



OFFICIAL REPORT
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Finance and Constitution Committee

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Session 5



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FINANCE AND CONSTITUTION COMMITTEE

13th Meeting 2017, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Adam Tomkins (Glasgow) (Con)

COMMITTEE MEMBERS

Neil Bibby (West Scotland) (Lab)

*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

*Ash Denham (Edinburgh Eastern) (SNP)

*Murdo Fraser (Mid Scotland and Fife) (Con)

*Patrick Harvie (Glasgow) (Green)

*James Kelly (Glasgow) (Lab)

*Liam Kerr (North East Scotland) (Con)

*Ivan McKee (Glasgow Provan) (SNP)

*Maree Todd (Highlands and Islands) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Sandra Eden (University of Edinburgh)

Judith Robertson (Scottish Human Rights Commission)

Susannah Simpson (PricewaterhouseCoopers LLP)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 3 May 2017

[The Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Convener (Bruce Crawford): Good morning, colleagues, and welcome to the 13th meeting in 2017 of the Finance and Constitution Committee. We have apologies from Neil Bibby. As usual, I ask members to put their mobile phones in a mode that will not interfere with proceedings.

Agenda item 1 is to decide whether to take item 3 in private. Do members agree to do so?

Members *indicated agreement.*

Scottish Approach to Taxation Inquiry

09:30

The Convener: Item 2 is to take evidence as part of our inquiry on a Scottish approach to taxation. We are joined by Judith Robertson, who is chair of the Scottish Human Rights Commission; Sandra Eden, who is a senior lecturer at the University of Edinburgh; and Susannah Simpson, who is head of private business at PricewaterhouseCoopers LLP. I welcome you all to our evidence session. We have received written submissions from all three of you, and they have been useful.

The focus of the inquiry is incorporations, but there are general issues that we will want to explore as well, particularly on human rights. I am glad that we have Judith Robertson here for that purpose.

I am sorry to go straight into the numbers, but I want to bore down into them. I found Sandra Eden's submission very interesting. It mentions the Office for Budget Responsibility's figure of a potential

"drop in tax revenue of £3.5 billion"

by 2021 as a result of incorporations, because their number is increasing. It is always difficult to extrapolate from such numbers what the impact would be for Scotland. We would normally apply a figure of around 10 per cent, but I am not sure that that is applicable in the circumstances. Will you have your best go at explaining what that might mean for Scottish tax revenues? If the figure was 10 per cent, the drop in tax revenue would potentially be £350 million.

Sandra Eden (University of Edinburgh): The estimated loss of tax and national insurance was just over £6 billion. From the United Kingdom perspective, that was made up by an increase in corporation tax revenues. That is where the loss of £3 billion comes from. Some £6 billion would be lost and £3 billion would be gained from increased corporation tax revenues. Obviously, that plays out differently in Scotland.

I did a back-of-an-envelope calculation and made real back-of-an-envelope assumptions. I assumed that the £6 billion loss was half tax and half national insurance contributions—we do not know that; the calculation is quite difficult. Obviously, Scotland is not losing the national insurance contribution revenue, so it is losing only half of the scaled-down amount of £6 billion. Assuming that it is losing half and assuming a population of 8 per cent relative to that of the UK, I

estimated that there could potentially be a loss of £240 million by 2021.

Subsequent to my doing that scribble on the back of an envelope, I saw figures from elsewhere—I forget where at the moment—that suggested a figure in the region of £200 million. Therefore, the figure is not that far off. Those are the sorts of figures that we could potentially be looking at.

The Convener: Okay. That is a sizeable sum. I am grateful to you for doing such back-of-the-envelope work, as you described it. If the committee asked HM Revenue and Customs or the Treasury to create an estimate for Scotland in the same way that you have done, but obviously in a more defined way, as they have all the numbers behind them, do you think that they would be able to do that for us?

Sandra Eden: I have no idea. That could be done only with quite a high degree of uncertainty. All such things are uncertain, because incorporations are growing more slowly in Scotland than they are in the rest of the UK. That would have an impact, and it might reduce the numbers a little bit. However, I have no idea whether HMRC would be able to do that.

The Convener: Would anyone else like to comment on that at this stage?

Susannah Simpson (PricewaterhouseCoopers LLP): A huge number of factors are involved in a decision on whether to incorporate—not just tax, which is my area, but commercial factors as well. I agree with Sandra Eden that that is what makes it so difficult to be able to predict the impact of incorporation in the future.

The Convener: Behavioural changes are among the things that might have an impact. Murdo Fraser wants to pick up on that issue.

Murdo Fraser (Mid Scotland and Fife) (Con): Good morning to you all. One of the things that the committee is interested in is whether the rate of incorporation in Scotland might be different from that in the UK as a whole if it were driven by different factors—for example, differentials in income tax. The Scottish Government has introduced an income tax differential for higher earners, which will have an impact, albeit a relatively modest one.

To what extent do you think that the devolved Government's use of differential taxation in Scotland is likely to drive more people towards incorporation compared with the rest of the UK, or is that unlikely to be a major factor? Maybe we could start with Susannah Simpson.

Susannah Simpson: It depends on the level of differential that is introduced and at what rates it is

introduced. It may be that, with the number of 40 per cent income tax payers in Scotland, more people would be impacted if the change were to be at that rate. Equally, if the change were to be at the additional rate, it would be a higher quantum, but fewer taxpayers would be affected. Mobility is clearly the key underlying driver as regards income tax, because taxpayers can vote with their feet and move. It therefore depends on whether such changes would have an impact on a greater number of taxpayers rather than those who are higher earners.

From a behavioural perspective, the key thing to remember is that taxpayers have more confidence—and therefore let their behaviours be affected less—if they know where the policy is going, why changes are introduced, how they will be implemented and, ultimately, the impact that will be felt. There is some empirical evidence on benefits to the economy as a result of tax changes. Therefore, my view is that taxpayers are less likely to take behavioural decisions based on tax changes.

