OFFICIAL REPORT
AITHISG OIFIGEIL

Economy, Energy and Fair Work Committee

Tuesday 23 October 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 23 October 2018

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ECONOMY, ENERGY AND FAIR WORK COMMITTEE
28th Meeting 2018, Session 5

CONVENER

*Gordon Lindhurst (Lothian) (Con)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)
*Colin Beattie (Midlothian North and Musselburgh) (SNP)
*Angela Constance (Almond Valley) (SNP)
*Jamie Halcro Johnston (Highlands and Islands) (Con)
*Dean Lockhart (Mid Scotland and Fife) (Con)
*Gordon MacDonald (Edinburgh Pentlands) (SNP)
*Andy Wightman (Lothian) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Gordon Dalyell (Association of Personal Injury Lawyers)
Simon Di Rollo QC (Faculty of Advocates)
Nicholas Gubbins (Community Energy Scotland)
Patrick McGuire (Thompsons Solicitors)
Gail Scholes (Robin Hood Energy)
Peter Speirs (Scottish Renewables)
Alister Steele (Our Power Energy Supply)
Professor Victoria Wass (Cardiff Business School)

CLERK TO THE COMMITTEE

Alison Walker

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Economy, Energy and Fair Work Committee

Tuesday 23 October 2018

[The Convener opened the meeting at 09:48]

Decision on Taking Business in Private

The Convener (Gordon Lindhurst): Good morning and welcome to the 28th meeting in 2018 of the Economy, Energy and Fair Work Committee. I ask everyone to switch any electrical devices to silent.

The first item on the agenda is a decision on whether to take items 4, 5, 6 and 7 in private. Do members agree to take those items in private?

Members *indicated agreement.*

Publicly Owned Energy Company

09:49

The Convener: We now continue our consideration of the possibility of a publicly owned energy company. I welcome our four witnesses: Peter Speirs, public affairs manager, Scottish Renewables; Alister Steele, chair, Our Power Energy Supply; Gail Scholes, chief executive officer, Robin Hood Energy; and Nicholas Gubbins, chief executive, Community Energy Scotland. Thank you for coming to the committee today.

Andy Wightman (Lothian) (Green): On one level, the whole concept of a publicly owned energy company seems to have been plucked out of thin air, with no one really knowing what the point of it is or why we would do it. Is there anything intrinsic in having an energy company that is owned by the public that would provide benefits for Scotland and its energy supply, generation and use?

The Convener: Witnesses can wave their hand to indicate that they wish to answer a question. The microphones are operated by the sound desk, so there is no need to press any buttons. Who would like to start?

Nicholas Gubbins (Community Energy Scotland): Community Energy Scotland finds it striking how undemocratic the energy system in the United Kingdom is. Given the way in which things are changing, for example through the roll-out of smart technologies, there is a huge opportunity for the system to become much more democratised. That would be a good thing because there would be a much higher level of engagement and so on. It is difficult to see that happening through the existing set-up of very large, privately controlled companies with limited or low levels of democratic accountability. That is our perspective from the point of view of the democratisation of the energy system.

Peter Speirs (Scottish Renewables): From our perspective, we would view the publicly owned energy company less as a company and more as an agency—or certainly as having the potential to act as an agency, rather than being a company in a narrow sense. For us, it presents an opportunity for us to behave a bit more like countries such as Denmark or Sweden and to have embedded within the Government an organisation that is committed to ensuring maximum renewable generation and supply. We would view it more as an agency, rather than just as a company.

Gail Scholes (Robin Hood Energy): Robin Hood Energy is a publicly owned organisation that has now been trading for three years. We were set

up publicly owned and not for profit. We are completely transparent and accountable for being an energy supplier.

We have been able to join up on lots of other strategies, in particular the climate change strategy and the fuel poverty strategy. With 183,000 households in extreme fuel poverty in Scotland, the publicly owned organisation provides a real way into connecting with communities and with other publicly owned or governed agencies, such as Citizens Advice. There are lots of agencies that it is possible to connect up with.

We now have more than 200,000 meter supply points. For the sticky customers and the customers who have never switched and who are on the most expensive tariffs, this model provides a really good way into that customer group and a good way to operate at community level.

Alister Steele (Our Power Energy Supply): Our Power was set up by Scottish housing providers, so our model is that of a community benefit society. We are owned and controlled by our member organisations. From the supply side and from the perspective of the company entering the supply market, the publicly owned energy company has to be clear about what it is trying to achieve. If the market is not working and you are looking to intervene in the market, is having a company enter into that market the right thing to do, or are there other ways in which you could intervene to address the problems that you have identified?

From the point of view of an energy supply company such as Our Power, the marketplace is dynamic and competitive just now, and there are a lot of risks for a company entering that marketplace. I question whether having a new publicly owned energy company is the right thing for Government to be doing just now.

On the broader system, including the areas of generation, the networks, distribution and the supply side, the issue is how the supply chain works and whether anybody in that supply chain is being disadvantaged. Parts of the country certainly are, as the transmission and distribution charges for electricity are higher in the north of Scotland than they are in the south of Scotland. People in an area that is off the gas supply are paying more for their electricity than people in other areas, and that is a major contributor to fuel poverty. On such issues, which concern the wider system, whether the body is an agency or a company is a moot point. I think that if it is more of an agency—rather than being a company that is set up to enter into the market directly—it could begin to address those issues.

Andy Wightman: That is very useful. It seems that we are starting with what we have been given, which is the proposition that there shall be a publicly owned energy company. We are not starting by asking how we tackle fuel poverty, support community energy and so on.

I agree with Nicholas Gubbins that the energy industry is very undemocratic. One way to democratise the energy sector would be to have many more municipal energy companies and social enterprises. Could you comment on that?

Peter Speirs represents some publicly owned energy companies. For example, Vattenfall, which is a member of Scottish Renewables, is a publicly owned energy company. Essentially, you are saying that you do not see the Scottish publicly owned energy company as a Scottish Vattenfall; you see it as being like the Danish energy agency. Could you clarify your position on that?

Is Robin Hood a social enterprise, or is it a company with no share capital? Could you talk about some of the governance issues around Robin Hood?

Peter Speirs: We see the company as something that could act as both. If the Scottish Government wants to proceed with the company acting as a supplier and behaving much like Vattenfall, it could do that. For us, however, the greatest opportunity lies with it acting in a more agency-like manner. It could be both, but the agenda that we are trying to push is for the company, if it does behave as a supplier, also to act within government in a broader sense.

Gail Scholes: Nottingham City Council owns Robin Hood Energy, and it is the only shareholder; the company is 100 per cent owned by the city council. We also have nine white-label organisations, which we set up in their own right. They include the Liverpool Energy Community Company—LECCY—RAM Energy, Your Energy Sussex and Ebico. Ebico has a charitable trust set-up as part of its arrangements. Robin Hood Energy is 100 per cent owned by Nottingham City Council.

Andy Wightman: So it is a municipal energy company, conventionally speaking.

Gail Scholes: Yes.

Nicholas Gubbins: The question from Andy Wightman was about the democratic nature of municipal energy companies, the potential for many more social enterprises and so on. It is almost as if we need to move to a position where the consumer is highly informed and, ideally, engaged. Mechanisms that engage the consumer much more in the sources and use of the power that they are receiving are very important to us. The question then is: what is the best way of doing that? In our view, the more local things are and the more of an ownership stake the consumers

have—we prefer the term “citizens”—the better the whole system will be.

