OFFICIAL REPORT
AITHISG OIFIGEIL

Economy, Energy and Fair Work Committee

Tuesday 30 October 2018

The Scottish Parliament
Pàrlamaid na h-Alba

Session 5

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ECONOMY, ENERGY AND FAIR WORK COMMITTEE

29th 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:

Joy Atterbury (NHS National Services Scotland)
James Dalton (Association of British Insurers)
Kate Donachie (Forum of Insurance Lawyers)
David Hilferty (Money Advice Scotland)
Eileen Maclean (R3, Association of Business Recovery Professionals)
Stewart Matheson (Scottish Government)
David Menzies (Institute of Chartered Accountants of Scotland)
Alan Rogerson (Forum of Scottish Claims Managers)
Norma Shippin (NHS National Services Scotland)
Craig Simmons (Money Advice Service)
Paul Wheelhouse (Minister for Energy, Connectivity and the Islands)

CLERK TO THE COMMITTEE

Alison Walker

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Economy, Energy and Fair Work Committee

Tuesday 30 October 2018

[The Convener opened the meeting at 09:45]

Decision on Taking Business in Private

The Convener (Gordon Lindhurst): Good morning and welcome to the 29th meeting in 2018 of the Economy, Energy and Fair Work Committee. I ask everyone in the public gallery and elsewhere to turn their electronic devices to silent.

Agenda item 1 is a decision on taking business in private. Does the committee agree to take items 4 and 5 in private?

Members *indicated agreement.*

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

09:45

The Convener: Agenda item 2 is stage 1 consideration of the Damages (Investment Returns and Periodical Payments) (Scotland) Bill. I welcome to the committee Kate Donachie, Forum of Insurance Lawyers; Alan Rogerson, Forum of Scottish Claims Managers; Norma Shippin, director and legal adviser, and Joy Atterbury, head of litigation, NHS National Services Scotland; and, finally but not least, James Dalton, director of general insurance policy, Association of British Insurers. I thank all of you for coming to the committee this morning.

I should point out that your microphones are operated by broadcasting, so there is no need to press any buttons. That sort of thing is dealt with automatically. Moreover, there is no need for you to answer every question that every member asks, but please come in as you feel appropriate. If you want to be brought into the discussion, simply indicate as much to me by raising your hand.

I will start the questioning. Last week's evidence to the committee, which I am sure that some of you will have looked at, probably set out the other side of the argument if we think about this in terms of pursuers' representatives and defenders' representatives. What are your thoughts on the present personal injury regime? Does it undercompensate or overcompensate those who have been injured and are seeking personal injury compensation? Is either scenario present in the current system, and how will it play out under the proposed regime?

Who would like to start? I think that James Dalton just volunteered.

James Dalton (Association of British Insurers): The current framework for setting the discount rate is broken, because, as a result of the damages framework and decision making by the courts, the way in which the rate is set bears no relation to what pursuers do in reality. For example, it assumes that 100 per cent of a pursuer's compensation is invested in one type of asset, but no rational investor, whether seriously injured or otherwise, would take such a decision. It also assumes that 100 per cent of that compensation is invested in index-linked securities, which again is not a balanced portfolio.

We are therefore very supportive of this legislation, which changes the framework for setting the rate to one that bears much more relation to what happens in reality. It is also much

more modern. Although there are some parts of the bill that we would like to be tweaked—and we might discuss those later—we think that, broadly speaking, the old framework is broken and this new framework is a significant improvement.

The Convener: From your point of view, then, the issue is not overcompensation or undercompensation but ensuring that the proper framework is in place. From what you have said, you seem to feel that the current framework is not the proper one.

James Dalton: That is correct. The framework is what we should be focusing on.

Alan Rogerson (Forum of Scottish Claims Managers): There was a lot of talk in last week's evidence about seriously injured people being risk averse because they need to provide for their future care. That principle is true, and I fully support it. That is probably where part 2 comes in, because its provisions on periodical payments will apply to those who are very risk averse or who require certainty. Those payments would be uprated with reference to, for example, a wage-inflation index for care workers.

As for part 1, we have in our submission looked at investment choices that an injured person would make. You have to look at these provisions as providing flexibility for an injured person, who will be properly advised on how to invest their damages. That is certainly covered by the bill, and what we need to do is to look at the real-world choices for people with regard to where they invest their damages and the rates of return that they are likely to get.

The Convener: Is it appropriate to focus on what people might do or want to do instead of taking a set approach to the matter?

Alan Rogerson: It is all about providing flexibility and giving people a clear choice. There are those who will require absolute certainty for the future, because they are risk averse or have certain needs, and they will choose periodical payments; however, the fact is that people like to be more flexible. In my experience, injured people like to take the lump sum and have control over their future.

As well as being a member of the Forum of Scottish Claims Managers, I work in my day job as a claims manager for Aviva. Two or three months ago, I had a case in which the settlement comprised future losses in the form of loss of earnings and pension losses, and in the immediate aftermath of the settlement, the injured person decided to buy a house. Therefore, the issue was not so much the choices that she was being advised to make; she needed the flexibility provided by the lump sum and the ability to do what she wanted with the settlement. We absolutely support the principle that it is for injured people to decide what they want to do with the compensation that they receive.

Norma Shippin (NHS National Services Scotland): It is very difficult to know whether people are being overcompensated or undercompensated with the damages that they receive, because we make no inquiries after a case has been settled about what people have done with their compensation. However, in our negotiations, we try to come to a fair settlement with the pursuer's agents within the context of the current rules, and we have found with catastrophic brain injury cases that, when you settle with a lump sum, you will always over or undercompensate. As Lord Stewart said in the case of D's Parent and Guardian v Greater Glasgow Health Board, the one thing that you can be sure of is that you will get the life expectancy wrong. The sum will be either too high or too low, which is why, over the past few years, we in the national health service have moved as a matter of practice to always offering periodical payment orders in catastrophic brain injury cases. It is the right thing not only for the individual but for the NHS—which is all we can speak for—because such payments enable that element of life expectancy roulette to be taken out of the situation.

The Convener: You say that you always get the length of life wrong, but of course you and the courts calculate any lump sum on the basis of actuarial tables.

Norma Shippin: Yes, but we also get evidence from experts on what the life expectancy will be, and there is usually a dispute about the length of that. There might be a variation of up to 15 years.

The Convener: So it is not an exact science from anyone's point of view.

Norma Shippin: That is right.

The Convener: We move to questions from Jackie Baillie.

Jackie Baillie (Dumbarton) (Lab): Good morning. Defenders' representatives have argued that the notional portfolio set out in the bill is overcautious. Can you tell us why? I will start with Mr Dalton, given the supplementary information that he has provided to us.

James Dalton: The research that we have provided to the committee suggests that the portfolio of assets that has been determined by the Scottish Government is quite conservative, and it also assumes a 30-year investment horizon. Our submission is that, when taken together, those two things make it a conservative and low-risk portfolio of investments. According to our analysis, the average life expectancy of a settled claim is

around 40 to 45 years, which means that a 30-year period is very short.

In that context, having a portfolio that is underweight on equities means that a person is not hedging their inflation risks sufficiently. If they were to increase the size of the portfolio of equities within the overall portfolio, they would be better able to manage the inflation risk, and if they were to combine that with an extension of the portfolio's life expectancy from 30 to 40 years, for example, they would get a less conservative but still low-risk portfolio.

Jackie Baillie: Another member will explore the timescale. By definition, equities are riskier; we know that markets go up and come crashing down again. Why introduce that element of risk to someone who would not be engaged in the discussion if they had not been injured? Surely risk free means 100 per cent compensation.

James Dalton: There is no such thing as risk free. If the pursuer wanted to pursue an option that very significantly reduced their risk, they would take a PPO, in the context of the independent financial and legal advice that they had received, in settlement of their claim. It is for the claimant to choose which option to pursue.

We are not suggesting that the portfolio would invest in east Asian information technology start-up companies; it is a question of increasing the overall equity balance in the portfolio, but those equities are likely to be fairly conservative, relative to the very conservative asset classes of cash.

Alan Rogerson: A lot of comparisons can be made between what happens when an injured person takes a lump sum and then invests it and what happens in the drawdown pension market. Last week, Professor Wass talked about closed pension schemes, which seem to me to be aligned far more with defined benefit pensions than with drawdown pensions. A drawdown pension investor is there to provide for the future and invest for the future; they will access the same investment markets as we are talking about for injured people.

I spoke to an independent financial adviser who likened investing in equities to investing in suntan lotion and umbrellas at the same time—rather than in suntan lotion and sunhats at the same time—to hedge some of the down sides to playing the markets.

The idea is that injured people and drawdown pension investors alike would be looking to invest their sum for the future and get the best possible rate of return, being properly advised by proper financial advisers, to make sure that they were taking a cautious approach—but not an overly cautious approach, as we deem the portfolio to take at the moment.

Kate Donachie (Forum of Insurance Lawyers): The point is that a lump sum cannot be made risk free, because we can never know what will happen in future. The only way to try to remove the risk for a pursuer is by deliberately and significantly overcompensating. Such an approach would depart from the 100 per cent compensation rule and is not necessary, as Alan Rogerson and James Dalton said. There is an option for pursuers that is as close as we can get to risk free: a PPO, which means that they do not have to take risks with stocks and shares and investments.

Norma Shippin: I do not think that NSS has much to say in response to Jackie Baillie's question; we would refer to actuaries.

Jackie Baillie: Let me come back to Mr Dalton. In its submission to the committee, the Institute and Faculty of Actuaries noted that insurers have to account for personal injuries liabilities on a risk-free basis. Why, then, do you think it fair to expect pursuers to take on more risk than insurance companies do?