Sandra Eden: I looked at the OBR figures. A point that I did not make particularly clear in my submission is that there has always been primarily an NIC differential between being incorporated and not being incorporated. That has increased gradually but not dramatically, although it is perhaps now increasing a little bit faster. There has been a steady move up the way, except for two particular tax-driven periods. One was the introduction of the 0 per cent rate on very small companies; we can see an enormous spike in incorporations at that point. The other was a pre-emptive move that did not work, when anti-avoidance rules were coming in for people who were really employed but were working as self-employed. We can see those spikes, but those were both potentially dramatic changes.

My feeling is that the tax-driven response is unlikely to be dramatic, except at significant levels of change. Members will ask, "What is significant?" I have no idea, but a change of 2, 3, 4 or possibly even 5 per cent would probably not be enough to stimulate people into incorporating unless they were going to incorporate anyway.

Murdo Fraser: To give a very current example, in today's newspapers there is speculation about the reinstatement of the 50 per cent additional rate. If the Scottish Government were to increase the additional rate from 45p to 50p—it has the power to do so—would that be significant? Would it drive higher earners towards incorporation?

Sandra Eden: I would need to see the evidence on the rate of tax paid by people who are in a position to choose whether to incorporate. People who are earning a lot of money might be in a company anyway—I do not know. Susannah

Simpson might have a feeling about the people who would be making that decision. They might not be additional rate taxpayers; they might be more likely to be basic and higher rate taxpayers.

Susannah Simpson: It goes back to my point that if there are changes at the additional rate end, fewer taxpayers will be impacted, and they might well be the owners of large businesses, but that is just speculation. It would depend on how that played through; they would be the more mobile ones.

Sandra Eden: I think that a lot of them would probably already be companies anyway, but I do not know—that is just speculation.

Ivan McKee (Glasgow Provan) (SNP): I want to explore that a wee bit further. We are talking as if people who make this choice just wake up in the morning and decide whether to incorporate, but it is more complicated than that. There are rules: there is some work for which people should be employed, and some things require to be done through incorporation. The rules have been tightened up over time through IR35 and the other steps that have been taken to make it clearer which side of the fence people should be on.

Are the rules clear enough? Are they not being enforced robustly enough? If the rules were clear and robust, we would not be having this conversation, because people would not have the choice. It should be a matter of fact whether someone is incorporated, although there are some grey areas.

Susannah Simpson: A number of factors are involved in whether to incorporate. You asked about the drivers for that. My clients in start-ups or scale-up businesses—the true high-growth businesses that are driving a lot of the economy in Scotland—will often take the decision to incorporate because it limits their liability and allows them to roll up profits and invest at the beginning of that journey, which cannot necessarily be done using non-incorporated structures. We should not lose sight of the fact that there are some very good reasons to incorporate, such as having the ability to roll up profits and to decide when to distribute and when to bring stakeholders in or take them out.

Over the summer Matthew Taylor will lead a project for the UK Government to look at the drivers for self-employment versus employment and how that plays out into incorporations. It will be interesting to see the results of that to find out what drivers—non-commercial drivers, I suppose—he believes there are for making that decision.

In my experience, tax is only one of the factors that are taken into account, particularly by high-growth small and medium-sized enterprises.

Sandra Eden: My feeling is that the rules are terribly vague. You are talking about a continuum, and borderlines on a continuum are always difficult to apply. Something that was really sharpened up in the UK tax system recently was the definition of residence for human beings, which used to be absolutely ghastly—it was really vague and HMRC guidance was not very helpful. The new statutory residence test is much more precise. Residence is a continuum, but now the definition is much more precise about the factors that you have to take into account and how many of the criteria you have to satisfy. I have not done work on this, but I suspect that you could probably tighten up on that borderline. However, it is difficult for HMRC to do that, because there are probably a lot of people on that borderline and a lot of resources would be required to keep an eye on it.

09:45

Ivan McKee: I take Susannah Simpson's point about start-up businesses, which is one thing. However, I am thinking more of the scenario that we think, in the back of our minds, might be driving the rise in incorporations. People who work for a company and who do not like paying tax might decide to set up their own company and then sell their services back to the first company through their company. Employees are doing that because companies are persuading them to—that is happening not just at the high end but at the bottom end, through the gig economy. That clearly does not follow the spirit of the rules, and there are some grey areas concerning the legality of it. That is a very different scenario from somebody who decides to start up a high-growth business to invest in something.

At the end of the day, the conversation that we are having is about what is driving incorporation and the £3 billion tax gap. The area that I am trying to focus on is not the people who are starting up high-tech innovative businesses—it is the people who are making the shift from employment to self-employment or incorporation, but who are not actually changing what they are doing. Are you saying that the rules could be clearer and that there could be more resource behind enforcement?

Sandra Eden: Yes, I would say so. The courts are developing rules as we go along, but sometimes it is better to take another approach and let the courts burble on. They are probably doing a good job against a rather vague concept, but statute could create a set of factors.

Susannah Simpson: I agree with Sandra Eden about certainty. If there was more certainty as to how the rules apply, as there is with the residence test, the grey area between what is employment and what is self-employment could be clarified. It

is not very easy for taxpayers to work out for themselves whether they are self-employed or employed. More certainty in that area will always be a good thing.

Sandra Eden: In addition, taxpayers can exploit uncertainty against a potentially underresourced HMRC.

Ivan McKee: Okay—thanks.

Maree Todd (Highlands and Islands) (SNP): We have discussed the potential for behaviour change around differences in income tax. It might be too soon to say this, but can you speculate on whether there is likely to be any impact on the level of incorporation with the changes in dividend tax? We know that the UK Government was forced into a U-turn over national insurance recently, and it is refusing to give an assurance that that will not be changed after the general election. Will that change behaviour in terms of the level of incorporation and how people set up their companies?

