
- allow for discussion and debate to clarify the detail of the legislation.

The risk with such announcements is that they create uncertainty so draft legislation should be available from the applicable date particularly as power 1 has a reduced period for scrutiny of 28 days.

12 Question 15 *Do you agree with the proposal for repayments that where the: a) taxpayer has overpaid as a result of the failed regulations they should be entitled to a repayment; and b) taxpayer has underpaid as a result of the failed regulations the WRA should not be able to collect the shortfall.*

12.1 We agree with this proposal.

13 Question 16 *Do you consider that power 2 should be used to make any changes to the Welsh Tax Acts that the Welsh Ministers consider to be expedient in the public interest, other than those specified for power 1?*

13.1 We consider that power 2 should be limited to changes needed to respond to UK budget changes that impact on the resources available to the Welsh Government and should not extend to routine policy changes which should be subject to consultation and public engagement in accordance with the Welsh government's tax principles.

14 Acknowledgement of submission

⁴ When examining case law, particularly EU case law, some care is needed because in some EU case law the terms are often given the opposite meaning to that generally used in the UK.

⁵ See Law Wales What is the doctrine of legitimate expectation? <https://tinyurl.com/yyznw9lw>

- 14.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

The Chartered Institute of Taxation and our Low Incomes Tax Reform Group

15 October 2020