We see tremendous scope to increase that engagement, whether through a hierarchy of organisations—a bit like how Gail Scholes has described—or through larger-scale municipal set-ups. We are entirely open on what form it might take, as long as there are much greater opportunities for engaging citizens in how the system is run, which is critical for us.

It is clear that economies of scale are central to the financially viable operation of any energy supply company. That has to be a massive factor in how a supply company would operate.

The Convener: We are slightly constrained for time this morning. I would like to move on to Colin Beattie now.

10:00

Colin Beattie (Midlothian North and Musselburgh) (SNP): Could I ask you a simple question on a matter that you have been bouncing around? Should the proposed company be involved directly in the supply of energy, or should it be taking a much more strategic role?

Peter Speirs: From our perspective, the opportunity that lies with this whole endeavour is less to do with direct supply, where the margins are quite small and where the market is relatively crowded; it lies more in ensuring that the Scottish Government and the UK Government can achieve their ambitious renewables and climate change targets.

One proposal is for the company to aggregate public sector demand and ensure that energy is purchased directly from renewable sources. That could be done either through Government-owned generation or through direct power purchase agreements—PPAs—with existing companies. The existing companies have a pretty good track record of achieving scale and reliability.

We have 69 per cent of Scotland’s electricity being generated through renewable sources already. If the Scottish Government could aggregate that demand and enter into PPAs, particularly with onshore wind, which is currently locked out of the contract for difference mechanism by the UK Government, that could at least provide a bridge to a future CFD decision or to high-level bespoke additional capacity over and above what would be provided by CFD.

There is an opportunity for the company to directly involve itself or to directly support generation at both large and small scale. The changes to the feed-in tariff that have been proposed by the UK Government provide an opportunity to support community-level generation, which could in some way replicate the success of the feed-in tariff in Scotland.

Colin Beattie: It seems to me that you are proposing something that is fairly limited in scope for the proposed company. You are talking about the consolidation of public sector purchasing capability, so that simply by bringing it all together, you can negotiate a better price. Is that really the role that the company should have?

Peter Speirs: That is a role that the company definitely could have. If it was directly involved in supply, you could add the demand for its supply to public sector demand and end up with a substantial amount of demand for both electricity and heat.

Colin Beattie: That might give slightly cheaper power to the public sector, but it would not alleviate fuel poverty or anything like that. It would not have a significant impact on that, yet that is part of the purpose of the company.

Peter Speirs: Onshore wind is the cheapest form of new electricity generation. Offshore wind and photovoltaic solar power are also very low cost. There is a direct relationship between the cost of generation and the end bill. There would certainly be a downward effect on bills for consumers, both for the Government and for individual consumers.

Alister Steele: We said in our submission that we did not think that the publicly owned energy company should be directly involved in supply. In considering what such a company could add to the market, we can see that there is now an active switching market for consumers who are engaged, who pay by direct debit and who manage their energy online. If the company is being set up specifically to deal with people who are disadvantaged within the energy market, particularly those in fuel poverty, we know about that from our experience.

Our Power was set up specifically with that aim in mind. We entered the market with one tariff for all customers no matter whether they were paying by prepayment, by direct debit or on receipt of a bill, and we embraced the warm home discount from day 1. Although we took on all those things, it is difficult to get people who are not engaged in the energy sector to switch. I do not see evidence from the work that has been done to date for the idea that a new company could come into the market and begin to make a big impact on fuel poverty, because accessing that body of consumers who are disengaged is very difficult.

In the next few years, the energy market will go through huge change. It will move away from suppliers charging people in kilowatt hours to a much more holistic energy services model in which people in a home are generating power

because they have solar panels on the roof and there is storage in the home. How the energy market works and how companies deal with consumers will be different in 10 years' time. The people who are disadvantaged in the current market will be even more disadvantaged in the future market, so the challenge will be to ensure that nobody is left behind in that energy transition.

If an agency or company is to be set up, it should look at the change that will happen in the energy sector and how we ensure that Scotland benefits from that change and that nobody is left behind. Part of that will be about what local authorities do, because they will have a role to play in that regard.

To answer your question, I do not think that a publicly owned energy company should be involved directly in the supply side.

The Convener: Gail Scholes wants to comment. We will then move to questions from Gordon MacDonald.

Gail Scholes: I agree that the company should not be involved directly in supply, but it is right to say that everything needs to be joined up. If we do not join up everything, we will be missing a trick, given the amount of new homes, electric charging points and battery storage that have to be built and the need to link all that up to renewable tariffs. The market will definitely change, and thought and vision are needed to bring that all together. I strongly believe that that should be the role of a publicly owned body.

Local authorities generally work at city and region level. They bring together all the climate change objectives, the fuel poverty goals and the roll-out of renewables. They are also the planning authority, and they are generally linked to new housing developments. Their role can be significant, if you get the model right. You could do both aspects by entering into something like a white-label arrangement initially, while still having those really close ties to local authorities that are connected into that model.

Gordon MacDonald (Edinburgh Pentlands) (SNP): On supporting the growth of community and local energy generation, is there scope for a publicly owned energy company to support small community-owned generators through power purchase agreements?

Nicholas Gubbins: The big issue right now is that the wave of community-owned generation projects has passed. The financials largely just do not make them viable. That relates to the point that many community-owned generation projects involve a great deal of voluntary effort, so they have to be very worth while to justify the huge amount of effort that goes into making them happen.

Could an energy supply company, even a publicly owned energy supply company, make a difference through how it offers PPAs, in order to facilitate and make new generation happen? We have thought through several possible models. The key is to have the combination of capital up front and a revenue stream that enables a project to be financed.

To be absolutely honest, we cannot, for various legal reasons, see how a public energy supply company could make much difference. Such a company would not be able to offer much better PPAs than the market can currently offer. It could offer a different way to structure finances, but any other energy supply company could offer that, too. For example, there could be scope for up-front investment in community energy projects and then having discounted supply—in other words, the community project would discount its supply to the supplier through a PPA, for example, over a period of years. That would give the supplier long-term security of supply, which is critical with current wholesale-market variations, and it would give the community generator a potentially viable financial framework to make it all worth while.

However, I repeat that suppliers that are interested in that model could do it now. I am not sure how much difference a publicly owned body would make, other than—

Gordon MacDonald: You mentioned that the financials have changed. What has changed? Is it the UK Government's announcement that feed-in tariffs are changing, or is it something else?

Nicholas Gubbins: The feed-in tariff has been going down significantly, and no longer exists for significant onshore wind projects. Removal of the export tariff, which is highly likely to happen from the end of March next year, pretty much signals the end of support for relatively small projects.

There has been a great deal of talk about subsidy-free renewables, which might be feasible at a very large scale, but that will not work for small projects that do not have the advantage of economies of scale. The only way through that problem that we can see is for there to be much more collective large-scale development, which could be linked to municipal development or could happen through large-scale engagement among lots of community groups throughout Scotland that wish to take forward projects. Economies of scale are needed to make the financials in any way viable.

Peter Speirs: The points that Nicholas Gubbins makes are accurate, but the difference that a publicly owned energy company could make would be through the political will to establish it. The Scottish Government's energy strategy notes the benefits of community decentralised

generation that come from the energy being generated closer to where it is required and from ensuring that the system is more flexible. The direction of travel of the Scottish energy system is towards that increasingly decentralised model.

The financials might be difficult from a private sector perspective, but the Scottish Government recognises the advantages and sees them as being increasingly important, so the political will could exist to provide the support that is required for community-level generation.

Gordon MacDonald: Grid connections are obviously needed for community generation; it has been suggested that a new company should focus on areas where there are grid constraints. What difference could such a company make in relation to those grid constraints?