Susannah Simpson: Clearly, tax is one factor in such decisions. Things such as the changes in the dividend tax rate and the proposals that were then withdrawn on national insurance contributions will have decreased the strength of that factor in making those decisions. From my client base, what we have seen developing over the past few years is fewer people applying the law in a way that was clearly not intended. People who seek to do that are now in the minority. There has been so much in the media about paying the right amount of tax that members of the public are reacting to that.

The world is a very complex place to do business now, both internationally and domestically, and there are many commercial factors in play. Tax plays a part, and levers such as changes to dividends and national insurance contributions have an impact, but they are levelled out across the playing field of other commercial factors.

Maree Todd: You said earlier that there is clear evidence that people are more likely to try to avoid tax if there is no clear signalling of policy and where it is going. Does that apply to this type of chopping and changing as well?

Susannah Simpson: Just to be clear, I was not saying that there is more evidence that people will avoid tax—it is just that, from a behavioural perspective, if taxpayers can see a clear objective, transparency as to how things are implemented and the impact of what they are doing, they are less likely to change their behaviours as a result of tax changes and will play more of a part in developing the economy generally.

Maree Todd: Okay. Does anyone else have any thoughts on that?

Sandra Eden: I think that the move to reduce the exemption on dividends from £5,000 to £2,000 was sensible. I do not really see a reason to have a full exemption. I suspect that that is at the margins—at £2,000, it is not that much money. It is a flat sum rather than a percentage that increases as your income increases.

Maree Todd: Thank you. I also want to ask your thoughts on a very general issue. Income tax has not been fully devolved to Scotland—the Scottish Government has quite limited control over income tax. As this and previous discussions in the committee have shown, it is important that income tax, corporation tax, national insurance and dividend tax are balanced. How limited is the Government's control? Is it possible for the Scottish Government to be radical on income tax when it does not have control over the other types of taxation?

Susannah Simpson: There are significant constraints on the Scottish Government. As you say, there is no power up here over capital gains tax, corporation tax, inheritance tax or national insurance contributions. All those taxes play a part in decisions on incorporation, so having no power or control over them makes it difficult for the Scottish Government to make decisions on income tax. All Governments are subject to those constraints. The UK Government is equally subject to those constraints in relation to European Union law on things like VAT, although that may well change in the future. The ability to make significant changes in Scotland is certainly limited.

Sandra Eden: Tax rates are a fairly blunt instrument: all that you can do is increase or decrease the amount of tax; you cannot take countermeasures. For example, income tax is one of the factors involved in incorporation, but there are NICs, corporation tax rates, CGT and IHT as well—factors that you do not control. Income tax is, therefore, a limited tool. You bear the risk but have very few other levers with which to mitigate that risk.

Liam Kerr (North East Scotland) (Con): I have a question for Susannah Simpson, arising from something that Ivan McKee said. I am concerned that the debate can become laden with value judgments about incorporation, such as that incorporation is tax avoidance that somehow cheats the public purse and is immoral. Your paper makes it quite clear that the ultimate choice of commercial structure is made primarily in the light of commercial and family considerations, with tax being a secondary consideration. My experience—and, I suspect, yours—says that that is correct. Is there any objective data that says

that that is correct, or is that simply the experience of PWC?

Susannah Simpson: I must admit that it is just my experience. We have not carried out any research in that area, so I cannot give you any empirical data. It may well exist, but there is none that I am aware of.

Liam Kerr: Are you aware of anyone else carrying out that analysis? We have previously seen evidence that contradicts that assessment and suggests that everyone is incorporating to avoid tax. You obviously take a different view, which I agree with, but that view is based on experience. Is there any evidence out there? Will anyone take evidence on that to prove the point?

Sandra Eden: There are spikes in the OBR figures from Companies House. It is extraordinarily difficult to get historical figures from Companies House, but the OBR figures show spikes that must be related to tax matters. There are spikes in 2002, 2004 and 2006, showing a dramatic increase in the number of incorporations that were related to the zero rate of tax on micro-companies and the predicted change to managed service companies. People were trying to incorporate before the changes came in, in the hope that they would be excluded from them.

My point is that, where there are significant differences in tax rates, there is a purely tax-driven behavioural response, and I think that there is evidence of spikes in incorporations that are specifically related to tax changes. However, where the differential is smaller, that is not the case.

Liam Kerr: A number of submissions have analysed the impact of incorporation on the tax take. I think that you said earlier that there was a loss of £6 billion but a recoupment of £3 billion through a different tax, give or take.

Sandra Eden: Yes—ish.

Liam Kerr: Has there been any analysis of any other spin-off impacts? For example, if I incorporate, I will use a local law firm to do it, I will use a local accountant and suppliers and I will rent premises locally. There would be an indirect benefit to the local economy that would not have happened if I were an employee. My point is that, if we use a blunt analysis based on the tax take, we might miss evidence of other things that are going on.

Sandra Eden: The knock-on advantages.

Liam Kerr: Correct.

Sandra Eden: I am not aware of any such analysis, sorry.

Liam Kerr: Ought someone to be doing that exercise so that we are aware of the other side of the coin?

Sandra Eden: It would be a very difficult piece of research to do. I suspect that it would be hard to get good figures that are valid over a period of years. Should such an exercise be carried out? Obviously, one would like to have loads more information in order to give us much greater certainty about the impact of the proposals.

Susannah Simpson: That is absolutely right. In a perfect world, we would have all that information available to us because that would give us more certainty about the impact of the changes. The question is whether that information is available.

Liam Kerr: That information probably ought to be available. If we are being asked to make a decision based on tax take, that is only one side of the coin and does not take into account any potential positive impacts.

Are you aware of any analysis of how many economically inactive people have become economically active through the incorporation model, rather than by being employed?

Susannah Simpson: I am not aware of any data on that. I do not have the numbers in front of me, but we have done some research on the impact of the gig economy, which is something that is driving what we are talking about. For example, where people are coming back into work and working from home as part-time workers, they are more likely to be self-employed to start off with. There is a lot more of that than there was in the past. People are more likely to move into self-employment, but I do not have the data to prove that.