James Dalton: There is an important point in that regard, which needs some clarification. There is a difference between the discount rate, in terms of how one calculates damages in personal injury cases, and the way in which insurers have to provide capital on their balance sheets from a solvency perspective. Those are very different things. The risk-free rate—I put "risk-free" in inverted commas—is set by the European regulator, the European Insurance and Occupational Pensions Authority, and is used solely to value liabilities; it is not used to value personal injury claims. It is about valuing the long-term liabilities that an insurer has on their balance sheet.

Jackie Baillie: There is a principle that underlies both situations; the circumstances might be different, but the principle is the same.

10:00

James Dalton: The principle is that the risk-free rate applies when insurers value liabilities to address the solvency and capital points that insurers are required to adhere to in order to retain their solvency. In this context, we are talking about how to value a personal injury claim that has longevity; that involves different things, which are reflected by different rates. As for the EIOPA risk-free rate, it is never negative.

Andy Wightman (Lothian) (Green): Mr Rogerson mentioned a client who had bought a house and said that it is for injured people to decide what to do with damages. As a matter of principle, why should the bill make any assumptions about what people will do?

Alan Rogerson: There must be a starting point that assumes what people will do. As part of the settlement process, we would expect an injured person to be properly advised by their solicitors and financial advisers. The compensation is for someone's future loss of earnings, their pension losses and the cost of their future care needs.

Unfortunately, the approach to date to the discount rate has been to look at what the rate of return would be or what the investment would be. Some injured people might choose to invest the capital sum for their future. However, some people—particularly in the drawdown pension market, for example, with which I drew a parallel—like having the flexibility to choose what to do with their capital sum and are also attracted to leaving something behind for their dependants. It is appropriate to look at injured people in the same way, because they have the same considerations about providing for the rest of their lives and for their families after they are gone.

Andy Wightman: The principle is that a discount rate is needed, because a sum of money is paid up front for the future. The question that is at the heart of part 1 of the bill is about how to set the discount rate.

The bill includes a 30-year period in the assumptions that must be taken into account. We heard that Mr Dalton thinks that that period is too short and that it should perhaps be 40 years. What are other panellists' views? Given that each case turns on its own facts and merits, is there scope for flexibility about the period?

Alan Rogerson: We talked a little about actuarial tables and life expectancy. The bill assumes a 30-year period for the notional portfolio. A 56-year-old male in the United Kingdom has a life expectancy of 29.64 years, so anyone who is under 56 would go beyond the 30-year period. At 59 years old, a woman has a life expectancy of 29.76 years. That is why the 30-year period is perhaps too short.

Your point about flexibility under the bill is good, and the committee might choose to look at setting split discount rates, for example, which other jurisdictions around the world use. Yesterday, Jersey announced that the discount rate will be 0.5 per cent for periods of up to 20 years and 1.8 per cent for periods of more than 20 years. Examples from around the globe could be looked at, if the committee was minded to consider them.

Joy Atterbury (NHS National Services Scotland): Our experience is slightly different from that of insurers, because the cases that we principally deal with at this high level involve babies who sustained brain damage at birth. Such cases are usually settled by the time the child is about eight years old, when experts are usually prepared to take a view on their life expectancy. That means that life expectancy predictions can vary hugely. Thirty years will be about right in some cases, but it may be considerably more and in some cases, unfortunately, it can be considerably less. The idea of variability is not a bad one, in our experience, but the number of cases that we are dealing with as lump sums is very small, as you can see from the statistics that we provided you with. They are nearly all being dealt with by PPO, so it may be that our new input is not particularly helpful.

Andy Wightman: That is in health. Broadly speaking, what is the situation in the general insurance market?

Alan Rogerson: I have been doing serious injury claims and dealing with seriously injured people for the past 18 years of my career, and I have never been asked to settle on a periodical payment basis. I know that the statutory framework has not been in place in Scotland, but a voluntary framework has been in place for a good while now and I have still never been asked. My experience south of the border is different; I have been asked for periodical payment settlements and we have done them south of the border, but it has not been a thing in Scotland.

Kate Donachie: My experience is the same as Alan Rogerson's. I have dealt for a long time with claims for serious injuries and I have never been asked for a periodical payment order, nor has it ever been raised, even as an option, or floated at any settlement discussion.

Andy Wightman: On the 30-year period, in health cases you may have claims that are being settled for people whose life expectancy is really rather short—five years, maybe.

Joy Atterbury: Yes, that can be the case.

Andy Wightman: Does that add to the argument for having a bit more flexibility around the assumptions that one makes about the period over which a portfolio will be invested?

Joy Atterbury: It could do. From our point of view, what it means is that settling by PPO becomes even more important, because we all know that those life expectancy calculations can be wrong. If we calculated a lump-sum settlement on the basis of a predicted life expectancy of five years and, fortuitously, the clinicians' opinions were proved wrong and the child in fact survived for another 10 years, there would be an enormous gap in the compensation that was available to them. PPOs are always the way to go in that situation.

Norma Shippin: That is obviously compounded when the discount rate changes. It may seem like a small percentage, but it has a huge impact on

the future value of a lump-sum payment. The point that Joy Atterbury is making is that if you have got that wrong and have given a lump sum based on a negative discount rate, the figure could be very high and end up not doing the job that it was meant to do, because the individual has died. Changing the discount rate can have a major effect on lump sums, and that makes it even more important for us to be able to impose periodical payment orders, or for the court to do that.

The Convener: Does that mean that you think that the suggested three-year period for review of the discount rate is too short? I think that three, five or seven-year periods have been suggested in various submissions to the committee. What are your views on that?

Alan Rogerson: I would certainly advocate a five-year review period. Three years, in my experience, is a little too short. That is because, in the run-up to a review, either side may see an advantage in holding off and not settling the case—there is a perceived advantage in waiting and perhaps getting more advantageous terms after a review period. A five-year cycle would allow a more stable period in between times. Allied to that are the questions about how an injured person chooses to invest their damages and what sort of advice they get—you would expect a managed portfolio to be reviewed annually. However, I strongly suggest that a five-year review period is the way to go, to stop people taking advantage of the system and of the uncertainty of the review period to delay settlement.

Kate Donachie: My experience in the lead-up to the change to the current rate and, since that rate was fixed, with the consultations that are happening here and south of the border is that litigation behaviour has been impacted; it has made it more difficult to settle cases.

Although personal injury cases are managed on a timetable by the court, the more complicated cases take longer and you might be waiting a year or even two years for a court hearing. That time can be used by the parties to negotiate a settlement, but if one party perceives that there would be a benefit in waiting a year, there is not really anything to stop them doing that if they think that they will get more or have to pay less if they wait. It has a material effect on our ability to settle cases.

The Convener: Recently, I think, there was a 15-year period in which the rate was not altered or changed. Would you agree that five years is the appropriate length of time? Is seven years too long?

Kate Donachie: I think that five years strikes the right balance. There are ups and downs to having a long period or a short period. A five-year period is a reasonable time to keep the rate relevant and avoids the distortion of the litigation process that a three-year rate might bring about.

The Convener: I see that Norma Shippin is nodding in agreement. James Dalton is nodding in agreement now as well.

James Dalton: Yes.

John Mason (Glasgow Shettleston) (SNP): I would like to continue with the theme of the discount rate. The further adjustment of 0.5 per cent is another factor. On last week’s panel, we certainly had one witness who argued strongly that the pursuer is disadvantaged to start with—they take on the risk of maybe living longer than is estimated and inflation is bound to be higher than any rate that we set because wages and equipment costs tend to go up faster, so the witness argued that the 0.5 per cent adjustment is very much needed to swing things back towards the injured party. I am getting the impression that you folk do not agree with that. Is that right?

James Dalton: The problem is that we have seen no evidence of the problem. You can make a political or policy choice about whether to overcompensate and, as the Government makes very clear in its policy memorandum, it is seeking to achieve the principle of 100 per cent compensation but has also included within the framework for setting the discount rate this further 0.5 per cent margin, which, by definition, overcompensates—that is a political and policy choice. However, it is a very blunt instrument with which to achieve that policy objective.

In our submission, we suggest that if you have decided that you want to err on the side of overcompensation and are being transparent about that, rather than using the blunt 0.5 per cent further margin deduction, you could determine what the actuarially assessed rate is and then round that down to the nearest 0.25 per cent. That would provide you with overcompensation but not to the extent of the significant costs that are associated with a blunt 0.5 per cent deduction.

Alan Rogerson: If the portfolio is already overcautious, as we would submit it should, the extra 0.5 per cent is quite a blunt instrument to then take it into overcompensation territory, as James Dalton says. If there is to be overcompensation, the costs are likely to be borne by insurance premium payers in Scotland, businesses and the public sector alike. The two aspects—the portfolio and the further adjustment—are very much aligned. I am of the same opinion as James Dalton that the 0.5 per cent adjustment seems quite a heavy-handed way of making the change rather than changing the portfolio.

John Mason: Yet we do not seem to have any evidence on whether people are being overcompensated or undercompensated because nobody seems to have done a real study of whether people ended up with money. It seems to me that we are a bit in the dark on all of this.

Alan Rogerson: We are. As one of the panel members said, we do not necessarily get to see what the injured person does with their settlement when they get it. To me, that would be the best evidence to inform the committee of the exact investment behaviours of injured people.

I go back to the current availability of periodical payments and the fact that I have never been asked for one, so lump sums must be working for people. We might not have the balance right in the discount rate so far, but people must want the flexibility of lump sums, because otherwise they would not ask for them.

10:15

John Mason: It is quite a big jump to say that lump sums must be working because people are not doing something else. If people run out of money late in life, there is not a lot that they can do, is there?

Alan Rogerson: No—I mean that they must be working because people are choosing lump sums and are not asking for periodical payments. No one has ever come to me to ask for a periodical payment.

John Mason: One of my colleagues will ask more about periodical payments, but we have been given other evidence that says that there are other reasons why people want a lump sum.