10:15

Nicholas Gubbins: The key to overcoming grid constraints that mean that a new project could not connect to the system is maximisation of use of the various innovative measures that are starting to appear and with which CES has been closely involved. Areas in which there is high-level constraint create real opportunities for using power in different ways. For example, rather than simply connecting new power to the grid, it could be used as a substitute for heating oil, or for fossil-fuel use in transport. The key is to have the will to explore, pilot and test the ways in which power can be linked directly, with the existing infrastructure, to local use.

For example, when a new generator plant comes on it must be known with certainty that the power that it pumps out is saleable and will be used. Currently, in constrained areas new plants cannot know that: they might at best get what is called a non-firm connection or, at worst, get no connection. A body of demand is needed locally—new demand that can be switched on to take the power when it is generated.

That has been proved to be technically feasible; it is a question of will to invest in local energy systems to make it happen and to create financially viable models that will elicit new generation schemes that are targeted specifically at new local demands. At the moment, that is happening only in a very small way, but there is tremendous scope to increase it, particularly in the constrained areas, which would unlock the still potentially very significant renewable energy generation in such areas.

Alister Steele: Our Power has a number of PPAs with community generators, and the market is very active. People tend to go out to the market annually, depending on how long the agreement is for, and almost retender. There is a PPA market that is working, so care needs to be taken when intervening in it. If the Scottish Government comes in with a different offer on PPAs, how will that impact on the current market? There is a danger that that could push up costs.

Jackie Baillie (Dumbarton) (Lab): Gail Scholes touched on the plethora of initiatives that are designed to tackle problems in the energy market. We could reel off a list; I understand that there are at least 36 schemes. I am curious to know whether the rest of the panel thinks that a publicly owned energy company would simplify things or add more complexity to the process. I will start with Peter Speirs.

Peter Speirs: Thank you, Jackie, that is kind of you. [*Laughter*.]

The proposals are still at an embryonic stage; what will happen entirely depends on what the Government wants and how active the company would be. Would such a company have the opportunity to take on the schemes that you mentioned, and to consolidate and improve on them?

An obvious example is heat policy. The local heat and energy efficiency strategy—LHEES—scheme has been proposed. We are concerned that the Scottish Government's proposals on renewable heat have been a bit watered down. The biggest issue is the lack of a pipeline of activity for companies and the industry to engage in, in the long term. There is the opportunity for a publicly owned energy company to assist local authorities in their LHEES work and to build on that work. That approach could consolidate and improve on an intervention that currently exists. If it were simply to result in a 37th intervention, that would not necessarily simplify things, but a system-wide approach could be taken to consolidate and improve on what exists. The opportunity is there; what happens depends on the precise proposal.

Alister Steele: A publicly owned company would have to be able to simplify the system or there would be no point in having it. If it just went into the market and added another layer of complexity, it would fail in what it was trying to do.

Given how the market is structured just now, it will be difficult to simplify it. There is quite a complex supply chain, within which a number of profit centres work. There is a UK-wide regulatory regime and, as we heard, distribution and transmission costs need to be tackled. Those costs were developed for another era, when there was centralised power generation. They do not reflect how energy is generated now.

Big things like that need to be challenged, but they are more at UK level than at Scotland level. The issue is the ability of a Scottish public energy

company to intervene to make the changes that are needed.

Jackie Baillie: We heard Gail Scholes's view in response to an earlier question. Does Nicholas Gubbins have a view?

Nicholas Gubbins: I struggle to see how a publicly owned supply company would add value. Because of how the market operates at the moment, it is almost a contradiction to say that we could have a publicly owned supply company. It is a question of what other useful things could be done: there are other things out there. At the moment, they are dealt with by different bits of the Scottish Government, its ancillary bodies and agencies, and although the system generally works, it could work a lot better if all the bits and pieces were brought together and co-ordinated. There would be merit in that.

Jackie Baillie: Whatever form that publicly owned energy company takes, should it be independent of Government? Is there a way of doing it such that it could act as a policy adviser, or would it, by merit of its being publicly owned, have to sit within the Government?

Nicholas Gubbins: If the company was doing everything other than supply, there would be a real advantage in its being publicly owned and governmental, so that it would have the weight and policy influence of a Government body or agency. I do not think that that would apply if it was a supply company; it would have to be independent.

Jackie Baillie: I see Alister Steele nodding.

Alister Steele: Yes. Gail Scholes's example shows that you can have publicly owned energy companies that sit more at local authority level, where there may be reference to a local energy market. However, companies have to operate outwith local authority areas in order to become financially viable, which is one of the contradictions in that model. It is a real issue for the sector.

In many ways, what Nicholas Gubbins has said about a national energy agency is absolutely right, in terms of how the economy is going to develop with smart meters, storage systems and so on. There are Scottish companies that are at the leading edge in developing some of those technologies. It is worth considering how to invest in those companies, so that when the transition happens, it will create jobs in Scotland and become a real driver. There will be opportunities: an energy agency might be able to link investment to employment. On the supply side, however, such companies need to be more local.

John Mason (Glasgow Shettleston) (SNP): Gordon MacDonald touched on community generation. Maybe the new company could amalgamate or be a guaranteed purchaser, but what about the new company actually doing generation itself? Is that feasible? I am not sure whether Our Power Energy Supply or Robin Hood Energy do generation or whether they just buy. If they do not, why not? Is doing that a possibility?

Alister Steele: Our Power buys rather than generates. It was in our initial vision that we would generate our own electricity, but the complexities of running a supply business and the capital that is needed to enter the generation side have precluded our doing that. We would like to have, in the longer term, much more control over the supply chain, but, up to this stage in our development, it has been too difficult a task for us to achieve in the two years for which we have been operating.

A publicly owned energy company entering the generation market would be faced with challenges of other generators in getting a financial model that works, given that there are no feed-in tariffs. The capital investment and the revenue from that investment have to balance, so the question is how to fund that and whether there would be state-aid issues if other companies are generating. We could look at ways of supporting the generation industry, rather than entering it directly.

John Mason: Our Power's submission says that we should perhaps nationalise some existing assets. Were you thinking about the buying of hydro schemes?

Alister Steele: I was thinking more about infrastructure in relation to the grid—investment in interconnectors from the islands and grid constraints on the mainland. If the infrastructure in those areas worked better and had more capacity, that would release a lot of potential elsewhere, including in renewables.

John Mason: Does Gail Scholes want to come in on that?

Gail Scholes: I suppose that nationalisation would be done where it would be financially viable. Robin Hood Energy has turned a profit only this year, and it is a small amount, so we have invested in the warm home discount scheme. We would look to invest in our own generation as soon as we were making greater profit. We would naturally go towards things such as private wire and investing in community energy projects.

John Mason: Is district heating something that you would look at?

Gail Scholes: Yes.

John Mason: I do not know about Nottingham, but in Glasgow district heating is very patchy—there are little bits of provision. Would you think about moving into district heating in a city?

Gail Scholes: Where it would work, yes we would. Nottingham has a fairly large-scale district heating scheme that is run quite successfully and is publicly owned. That is interesting, in itself: the schemes that tend not to work so well are those that are commercially owned, where there are financial constraints around further investment in pipe networks and private wire. Those networks will extend only to where they are financially viable and where there is a sale of the heat network at the end—and that sale is needed almost straight away.

Our approach in Nottingham has been to ensure that the city is well connected. When the tram network was put in, for example, we ensured that there was pipework underneath so that parts of the city could be connected in the future. That is where the model has worked. In answer to the question, I say yes—I think that we would invest in the future if it would be financially viable for us to do so.