Liam Kerr: That sounds like anecdotal evidence. From what you can recall, does your data suggest that people are making a rational choice to choose that model to re-enter the market or are they doing it because they are forced to do so and have no other choice?

Susannah Simpson: It is probably a combination of the two. When someone is moving back into the market, they are more likely to find that self-employment gives them a more flexible model than they would get if they immediately went back into employment and were required to work full time or close to it. That is my experience from speaking to clients, rather than from anything empirical.

10:00

Patrick Harvie (Glasgow) (Green): From the past few minutes of discussion and from some of the evidence that we had last week, it seems that there is a case for having more research on a

range of the aspects of the issue, particularly the slightly grey area between what is called the gig economy and what is often described as bogus self-employment. In the latter, someone is actually in an employment relationship but the only option that they are given is to have it through some form of self-employment and lose all the rights and protections that would come with employment, which many people say give real flexibility.

I looked at the list of advantages and disadvantages of incorporation in Susannah Simpson's written submission and it occurred to me that we should be focused on those if we want to engage in a meaningful attempt to make a difference to what is happening. It may be that the Government of any day does not wish to intervene deliberately. However, if we assume that Government policy should recognise that there is to some extent a tax avoidance element in incorporation—or that that is one part of the motivation in some circumstances—is there anything that the Scottish Government can do in a devolved context or that the UK Government ought to do in a reserved context to alter the balance between the advantages and disadvantages to achieve the desired effect of supporting incorporation where it is of genuine benefit to society and the economy but disincentivising it when it is closer to the grey area of bogus self-employment? Can we intervene in the balance of those advantages and disadvantages to that effect?

Susannah Simpson: I assume that that is a question to me initially.

I agree that those advantages and disadvantages are a good place to start to focus. You will note that PAYE—the tax factor—is on the disadvantages list. It is only one of a number of disadvantages. The answer to your question comes back to the number of levers that are available to the Scottish Government as devolution stands. Given that the only one is the lever over income tax rates and everything on capital gains tax, corporation tax and dividend tax rates is outwith the Scottish Government's control, there is a limit to the impact that the Government can have.

Many of the items on the list concern legal limitations. From a corporate perspective, Scots law and the law south of the border are similar on incorporation, so more could probably be done to change the underlying legal factors. However, that is a much bigger question to take on.

Patrick Harvie: One option might be for the Scottish Government to have some restriction or code that sets out in what circumstances people can access business support services, grants and loan schemes, and public procurement opportunities that are funded by devolved taxes, or

in what circumstances public bodies and agencies would be willing to employ people in structures that they would generally avoid. To what extent would that be a useful tool to give a clear signal to the rest of the economy about what is on and what is not on?

Susannah Simpson: We return to the need for clarity. If that were set out as a clear objective in legislation or guidance, taxpayers would at least be aware of the intention behind the legislation. I cannot give you a view on whether that is the correct policy because that is outside my remit.

Patrick Harvie: I do not expect you to comment on whether it is a correct policy, but would such a policy have the potential to have an effect?

Susannah Simpson: If there is transparency on the objective of something that is done, it always increases clarity for the public.

Patrick Harvie: Do the other witnesses want to comment on those issues?

Judith Robertson (Scottish Human Rights Commission): I will in a minute, but I will do so in the context of my other remarks.

Sandra Eden: One of the main guilty parties is national insurance, which is outside the Scottish Parliament's remit. The huge difference between employer and employee NICs is no longer justified by the differential in benefit entitlement. There used to be some sort of link at one level.

I think that national insurance contributions have to be looked at across the board—or scrapped. The issue rumbles on; the problem is that politically it seems to be a bit easier to get money through national insurance contributions than it is to do so through tax—although the evidence of the last few months suggests that that is no longer the case.

I suppose that the approach should be “do as we do”, to encourage people who have that employment relationship to have an employment contract.

Patrick Harvie: Recent events around national insurance underline, for me, an argument that was made during a previous discussion in the committee's inquiry, which is that company law, as it stands, is not up to meeting the requirements of the modern economy, and what is required is a fundamental rewrite, perhaps to offer more points along the spectrum between employment and incorporation, or to close the gap between the tax that people pay in different structures—

Sandra Eden: Certainly the latter, yes—

Patrick Harvie: Is a fundamental rewrite of company law required?

Sandra Eden: I do not know. I am not a commercial lawyer.

Patrick Harvie: Okay. Convener, I want to move on to human rights; do you want to bring in other members first?

The Convener: Has anyone else got a question about incorporation, or have we finished talking about that? I want to ensure that Judith Robertson gets a chance to reflect on her paper, and I know that Susannah Simpson has to be away by 10.30—if we are still in session and you need to go, just feel free to make your exit. I will bring in Willie Coffey to ask about human rights, but you can come back in later, Patrick.

Patrick Harvie: Okay.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): Judith Robertson said in her paper:

“Taxation is a crucial contributing component of the realisation of human rights.”

That might not be immediately obvious to many people out there. The paper makes it clear that taxation is at the heart of fairness in society; it also mentions the United Nations Convention on the Rights of the Child and impacts on women.

How do we assess impacts more directly, so that we can illustrate the impacts that taxation changes might have? Data tends to be in the hands of Governments and agencies. How does the Scottish Human Rights Commission analyse the impacts and then reach out to MSPs and the public to present to them the wider impact of changes in taxation policy with respect to human rights?

Judith Robertson: Thank you for the opportunity to talk about the issue. The direct answer to your question is that a number of tools for human rights impact assessment of policy are at our disposal. It is currently a requirement of equalities legislation that an equality impact assessment is done in advance of a decision being made on policy.

The kind of impacts that you have just been talking about in relation to incorporation give some lines into the assessment of a decision's impact in terms of revenue—the return—and the drivers of change in a process. Those are some of the human rights assessments that we can make.