Moving on, there is the question of the methodology of calculating the discount rate. The plan is that the United Kingdom Government actuary will be a player in that, and that the Scottish Government could perhaps change the notional portfolio. I am an accountant, and I quite like the idea that the process could be completely automated and we could take people out of it. We could look at the inflation rate and what the gilt market, equities and the property market are doing, and then put a formula in place that works its way through. Do we have to involve people?

James Dalton: That is a decision for policy makers. I am a supporter of technology and technological advances, but I would be very cautious about automating a process that will ultimately have such a profound impact on the lives of the most seriously injured people in society. For now at least, it is probably best to remain with the exercise of human judgment in such decisions.

John Mason: Is everyone comfortable with that?

Kate Donachie: The discussion that we are having today and the discussions that the committee has had before on the discount rate highlight the difficulty of fixing a discount rate. Attractive though it may be to think that we could automate that, it is a difficult process that cannot be reduced to an arithmetical formula. It just would not be possible.

John Mason: Should we go the other way, then, and in a sense make it more political or accountable? We could forget the actuary and let Government ministers and their advisers come up with a rate.

Kate Donachie: There should be involvement from the Government Actuary's Department, but FOIL's view is that there should be political accountability for a decision that necessarily will involve an element of political judgment in fixing the rate.

John Mason: Do you reckon that that accountability is provided in the bill?

Kate Donachie: It is difficult to know how it will work in practice. Under the bill, the Scottish ministers will retain control and will have the ability to fix a notional portfolio and the standard adjustments, but the Government actuary will have the final say on what the figure is. As matters stand, it is not entirely clear where the accountability for the decision will lie.

Alan Rogerson: In England and Wales, a slightly different route has been chosen, in that, as I understand it, the Lord Chancellor, with a panel of special advisers, will specify the portfolio to the Government Actuary's Department. The approach that the Scottish Government has taken so far is to say that it will set the notional portfolio and the adjustments—it will set the parameters for the Government Actuary's Department. Which direction you want to go in is a question for the committee; it is a policy decision. Both options might arrive at similar figures, or they might completely diverge and go down different avenues.

John Mason: So you do not have strong feelings one way or the other.

Alan Rogerson: Not particularly, as long as we recognise what we are doing and what route we are going down, and we do it for the right reasons. We will have to wait and see what transpires.

The Convener: Could any difficulty arise as a result of the paths in Scotland and England diverging?

Alan Rogerson: Possibly. Again, I will draw a parallel with drawdown investors. They invest in

the same market, which is UK wide. If the end result is that the discount rate in England and Wales is different from the rate in Scotland, more cost might be passed on to a Scottish premium payer in the insurance market. Conversely, if the discount rate is lower in England and Wales, English and Welsh premium payers would pay more.

The Convener: So you would look at it more as a consequence of the different approach, rather than something that in itself is a difficulty.

Alan Rogerson: It is not a difficulty, but we need to be mindful of the unintended consequences.

Andy Wightman: The fact that insurance premium payers and taxpayers will pay for this has been mentioned. Are there any figures on what percentage of total insurance payouts or total compensation from health boards is lump sums for personal injury claims?

Alan Rogerson: I do not have any empirical evidence of that.

Andy Wightman: I suggest that the percentage would be tiny and that, therefore, any impact on consumers would be almost negligible.

Alan Rogerson: It is a very small proportion of the overall total, but we are dealing with the highest value claims, at the other end of the spectrum, so it is very difficult to know exactly where the truth lies. I can talk about my own company. My employer has said, as part of the whiplash reforms in England and Wales, that it will pass on all the savings to the people paying the insurance premiums. However, I am afraid that I do not have data on what we pay out in Scotland on high-value personal injury claims.

Andy Wightman: Is it possible to find that out, even in broad terms?

The Convener: Panel members could write to the committee if they have that information.

James Dalton: If we can get that information, I am happy to write to the committee.

The Convener: That goes for the others on the panel, too.

Norma Shippin: We have given the committee some information on this. Part of the problem is that because there are a small number of claims, if we provide the annual figures it might identify the person. However, we have been collating the figures over a number of years and could perhaps shorten the period to five years.

The Convener: If you could do that in an anonymised form it would give the committee some understanding of the answer to that point. I do not know whether Kate Donachie is in a position to comment—perhaps I can leave the matter with panel members. Indeed, if you have comments on any other issue that has been raised today, please do not hesitate to write in to add to your submissions.

Colin Beattie (Midlothian North and Musselburgh) (SNP): I am going to ask one or two questions on PPOs. First, I want to check whether I understand something that Joy Atterbury said. You said that most of your settlements are PPOs.

Joy Atterbury: Most of our high-value settlements are PPOs. The figures that we have given you are for settlements over £1 million. Have you got those?

Colin Beattie: Yes.

Joy Atterbury: The numbers are very small, but they show that in 2016-17, we had one lump-sum settlement over £1 million and two PPOs. In 2017-18, we had one lump-sum settlement over £1 million and two PPOs. The numbers are extremely small. Our desire is to settle those by PPO. There are a number under negotiation at the moment.

Colin Beattie: Am I correct in taking from what you said that, for obvious reasons, it is mainly children who fall into that category?

Joy Atterbury: Yes.

Colin Beattie: And, for the rest of the panel, is it correct to say that there is very little experience of PPOs in Scotland?

Witnesses *indicated agreement.*

Colin Beattie: Some of the evidence that the committee has seen suggests that the regulatory regime for insurers makes it expensive to offer PPOs. Are there any issues with the regulatory regime that would indicate that?

James Dalton: As I was explaining in response to an earlier question, the way that insurers have to reserve for their long-term liabilities is set out in a very different way from the way that the discount rate is set. They hold capital based on those long-term liabilities.

To answer your question directly, there is no problem with that regime. Insurers comply with that across Europe in valuing those long-term liabilities; they put money on their balance sheets to account for that and to ensure that they are solvent and their capital position is robust. There is no problem with the regulatory regime.

Alan Rogerson: There was some evidence in your meeting last week that there may be a problem with insurer insolvency and how insurers are backed. Insurers that underwrite business in the UK are subject to the financial services compensation scheme rules and guarantee, so

there should not be a problem with an insurance company. If an insurance company was not able to fulfil the PPO and went bust, the Government would step in and replace that. That is something that the committee might want to consider in relation to the bill because, at the moment, the Motor Insurers' Bureau is not named as a compensator for the purpose of periodical payments.

There are perceived issues around the insurance industry and there is the question of whether we like PPOs, but that is not necessarily the right question to ask. The right question is: what is the right thing to do for injured people? I find it hard to envisage a situation where an injured person went to court to ask for a periodical payment and the court did not have sympathy for that injured person and did not give them the periodical payment that they were seeking. It is not really for an insurance company to try to argue against that or to intervene, because there does not seem to be any rational reason to do so.

Colin Beattie: You have touched on a subject that I was going to ask about, which is the bill's requirement for "reasonable security"—enough to keep the continuing payment going. Obviously, insurance companies have backing and any court is likely to say that a properly constituted insurance company would give reasonable security. However, are there other bodies—such as the NHS—that the court might not see as being able to provide that reasonable security?

James Dalton: Alan Rogerson makes a very important point about the context of the Motor Insurers' Bureau. Many claims are settled as a result of accidents with uninsured drivers. The MIB settles some of those cases on a PPO basis. Rather than the MIB needing to go to court every time that it wants to settle a case, to demonstrate to the court that it has the solvency and capital to provide that PPO on a long-term basis, we would like the bill to deem the MIB to be a body able to pay such claims—in the same way that insurance companies are.

Colin Beattie: We will note that point. Are there any other organisations that might not meet the "reasonable security" test?

Alan Rogerson: I cannot think of any, because ultimately it would be an insurance company or a Government agency, in which case it would be backed by the Government. I am struggling to think of a single example that would not meet it.

Norma Shippin: Several years ago, before PPOs were in their current format, there used to be structured settlements. In the days of the NHS trusts—if you remember those—there was considerable discussion about whether those settlements would continue. They did not. It was always recognised by pursuers' agents that there would be some mechanism of payment for a health service organisation or a Government organisation. However, it was a question that we had to field at that time, so I can see that it might be a question for other defenders and probably for pursuers' agents.

Colin Beattie: I want to tie up the question on the regulatory regime. Are there any practical barriers to insurers offering PPOs, perhaps for regulatory or other reasons?

James Dalton: Not that I am aware of.

Alan Rogerson: The only other aspect to bear in mind is the indemnity limits of a policy. An employer's liability policy or a public liability policy will have an in-built limit. That would be a barrier in any event, because after that indemnity limit it is essentially the money belonging to a private business or individual.

10:30

Gordon MacDonald (Edinburgh Pentlands) (SNP): I want to continue this discussion about PPOs, with particular regard to the variation of PPOs at a future date. This morning, we have heard that PPOs could reduce the chance of someone being overcompensated or undercompensated and that they provide a bit of certainty that someone would get the award that they required if their life expectancy changed at a future date. Given that degree of certainty, would I be right in saying that there are no concerns about courts varying PPOs?

Norma Shippin: You would need to be clear in the guidance about the circumstances in which you would envisage people being able to go back to the court to amend the PPO. One of the advantages of settling a case is that you achieve certainty for the defender and the pursuer. I think that it would be written into the agreement when those circumstances might arise, but it would be important to have some degree of certainty about the kind of situation that you envisage arising, rather than just the general run of cases.

Gordon MacDonald: What do you think those changes could be?

Norma Shippin: For example, someone becoming unexpectedly more severely damaged by an event that took place in their life that was a consequence of the original negligence but which had not been foreseeable at the time of the PPO coming into play.

Gordon MacDonald: Should there be a list of trigger points?

Norma Shippin: That would be helpful. You would not want to think that it would be regularly

done by every pursuer in every case, because the whole point of having the discussions and reaching agreement at the outset is to try to foresee matters that could arise.

Kate Donachie: We already have a system of provisional damages that is used, in the main, when we are dealing with people who have developed a disease through exposure to something, perhaps at work, and they have a relatively minor condition that could develop into a more serious condition in the future. The provisional damages regime enables them to have some compensation now for the relatively minor condition but to reserve their right to seek damages in the future if they develop a more serious condition.