John Mason: Perhaps the other two witnesses want to come in at this point. Is there enough generation already, such that there is no space for a company to create new generation?

Peter Speirs: The large-scale work on onshore wind that is already in the planning process could double the capacity of existing onshore wind. With regard to small-scale generation, the industry exists; it just needs support and clarity.

District heat is one area in which the Government could certainly be a first mover. For quite a lot of district heat schemes—in particular where a scheme is the first in its area—the borrowing costs are prohibitive in terms of private sector involvement. An instigator of a district heat network has to do the hard work of getting consumers to want to participate in a district heat system. To have the reasonably low borrowing costs that are associated with Government could make viable the projects that are currently either unviable or on the precipice of being so.

That could certainly be the beginning in a place like Glasgow where provision is piecemeal, because it could enable the industry to establish a pretty significant foothold. The public sector could continue to expand the scheme, or could simply be the first mover and then allow the industry to build on the scheme. There is an opportunity.

John Mason: That was helpful. Thank you.

Nicholas Gubbins: I will make a quick comment. I am sure that both Alister Steele and Gail Scholes—although I do not want to speak for them—would be delighted if there was an incentive that enabled them to invest in acquisition of generation assets, or at least in long-term PPA arrangements with local or Scottish generation assets. Stabilisation of the supply to an energy supplier is vital in avoiding the fluctuations in the wholesale market. That will be a key requirement if we are to see more democratic energy companies surviving.

John Mason: That is great. Thank you very much.

10:30

Angela Constance (Almond Valley) (SNP): I have a general question for the panel and a specific question for Ms Scholes.

I am conscious that a publicly owned energy company in Scotland would not operate in isolation, given that energy regulation and the market operate at a UK level and beyond. Therefore, I am interested in the panel's views on the impact on the energy market here in Scotland, and the potential impact on a publicly owned energy company, of any UK Government decisions about support for renewables and access to the grid.

Alister Steele: We were formed by Scottish housing providers, but we have now moved into the Great Britain market, because we needed such width to enable us to become financially viable. The regulator has recently intervened on price caps, standard variable tariffs and price caps on prepayment meters, which has had a significant impact on suppliers' marketing behaviour, and that was a policy-led initiative by the UK Government. The smart meter timetable, which is a UK regulatory matter, impacts on consumers here, and we have spoken about the removal of feed-in tariffs, which is also a UK-wide issue.

It is unavoidable that a Scottish publicly owned energy company would be influenced by what happens at a UK level, because that is where the energy sector is regulated and it is where a lot of the policy drivers come from.

Gail Scholes: The problem is that the energy industry is quite broken in places. Before we even start with anything new, we need to do a whole load of fixing to ensure that the industry is set up for the next generation. The industry code was designed around six big energy companies, but the market is very different, so there is an awful lot of work to do. A feature of being publicly owned is that we get to do an awful lot of lobbying, of the regulator and of Government, to ensure that some of that is addressed. The Office of Gas and Electricity Markets is not hearing any lobbying from the big six or from some of the other suppliers in the market, because only the very small energy suppliers who are entering the market are really struggling with the industry code, which is blocking progress.

However, a lot is changing. Since we entered the market, we have managed to influence the price cap on prepayment tariffs, which was a change for the greater good.

Nicholas Gubbins: This is a bit of an unusual point, but I got a letter yesterday from Claire Perry, the UK Minister of State for Energy and Clean Growth, which responded to a letter that we sent jointly to the Prime Minister on the state of the UK Government's policy on small-scale community energy development. The minister's letter of response was very nice, but everything that she documented in it about the community energy sector related only to England.

There is an issue about how little visibility Scotland has in the UK Government's energy policy mechanism, and yet Scotland is entirely subject to the UK energy market—Ofgem, the regulator, and so on. There is a disconnect, which needs to be addressed far better than is currently the case.

That illustrates the need for a much more significant measure that would have an impact at a UK level, for as long as we have a UK energy market.

Peter Speirs: The points that have been made are pretty spot on. There will always be limitations, which derive from the powers that we have here in Scotland. The UK Government views Scotland as doing a very good job on renewables—as does most of the world—and I think that its view is that it can take a more hands-off approach. We are trying to change that, but there are just inherent limitations on the work that the company can do.

Angela Constance: My final question is for Ms Scholes. The Scottish Government has announced that its approach to a publicly owned energy company will involve local authorities, either individually or collectively, will be phased and will have a white-label arrangement. Do you endorse that approach? Given your great experience in Nottingham, what is your advice for the Scottish Government as it proceeds, working in partnership with local authorities?

Gail Scholes: I endorse the approach because of the risk in entering the marketplace, as Alister Steele mentioned. Three years ago, the market that we entered was very different. There were 42 small energy companies and now there are more than 70; and commodity prices have risen 60 per cent this year. We have learned that the expertise and industry knowledge required to set up a publicly owned company are not to be underestimated. There is the financial risk of entering the market; some smaller energy suppliers have quickly departed it because of commodity prices.

The starting point is good, as is the transition. Scotland could enter the market more quickly than 2021, as is envisaged at the moment, because if it waits until 2021, it will probably miss smart meter roll-out programmes, and the market will change in the next two years. Entering into a white-label arrangement will take Scotland to the market more quickly and with less risk, but it could still take a longer-term view on what the transition will look like and how the initiative will develop. Starting with a white label and then engaging other parts of Scotland and other partners could work really well for Scotland.

Jamie Halcro Johnston (Highlands and Islands) (Con): I am conscious of time so have a few brief questions. We have talked a lot about reducing prices but supporting community energy and other small-scale energy approaches. Is there a conflict in those two objectives? Without putting considerable subsidy, as well as time and focus, into community energy—which I support—how can we reduce costs?

Peter Speirs: There are clear advantages from community-owned energy but there are cost implications, some of which increase the price and some of which decrease the price. Generation closer to consumers decreases the price of transmitting energy to them, for example, but the picture is reasonably complex. However, the overall advantages of community-owned energy are pretty significant—I know that you are aware of that, so the conflict is perhaps more complicated than your binary description.

Alister Steele: Wholesale energy costs are about 40 per cent of the cost of running such a business, so a rise in those will have a direct impact on prices because they account for such a significant part of what you are doing. If there is a relationship between the two, it is about using community energy to try to bring down some of the other costs in order to avoid price increases, and Peter Speirs's point about transmission and distribution and linking generation to local consumption can make that viable if it can be managed.

Jamie Halcro Johnston: That would rely on a lot more generation happening closer to sites of main usage, such as cities. Is that feasible?

Gail Scholes: Yes.

Nicholas Gubbins: Yes.

Alister Steele: Yes. If there is a publicly owned energy company that tries to join everything up, it may very well be possible. It is important to look at the matter holistically and ensure that local authorities and others invest in renewables both in cities and in remote areas, where there is a lot of generation that bypasses consumers in those areas. A different approach is required in urban

areas than we would want to take in rural areas, but I think it is achievable. The challenge is to make it happen.

Nicholas Gubbins: We typically have a differential of about 10p per kilowatt hour between the wholesale value to a community generator of selling its power to the grid and the retail cost that someone—who may live nearby—will pay for that energy, because it goes off to the grid and comes back again. The hidden issue in that regard is the use of system charges both in the distribution network and in transmission, where a chunk of the cost is. There is a big debate about those charges and what a fair charging rate would be, but we believe that within that there is scope to control some of the cost elements and therefore incentivise local generation and local use. We are not there yet, but that issue is significant in working out the financials that have been alluded to.

Jamie Halcro Johnston: Would an increase in such generation require Scottish Government support? Would there be up-front costs to get it in place?

