



Law Society
of Scotland

Consultation response

Additional Dwelling Supplement: Proposals for Change

April 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Tax Law Sub-Committee welcomes the opportunity to consider and respond to the Scottish Government consultation: *Additional Dwelling Supplement: Proposals for Change*.¹ The sub-committee has the following comments to put forward for consideration.

General Comments

We welcome the Scottish Government's proposed legislative amendments to the arrangements for the Land and Buildings Transaction Tax (LBTT) Additional Dwelling Supplement (ADS). Overall, we consider that these will deliver positive change.

We regret that the proposals do not go further in some areas. In particular, there is no provision for trade-related or tied properties, where application and implementation of the ADS can cause difficulties. There are also no proposed amendments in respect of mixed property purchases, where a mixture of dwellings and non-residential property is being purchased. Current rules result in the ADS effectively being paid on the non-residential property. We consider that this is inappropriate.²

Legislative amendments will need to be accompanied by clear guidance to assist taxpayers and their professional advisers.

We would wish to have the opportunity to review and comment on any redrafted proposed legislation arising from this consultation, whether based on our comments or otherwise.

¹ [Additional Dwelling Supplement: Proposals for Change - Scottish Government - Citizen Space \(consult.gov.scot\)](https://consult.gov.scot/consultations/2022/03/11/consultation-lbtt-ads-call-for-evidence-and-views)

² For further commentary, see our response to "The Land and Buildings Transaction Tax - Additional Dwelling Supplement: A call for evidence and views" (March 2022)- available at: <https://www.lawscot.org.uk/media/372548/22-03-11-tax-consultation-lbtt-ads-call-for-evidence-and-views.pdf>

Consultation Questions

3A: Timelines

1. Do you think that the proposed amendments provide for the Scottish Government's intended change?

1.1 Yes, the proposed amendments do achieve the intended change. We welcome the extension of these time limits to 36 months. The extension will allow many more transactions to be covered by the replacement of main residence rules, and will also help divorcing and separating couples. It is helpful that the proposed amendments will align with the position in England and Wales.

1.2 The extension of the time limits to 36 months is not retrospective. Whilst we consider this appropriate, there is the potential for this to cause confusion for taxpayers. This proposed amendment must be accompanied by clear guidance and public information to allow individuals to understand their obligations and guide their conduct accordingly.

2. If not, what amendments would you propose to the draft legislation and on what basis?

2.1 Not applicable.

3B: Inherited Property

3. Do you think that the proposed amendments provide for the Scottish Government's intended change?

3.1 We do not believe this relief will assist many purchasers, as the average length of missives is 6 – 8 weeks, and missives are often concluded just before the purchase completes. In addition, if the date an inherited property is acquired is determined by the date a conveyance or transfer is delivered by the executors, it would always be open to the purchaser to ask the executors to delay executing and delivering the disposition or transfer. As noted below, the relief should also apply to properties inherited by other means on the death of a person. Nevertheless, a change is welcomed as it will assist those with a long period between conclusion of missives and completion – such as new build buyers. Under the current

legislation, while it might be open for an executor to delay the transfer, it is perhaps unlikely that an executry practitioner would have an in-depth knowledge of the LBTT legislation and each beneficiary's individual status. The executors will often wish to administer and complete an estate as quickly as possible, potentially causing tensions between this goal and the beneficiary's desire to ensure a predictable LBTT liability. A change will resolve this unfair position.

3.2 We recommend that dwellings inherited (by any means) within a period of 3 years before a purchase should be disregarded for ADS purposes.

3.3 Where a buyer is buying jointly with another person who is a spouse, civil partner or cohabitee, ADS would still be payable on the purchase because the proposed new relief for inherited properties will only apply to one of the buyers. The other joint buyer would be treated as owning the inherited dwelling and so ADS would be payable.

3.4 Paragraph 9B(1)(c) refers to a buyer acquiring ownership of a dwelling "by virtue of a conveyance or transfer in their favour by the executors...". There are other ways in which a buyer could inherit property which should also be included, for example by survivorship from common ownership (or its non-Scottish equivalents, such as joint tenancy in the rest of the UK), the ending of a liferent (whether a proper liferent or a trust liferent), or the appointment of a dwelling by executors. Some of these involve deemed ownership as the beneficiary of what becomes a bare trust in the buyer's favour; and unlike a conveyance in favour of such a person, some of these can bring actual or deemed ownership without intimation to or acceptance (at that point) by the person concerned. The addition of the following words at the end of section 9B(1)(c) may be suitable: "... or otherwise acquires ownership as a result of the death of a person."

3.5 On a similar line, this issue could be resolved if inherited property was dealt with by disregarding the dwelling generally, rather than by way of a relief as currently envisaged. In other words an exclusion could be included in paragraph 11 (if the basic proposal proceeds) along the following lines:-

"A dwelling owned by a person is not to be counted for the purposes of paragraph 2(1)(c) if the owner of that dwelling is (a) a beneficiary in the estate of a deceased person and acquired ownership of the dwelling by virtue of a conveyance or transfer in their favour or (b) is a person who otherwise acquired ownership as a result of the death of a person after the date on which the buyer entered into a contract for the purchase of the dwelling which is the subject matter of the transaction and before the date of completion of that contract."