FOIL's submission is that the wording around PPOs and their variation should mirror the wording that is used in relation to provisional damages. There has been a fair amount of argument in court about what a significant improvement or deterioration means and, if you tie the wording around the PPOs to that wording, you would be benefiting from what has already been done.

The legislation also envisages that you would write into the agreement things that might change life expectancy or the need for care, and that would restrict the scope for people on either side to come back again and again to try to change what has already been agreed. There are ways to manage that and to make it acceptable.

Alan Rogerson: It might even be that primary legislation is not the place for that to be considered. It might be that the Scottish Civil Justice Council can take account of that in secondary legislation or rules of court. However, I understand that it is for the committee to ensure that the headline legislation is fit for purpose and enables all of what we are talking about to take place.

Gordon MacDonald: Given that there might be an individual whose illness gets progressively worse in a way that was not foreseen, who should pick up the fees if the matter goes back to court?

Kate Donachie: Again, that is something that will be in the detail. In a broadbrush sense, if someone is compensated because they have been harmed by someone else, it seems right that the person who caused the harm should bear the cost of that. The concern would be that there could be a vexatious person who keeps bringing someone back to court. In those circumstances, you would need to consider safeguarding the defender. However, that is something to be dealt with in the detail of court rules.

At your meeting last week, qualified one-way costs shifting was mentioned. The detail of that system is currently being examined by the Scottish Civil Justice Council. It might, therefore, be appropriate for it to consider the issue that you have just raised.

The Convener: FOIL's submission suggests changing the wording of the proposed new section 2E(2)(a) from

"a change in the pursuer's physical or mental condition"

to

"a significant improvement or serious deterioration in the pursuer's physical or mental condition".

Is that because if there is new wording, the courts will have to go through the process of establishing what it means, whereas the existing wording, which you suggest using, is already understood?

Kate Donachie: That is correct. Work has been done to interpret the words that we suggest using, and it would be useful to take advantage of the time that has been spent on that rather than trying to start again.

The Convener: On the other hand, I think that you also accept that the issue could be dealt with by the rules council.

Kate Donachie: If the wording reflected the provisional damages wording, people would know broadly what they were dealing with and the level of change that would be required to justify bringing something to court. The level of detail around how the expenses situation works with that and any sanctions for people being vexatious on either side would be for the rules council to determine.

The Convener: So, your primary position is that that wording should be made clear in the bill rather than that being left to the rules council.

Kate Donachie: It would be helpful if the description of the change in circumstances mirrored the Administration of Justice Act 1982 in relation to provisional damages. It would make sense for the detail beyond that to be determined by the Scottish Civil Justice Council.

The Convener: As there are no further questions, I invite our witnesses to state in one or two sentences any key points that they think that the committee should take away from today's discussion. On the other hand, they might not wish to, as they might feel that that would be limiting too much what they have to say and have set out in their submissions. Would anyone like to make any final comments on anything that we have or have not covered today?

James Dalton: Nothing from me.

The Convener: And nothing from anyone else.

I thank our witnesses for their time. We will suspend the meeting to allow for a change of witnesses.

10:37

Meeting suspended.

10:44

On resuming—

Subordinate Legislation

Common Financial Tool (Scotland) Regulations 2018 [Draft]

The Convener: We will now consider the draft Common Financial Tool (Scotland) Regulations 2018. We are joined by David Hilferty, the deputy chief executive of Money Advice Scotland; Eileen Maclean, the national council member for the Association of Business Recovery Professionals, or R3, in Scotland; David Menzies, the director of practice at the Institute of Chartered Accountants of Scotland; and Craig Simmons, the sector co-ordination manager with the Money Advice Service. I welcome all four of you to the committee.

The microphones will be operated by the sound engineer, so there is no need to press any buttons. If you want to come in, please raise your hand. There is no need to answer every question, but please feel free to contribute to the discussion.

10:45

Angela Constance (Almond Valley) (SNP): Good morning to the panel. I have three questions that will explore the desire for a common financial tool and some of the pros and cons of that. One of the key arguments for adoption of the standard financial statement is that it will standardise assessment of income across the UK. How important is that, and what impact will stricter limits on expenditure have on debtors? I do not mind who starts.

Eileen Maclean (R3, Association of Business Recovery Professionals): I represent R3 members, who will, as insolvency practitioners, be putting the SFS into practice on appointment and, obviously, on the basis of the regulations. R3's position is that it is preferable to have a standard. One of the problems prior to introduction of the common financial statement was that there were several different standards: some firms used that of the British Bankers Association, some used what was then the Consumer Credit Counselling Service's, and some used their own individual approaches. What we were aiming for with the common financial tool—and are now aiming for with the SFS—is a common platform for analysis, so we have had that for several years in Scotland.

The SFS will be UK-wide, which is preferable. The fact that we have different debt solutions north and south of the border is well recognised, but the majority of creditor organisations are now based in

Manchester or elsewhere in the UK, so when individuals get debt advice, it is not geographically specific.

Like the majority of creditor organisations, the big commercial lenders are also spread across the UK—they are, predominantly, down south—and adoption of the SFS will mean that there is a common platform that they recognise. In the past, we have had problems when they have not recognised the Scotland-specific approach because they did not see it often enough to be familiar with it.

We would definitely support the SFS being UK-wide for ease of use for everyone and so that there is a common platform for advice.

Angela Constance: Before I move on to hear other opinions, is it your view that the SFS will be accepted by more creditors?

Eileen Maclean: Yes—arguably, that is the case.

David Menzies (Institute of Chartered Accountants of Scotland): As Eileen Maclean said of R3, ICAS generally supports the principle of having a common financial tool because it makes sense to have a similar method of calculation being used throughout the UK. A common financial tool was brought in by the Bankruptcy and Debt Advice (Scotland) Act 2014, and when it was discussed in Parliament, we suggested that the common financial statement was probably not the right method. A discretionary element is always needed. We would prefer to see a tool that has a smaller administrative burden and is more generic. We can explore that later, if that would be of interest to the committee.

Craig Simmons (Money Advice Service): Good morning, and thank you for inviting us all to speak. I work for the Money Advice Service: we are the owners of the standard financial statement.

It is worth mentioning that the standard financial statement has been built on the good practice that already exists in the sector. There is the common financial statement, which is currently in the common financial tool, and there is the approach that is used by StepChange Debt Charity and many insolvency practitioners across the UK. Various approaches are used to assess affordability when people are in problem debt.

We have tried to take what has worked well from all the formats and we have learned a huge amount from what has happened in Scotland. The savings category is a prime example of that: it worked well here in Scotland, so it has been built into the standard financial statement.

The main thing to stress about the impact on debtors is that when people go to StepChange Debt Charity Scotland or to the UK-wide Christians Against Poverty, the spending guidelines under which they are assessed are different from those used by the Accountant in Bankruptcy; the standard financial statement will mean that only one approach will be used across the debt advice sector.

That is very important for clients because being assessed under another method might mean that the output would be slightly different to what ends up being in the common financial tool output. That sort of change does not result in a great customer experience, because the person might have to go to a different provider—say, an insolvency practitioner—who would see that the spending guidelines that had been used were different to those that had been used previously, and would be able to find a solution.

The approach should, therefore, reduce the burden not only on advice practitioners and insolvency practitioners but, most important, on clients who, in their hour of need, require a seamless journey.

David Hilferty (Money Advice Scotland): MAS views the matter from the perspective of our members: the front-line money advisers who deal with the tool every day. If you were to pitch the question at our members, their resounding response would be, “We’ve had a standardised assessment of income since the introduction of the CFT in 2015.” They are more likely to view the situation in terms of the importance of replacing the existing standardised assessment of income with a new one that has not been tested as much as the current system, and which we are concerned will lead to more work because of the additional evidence requirements, which will be touched on during this evidence session.

The practical difference for clients in Scotland, compared with clients in England and Wales, is that under the approach that has been taken in Scotland by the Accountant in Bankruptcy, the evidence requirements are already more onerous than those elsewhere. Under the standard financial statement, categories including transport, school uniform costs, the cost of school trips and other things that are difficult to evidence will be moved so that they will always require to be evidenced.

That is the view of MAS’s members, and those are some of the impacts on clients in debt that will start to emerge in the transition to what will be the second standardised assessment of income.

Angela Constance: Following on from that, I note that Eileen Maclean acknowledged that UK creditors already have to adapt to specifically Scottish processes. Does it make a practical difference if Scottish statutory debt solutions use a different income assessment method? I will ask

David Hilferty to answer that first, because I think that he had already begun to touch on the matter.

David Hilferty: When I speak to our members—our money advisers—what I hear is that the difficulty lies not with the conventional consumer creditors that are, as Eileen Maclean has said, based throughout the UK. Those sorts of creditors, which include banks, lenders and credit card firms, have numerous approaches for dealing with customers who are considered to be vulnerable, or who are on low incomes. As advisers will tell you, dealing with those creditors is, for the most part, relatively straightforward.

Difficulties often arise when dealing with what one might refer to as public sector creditors, such as the Department for Work and Pensions, Her Majesty's Revenue & Customs and, primarily, local authorities, which often use pretty aggressive means to recover council tax arrears. The notion that advisers have problems negotiating with consumer creditors is not one that our members would necessarily accept.

On the second question about the impact on statutory debt solutions, the evidence requirements that must be met in the financial statement can in many cases, as I have said, be onerous. We know of a case in which a father's expenditure on train fares to visit his daughter was considered to be excessive, and we have also seen a disabled client being asked to evidence expenditure on incontinence pads. Such issues do not necessarily arise in the rest of the UK, but they arise in Scotland because of the approach to statutory solutions.