The reason why we talk about coming at policy from a human rights perspective is that doing so provides a framework that people can begin to understand—we talked earlier about the principles of certainty and transparency and about the need to have a conversation with the public, so that people understand why we are doing what we are doing. Human rights give us a framework in which to do that.

The human rights framework is underpinned by international law. It is not just good to have; it is something to which the UK, as a state party, is signed up, and to which the Scottish Parliament and public authorities are committed, under the Scotland Act 1998. There is a legal framework that provides the basis for and underpinning of the taking of a human rights perspective to any policy—in this context we are talking about the Scottish approach to taxation.

A human rights approach, which is enshrined in law and underpinned by a range of international treaties, gives the Scottish Parliament a strong basis on which to assess decisions that it makes on taxation from a principled perspective, and provides a framework for having that conversation with the public.

Willie Coffey: When you look across the landscape in different jurisdictions, can you see any evidence or data to show that a particular Government has introduced a measure that has a certain impact on society? Is that clear and could we pick up that kind of information to help guide us in our decision making in the years to come?

Judith Robertson: There are examples from across the world. The South African constitution has brought economic, social and cultural rights to the heart and centre of the country's constitutional framework. In that setting, Government, public authorities and decision makers have to take into account the impact of their decisions on economic, social and cultural rights as well as on civil and political rights. Back home in Scotland, Jeane Freeman, the Minister for Social Security, has committed to bringing the right to social security into the heart of policy making. That will have an impact on the way in which policy is delivered, in terms of communicating to people what their rights are in relation to social security in Scotland and the way that the system is designed and the processes that are involved in its design, and in terms of establishing the fact that people already have a right to social security, and strengthening that right by enshrining it in domestic law.

Willie Coffey: What about infringements, or alleged infringements, of people's human rights, should they occur in relation to such things as taxation or fiscal policy? Where do people go for redress? Do they disappear down the legal route to the European Court of Human Rights? Is it difficult to achieve redress if judgments are made about human rights issues relating to those matters?

Judith Robertson: You can keep it general or you can make it more explicitly specific to taxation, and that is up to you. However, one of the fundamental principles of a rights approach is bringing in effective accountability and effective redress in a way that, within the system that the

Scottish Government and Parliament decide to establish, ensures that systems of redress are explicit, that it is clear how they can be accessed, that they are resourced and funded, that there is effective monitoring and that there is a transparent process by which people can access justice.

In the context of taxation, the principle would be to look at tax take with regard to the resources that we are seeking to generate and what we want to spend those resources on, and to ask how fair that expenditure process is and how transparent and accountable the systems are, with regard to people understanding what is happening. We have talked about certainty, rationale and transparency and about how people can understand what they are being asked to contribute to and, crucially, why. We need to have a clear system for people to make appeals. That system must be affordable and accessible, and people must be aware of it so that they can effectively access their rights.

I am not recommending a specific system. What I am saying is that there are principles that you can work from in any aspect of Government policy. Given that you have established a national human rights institution, our country is constitutionally signed up to endorsing the international treaties that the UK as a state has signed up to, so we have an obligation to bring those matters in to the way that we do business in Scotland.

Willie Coffey: Where do you think that we will stand with all this if the UK scraps the Human Rights Act 1998? The situation is not clear at the moment, but that was recently the UK Government's stated intention. In fact, the Prime Minister said that we should withdraw from the European convention on human rights, saying that it "adds nothing" to the prosperity of the country. How are we going to judge or measure any of what we have been talking about if we move away from the human rights legislation altogether?

10:15

Judith Robertson: Our human rights protections will be severely weakened if that happens. Clearly, there will be very little backstop or basis for the principles and decisions that we have signed up to internationally. I cannot emphasise that enough. We did not come by those commitments lightly. They were negotiated internationally and we were part of the negotiations, in many contexts setting the terms of the debate. There was an international political process, to which the UK is committed.

The protections that are provided by the convention and by the Human Rights Act 1998 are strong and important. From the perspective of the Human Rights Commission and many other national human rights institutions, they should be

strengthened, not weakened. We are not fully protected in relation to international human rights standards. We do not have those protections in the UK, and any attempt to weaken them should be resisted and stepped back from. In any setting where that might happen, public authorities in Scotland, including the Parliament and the Government, have a duty to do everything in their power to put in place those protections that they can. That would be the recommendation from the Scottish Human Rights Commission.

The Convener: Members have a couple of supplementary questions to ask. James, you were interested in transparency issues, which have been mentioned a couple of times.

James Kelly (Glasgow) (Lab): I am interested in the points that you have made, including in your written submission, about transparency and public participation.

The decisions that are made around taxation obviously have a big impact on how much tax families and individuals pay, which impacts on their household income. There is also the impact on the levels of budgets and therefore on how much we are able to invest and spend on communities.

Much of the discussion that we have had this morning has been quite technical, and there is a big issue around people on the ground being able to interact with that. What can be done by way of more transparency to make more information available, and in a more understandable format, so that people can participate in decisions on taxation, taking into account how they will impact on their lives?

Judith Robertson: I think we could all have a view on that question. From a human rights perspective, we have a duty to provide information in a way that is accessible to all people in our society, that does not discriminate and that supports people's access to that information. We have a responsibility to do that, in order to ensure that people can participate in decision making and can contribute to thinking about and analysing why decisions might be made. There are many things that we can do to engage all sorts of non-governmental organisations and community organisations in a conversation around the principles of our tax system or indeed any other system of policy or revenue. That relates to the whys, to the principles and the underpinning, and to what the money is going to be spent on. That, internationally, is what enables citizens to sign up to systems in which Government revenue is raised by a system of taxation. In those systems, the population's investment in Government processes is much greater than it is in systems in which finances come directly through natural resource revenue or some other means. From a human

rights perspective, that dynamic of a citizen's contract with the state and of their investment in the state as an effective delivery vehicle is a fundamental dynamic, so those processes of engagement and participation are crucial.