3.6 An alternative approach would be to provide that if the new relief for inherited dwellings applies to one buyer, it also applies to their spouse, civil partner and cohabitee or minor children.

3.7 In new paragraph 9B(2) as currently drafted the new definition of the date on which a buyer acquires ownership of an inherited property only applies for the purposes of paragraph 9B(1). If the intention is for this definition to apply generally to inherited property, the drafting would need to be amended, perhaps to say "for the purposes of this Schedule".

3.8 In any event, in new paragraph 9B(2) we believe the date on which a buyer acquires ownership in these circumstances should be the date on which a conveyance or transfer is "delivered" by the executors, rather than the date of grant of the conveyance or transfer, which is when the conveyance or transfer is signed by the executors.

4. If not, what amendments would you propose to the draft legislation and on what basis?

4.1 We would suggest that paragraph 9B of the draft legislation be amended as follows (proposed amendments in bold):

9B.—(1) A chargeable transaction to which this schedule applies by virtue of paragraph 2 is exempt from the additional amount if—

(a) at the end of the day that is the effective date of the transaction, the buyer **(or any buyer where there is more than one)** owns two dwellings,

(b) the date of acquisition of ownership of the first of the two dwellings is after the date on which the buyer entered into the contract for the land transaction relating to the second of the two dwellings, but before the effective date, and

(c) the buyer is a beneficiary to the estate of a deceased person and acquired ownership of the first of two dwellings by virtue of a conveyance or transfer in their favour by the executors of that person, **or otherwise acquires ownership as a result of the death of a person.**

(2) For the purposes of paragraph (1) the date on which the buyer acquired ownership of a dwelling by virtue of a conveyance or transfer in their favour by the executors of a deceased person is the date on which the conveyance or transfer was **delivered by** the executors.

4.2. We have suggested further proposed areas for amendment in our response to question 3, above.

5. Over and above existing legislative arrangements, are there any targeted anti-avoidance measures that the Scottish Government should consider in respect of this proposed amendment?

5.1 We do not believe targeted anti-avoidance measures are necessary in relation to the proposed new relief for inherited dwellings. We do not think the inheritance of dwellings is an area which lends itself to tax avoidance.



3C: Small Shares

6. Do you think that the proposed amendments provide for the Scottish Government's intended change?

6.1 The disregard of shares in jointly owned properties where the value of the share is less than £40,000 is a helpful change.

6.2 One unintended consequence of the disregard of shares with a value of less than £40,000 is as follows. LBTT Technical Bulletin 1 paragraph 7.2 confirms that where an individual acquires a further share in a jointly owned property, ADS does not apply as they are already treated as owning the whole property. If A, B and C jointly own a property worth £90,000, under the new rules they are not treated as owning a share in the property as their share is worth less than £40,000. That means that if A buys out B and C, ADS will be payable. By contrast if D, E and F jointly own a property worth £200,000, D can buy out E and F without paying ADS. This seems like an unintended consequence of the change.

6.3 This could probably be addressed by excluding the application of ADS in the very limited circumstances where an individual is acquiring a further share in a jointly owned property where their initial share is worth less than £40,000.

7. If not, what amendments would you propose to the draft legislation and on what basis?

7.1 See above, at para 6.3.

8. Over and above existing legislative arrangements, are there any targeted anti-avoidance measures that the Scottish Government should consider in respect of this proposed amendment?

8.1 We would suggest that a targeted anti-avoidance measure relating to small shares in jointly owned properties could be extremely cumbersome. It is hard to see why a targeted anti-avoidance measure would be necessary.

3D: Divorce or Separation

9. Do you think that the proposed amendments provide for the Scottish Government's intended change?

9.1 The relief as drafted relates to divorce and separation. In new paragraph 9(C)(e) we believe the reference should be to "paragraph 4 or 5 of Schedule 1" and not just to paragraph 5. Paragraph 5 of Schedule 1 deals with dissolution of civil partnership, but paragraph 4 deals with transactions in connection with divorce which also needs to be included to ensure that the relief applies to divorce as well as dissolution of civil partnership.

9.2 It should be made clear that the proposed relief is not restricted to circumstances where a court order is in place, but is also available where an agreement is in place between the parties made in contemplation or otherwise in connection with the dissolution or annulment of the marriage or civil partnership, judicial separation or the making a separation order. This is not clear in the consultation document. From a practical perspective, we would also highlight that court orders or agreements are frequently not in place at the point where separating couples may look to purchase new properties, and there is a risk that requiring such an order or agreement for the purposes of their relief may 'weaponise' ADR in certain acrimonious situations. There may be merit in removing proposed para 9(C)(e) from the draft legislation.