As I have said, the SFS will move elements such as transport and school uniform costs into categories that must be evidenced, which has not been the case with the common financial statement—and that is before we begin to talk about trigger-figure breaches. All that will lead to an increased workload for advisers, clients and, for that matter, the AIB, unless we get a reasonable approach to guidance, which would alleviate a lot of our concerns about the evidence requirements.

Angela Constance: I want to put the same question to the rest of the panel. Perhaps you can also comment on dealing with public sector bodies, such as local authorities or the DWP, as creditors.

Eileen Maclean: The wider issue is that, from a creditor's perspective, if there is no standard whatsoever, we go back to a scenario in which there is a huge subjective overview, and individual creditors—whether that is a local authority or a small trader—will express an opinion on a debtor's spend. It will go down to the level of whether someone should have Sky telly, whether they should smoke, whether they are allowed to visit their daughter and what else they can spend their money on. At the end of the day, there are all sorts of privacy issues. Debt is not a crime: we are aiming for a standard of living for people.

We will come back to trigger figures, but if we set a standard against which to benchmark, it is harder for creditors to argue, because we are using a standard against which everyone is measured on a common basis.

David Menzies: Like David Hilferty, I think that the onerous part is currently the level of evidence requirements. It makes absolute sense for everyone to be assessed in a standard way, using a defined framework.

UK creditors are well used to dealing with the different nuances of Scots law and the slightly different procedures that we have. On assessment of contributions, it benefits them to be able to do that on a common basis across the UK, whether it is for someone entering into an individual voluntary agreement in England and Wales or Northern Ireland or someone entering into a trust deed or debt arrangement scheme in Scotland. Such commonality across the board is beneficial to creditors: they would have discretion about whether to permit a debtor to enter that solution. It allows them to assess that far more easily.

Craig Simmons: I would like to pick up on three points. David Menzies is right that Scotland is leading the way in commonality of approach in formal solutions. However, it is worth stressing that there are still informal debt solutions operating in Scotland, such as informal debt management plans and token-payment agreements with creditors. The move to a standard financial statement will bring consistency across the board for people who are in debt, whether they go for a formal solution or a less formal one.

The point about evidencing trigger-figure breaches will come up more in our discussion. The reason why things such as travel, prescription costs and school meals have come under fixed expenditure costs—forgive me if I am telling committee members what they already know—is that there is no trigger figure. Those costs are viewed as essential expenditure and will not be subject to challenge by creditors. Challenges would be to the more discretionary areas of expenditure. That is very positive for clients, who would not have the spending guidelines pursued against things such as their bus fares.

Finally on public sector creditors, I can only reflect on the experience in England and Wales. The standard financial statement has been in operation since 1 March 2017. Just over 100 local authorities in England and Wales have signed up to express an interest. I want to be clear that

expressing an interest in using the SFS is their approach to assessing affordability. Several authorities have now implemented it and the rest of them are investigating that.

MAS also sits on a Cabinet Office fairness group, which includes representation from the DWP and HMRC. A consistent approach to public sector debts is a key topic on the group's agenda. I am very encouraged by the momentum that the SFS is building. If it is implemented in Scotland, that momentum will only continue.

11:00

Angela Constance: Finally, is the panel confident that the SFS will be accepted by UK Government bodies? If the common financial statement were to continue in Scotland, who would maintain it? Whether it is the CFS or SFS, what issues are there around assessments, costs and bureaucracy for those who provide advice?

Craig Simmons: There are a few examples in which the UK Government has already accepted the use of the SFS: the Insolvency Service of England and Wales uses the SFS to assess bankruptcy, and has done since April 2017. It is very positive about the standard financial statement. It is in the pre-action protocol in the court system down south.

I should also mention that, yesterday, along with the budget papers, the Treasury published plans for a statutory debt management plan, which would be similar to the DAS, which is used in Scotland. The Treasury referenced the use of the SFS in that. I have no doubt that the SFS is supported more broadly in the UK.

I am sorry: can you remind me of the second part of the question?

Angela Constance: The question was about who would maintain the other system if it were to continue.

Craig Simmons: Currently, the common financial statement is maintained by a charity called the Money Advice Trust. It has indicated that it intends to cease the common financial statement if everyone moves to the SFS. I believe that it would seek funding if the CFS were to continue. At the moment, we fund the standard financial statement, so it would be of no cost to anyone apart from us.

David Menzies: I tend to agree about the adoption of the SFS by UK Government departments: it is, broadly, well supported.

If we are considering whether the common financial statement is to be maintained in Scotland, we need to understand the basics behind it. Fundamentally, in it, categories of expenditure are allocated against a model. Those figures are taken from Office of National Statistics data on household expenditure. Maintenance is not a huge deal—it is just taking the ONS figures and putting them in the appropriate format. It is a formatting issue.

The SFS and the CFS use the same things, but with categories of expenditure in slightly different areas. I do not see how maintenance of the CFS would be a tremendous burden. I do not know who would be best placed to pick that up—it might be the Accountant in Bankruptcy or some other public body.

Eileen Maclean: On who might maintain the CFS, I know that there is an argument for the Accountant in Bankruptcy supporting that function. However, there would possibly be a conflict of interests, because the AIB would be setting the standard and monitoring it and, in some cases, implementing it. The role might better be taken by a body that is completely independent and which would, as David Menzies said, take the wider economic figures and put them into the model. The Fraser of Allander institute is an obvious candidate. A Government agency or department under the economic directorate might also be considered. It has crossed my mind that it would be important to have some separation between setting the standard and implementation.

David Hilferty: I do not have much to add about who would maintain the CFS. If the spending guidelines in the CFS and the SFS are broadly in line, they would be distinct, but not too different. Someone who was persuaded that there are drawbacks and flaws in the SFS would also find those flaws in the CFS. For example, there is no transparency under either option in respect of the relationship between the client, the creditors and the advisers. The client is the only person who does not have access to the spending guidelines. I do not know whether the committee has had access to the guidelines.

To prevent members of the public from seeing the guidelines contributes to the notion and misconception that people who are in debt cannot be trusted and that they could, if they could access the guidelines, somehow game the system. As Eileen Maclean said, being in debt is not a crime. We need to change many of the misconceptions about people who are in debt.

We are also concerned that there is no contingency under either option. The figure is 10 per cent of disposable income, capped at 20 per cent. That means that someone who is paying £50 a month towards their debt has £5 disposable income contingency slack to play with, which is not sufficient to deal with unexpected expenditure.

Eileen Maclean mentioned living standards and David Menzies mentioned the methodology that underpins the CFS and the SFS, which is based on the spending patterns in the bottom 20 per cent of households in the ONS's living costs and food survey. I have frequently made the case that basing the methodology on what the bottom 20 per cent are spending means that it is based on the spending patterns of people who are spending what they have rather than what they need to spend. That seems to me to be the wrong starting point.

I am fully aware that the decision here is a straight shootout between continuing the CFS and going with the SFS. However, MAS wants to see a full review of potential alternatives, as well as a review of the guidance that interprets the regulations.

Jackie Baillie: On that last point, convener, it would be useful if the committee could request the sight of that guidance.

I wonder whether I could be slightly cheeky. David Hilferty spoke about his network of money advice advisers. When did each of you last provide face-to-face advice to a debtor using one of these common financial tools?

David Hilferty: I have never been a front-line money adviser; I was appointed as a policy officer at Money Advice Scotland. However, I am very much someone who has always thought that policy officers should not remain in the office with their heads stuck in books and legislation. In Money Advice Scotland, we work to the maxim that, if you assert something without evidence, it can be dismissed without evidence, so we put evidence at the very heart of all that we do.

Our analysis of the CFS and SFS has been based on close engagement with our members. We have had three consultation events and various engagement events throughout the country, in Glasgow, Edinburgh and Aberdeen. We also went through the rather laborious task of doing a line-for-line transposition of CFS financial statements into the new SFS.

You are absolutely right to suggest that I do not have front-line advice experience, but the level of engagement that we have had with our members goes some way towards making up for that.

The Convener: Are your members people who give front-line money advice?

David Hilferty: Yes. Our members are money advice providers in local authorities, citizens advice bureaux, housing associations and some IPs in the private sector.

Eileen Maclean: Likewise, our members are people who give advice. Without going into too much detail, my role is slightly more complicated. I teach the insolvency profession, so I work with the CFS on a regular basis.

David Menzies: I am currently advising a debtor. The last time that I used the common financial statement was last week.

Craig Simmons: It is a good question. I am not a regulated debt adviser. However, I must stress that the idea of the standard financial statement has been around since about 2013 or 2014—

Jackie Baillie: I am not asking about the idea; I am asking about whether you have practical experience of applying it, because I think that that is the nub of the issue. I have heard people agreeing today that there should be a common financial framework. The question is, which one, how does it work and in whose interest does it work? I know that that question was a bit cheeky, but I wanted to ask it.

I will turn to something more substantive. There are clearly conflicting views between the Accountant in Bankruptcy and, at least, Money Advice Scotland—if not others—with regard to whether the use of the standard financial statement will result in more or fewer trigger figure breaches. What are your views? I put that question to David Menzies first, seeing as it was only last week that he advised someone.

David Menzies: Without prejudging what David Hilferty might say, I do not think that there is a huge difference between the views of the AIB and Money Advice Scotland on that. There is a common view that there will be an increase in trigger figure breaches using the SFS. The question is about by how much that will be and how many there will be.

I am sure that David will talk about this in more detail. The analysis that was carried out by the AIB in relation to the consultation was done prior to the SFS trigger figures being uprated and it showed that around 12 per cent of debtor contribution orders would result in a trigger figure breach. In the initial comparative survey that Money Advice Scotland carried out, the percentage was about 40 per cent. Since the figures were uprated, Money Advice Service re-established that evidence and it came out that the number of bankruptcies that resulted in trigger figure breaches would increase by about 4 per cent.

There is commonality across the board that there will be an increase in the number of trigger figure breaches and evidential requirements—that is just the way that it is. That is where things stand at the moment.