Nicholas Gubbins: It would benefit from such support in a number of ways, not just in relation to market compliance and investment measures, but in relation to support for innovation, the network and changes in the way the network is operated locally in order to enable it to happen. I think it is going to happen; it could just use a bit of a push.

The Convener: Gail Scholes can have the last word.

Gail Scholes: Where there have been financial incentives, such as with the feed-in tariff, it has accelerated solar programmes. Putting an incentive in place works really well in getting scale back into communities.

As a priority area, off-grid locations could work really well in terms of cost. In general, consumers in those places pay the most for heat from oil, diesel or whatever they have to buy. The cost is huge and, generally, those off-grid areas are where fuel poverty is found. There are some obvious places where initial investment would work really well.

The Convener: I thank our panel of witnesses very much for coming in today.

10:43

Meeting suspended.

10:46

On resuming—

Damages (Investment Returns and Periodical Payments) (Scotland) Bill: Stage 1

The Convener: We move on to agenda item 3. I welcome our witnesses: Simon Di Rollo QC, from the Faculty of Advocates; Gordon Dalyell, vice-president of the Association of Personal Injury Lawyers; Professor Victoria Wass, professor of human resource management at Cardiff business school; and Patrick McGuire, solicitor advocate at Thompsons Solicitors. I thank all four of you for coming in today.

I should refer to my registered interest as a member of the Faculty of Advocates.

Before I bring in other committee members, I want to ask about the setting of the personal injury discount rate. I looked at the submissions from the Faculty of Advocates and Thompsons Solicitors, in particular, and it appears, at least on the surface, that slightly different approaches are being taken. Mr Di Rollo and Mr McGuire might want to comment on that—indeed, the other two panel members might want to do so.

There is a question about the involvement of the United Kingdom Government actuary in the setting of the rate. Thompsons suggested that it might be better to involve an "expert or expert panel", whereas the faculty said:

> "We agree that it is right to seek to remove the setting of the rate from the political sphere. We understand that the Government Actuary will be able to deliver what is sought."

Is there disagreement on that point? I noted that the faculty commented that expert advice or evidence would need to be referred to in relation to a lot of other areas.

Simon Di Rollo QC (Faculty of Advocates): The faculty's position is that, in so far as we understand how these things work, the Government actuary would be able to perform the role adequately. There might be room for a different view; I do not have a particularly strong view on that aspect of the matter. From what I understand of the role of the Government actuary and how they operate, it seemed to us that they would be able to perform the role as proposed, and to do so independently of Government, because they are meant to deliver advice independently.

Patrick McGuire (Thompsons Solicitors): My comments in that section of my submission are secondary and almost esto case to my primary point that I do not believe that the approach to the

investment is correct. The notion of the cautious investor is wrong. Therefore, in many ways, my comments about the Government actuary are secondary to that. If my primary position is accepted, there is no need to go down that road.

I have two points to make. First, independent of the Government or not, it strikes me that the role of the Government actuary is at least quasi-political. When we look at the two Parliaments and their approaches to key issues such as this one and all matters of civil justice over the past decade, there has been clear divergence between the two. It strikes me that it would be inappropriate and a retrograde step for the Parliament here to rely on the Government actuary at Westminster.

My second point is on the process around how the Government actuary arrives at a figure and how that can be reviewed. As drafted—this is also the approach that is to be followed in England and Wales—the figure will be set and cannot be reviewed by an expert panel for five years. That could very well be far too late.

In all those respects, we really should be doing our own thing north of the border.

Professor Victoria Wass (Cardiff Business School): I will say a few words about myself before I respond. You might be wondering why a professor of human resource management has an interest in this issue. My background is economics, I am trained as an economist and I largely teach economics in university. I have had an interest in damages going back a long time.

The politics comes in here in the mix of the portfolio, not in whatever the Government Actuary's Department will do. The biggest determining factor of the rates that the department comes up with will be the mix of the portfolio that the ministers have decided on—that is where the politics come in.

Gordon Dalyell (Association of Personal Injury Lawyers): The Association of Personal Injury Lawyers takes the view that there is an advantage in the Government actuary being involved in making the decision, because there is a certain independence there and we felt that they may be free from political influence. Professor Wass's point is right: prior to the Government actuary coming to the decision, Scottish ministers will have the power to issue regulations setting out how the portfolio is comprised and setting the standard adjustment rates that are mentioned in the bill. There is the potential for significant political influence. The committee ought to be aware of that and consider whether that is appropriate.

Simon Di Rollo: It does not really matter whether it is the Government actuary or whether we go along with what Patrick McGuire said. That is not the important point here.

The Convener: That is helpful clarification.

Jackie Baillie: Other colleagues will explore the detail of that with you, so forgive me if I go back and take this logically and pursue a couple of aspects of the discount rate. The issue of what pursuers do with any award is interesting, because my understanding is that Wells v Wells established that what a pursuer does with an award is irrelevant. Do you have a view on how pursuers would likely invest their awards? Is that remotely relevant to setting the discount rate?

Professor Wass: It is not relevant, and I will explain why. I do not know because I do not have any contact with pursuers after their damages have been ordered, but I hear that they largely invest not in index-linked Government stocks but in risk-bearing assets. The reason why they invest in those assets is the most important issue: they are undercompensated by their award and they have no choice but to invest in those assets in order to make up the shortfall.

In paragraph 2(a) of my written submission, I go through four sources of undercompensation. The first shortfall that all claimants have to make up is that the personal injury discount rate since 2003 has always been above the actual risk-free rate on ILGS. They also have a risk of longevity; they do not know when they are going to die, so they always feel that they need to keep back some money so that they do not run out of their lump sum before their actual date of death rather than predicted date of death. That is another reason why they invest outside ILGS.

A lot of what the lump sum will cover is earnings-based losses. It might be loss of earnings, but principally it will be care. Care costs go up according to earnings inflation rather than price inflation and ILGS only protects against price inflation. Earnings inflation, up until the past 10 years, has always been more than price inflation. That is another shortfall that claimants have always been trying to make up.

The fourth shortfall is on accommodation. Because of the way in which the accommodation is compensated, people do not have enough to pay for adapted accommodation—the accommodation that they need—so they need extra there.

Because people are undercompensated from all those different sources, if they invested in ILGS, there would be a certain shortfall. That is what drives them to take a bet so that they have a chance of reducing that shortfall. They also take a chance that the shortfall might be greater but what is driving the behaviour that we are observing, as

the research on this has shown, is the fact that they are undercompensated to start with.

Simon Di Rollo: One thing that you should always keep in mind in considering this issue is that if you settle a case, you are buying off a risk of losing or getting less if you have to litigate. When you settle, you very often take a discount in exchange for the certainty of getting your award of compensation at a particular level.

There will be a discount anyway, in terms of any settlement figure, in order to avoid going into court. There is an inherent amount—there is a component of any award that is short of what, potentially at least, the court would award. A risk-averse pursuer who is a stranger to litigation and litigates only once will always buy off that risk, or will be advised to buy off that risk, by cautious advisers to avoid potentially losing the case or a finding of contributory negligence or getting a lower award than is being proposed because of arguments about the amount of damages. Therefore, there is an inherent shortfall in the system in any event. You can add that point to what Victoria Wass mentioned.

Jackie Baillie: Are you saying therefore that the system is risk averse—that it encourages people to be risk averse and be undercompensated?

Simon Di Rollo: Any person who litigates takes a chance if they go into court; court proceedings are uncertain and they do not know how things will turn out. There is always an element of risk in any court process.