9.3 We note that the relief as currently drafted does not apply to cohabitants. We believe the relief should be extended to include the termination of cohabitation. We understand that in the break up of cohabitants, mortgage lenders are perhaps even more likely to demand that both stay on the property title. On termination of a cohabiting relationship, one of the parties may apply to the court to seek an award under s.28 of the Family Law (Scotland) Act 2006, or they might otherwise come to an agreement in respect of heritable property. It would be possible to include a reference in paragraph to "....court orders made under s.28 of the Family Law (Scotland) Act 2006 or agreements made in contemplation or otherwise in connection with the termination of their cohabitation....".

9.4 The new relief for divorcing and separating couples will not avoid ADS being payable where the departing spouse is buying a new property jointly with a new partner (who is a spouse, civil partner or cohabitee). This is because the relief in paragraph 9C would only apply to the departing spouse, and not the new partner. The new partner would be deemed to own the share in the former marital home, and so ADS would be payable on the joint purchase.

9.5 This issue could be addressed if a former marital home in which a departing spouse had to retain an interest was disregarded for ADS, rather than being the subject of a relief. A disregard could be included in paragraph 11. In our view, a disregard in these circumstances is a more appropriate way to achieve the policy intention than a relief.

9.6 An alternative approach would be to provide that if the relief under paragraph 9C applied to one of the joint purchasers, it would also apply to the other joint purchaser where the other joint purchaser was a spouse, civil partner or cohabitant.

9.7 We would also suggest that a departing spouse who is unable to dispose of their interest in a jointly owned former main residence should be treated as if they had disposed of their main residence when they moved out. This would mean the departing spouse would not have to pay ADS if they owned other properties but were buying a new property. This would put the departing spouse in the same position as an individual who had disposed of a former main residence.

10. If not, what amendments would you propose to the draft legislation and on what basis?

10.1 See our comments above.

3E: Joint Buyers/Economic Unit Provisions

11. Do you think that the proposed amendments provide for the Scottish Government's intended changes?

11.1 As a result of the proposed changes to sub-paragraphs 8(1)(a), (b) and (c), we believe that the provisions of paragraph 8A (2) (a), (b) and (c) no longer make sense. For example paragraph 8A(2)(a) provides that the reference in sub-paragraph 1(a) is to apply as if the reference to the buyer were a reference to either or both of the buyers. It is not clear how this can apply to sub-paragraph 8(1)(a) which now reads "the buyer or, where there are two or more buyers who are or will be jointly entitled to the interest acquired, one of the buyers".

11.2 We note from paragraph 3.21 of the Consultation Paper that the intention is for ADS to be repayable where a house is bought jointly and only one of the joint purchasers can dispose of a former main residence, and the other buyer owns no other properties. The change is not intended to apply where the other joint buyer does own other properties. We believe the proposed amendments to paragraph 8 will actually allow ADS to be repaid where the other buyer owns other properties, which is presumably not the intention.

11.3 We note that the proposed amendments to paragraph 6 are intended to align the treatment of disposals within the economic unit deeming provisions with purchases of property by one party to the economic unit. We suggest that a similar result could be achieved by amending paragraph 6(1) so that it reads "For the purposes of this Schedule" rather than "For the purposes of paragraph 2(1)(c)", however this approach may also have unintended consequences which we have not been able to fully consider in the time available.

12. If not, what amendments would you propose to the draft legislation and on what basis?

12.1 See our comments above.

3F: Local Authorities

13. Do you think that the proposed amendments provide for the Scottish Government's intended change?

13.1 The new relief for purchases of housing by local authorities is a very welcome development.

13.2 We note that the relief is only available where purchases are funded by grants or financial assistance provided by the Scottish Government under section 2 of the Housing (Scotland) Act 1988. We understand that many purchases of housing stock by local authorities which is to be used to provide affordable housing are not funded by grants or financial assistance under section 2 of the Housing (Scotland) Act 1988 but by local authority's other resources. The new relief in Schedule 6A would not cover these purchases.

13.3 We believe the relief should be extended to apply where local authorities buy houses which are to be used to provide affordable housing which are funded without grants or financial assistance under section 2 of the Housing Act. We note that there is no single definition of "affordable housing", however it is a very widely used term and it would presumably be possible to base the conditions for this relief on one of the definitions of affordable housing which are already in use.

13.4 We believe the relief should also be extended to subsidiaries and other special purpose vehicles (SPVs) in which local authorities have a controlling interest. This is because we understand that affordable housing, and in particular Mid Market Rental (MMR) housing, is often delivered not by local authorities themselves but by SPVs controlled by local authorities. We understand that the target is for MMR to represent 30% of affordable housing targets by under the Scottish Government's Strategy Housing to 2024, and the availability of the LBTT and ADS relief for MMR housing would be particularly helpful.

13.5 We also suggest that the Scottish Government should consider extending the relief to cases where local authorities are purchasing houses to provide accommodation for individuals with disabilities.

14. If not, what amendments would you propose to the draft legislation and on what basis?

14.1 See our comments above.



4 Equality Impacts

15. Do you think that the proposed amendments will in any way impact upon equal opportunities, human rights, businesses, island communities, privacy and/or sustainable development in Scotland?

15.1 We have no further comments.

16. If so, please give us your views.

16.1 We have no further comments.

For further information, please contact:

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