David Hilferty: It is important to stress that the initial AIB consultation took place, or at least closed, in October 2017, and the argument about trigger figure guidelines has moved on a lot since

then. There have been two separate upratings to the spending guidelines in the SFS, for which a huge amount of credit is due to guidance colleagues at Money Advice Service. We were at the forefront of raising concerns and there was a response to the concerns. For certain figure categories, the guideline trigger figure has been increased by more than 100 per cent.

However, it is worth noting that in the previous uprating in 2017, the trigger figures in the SFS guidelines increased and the trigger figures in the CFS guidelines came down slightly. As much as anything else, that is why we have sets of guidelines that are, broadly, more equivalent. When we asked Money Advice Trust why the trigger figures in the CFS guidelines had come down—that was somewhat perplexing as, for example, household bills have not gone down in the past year or so—it said that people in the bottom income quintile were registered as spending less, which comes back to the methodology. They were spending less because they had less, and the trigger figures in the CFS guidelines accordingly came down. That is another of the drawbacks of the current methodology, which I emphasise is the same whether we use the CFS or the SFS.

Eileen Maclean: When the CFS came in, the number of individuals making contributions plummeted. Between 50 per cent and 75 per cent of debtors in an insolvency solution at that time went from paying a contribution to making no contribution. I just want to put in context the fact that we are now going back to just 4 per cent—or, arguably, 4 to 12 per cent—of debtors making a slightly increased contribution.

Jackie Baillie: Finally, we will hear from Craig Simmons, who was getting praise there.

Craig Simmons: Thank you, David Hilferty, in particular, for that.

I do not have a lot to add to what he said, but I will mention that it is very difficult to compare precisely the common financial statement with the standard financial statement. What I see as the most reliable indicator is what has happened when the SFS has been live in England and Wales, and none of the providers who use it south of the border have reported any problems or any particular increase in trigger figure breaches.

The Convener: Is allowable expenditure graded according to region or area?

Craig Simmons: I am happy to answer that question. The spending guidelines that are attached to three areas of expenditure are UK-wide guidelines. It is all tied up with the standardisation of the format for its use throughout the UK. The key thing to stress on that is that the guidelines and guidance for the SFS state that there will be areas—very rural areas, for example—where there might be higher expenditure.

Where spending guidelines are breached, there should be a note added to the statement and where there is a good reason for the breach, that should be accepted. That tends to be the practice that we have seen thus far.

11:15

The Convener: Is it an ad hoc approach that depends on the individual and the location?

Eileen Maclean: The flexibility of the process is part of the design. The SFS takes into account a person’s domestic situation, the type of house that they live in and the fuel that is used, so that certain categories, such as fuel and heating, have an upper limit and are not triggered. It is also dependent on the number of adults and children who live in a property.

David Hilferty: It is a concern that we have raised, particularly in response to the additional costs of living in remote and rural Scotland. Eileen Maclean and Craig Simmons mentioned that transport and energy are not triggered categories, but if someone is submitting a statutory application to the AIB, those categories have to be evidenced in any case, whether the spending is considered excessive or not.

We need to consider the wider context of the money advice sector. Investment from local authorities in money advice services has dropped by 45 per cent in the last two years. We need money advisers on the front line, advising clients. We do not need money advisers chasing up fuel bills and bus tickets that need to be submitted as part of an application.

The Convener: Is the SFS better in that it can take account of regional differences in individual cases?

David Menzies: There is broadly no difference between the SFS and the CFS—they use the same source figures. There is no regional variation, but both approaches allow a degree of flexibility or rationalisation for individual circumstances. However, that takes us back to the first principle, which is that someone should get the same result regardless of which debt adviser they go to. I am not convinced that that would happen under either the CFS or the SFS, because some advisers would allow something—cigarettes or travel—and others would not. The adviser would have to consider how much is too much travel for the client to visit their daughter. Neither the CFS nor the SFS gets advisers away from making that judgment.

Eileen Maclean: The point is not necessarily about which tool we use, but about how we implement it. We all agree that there is a wider discussion to be had about the level of confirmation and evidential requirements that go into supporting that, both in relation to the cost to the money advice sector and the insolvency profession and to the level of evidence that the Accountant in Bankruptcy—which oversees the implementation and which, in the context of sequestration, sets the contributions—requires. There is work to be done there.

From sitting on the bankruptcy stakeholder group in my R3 capacity, I know that the issue about the level of evidence has been fed back to the AIB. I have been advised that the AIB is considering that.

Colin Beattie: I have a simple question that builds on some of the information that you have already given us. What is the likely administrative impact on money advisers and insolvency practitioners of a switch to the standard financial statement?

David Menzies: As I have already indicated, there is a large evidential requirement, which is a burden that results from the way in which the AIB operates. Those concerns relate to both the common financial statement and the standard financial statement.

Neither the CFS nor the SFS will increase the administrative burden an awful lot, except for in relation to the trigger figure breaches, for which there is clear evidence that there will be an increase. There will be an additional administrative burden in relation to the discussion back and forwards between the AIB, the insolvency practitioner or debt adviser and the debtor around obtaining that evidence and justifying the breaches.

Based on the analysis carried out by the AIB and Money Advice Scotland, we make a conservative estimate that the cost to the economy in Scotland is somewhere between £155,000 and £450,000 per year, depending on the range of breaches. There is undoubtedly a cost.

Colin Beattie: Are there other costs, such as for changes that will have to be made to systems? I imagine that some sort of bespoke system or software will be needed.

David Menzies: There will be some changes. It depends on how each organisation operates. Money Advice Service provides an Excel spreadsheet and some places will use that. The Accountant in Bankruptcy has built the common financial statement into the Basys system that it uses, so that will have to be updated. There are information technology costs there. Other organisations, such as StepChange, will have to invest in IT changes, too.

Colin Beattie: Given that we are talking about back-office costs, you seem to be indicating that they will be fairly minor.

David Menzies: They will be relatively minor. The cost is in context, but the question is whether it is justified.

Colin Beattie: What is “relatively minor”?

David Menzies: We are not talking about millions of pounds.

Eileen Maclean: As an insolvency practitioner, I keep abreast of myriad changes, such as the new Scottish insolvency rules, and we just have to absorb such costs as part of doing business. Most of the IPs are already on board. There are many things that we can do to talk directly to AIB systems, but that is not a significant cost to the IP community.

David Hilferty: Implementation costs will vary between organisations. However, as David Menzies has said, the potential for additional day-to-day operational costs, due to the additional evidence requirements, is universal. If we can get good guidance on the proposals, some of those concerns will be mitigated.

Craig Simmons: I disagree with what David Menzies is saying. I do not believe that there is any evidence that there will be an additional burden as a result of using the SFS rather than the common financial statement. The spending guidelines are broadly similar and there is one less expenditure category that is covered by spending guidelines, so I do not think that there will be an increase there.

We provide an Excel tool and we have also produced an evaluation toolkit that can be dropped into systems. That does a lot of the work and reduces the burden slightly. We have produced quite a lot of training that will be available free of charge to advice agencies.

John Mason: Mr Simmons, could you explain a bit more about the Money Advice Service? Am I right to say that it is a UK Government agency—if that is the correct term?

Craig Simmons: We are an independent body set up by the Government—the technical term that is often used is a quasi-autonomous non-governmental body, or quango. Our statutory objective is to improve the quality, consistency and availability of debt advice in the UK.

The reason why we are the right people to develop a tool such as the SFS is that we have no axes to grind. We want to deliver a sector that works well both for creditors and for debt advice agencies. We have no other motivator.

John Mason: How did the tool come about? Who decided that there was going to be a standard financial statement?

Craig Simmons: We were established in 2012 and carried out a consultation on what would be the right sector-wide initiatives that would help improve the quality, consistency and availability of debt advice in the UK. One of the strongest things that came back, among many points, was the need for a standard approach to financial statements across the country—that was the driver. As I mentioned earlier, there are a lot of disadvantages to having various different approaches. That is what the sector told us was needed.

John Mason: You have said that the Money Advice Service is independent of the Government. However, one concern might be that, although we are fairly comfortable where we are just now and the two models are not that different, political pressure could be put on your agency in the future, either to squeeze down or inflate what debtors are allowed to keep. Are there clear rules about that?

Craig Simmons: The methodology that is used to define the guidelines is written and set in stone through the process that our statistician goes through every year, and we produce all the calculations. It would not be easy to change the methodology secretly. We have a governance committee that includes Citizens Advice Scotland, Money Advice Scotland, most advice providers in the UK, a number of creditors and the AIB, all of which have a say in the methodology.

The Money Advice Service's position is that creating the standard financial statement is a collaborative project. It is the sector's tool rather than ours, and the decisions are taken in consultation with practitioners; we do not just make the decisions and then roll them out. I put on record how grateful we are to the AIB, because it has been a very collaborative process and the AIB has shared with us a lot of learnings about the common financial tool that has been used since 2015.

John Mason: I turn to the other three members on the panel. Are you also comfortable with the Money Advice Service doing the work and with the process, the protection, the safeguards and so on?

Eileen Maclean: Yes.

John Mason: That is great.

David Hilferty: Yes. As Craig Simmons said, any change to the methodology is low risk. A governance group has been set up that covers a range of bodies across the sector. On the other hand, if you quite like the notion of reviewing other ways in which we might do this, there is a low probability of that happening. That is another aspect to your question.

David Menzies: Generally, I have no concerns with how the tool is put together and how it is working. Our concerns about the regulations are more a matter of principle and are about them not being in the control of legislators in the Scottish Parliament. We have concerns about the system of insolvency practitioner regulation, authorisation and monitoring. I suggest that some of those aspects are not sufficiently protected in the regulations. The regulations move some of the responsibility for those matters into the hands of the Money Advice Service rather than that responsibility being in the legislative provisions.

John Mason: I am sorry—what is the concern?