Gordon Dalyell: The vast majority of the pursuers whom we act for are risk averse. That is because the fundamental principle that we are dealing with is that of restitution—putting the person who has been injured back in the position that they would have been in had the accident not happened. The compensation is to reflect their pain and suffering, their loss of earnings, care costs and, in more serious cases, other heads of claim.

Somebody who has suffered that kind of accident does not want to take any risks investing money in the markets. They want to be as certain as they can be that the money will be there to pay for their needs, often for the rest of their life. That is why I think that past investment behaviour is on the basis of a discount rate of 2.5 per cent, which was woefully inadequate; it had not changed for 15 or 16 years. In essence, you had systemic undercompensation over a large part of that time.

Patrick McGuire: From my perspective, every survivor of a catastrophic injury is different in the approach that they take to the lump sum compensation that they receive, just as every member of society is different. I agree with Gordon Dalyell that they are generally very risk averse and that is for very obvious reasons.

However, I return to my fundamental point, which is that I do not think that we should be asking how, historically, survivors of catastrophic injury have invested their money. We should be looking at the most fundamental issue of law of all, which is how we ensure that they receive restitution—that is, as best as the law permits, to put them back in the position they would have been in through financial compensation—and that can be done only with an investment rate that guarantees that rate with no-risk investment. We are looking at it the wrong way otherwise.

11:00

Jackie Baillie: Contrary to the impression that I am getting from the panel, the defenders' representatives would argue that the bill's provisions create overcompensation and depart from the principle of 100 per cent compensation. Do you think that that will be the case? Could you also give your view on how the awards are calculated and what impact, from your perspective, that could have on the likelihood of overcompensation for the pursuer?

Simon Di Rollo: What is the basis for saying that people are being overcompensated? That is the key question. What is the justification? I am not coming at this from either a pursuer's or a defender's point of view. What I would like to know is the evidence for overcompensation. Somebody such as Victoria Wass is in a good position to tell us whether there is any justification for that perspective.

Jackie Baillie: Indeed, and when the defenders' representatives are before us we intend to question them on their assertion too.

Professor Wass: We all agree that claimants are risk averse. It is not contended otherwise in the bill. I was there when Lord Keen was giving evidence at a Westminster select committee, and he agreed that claimants are risk averse. If they are risk averse, they should face the risk-free investments, because they are having to invest their lump sum and take an investment risk all for injury-related reasons. If they had not been injured, they would not be in a position where they have to invest a lump sum in order to generate a cash flow for the rest of their lives, so it is entirely injury related. If they are risk averse, that means that facing risk imposes a cost on them. If you are going to deliver 100 per cent compensation, you should not make people who are risk averse bear a risk that they would not otherwise have had to face.

I have looked for overcompensation, and I cannot find any overcompensation, pre-bill or post-

bill. My advice to the committee is that, unless you are sure that there is some overcompensation, you should be very careful about signing up to this bill.

Jackie Baillie: That is very helpful.

Patrick McGuire: I simply do not recognise the concept of overcompensation and I would entirely echo Victoria Wass's comments. Where is the evidence from the economic and financial experts, not Government ministers in Westminster, that establishes the point? There is none, as far as I can see.

Gordon Dalyell: As soon as you move away from gilts in calculating the discount rate, you are highly likely to have undercompensation. There is certainly no question of overcompensation.

The Convener: If we are talking about overcompensation and undercompensation, a court determining an award and looking at the length of time the award is meant to cover to compensate someone fully is, to a certain extent, doing a best estimate or guesstimate of how long the person will live. It is true that there is uncertainty about those things in any event, unless one were to go back and review the award over the course of time.

Simon Di Rollo: That is right.

Gordon Dalyell: It is fairly uncertain, and moving away from gilts adds to that uncertainty because you are relying on the markets. To be frank, I would be surprised if anybody has any firm idea of what the markets are likely to be doing in the foreseeable future.

The Convener: I was also thinking that the question of how long the person will live is uncertain, if you are looking at it from the point of view of awarding compensation.

Simon Di Rollo: It is very uncertain. The worst type of situation involves a parent with a catastrophically injured child having to consider how long their child will live. When the parent is no longer able to look after their child, their concern is about who will do so. They will want to get as much money as possible in order to be able to look after their child for as long as possible, but there is an inherent uncertainty in the whole process. The point that is being made is that if we depart from gilts and a risk is required to be taken, we will introduce yet another uncertainty.

John Mason: A pension fund, for example, does not have all its money in gilts because people want a better return, so money is put into property or the stock market, and generally that money does better than money that is put into gilts. Although risk is involved, my assumption is that that will lead to a better return.

The bill proposes a further margin of 0.5 per cent. I am not saying that I am arguing this, but it is argued that that is overcompensation, because we are aiming for 100 per cent restitution and then throwing in an arbitrary 0.5 per cent. Is that 0.5 per cent necessary? Will it damage the process, as some people are arguing?

Professor Wass: You raised the question about the pension scheme, so can I answer that?

John Mason: Okay.

Professor Wass: I imagine that at least half of the investment in an immature pension scheme would be in equities. However, almost the entire investment in a closed pension scheme would be in ILGS or something very close to it. It is a requirement that a closed pension scheme is invested in that sort of portfolio. The claimant is in exactly the same position as the closed pension scheme. They have a lump sum and nothing further coming in, but they have a stream of liabilities going out that they need to plan for. A claimant is like a closed pension scheme and, under a closed pension scheme, the requirement is that investment is in a very low-risk portfolio—probably ILGS.

John Mason: That is helpful.

Patrick McGuire: John Mason might well be right. It might well be the case that having a mixed portfolio, with investment in equities to some extent, could lead to a better return. However, the fundamental question that we need to address is this: why should we force victims of the most serious accidents to do that? If they choose to have a mixed portfolio, they might end up with slightly more money at the end of the day, but why should we force them to do that? As far as I can understand from the bill, the only purpose of forcing people to do that is to benefit shareholders of insurance companies. Is that what we want to be doing?

John Mason: I presume that it will also benefit the national health service if we do not overcompensate.

Patrick McGuire: Again, the word "overcompensation" is being used. The same principle applies: why should we be forcing victims of the most serious injuries to take that risk? I have not heard an answer to that question in any of the consultation responses.

John Mason: Why do you say "forcing"? You say that we should not look at what people do, but surely we are not forcing them if people are doing that already.

Patrick McGuire: The bill—

Simon Di Rollo: You are not listening to what Victoria Wass said.

John Mason: One at a time, please.

Patrick McGuire: If the bill is passed, it will force every victim of serious accidents or serious disease to invest in equities. That is exactly what is in the bill. We will force victims to take a risk. Why should we force victims to take any risk at all when the law says that they should be entitled to restitution?

Gordon Dalyell: On the standard adjustment rate, two rates are proposed in the bill—one to reflect investment charges and tax and the second to reflect other contingencies. The suggestion in the bill is 0.5 per cent. The committee needs to look at that area in more detail. The information that we have received suggests that the investment charges and the tax costs could be anything from 0.5 per cent up to 1.5 or 2 per cent.

To be honest, we are probably not the best people to give evidence on that aspect. The committee will need to speak to financial experts and people who have experience of investing those sums. I think that suggestions about who might be able to help have already been made to the committee. I have certainly seen one or two submissions from people who have that expertise, and APIL strongly urges the committee to take evidence from such people.

John Mason: On that specific point, do you feel that we should not have one rate for everybody? Should the rate be more flexible or variable? Could it be 0.5 per cent for one person and 1.5 per cent for someone else?