I can describe some specific examples of that. There are very good examples internationally and domestically, in England and Scotland. In Scotland, through the community empowerment legislation, budget has been allocated to a participatory budgeting process and we have made decisions to empower communities to participate in deciding the ways in which to spend that budget. That is a good example of enabling participation. How we monitor that participation and its degree, quality and effectiveness has resource implications that need to be dealt with in decision making.

There are myriad examples of good practice. Any NGO that is working with people who are vulnerable or have issues with receiving, understanding and communicating information will have plenty of good practice in communicating difficult concepts. The concepts are not fundamentally that difficult, because people understand the idea of making a contribution and getting something back from that contribution, it is just that we make the process very complicated—apparently, our tax book is massive.

It may be that one of the lessons of the principles of a human rights approach is to simplify the process so that people—all of us—can fundamentally understand it and we can predict outcomes of decisions much more easily because the complexity is reduced.

Sandra Eden: I just want to add one thing to support what Judith Robertson has said. There is evidence to show that the degree of trust—to use the word loosely—in the Government is directly correlated with voluntary tax compliance. In other words, the more that people believe that you are doing a good job and spending the money properly, the more likely you are to get people to pay tax without having to twist their arms.

The other thing to consider—although the economists do not like it—is having something that is very visible, such as hypothecated taxes where you raise a particular amount of money and commit that to a particular budget. The Liberal Democrats have talked about that approach. The economists say that such taxes are bad because you should spend the money where it is best spent, rather than committing yourselves in advance to spending a particular portion of money in a particular way. However, increasing visibility might mean saying that an extra penny is going to go into cat and dog homes, for example, which is an easy way to help people understand where their taxes are going.

As I said, that approach is not regarded by economists as being particularly good, but economists do not know everything.

Susannah Simpson: I agree, particularly with the point about hypothecated taxes. We have a great opportunity in Scotland to start from scratch without a huge bulk of legislation behind us. We have already set out the Scottish Government principles behind taxation and that is very helpful. As Judith Robertson has said, keeping those principles simple can drive behavioural movements of those impacted by the tax.

On the point about hypothecated taxes I agree that ring fencing the receipts that come out of those taxes and similar proposals—we have gone down that route with the soft drinks levy—makes the direction of the Government policy very clear and therefore means that it has the intended effect on behaviours.

Adam Tomkins (Glasgow) (Con): I have a supplementary question that arises from the exchange between Judith Robertson and Willie Coffey. Judith, you answered the question about enforcement in a way that you described as being generic rather than specific and I would like to drill down into the detail.

Human rights law enforcement is not generic, is it? It is quite specific and particular, in that effective judicial protection of human rights is itself a human right. That has been the case in the jurisprudence of the European Court of Justice for decades and is also what we see in article 13 of the European convention on human rights. I assume that you would agree with that?

Judith Robertson: Yes.

Adam Tomkins: Is it therefore your position that, for any putative human rights approach to taxation or social security—as you mentioned earlier—to be truly human rights-based, it would have to include a right to effective judicial protection?

Judith Robertson: Ultimately, yes—absolutely. However, there are a number of things to consider. A judicial approach gives the final backstop of protection but that is in many respects the last place that you would want people to end up. Ultimately, one of the intentions of the human rights approach is to influence and affect all policy so that we do not have to rely simply on a judicial backstop; it is about a process that enables consideration, reflection and review.

One thing that impacts internationally is full incorporation of the UN Convention on the Rights of the Child, which basically means that the convention is enshrined in domestic law—currently, that is not the case in Scotland or the UK. The approach is about having that impact on

all policy. It is not just the judicial backstop that is fundamental; it is the up-front process that changes how policy is made and what policies are put in place.

Potentially, the threat of a judicial backstop is one of the things that drives that change. That is a legitimate process. However, one of the reasons why that fundamental element was put in place is the same reason why human rights law was put in place in the first place: there was a recognition that states could abuse their power, to the vast detriment of their populations. Putting in place a protection that gives citizens the fundamental right to hold their state to account via judicial process is a really important principle of human rights law. For me, that is the last recourse that we would be looking for, but having that ability in place is powerful. It sends a powerful message to the citizen that the state will be held responsible for its actions.

Adam Tomkins: Not only is it powerful, it is essential if you are serious about having a human rights approach to either taxation or social security.

Judith Robertson: Yes.

The Convener: Susannah Simpson, I am conscious of the time—it is 10:26. Do you want to make good your exit at this stage before we get into the next set of questions?

Susannah Simpson: Yes—thank you.

Ash Denham (Edinburgh Eastern) (SNP): Judith Robertson, in your submission, you say that a state should

“take strong measures to combat tax abuse”

and that if it does not, it is not fully realising

“economic, social and cultural rights”

and so on. You also make the point in your submission that tax abuse is not a victimless crime. The most recent estimate that I could find of the tax gap in the UK was for 2014, when it was £120 billion. Most of the enforcement powers are held at UK Government level but clearly the tax gap has an effect on Scottish Government public finances. Do you see a link between the UK Government’s failure to close that tax gap and Scottish human rights?

Judith Robertson: Now that you come to mention it, yes.

Coming back again to the human rights principle of transparency and accountability, I think that the gap between the expected revenue generation and the actual revenue generation will mean that it is harder for any Government, including the Scottish Government, to put in place policies—in health, social care, education and so on—that

deliver people’s rights on the ground, which is, ultimately, where we want to get to and is what the human rights framework is intended to do.

The tax gap potentially removes resources. That is a global phenomenon—I am not saying that in defence of the UK Government, because, clearly, the UK Government is one of the international drivers of some of the processes that enable tax avoidance. However, domestically, it removes potential revenue that public authorities could spend, and therefore limits the capacity of those authorities to deliver people’s rights. There is a direct correlation. In the context of a Scottish approach to taxation, ensuring that Scottish taxes are paid, monitored and adequately collected, and then ensuring that those responsible for the expenditure are held to account, is an integral part of the process.