David Menzies: We already have a well-defined system of regulation. The code of conduct that is available for the SFS, for example, dictates or allows the governance group to decide who can and cannot use the SFS. However, in the regulations, there is a requirement that says, "You have to use this." There is the possibility of the governance group saying, "This firm is not applying the procedures correctly, so we want to withdraw its licence," which would impact on the ability of that debt provider or insolvency practitioner to provide its services in the regulated sector.

John Mason: Are you saying that the picture is a bit confused?

David Menzies: Yes. That confusion could be easily resolved by having the licensing done directly by the AIB or the Scottish Government. The regulations are confused, in that sense.

John Mason: Could Mr Simmons comment on that point?

Craig Simmons: Yes—I am very happy to do so. What David Menzies has said is technically accurate but, in practice, the likelihood of what he suggests happening is very slim, because we have designed the SFS in collaboration with the AIB. The principles that we have set out on how to use the SFS are the same as those that are used by the AIB, and the governance group that David Menzies mentioned includes the AIB. I cannot foresee a day when we would withdraw a licence without consultation with the AIB, because that consultation gives some additional comfort. The SFS has been live since 1 April 2017 and, as yet, we have had no reason to remove anyone's licence. The likelihood of there being disagreement is very small.

Eileen Maclean: That provision already exists with the CFT, because a debt provider or insolvency practitioner has to be licensed by the

Money Advice Trust to use it. When we talk about licences, we mean registration so that we know who uses the CFT. We have had no instances of any insolvency practitioner having a licence to use the CFT withdrawn.

11:30

Andy Wightman: David Menzies said earlier that the standard financial statement and trigger figures are calculated using average spending by the bottom quintile of household incomes. Is there a concern that the standard financial statement does not take account of what some critics would regard as a reasonable standard of living, as opposed to the standard of living of the lowest-income households, which, by definition, probably spend less than they should in some areas?

Craig Simmons: Your point about the spending guide has been a topic of debate in the sector. Just over a year ago, I think, we did an exercise with the Joseph Rowntree Foundation to compare the spending guidelines with its minimum income standard, which found that the two are broadly aligned. It was most interesting and a surprise—certainly to me—that the ONS figures look at the lowest quintile of income but not the lowest quintile of expenditure. I do not want to get into jargon, but the expenditure levels for the lowest quintile are the second-lowest quintile of expenditure—that fact gave us some reassurance that those expenditure levels are broadly aligned with the Joseph Rowntree Foundation's minimum income standard. We are committed to running that exercise regularly to see whether they stay aligned or diverge. If they start to diverge, we will look into it.

Andy Wightman: The question was not whether the figures are aligned with the minimum income standards but whether they should be aligned with reasonable income standards.

Craig Simmons: The governance group of advice providers, the AIB and creditors considered that issue and deemed that the current methodology is the most appropriate.

Andy Wightman: Do other panellists have any comments?

David Hilferty: I will come in on that. I will give credit to Craig Simmons again—I apologise that I will make him blush—because we have long called for the comparison work to be done on where the trigger figure is set and what is understood as a socially acceptable living standard. We were really pleased to see that work undertaken, and the committee may be interested in seeing the research. The only household type that had a better deal under the minimum income standard and under the trigger figures was a single person. In the analysis, every other household type fell slightly below the minimum income standard, and lone-parent households were disproportionately impacted.

When we talk about the guidelines being broadly aligned, that may look the case on paper. If a household has £15 a week less than a minimum income standard, the figures will look broadly aligned on paper but, in practice, we can think of what that household will forsake week to week for a payment agreement that might last for five, six, seven, eight, nine or 10 years. It is easy to view a financial statement as an abstract concept—in essence, it is an income and expenditure form with guidelines on spending—but it is so much more. In effect, it sets out a standard of living for a household or client over the period of repaying their debts.

We have consistently said that it is a drawback of a CFS or an SFS that we do not have a way to check whether the payment agreement leaves somebody with a socially acceptable living standard. We have advocated checking that it does, but there is not a lot of support—I will rephrase that, as there is no support—from the SFS governance group. It is an example of something that we would aspire to if we had control. I do not know why a practitioner would not want to know whether the payment agreement that they have set up leaves somebody with an acceptable standard of living.

Andy Wightman: The regulations are for Parliament to decide whether to approve or not; we cannot amend them—we take it or leave it. I was intrigued that ICAS says in its submission:

> "We would strongly encourage the AiB and Scottish Government to defer any decision on the use of CFS or SFS and instead urgently carry out an assessment of the policy effectiveness behind the CFT."

Is it your view that we should not pass these regulations?

David Menzies: That is clearly for Parliament to decide—

Andy Wightman: Yes; I am asking for your view of what Parliament should do.

David Menzies: There is certainly a need to review the common financial tool and the methodology behind it. Whether it is the SFS or the CFS, the contribution levels will be broadly the same. It is not necessarily desirable for us to change to the SFS and then carry out a review and implement a further change further down the line if we need to. I would prefer it if we carried out the review now and made one change at the right time.

Andy Wightman: The implication of what you are saying is that there has been no review at all. There must have been some review.

David Menzies: I am not aware of there having been a review of the effectiveness of the CFT that was introduced in the Bankruptcy and Debt Advice (Scotland) Act 2014.

Andy Wightman: So, in a sense, this legislative change is being proposed in the absence of any assessment of the policy effects of the existing tool. Is that right?

David Menzies: I suggest that the underlying rationale behind the regulations is that, on a UK-wide basis, there is now the standard financial statement and the withdrawal of the CFS being maintained. Those two items are what is driving the change in regulations, not whether there is a policy need for that to happen.

Eileen Maclean: There is perhaps a tendency for the Parliament and the Government to approach this issue with an attitude of, "Well, what can we fix?" and there is an idea that they can fix a bit of bankruptcy law and bring in the SFS for the CFS. However, sitting behind this issue is a range of other policy issues involving, for example, the minimum wage, the living wage and what is a socially acceptable minimum level of income, and the regulations that we are discussing are not going to address those issues.

Arguably, a lot of other issues are involved as well. For a long time, we in the insolvency profession in Scotland have called for a root-and-branch review of whether the family home, for example, should be included in a bankruptcy or a protected trust deed. We can have that debate, but that must be set against a wider discussion about housing policy.

There is a tendency to think that bringing in the SFS will fix all of the other issues, but it will not. The SFS is a tool, a mechanism and a measure, and there is a range of other issues that must be addressed and which I would suggest, with respect, are outwith the scope of these regulations.

Andy Wightman: David Hilferty, do you have any comment on whether we should defer a decision?

David Hilferty: As I have said already, the drawbacks in the CFS are also present in the SFS, which means that there is not much difference between the two options in that regard.

We echo the call of David Menzies for a review of the effectiveness of the policy. We would also welcome a review of potential alternatives.

This process has engaged with a range of insolvency practitioners, money advisers and creditors, but we have not really heard from people who are in debt and are involved in the plans. One of the most encouraging things that I have seen from the Scottish Government in recent years was the establishment of experience panels, which was done with the view that the best people to shape a new system are those with experience—often quite unpleasant experience—of the previous system. We need to do that in a debt advice context for the decision about whether to go ahead with the current process or review what other options might be available.

Andy Wightman: Do we have any sense of what those other options might be? What are the alternatives? Have they been explored already?

David Menzies: I could talk about the experience of countries that do not use this particular method of assessing debtor contributions or surplus income. For example, Canada and Australia have a number of bands that take into account how many people are in the household and how many of them are dependants and so on, and they set an element of income that is outwith the scope of debtor contributions, and then they set a percentage above that.

It is a very straightforward system that is easy to understand. It does not involve costs to maintain it or a large administrative burden. I suggest that that could be used as a model in Scotland. I would not suggest that we use exactly the same model, because I think that there are some disadvantages that that model does not particularly take account of, such as people with additional support needs and so on, in relation to whom various levels of expenditure might be required. That sort of system, with an adapted percentage and, perhaps, an additional lower percentage in relation to people with additional needs, could work effectively in Scotland.

Andy Wightman: In paragraph 9 of your submission, you say:

> "The end result would be to increase the returns to creditors."

What is the basis for that view?

David Menzies: It would do so simply by reducing the costs of administering the calculation. To clarify, it would not necessarily result in increased debtor contributions, but it would lower the cost of administration.

David Hilferty: There are any number of alternatives. As David Menzies has outlined, you could have a set percentage contribution—if consistency is the objective of the policy, that seems like a consistent approach. If you wanted to enshrine the living standards issue at the heart of the process, you could draw on the Joseph Rowntree Foundation's minimum income standard. You could apply the SFS without spending guidelines because, as a format, it is absolutely fine—it looks good and it works well, but the concern about it comes from the spending

guidelines. I do not say that to be facetious; we saw in the AIB's submission that spending guidelines should not influence contributions. If they should not influence what someone is paying towards their debt, why have them at all?

As I said, there is no limit to the alternatives that we could be examining.

Craig Simmons: I would like to give some extra reassurance to the committee that the standard financial statement has been some years in the making. It looks to build on the good practice that is out there. It has taken what has worked in the common financial statement and in the StepChange approach and various other models that are used in public approaches to affordability assessments. Further, it has been tested at length with the money advice community. I am confident that it represents the current best practice that is available.

On the point about spending guidelines, it is worth touching on what is now guidance for using the standard financial statement. That says that they are exactly that: they are guidelines; they are not allowances for people's expenditure to be capped at. To pick up on the point that David Menzies made, that allows a degree of discretion and flexibility for money advisers to consider a person's individual circumstances and say that their expenditure has to be higher than the model recommends, which means that the money adviser can put a note in the form to record why that view has been taken.

Finally—I will not take up too much of the committee's time on this—our assessment is that the ONS survey, which is the basis of the methodology, is the most robust set of data that is out there at the moment for building a set of guidelines such as the ones that we are dealing with. We considered the approach of the Joseph Rowntree Foundation—we work quite well with that organisation, actually—but its sample size is quite small, and it is not annually updated across every household type; only bits of it are updated annually, which means that it runs the risk of not being up to date.