Gordon Dalyell: No. The bill sets out that there is to be a rate for the amount that is to be taken off whatever the portfolios come up with. Of course, that is against the backdrop of the Scottish ministers having the power to issue regulations to set the rate. You would need to look at the matter as a whole and ask how the decisions are being made. There needs to be transparency and accountability in how the Scottish ministers come to their decision on how the portfolios should be set up and what rate should be set. The Government actuary then has to come to its decision. Again, you may want to look at the mechanism for that.

Simon Di Rollo: I want to repeat what Victoria Wass said and emphasise its importance. It is important to understand that you cannot say that certain people, because they are investing in more risky investments in order to make their money last, are being overcompensated, because the rate is fixed by gilts. If you understand what Victoria Wass is saying, that argument falls away.

It is about what people do with their money. They have to invest in more risky investments in order to make their money last. Someone who has to pay £100,000 a year for full-time care does not know how long they are going to live, they have to anticipate wage rises in excess of the retail prices index, and they may require an additional carer as they get older. Those are all factors and uncertainties that may require someone to go beyond investing in index-linked Government securities.

That is what has driven the behaviour of people if that is what they have done so far. If we could say to people, “We can certainly give you this amount of money, and it will last you for your lifelong needs”, that would be a closed pension scheme-type scenario. In that situation, you would expect to be told by any financial adviser that you should invest in gilts. It is not a good argument to say that people are currently being overcompensated. It is not correct.

John Mason: I will come back on that. I understand the argument—I am not entirely stupid. The point is that, yes, we can have a theoretical argument, but I do not think that we can ignore what people have actually spent their money on and how they have invested it, for whatever reason. Theoretically, if everybody had made a large profit and had a large lump sum left at the end, that would suggest that there was overcompensation. I am not making that argument, but I am saying that it is possible.

I have one other question. Inflation is another factor. At present, the retail prices index is used. Somebody—I think that it was Professor Wass—mentioned that wages inflation is much higher. Should a different method be used to take inflation into account?

Professor Wass: It ties in with the fact that that is a source of undercompensation for the claimant. If we use ILGS as the benchmark, we do not have a choice about which inflation rate we use, because ILGS are indexed only to the RPI. There are no gilts that are indexed to the consumer prices index or to earnings inflation. One of the hits that the claimant has to bear is the fact that his or her lump sum protects only against RPI inflation and not against earnings inflation. Does that make sense?

John Mason: Thank you.

Gordon Dalyell: Can I clarify that point? We need to distinguish between the award of damages and what might be regarded as an investment portfolio. The award of damages is not an investment pot—it is not a reward. It is a sum of damages that is awarded to look after somebody’s needs for the rest of their life. The point is that the discount rate is used as a mechanism to calculate what the award of damages ought to be. You need to be careful about how you assess behaviour thereafter. As the Scottish Government sets out in its policy memorandum, it did not think it relevant

that past investment behaviour should be looked at, and the same applies into the future.

What a person does with their damages can vary from case to case. For the reasons that Professor Wass expressed, there are often immediate shortfalls when someone receives an award of damages. In serious cases, somebody may have to buy a new house, adapt it and buy equipment. They may not have recovered the full extent of the money needed to pay for that. That can be for a number of reasons, some of which were expressed by Mr Di Rollo earlier.

There is the discount rate, and the award of damages is calculated at a certain point. How awards are utilised thereafter varies, however.

11:15

Patrick McGuire: I will briefly conclude on this point. We refer—I think correctly—to the very powerful contribution made by Professor Wass. There are two other independent contributors to the process, as I would describe them: Personal Financial Planning Ltd and the Institute and Faculty of Actuaries. Professor Wass and those organisations are entirely clear that they do not recognise the concept of overcompensation. They say that the bill should be drafted in such a way that victims are entitled to no-risk investment to achieve restitution. We should not overlook that.

Andy Wightman: We have talked quite a bit about the question of overcompensation. As a matter of legal principle, once a case is settled in court, should any consideration be given to how the person may behave in the rest of their life? That is their private matter. As a matter of legal principle, is it right that by implication—or, in fact, as directly proposed in the bill—we take account of their behaviour in the future, or is there no legal principle involved here?

Simon Di Rollo: The only legal principle is that a person should be put in the same position that they would have been in but for the accident or the event, in so far as money can do that, but the court has no interest in what happens once the damages are awarded.

Andy Wightman: That powerful legal principle, which is embodied in the bill, suggests that putting people in that position should rely on them having to take risks on the performance of energy companies, Vodafone or any other firms. Such risks are completely outwith their control.

Simon Di Rollo: That is right.

Andy Wightman: I turn to a more fundamental question in our consideration of the principles of the bill. Mr Di Rollo, you mentioned a situation involving a child. Given the uncertainties about the future of someone who has suffered a catastrophic injury or disease and who faces huge uncertainties for the rest of their life, is it appropriate to award a lump sum in any case?

Simon Di Rollo: I would say that lump sums are—[*Interruption*.]

The Convener: I am sorry: I should have explained at the outset that the sound desk deals with the microphones. There is no need to press any buttons at all. My apologies, Mr Di Rollo.

Simon Di Rollo: Thank you—that is all right.

The question is about lump sums. There is a place for lump-sum damages. Until now, that has been the only method that a court could provide for in Scotland, unless there is consent from both parties. One of the good things about the proposal in the bill is that it provides the court with a menu of options to allow periodical payment orders. There are disadvantages with periodical payment orders compared with lump sums, and I do not think that you can say that one is necessarily better than the other. It depends on the individual case. Where there is a big dispute about life expectancy, you would think that a periodical payment order was more appropriate.

However, from both parties' point of view, a lump sum is preferable in some situations. Insurers will tell you that they like to close their books. They like to finish the case off—they do not want to have a future liability. They want to buy off the risk for themselves and they are prepared to do that. A lump sum therefore often suits the defender.

Equally, the periodical payment route potentially brings uncertainties for a pursuer, and a lump sum can assist. It is not a case of saying that one approach is superior to the other; it is important to have the ability to do one thing or the other, depending on the circumstances of the case and the desires of the parties.

Gordon Dalyell: Let me address the point that Mr Wightman made. Following the passing of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, in more serious cases, in particular where future losses are more than £1 million, there is an obligation for the pursuer's side to obtain a report from an independent actuary on whether a periodical payment order is the appropriate way to deal with that element of the damages claim. The report would be made available to the court in suitable cases, and a decision would be made. There is already a safeguard in extremely serious cases.

Andy Wightman: In general terms, then, all the witnesses welcome the greater flexibility that the bill provides in the approach to settling the future needs of people who have suffered damage—I see that you are indicating that you do.

Someone—it might have been Patrick McGuire—talked about different approaches north and south of the border. Does it matter if we have a different discount rate? If it matters, what are the implications? Could pursuers start to shop around for where they litigate?

Simon Di Rollo: For my part, I do not think that it matters terribly if there is a different discount rate. We already have different levels of awards of damages in certain aspects of our procedure, and I do not think that there being different approaches is a major reason why we would not approach the matter for ourselves, in a way with which we are comfortable. I do not think that having a different discount rate is a major problem. I do not know what others think.

Patrick McGuire: I agree entirely. We are seeing more and more divergence between the two jurisdictions on various levels of compensation. That is because the two Parliaments take different views on fundamental issues, which can only be a good thing. Even before the divergence that we are seeing as a result of recent legislation, there have always been differences between the jurisdictions. For example, there are differences in awards for fatal damages.

As a matter of principle, is there a problem with victims in Scotland being compensated at a different—dare we say "higher"—level? I see no problem of principle or policy there.