Ash Denham: I guess that a bit of a dichotomy is developing between Scotland and the UK Government on tax. If we use the tax gap as an example, we see that Scotland is taking a more rights-based approach; the UK is taking a different approach. Furthermore, we know about the secrecy jurisdictions in London and so on. Is it possible for two different approaches to work and be compatible within one island?

10:30

Judith Robertson: Yes. That is absolutely possible, but it is not without its challenges. The Scottish Parliament and Government are having a conversation about whether there should be a Scottish approach to taxation. Ultimately, there will be a Scottish approach, no matter what, and Parliament will make a decision about that process.

The Scottish Government and the Parliament could make a decision that advances people’s rights, making possible—as it is called under economic, social and culture rights—progressive realisation. There is also the potential to do something that goes in the other direction. Clearly, it is a political decision, but we advocate that Scotland go in a progressive direction. As I say, it is possible to be different—it has been achieved in many other policy areas and I see no reason why it cannot be done on taxation.

The Convener: I turn to Patrick Harvie. I am sorry that I did not bring you in earlier. I know that you had signalled your interest in this area, but I was trying to make sure that everyone else in the room was getting involved in the conversation.

Patrick Harvie: That is fine. First of all, I will pick up on the enforcement angle. Will you help me to understand the extent to which citizens can take action on human rights grounds against Government fiscal decisions? Clearly, there has

been some success in doing that on welfare issues. For example, when people were, in effect required under threat of sanctions to work without pay, a series of successful court cases were raised against the UK Government on that policy. If that level of human rights argument can be brought to a court on welfare policy, is it possible to bring it to a court in relation to a Government decision about taxation?

Judith Robertson: To be honest, I cannot fully answer that question. It is a good question: I can go and do a bit of research and maybe come back to you with a specific answer.

Patrick Harvie: That would be helpful.

Judith Robertson: I agree that there is no reason in principle why an action on taxation could not be brought to court, although the route might be indirect and the case might be quite hard to argue. It might be easier to make a case with a hypothecated tax, in respect of which a direct correlation is made between the money that is raised and what it is spent on, so you would be looking to identify the human rights impact of that policy. There might also be relevant cases on the right to property and the right to ownership, but I do not know whether those arguments have been used to challenge a taxation decision. There might be domestic or international instances of that being done, but I am not aware of them.

Patrick Harvie: I am not aware of attempts in the UK to do that—hence my question about whether it would be possible.

Sandra Eden: There have been cases both on property and on the right to human life. In fact, one of the UK cases went to the grand chamber of the European Court of Human Rights. It was about two elderly sisters who were trying to claim inheritance tax relief when one of them died.

The answer is that challenges to the court have been a relatively weak tool because of the large margin that the European Court of Human Rights has given national jurisdictions to impose tax. Cases on quite unusual matters have been successful—long delays or retrospective taxation—but, on the whole, countries can design their own tax system.

Patrick Harvie: In trying to move to a situation in which citizens' ability to exercise those rights and to challenge Government decisions on tax is made stronger, is part of the complexity due to the fact that tax decisions are taken by the UK Government, the Scottish Government and local government? For example, to whom would a person who argues that their cumulative tax burden, including council tax, which is set at local level, is higher than that of someone who is much wealthier, and that that tax burden overall deprives

them of the ability to exercise or to access their human rights, bring that challenge?

Judith Robertson: The person might want to do that under equalities legislation, because they would be being discriminated against because of the cumulative impact of policy, whether it is taxation policy, welfare reform or whatever. The SHRC is advocating the approach that the way to really understand the impact of policy is to do a cumulative impact assessment.

At the moment, because it is principally civil and political rights that are explicitly protected—for example, under the Human Rights Act 1998—there is limited protection of economic, social and cultural rights. We are advocating that the Scottish Government, the Scottish Parliament and, indeed, the UK Government incorporate those rights in order that such questions can more adequately be explored.

Patrick Harvie: The Scottish ministers are unable to take actions that breach people's human rights. It is not just that Parliament cannot pass legislation that does so; ministers cannot act except in compliance with human rights. That is not true, as far as I understand it, of UK ministers' actions. I do not know whether it is true of local councils in making their tax decisions.

Adam Tomkins: That is true of UK ministers. I am sorry, but neither UK ministers nor local authorities in England, Wales or any other part of the United Kingdom are lawfully able to breach people's human rights. That is under section 6 of the Human Rights Act 1998.

Patrick Harvie: Thank you. I am grateful to the witness. *[Laughter.]*

Judith Robertson: As am I.

Adam Tomkins: Excuse me.

Patrick Harvie: I am trying to get a sense of where the challenge would be directed if the tax decisions that affect a person's human rights are the result of more than one level of government.

Judith Robertson: I am not a lawyer—forgive me. We can get the answer to that from the lawyers. I think that when there is a court process, the decision maker is the one that is impacted, wherever the decision is made. I think that such a challenge would have to be brought through the Scottish national court process.

Patrick Harvie: I also want to ask about basic principles and to see whether I understand the general thrust of the SHRC's paper. The principles that the Scottish Government proposes for taxation policy are largely about the direct fiscal impacts: taxation policy should

"Be proportionate to the ability to pay ... Provide certainty to the taxpayer ... Provide convenience/ease of payment, and ... Be efficient."

Those principles are about individual taxpayers and how they are directly affected by tax policy.

It seems to me that you are arguing three things about those basic principles. I would be grateful for your view on whether I understand it correctly. You seem to be arguing, first, that there should be a principle of sufficiency: tax policy must raise sufficient revenue to meet public need in respect of providing for people's human rights and ensuring that they are not breached. Secondly, the indirect effects of tax policy on people's human rights should be included as a principle. The effects of tax policy, and not just the operation of it, need to be human rights compliant. Thirdly, you say that there should be a principle of accountability. Is that broadly correct? Are you saying that the Scottish Government should specify those in its principles of tax policy?