Andy Wightman: You say that you have tested across the sector, but have you tested it with debtors?

Craig Simmons: It has been used in England by a number of large providers, who report that it is working well.

Andy Wightman: That is what the advisers say, but what about the debtors?

Craig Simmons: It is being used with hundreds of thousands of debtors in England at the moment.

Andy Wightman: My point is to do with whether the experience of the debtors and their views of the system are being taken into account.

Craig Simmons: That is not happening as yet, because it was rolled out only a year and a half ago. However, we have a plan to evaluate the impact on the client, on the debt adviser and on the creditor when we reach a certain scale. We hope that Scotland will be on board when we do that so that you can test the impact of the new policy. We will evaluate it. We always do.

The Convener: If there are no further questions from committee members, I thank our witnesses for attending. We now move into private session.

11:44

Meeting continued in private.

12:41

Meeting continued in public.

Subordinate Legislation

Renewables Obligation (Scotland) Amendment Order 2018 [Draft]

The Convener: I welcome the Minister for Energy, Connectivity and the Islands, Paul Wheelhouse, and also Stewart Matheson, who is the senior policy adviser on electricity networks and regulation at the Scottish Government. We now turn to the Renewables Obligation (Scotland) Amendment Order 2018 and I invite the minister to make an opening statement.

The Minister for Energy, Connectivity and the Islands (Paul Wheelhouse): Thank you, convener; and I also thank you, committee members and the clerks for allowing me the flexibility to appear late in your meeting today. I appreciate that you have had a long meeting, so I am grateful for your forbearance.

The order before the committee will, if approved, result in a minor amendment to the Renewables Obligation (Scotland) Order 2009. Before turning to the amendment itself, it might be helpful to provide a little bit of background to the renewables obligation order. There are three renewables obligation orders—one covering England and Wales, another for Northern Ireland, and one for Scotland. The orders place an obligation on United Kingdom electricity suppliers to source an increasing proportion of the electricity that they supply from renewable sources.

Renewables obligation certificates—ROCs for short—are awarded to eligible renewable generators in respect of the output that they generate. Suppliers can buy ROCs and use them to demonstrate that they have met their obligation, or they can pay a fixed sum into a buyout fund for each ROC or SROC—Scottish renewables obligation certificate—that they either cannot or choose not to present.

The obligation, as intended, has provided a hugely effective incentive for renewable generators, with capacity across Scotland having reached 10.3GW, as at the end of quarter 2 of this year. Indeed, the final figures for 2017 show that renewable generation supplied the equivalent of 69 per cent of Scotland's electricity consumption—a record high level that is slightly higher than the figure quoted in the document, because since it was published we have had updated base figures.

Successive Scottish Governments have largely maintained an approach that is consistent with the other UK obligations. However, there have been important exceptions where we have tailored the Scottish obligation to better reflect Scotland's particular needs and priorities. For example, in April 2009 we introduced enhanced ROC bands for wave and tidal projects in Scotland, and in April 2014 we introduced two new enhanced ROC bands to provide additional support for innovative offshore wind projects in Scotland.

The committee will recall that those devolved powers were curtailed by the Energy Act 2013, and the contracts for difference mechanism has now replaced the renewables obligation as a means of supporting new renewable capacity. However, although the obligations across Great Britain were closed to new capacity from April of last year, they will continue to run until 2037 for eligible projects.

I now turn to the content of the order itself. When the UK renewables obligations were closed in March 2017, changes were introduced that allowed generators to add capacity at accredited sites. That additional capacity would not be eligible for SROCs, but nor would it affect the eligibility of the existing capacity at those sites. However, article 17(4) of the Renewables Obligation (Scotland) Order 2009 has the effect of preventing any accredited hydro stations from adding capacity where that takes the declared net capacity of any such station above 20MW.

Our amending order will rectify that and allow hydro generating stations in Scotland to add extra renewable capacity while retaining their eligibility for Scottish ROCs only from the originally accredited capacity at their site. That will allow any generators who choose to do so to increase their renewable capacity and production without creating any additional costs for consumers. It will also bring hydro generating stations in line with all other technologies and allow them to compete on a level playing field.

We expect that the order is likely to have limited application, since it will be of relevance only to hydro generating stations that were accredited before 2002 and which are able to increase their declared net capacity above 20MW. Although its impact may be modest, it nonetheless provides a means to encourage additional renewable electricity generation in Scotland, which I believe is an equitable and sensible amendment.

Before I formally move the motion recommending the order, I am, of course, happy to respond to any questions that you or your fellow committee members have, convener.

12:45

Andy Wightman: We have received evidence from SSE, which is responsible for the vast majority of the power schemes that have

downgraded from a capacity exceeding 20MW. My understanding is that SSE has sold all its hydro assets to Drax.

Paul Wheelhouse: ScottishPower has sold its assets; SSE still retain its assets.

Andy Wightman: Ah, I see. My apologies–I got it wrong.

You have come up with scenarios in which the likely impact on generation is low, medium or high. What factors will influence the impact?

Paul Wheelhouse: Mr Andy Wightman raises a fair point. We think that SSE is unlikely, at this stage, to make amendments to seven out of its eight sites that had their capacity curtailed as part of the impact of the previous policy position.

We believe that one of the other developers, SIMEC, which has the Kinlochleven hydro scheme, which serves the former Alcan smelter at Lochaber that the Liberty House Group now owns, will potentially increase capacity. The Office of Gas and Electricity Markets has made the point that, in order to be compliant, there will need to be either separate metering to fully record and make sure that there is no overclaim on the ROCs or it will, on a pro rata basis, allocate over the total production from the site revenue through ROCs to that proportion that is eligible to receive ROCs.

The developers will have to make an individual judgment on whether that leaves them in a better or worse position. It will be a commercial decision on the part of SIMEC as to whether it goes ahead at Kinlochleven. At least by removing the barrier, the order would allow SIMEC to make a decision and to potentially take things forward, if it believes that increasing capacity is the right thing to do. Similarly, SSE has not ruled out doing that at some future point but, at this stage, it has indicated to us that it is not likely to proceed.

The overall impact will be modest. There will potentially be an additional 10MW of hydro capacity at Kinlochleven. If all sites were to go down the route of reinstating the original capacity, there would be an additional 55MW of hydro generating capacity. That would be done without any additional cost to consumers, which is an important point.

Andy Wightman: The bottom line is that the order would remove a barrier, but it is up to the private generators to decide whether they wish to take advantage of it or not.

Paul Wheelhouse: Mr Wightman is absolutely correct about that.

Jamie Halcro Johnston (Highlands and Islands) (Con): I appreciate that the order is about hydro schemes, but is there any likelihood that it could impact on constraint payments in the onshore wind sector?

Paul Wheelhouse: We do not believe so. That is an important point in terms of the capacity on the grid and at a local level. There has been discussion about the increased capacity that is needed at Lochaber to allow any increased capacity in the hydro plant to transmit electricity to the grid. The investment that would be needed there is a commercial matter between SIMEC and, in this case, SSE.

We do not believe that there would be any direct impact—or, at least, I am certainly not aware that there would be any; I will ask Stewart Matheson to confirm whether that is the case. There are individual contractual relationships between developers and the distribution network operators in relation to receiving grid capacity, so an arrangement is already in place. Those would trump any additional capacity that came in; SIMEC would have to argue for that separately with SSE and not eliminate the previous arrangements that are in place for existing sites and areas.

With your forbearance, convener, I invite Stewart Matheson to comment on the matter.

Stewart Matheson (Scottish Government): Our assumption is that, as part of that decision-making process, SIMEC would consult the local network operator—which, as the minister said, in this case is SSE Networks—on the available grid capacity. The assumption would be that, for SIMEC to proceed with the project, sufficient grid capacity for it to export additional energy would have to be available. The impact of constraint payments would depend on whether there were wind generators in the vicinity that may be competing for similar grid capacity. However, our assumption is that SSE Networks would support the project only if there was sufficient grid capacity for additional hydro generation and existing wind generation.

Paul Wheelhouse: One additional point is that if the Kinlochleven site is upgraded, primarily that power will be directed towards the smelter there. The smelter is very energy intensive, so there is a high concentration of demand for electricity in that locality. Therefore, the occasions on which the site will transmit net electricity into the grid may be limited, certainly initially at least, given the needs for electricity consumption there. I suppose that if the smelter did not operate at some point in the future, there would be an issue about unused capacity locally having to be transmitted into the grid, but I hope that we will never reach that point.

The Convener: Is there a reason why the change has not been made before?

Paul Wheelhouse: That is a good question that has been raised a number of times by individuals.

People have queried why the particular provision was introduced in the first place. It is fair to say that the de-rating of the plants was an unintended consequence of the original legislative change back in 2002, which was intended to allow a strand of activity to take place that would help hydro fleet owners to reinvest in renewing their estate. The original order actually helped to unlock significant investment from SSE and Scottish Power in renewing their existing hydro fleet, so it had a positive effect, but the unintended consequence was that several sites de-rated their capacity in order to come under the 20MW threshold, which has resulted in the situation today in which we have an unfortunate barrier to their growing their output at a time when the world needs us to generate more renewable energy; it is an odd anomaly. I hope that the order will remove that anomaly so that hydro sites will be able to operate on a level playing field with all other technologies.

The Convener: As there are no more questions, we will move to formal consideration of the motion. I invite the minister to formally move motion S5M-14103.

Motion moved,

That the Economy, Energy and Fair Work Committee recommends that the Renewables Obligation (Scotland) Amendment Order 2018 [draft] be approved.—[*Paul Wheelhouse*]

Motion agreed to.

The Convener: In light of the timing, do members agree that I along with the clerks will produce a short factual report of the committee’s decision and arrange to have it published?

Members *indicated agreement.*

Meeting closed at 12:53.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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