Will having a different level create what people sometimes describe as "forum shopping"? That has become far more difficult in recent years, given some court judgments, so I think that it is pretty much a non-issue.

It is therefore a question of policy and principle. Is it a problem for this Parliament that our victims are compensated at a higher rate, if that is appropriate? I hope that the answer is no.

Andy Wightman: As I understand it, a court should be able to require periodical payment only where the organisation that pays the compensation is reasonably secure. Does that present a risk that, in cases where an award of periodical payment would be the best and most appropriate solution for the pursuer, the pursuer will not get that award, purely because the defender is in a different position? If that is the case, should we consider alternative mechanisms for ensuring security of periodical payments for everyone for whom they are suitable?

Gordon Dalyell: You raise quite a wide issue. One of the main areas of concern relates to cases that involve employers' liability insurance and public liability insurance. Such policies generally have an indemnity limit of £10 million. That is sufficient for most lump-sum cases, but in a case that involved a young pursuer, in particular, a PPO might create difficulties for the future. The issue would need to be looked at carefully and would require reassessment of the obligations on employers and public bodies in relation to their levels of insurance cover.

Andy Wightman: What I am hinting at is some kind of underlying state-backed guarantee scheme that would prevent people losing out on a periodical payment award, where that was appropriate for them, merely because, as a result of some historical fluke or accident, the defender was not in a position to be reasonably secure.

Gordon Dalyell: We already have that in motor cases. We should look at extending that into the employers liability area—

Andy Wightman: Sorry, but what do we already have in motor cases?

Gordon Dalyell: Essentially, a state-backed guarantee.

Andy Wightman: Okay, thanks.

Professor Wass: This is on a slightly different issue, but we are talking more broadly about the limits on PPOs. PPOs look like a really good idea. You said that lack of security is a constraint. Another constraint is that most cases do not go to court. Private defenders do not like periodical payments because they are very expensive for them. The defender is usually in the driving seat in litigation. The cases that do not go to court will end up in payment of lump sums. We have noticed that in England and Wales.

When there is a public defender, periodical payments go through, because that is in everyone's interests. It is not in the interests of a general insurer to have damages awarded under a PPO.

Gordon Dalyell: There is information about this in one of the submissions to the committee. The rate of PPO use in private insurer situations is about a quarter of the rate of PPO use in NHS cases in England and Wales.

Colin Beattie: I want to continue to look at PPOs. Generally speaking, how does the panel view the provisions in the bill that deal with PPOs?

Simon Di Rollo: The faculty has no real problem with the proposals on PPOs, which look reasonably sensible and strike the necessary balance to allow for people to come back under very limited circumstances. They also deal with the issue of security and the rest. From my perspective, the provisions look quite sensible.

Colin Beattie: Do the rest of the panel members agree?

Professor Wass: I refer to the constraints that were raised before about lack of security, cases not going to court and private defenders not wanting a PPO—in the end, they usually get their preference.

Colin Beattie: Several defender representatives have argued that pursuers prefer a lump sum award, rather than a PPO. Is that your experience?

Professor Wass: If pursuers were advised by an IFOA member and had large care costs going forward, it is very unlikely that they would be advised to go for a lump sum. However, some would and there are circumstances in which a lump sum is better. For cases in which there will be large future costs, the advice will be that a PPO would be better. I referred to risks and shortfalls at the beginning. You would take out the risk around life expectancy and longevity and earnings inflation—very often care costs are linked to an earnings index, not a prices index.

Gordon Dalyell: The reality is that many private insurers also like lump sum payments, because they provide certainty and finality. Particularly in higher-value cases, not only do you have an insurer involved, you often also have a reinsurer, and reinsurers like finality as well.

Colin Beattie: In what circumstances would pursuers prefer a lump sum? What circumstances would lead to that conclusion?

Gordon Dalyell: There might be uncertainty about the creditworthiness of the defender if it is not a public body and there is a limitation. You would have to investigate how financially sound even the insurer is. If you are dealing with significant sums of money, you need to know who the insurer is and what sort of company you are dealing with. Some of them might be registered in Gibraltar or somewhere else that is not in the UK. There might be concerns about whether they are covered by the guarantee scheme under the financial services provisions. That is one example of where you might say that you would rather have a lump sum.

Another aspect is that there is no danger of anybody coming back; the litigation is finished, you do not have to deal with other things and there is no possible prospect of a future argument about whether you are entitled to a sum of money. That potential concern might drive people towards a lump sum rather than a periodical payment order.

I do not think that we can generalise; it is a very individual choice. It is important that the court will have powers that it does not have in Scotland at the moment. If one party says, "I would like a periodical payment order to be imposed," the court cannot do that at the moment if the other party does not agree; a Scottish court can only award a lump sum in those circumstances. It is welcome that these provisions change that.

11:30

Colin Beattie: PPOs have an implication that the pursuer could presumably come back to court at some point to seek a revision of the terms of the payment that has been made or that an agreed trigger point would result in the case going back to court. Who would be responsible for the court fees?

The Convener: I will bring in Mr McGuire, as he has been wanting to get in.

Patrick McGuire: Thank you. Mr Beattie's point was raised in my paper, and you have asked what I feel about how the bill is drafted on that point. I have two issues with the drafting. Before addressing those, I will deal with the general point about whether insurers or claimants are more pro or anti-PPOs. I think that, if they are properly advised, the vast majority of pursuers in the most serious cases will see the benefit of PPOs. It has been suggested that they would run away and go for lump sums, but that would be rare, subject to what has been said, correctly, about concerns about liquidity and so on.

However, my concern is that the bill creates a situation in which a PPO could be forced on a victim. I have personal experience of acting at the Scottish end of litigations in which the claim has been raised in England for jurisdiction reasons and a Scottish person has had a PPO forced on them. That occurrence—when a person does not want a PPO and wants the choice of a lump sum but the court makes the decision for them—can be very difficult for somebody at the end of what is often an extremely long road to compensation, as catastrophic injury cases inevitably are. The process of finally getting compensation is ultimately empowering and a decision that is forced on a person in many ways disempowers them. I caution against creating a situation whereby the decision can be forced on a victim. That is not necessarily the case for insurers, but if a victim wants a PPO, they ought to be able to argue for that and a court can make a decision irrespective of an insurer's view.

With regard to reviews of the PPO rates, they could go either way. You have indicated that a victim may realise that they are falling short and look for more. It is possible that an insurer may think that circumstances have changed and the person has got better, so the rate should be reduced. You have highlighted the important point that that would involve a court process and we now live in the post-QOCS—qualified one-way costs shifting—world. As far as I am concerned, the QOCS principles should apply to these further

court processes for PPOs; the victims should have their costs shifting protected, irrespective of the outcome. That is missing from the bill.

Colin Beattie: Do you feel that there is an exposure at the moment?

Patrick McGuire: Yes, there could be, as the bill is drafted.

Colin Beattie: As an extension to that point, how are pursuers who lack mental capacity handled?

Patrick McGuire: They would require a guardian to be appointed on their behalf to represent them and to take decisions for them.

Colin Beattie: Would the guardian sign off on the compensation package?

Simon Di Rollo: Yes, and the guardian would have to take the decision as to whether it is a lump sum or a PPO.

Colin Beattie: Who appoints the guardians? Is it the court?

Simon Di Rollo: An application is made to the court, which appoints the guardian. It is not a personal injury action; it is a different process that takes place in the sheriff court.

The Convener: Thank you for your contributions.

We have run slightly over time. The meeting will move into private session.

11:35

Meeting continued in private until 12:49.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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