Judith Robertson: Broadly, that is correct. Article 2 of the International Covenant on Economic, Social and Cultural Rights in effect demands that

"Each State Party ... undertakes ... steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources".

It demands that they seek to maximise those available resources as well, in order to achieve people's economic, social and cultural rights.

That is just one treaty. We have signed up to many treaties in which reference to the process of raising the revenue to do the work that the treaty demands is highlighted and made public. We have an absolute commitment and duty to deliver against those recommendations in order to achieve progressively the full realisations of rights that are recognised in the covenant. That is the fundamental underlying principle of any tax system, and we should be seeking to achieve that. It is important to make transparent and accountable connections between the revenue that is being raised, what the money is being spent on and what we are seeking to achieve with that money. Taxation is a means to an end; it is not an end in itself. Enabling people to better understand the end achieves more than just investment in contributing to it.

In the public narrative in the UK, we have a pretty toxic relationship with taxation. In other countries around the world, the relationship to taxation is valued very differently: people are proud to contribute and they value and are open about it. In some Scandinavian countries, information about people's entire tax contribution is published and made public, whereas we have a very closed attitude to and relationship with

taxation. We have the opportunity to change that in Scotland, and one way to do that is to be transparent, accountable and explicit about our intention.

The principles that Patrick Harvie outlined are good, but they are not sufficient to achieve what I just described, which we have an opportunity to achieve. We have a duty—that is key—to bring a rights-based approach to the issue, but that approach would also provide a legitimate framework within which we can start to communicate much more clearly to citizens about tax issues. If we considered all relevant Government policy—frankly, that would be most Government policy—in that framework, the conversation would start to resonate and have a different meaning for people; there would be a different conversation about the relationship between taxation and expenditure.

Patrick Harvie: Some of that relates to Sandra Eden's earlier comment about the research that demonstrates a link between the level of trust in government and voluntary tax compliance. I would find it invaluable to get a reference to that research, if it is available.

Sandra Eden: There appears to be a correlation. I am not saying that it is necessarily a causative correlation, but there is a correlation.

Patrick Harvie: It would be really interesting to see the research.

Sandra Eden: It was old European Union stuff from before enlargement. I can dig it out for you.

Patrick Harvie: That would be helpful. Thank you.

Murdo Fraser: I have a follow-up question to Patrick Harvie's first line of questioning on taxation and human rights. Is there a level of taxation that would be deemed to be a breach of human rights? If the Government set a confiscatory tax rate of 98 or even 100 per cent, could that be challenged under human rights as a breach of the right to property, for example?

Judith Robertson: It probably could be challenged, but whether it would survive the challenge would depend on the rationale for setting the rate. The rationale might be something to do with how the money was generated, so there could be extenuating circumstances.

Human rights law gives us the opportunity to have the conversation or debate about whether such a rate is proportionate, whether it contributes to progressive realisation, and whether it is justifiable from a rights perspective. Clearly, for Murdo Fraser's example, I cannot make that assessment, but human rights law gives us the space to look at the balance of rights and the reasons and rationale for the decisions that are

being made. It also allows us to have the conversation up front—before a decision is made—about whether it is justifiable in human rights terms to take that action in that setting and for that reason.

Maree Todd: I have a quick supplementary question that is slightly off-topic. I was very interested when you were discussing the possibility of whether the UK Government could act against individuals' human rights. I immediately thought of when the United Nations declared that the welfare reform of the bedroom tax was a systemic violation of the rights of disabled people. I know that it was challenged in the High Court. Is it being appealed in the Supreme Court? Has that process worked right the way through yet? Many people consider that to have been a breach of the rights of disabled people, but it is still policy, is it not?

10:45

Judith Robertson: It is. No changes have been made to that policy on the basis of interventions from either the UN or, as far as I am aware, the courts.

Maree Todd: So Government can act against people's human rights.

Judith Robertson: Oh, yes—absolutely.

Sandra Eden: Technically, the bedroom tax is not a tax.

Maree Todd: I know. That is why I said the question was slightly off-topic. It has been called the bedroom tax, but it was actually a welfare reform. Thank you.

Liam Kerr: I will quickly go back to incorporation, if I may. You talked at some length about the importance of transparency in how we spend the money from tax, and you said that people should understand that. Can we extrapolate from that that there ought to be similar transparency in how we raise tax from people, in order to ensure that everyone can make an informed and unfettered choice about what vehicle is most appropriate for their circumstances, be it employment, self-employment or incorporation?

Judith Robertson: Absolutely. I am not a tax expert, but in listening to the conversation it struck me that we have a lack of certainty, and a context in which there are lots of grey areas. That does not enhance transparency or accountability, and it is really difficult to challenge either individuals or organisations on their decisions because there is so much uncertainty. Regardless of where people are in the system, the ability to make that system clear, explicit and transparent is a key principle.

Sandra Eden: The first thing to say is that similar people should be taxed in similar ways—there should be horizontal equity.

Judith Robertson: The principle of equality and non-discrimination in processes should apply to the structure of the taxation system. The recommendation from many international UN experts is that progressive taxation systems lead to better human rights outcomes because they take less from those who have less. Those who can afford to contribute more do so, and those who can afford to contribute less do so. The cumulative impact of the tax burden that Patrick Harvie mentioned, be it through indirect taxes such as VAT or direct taxation, is an important outcome and an important indicator of the direct human rights impact.

Sandra Eden: The UK tax system overall is mildly regressive when we take into account consumption taxes. When we look at the top 20 per cent and the bottom 20 per cent, we see that it is mildly regressive, overall.

The Convener: I think we have reached the natural end of this evidence session. I thank our witnesses very much for coming along this morning and contributing to our deliberations.

At the start of the meeting, we agreed to take item 3 in private. I therefore now close the public part of the meeting.

10:48

Meeting continued in private until 10:54.

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