OFFICIAL REPORT
AITHISG OIFIGEIL

Economy, Energy and Fair Work Committee

Tuesday 6 November 2018

Session 5

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ECONOMY, ENERGY AND FAIR WORK COMMITTEE

30th 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:

Nicola Birrell (East Renfrewshire Council)
Jill Clark (Scottish Government)
Willie Coffey (Kilmarnock and Irvine Valley) (SNP) (Committee Substitute)
Ash Denham (Minister for Community Safety)
Alex Gordon (Scottish Government)
Angela Kazmierczak (Aberdeen City Council)
Scott Matheson (Scottish Government)
Alan McIntosh (Inverclyde Council)
Scott Milne (WRI Associates)

CLERK TO THE COMMITTEE

Alison Walker

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Economy, Energy and Fair Work Committee

Tuesday 6 November 2018

[The Convener opened the meeting at 09:46]

Interests

The Convener (Gordon Lindhurst): Good morning and welcome to the 30th meeting in 2018 of the Economy, Energy and Fair Work Committee. I ask everyone to turn off electrical devices or switch them to silent as they might interfere with the sound system. We have received apologies from committee member Angela Constance, and Willie Coffey is here in her stead. I invite him, as a substitute, to declare any relevant interests.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): Thank you, convener. I have nothing to declare other than what is already in my entry in the register of members' interests.

Decision on Taking Business in Private

09:47

The Convener: Item 2 is a decision by the committee on whether to take in private items 5, 6 and 7. Do members agree to do so?

Members *indicated agreement.*

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

09:47

The Convener: Agenda item 3 is an evidence-taking session on the Damages (Investment Returns and Periodical Payments) (Scotland) Bill. I welcome the Minister for Community Safety, Ash Denham, to the meeting.

The Minister for Community Safety (Ash Denham): Good morning, convener and committee. Having sat on the Economy, Jobs and Fair Work committee, I just want to say that it is nice to be here at the Economy, Energy and Fair Work Committee.

The Convener: Good—we will see how matters unfold. [*Laughter*.] I am sorry, minister—I meant nothing untoward by that.

As you will be giving a statement, I will introduce the other witnesses and then invite you to begin. We have from the Scottish Government Jill Clark, civil law and legal system division; Scott Matheson, legal directorate; Alex Gordon, parliamentary counsel office; and Frances McQueen, also from the civil law and legal system division.

May I say, minister, how good it is to have you back at the committee. I invite you to make your opening statement.

Ash Denham: Thank you, convener, and I thank the committee for inviting me to give evidence on the Damages (Investment Returns and Periodical Payments) (Scotland) Bill. As you know, part 1 of the bill provides a changed methodology for setting the personal injury discount rate and allows courts to impose, and in certain circumstances vary, periodical payment orders. It follows quite a lengthy period of consultation on the issue, given the range of criticisms of the current methodology, and the bill itself is intended to address some common concerns that emerged from that consultation with regard to the fairness, clarity, certainty, regularity and credibility of the method and process for setting the rate.

Although the types of personal injury cases that will be impacted by the legislation are not high in volume, they are at the serious end of the injury scale. The personal injury discount rate is therefore of significant importance to both pursuer and defender interests in personal injury damages awards for future pecuniary losses. As the committee has heard in its evidence sessions, both interests have very different perspectives on how best to achieve, and what will deliver, 100 per cent compensation for those who have suffered significant life-changing injuries in order to put them back in the position in which, but for their injury, they would have been.

For a range of reasons, the process is not an exact science; it is, as the committee will have heard in evidence, inevitably imperfect. Without the benefit of foresight, it can never be anything other than an approach that provides the best possible assessment for the broadest range of cases. The policy intention in the bill in respect of the PIDR is to strike a balance between making provision for regular reviews and setting out a transparent and credible process that will ensure much needed certainty and clarity in the law.

Part 2 of the bill relates to periodical payments, principally under periodical payment orders, which are an alternative means of paying damages for future losses other than a lump sum. In some cases, a pursuer might have a straight choice between taking a lump sum or a PPO. However, it should be stressed that that is not always the case, and the two options should not be seen in that light, as might have been suggested in earlier evidence sessions.

I look forward to the committee's questions on the principles of the bill.

The Convener: Thank you for that opening statement, minister. I will start with one or two questions.

You mentioned the uncertainties in this area. Those uncertainties are recognised on all sides and by the committee, and they may affect the notional portfolio and the methodology that is used to create it. One issue that has been raised is the question of how the "notional portfolio" can represent the needs of the "hypothetical investor"—I suppose that the bill's use of those terms indicates some uncertainty in the first place. Is the methodology used in setting out the notional portfolio clear enough?

Ash Denham: As you will have seen, the bill sets out a portfolio with asset classes and percentage holdings that are designed to meet the needs and characteristics of the hypothetical investor. Because they are laid out in the legislation, I will not go over them now.

The hypothetical investor will have a series of objectives. They will be properly advised, and our objective will be to secure the investment of the award to cover their damages, losses and expenses. They will make withdrawals from the fund over the period to cover their losses and expenses, and the withdrawals will, over the period in question, exhaust that fund.

The portfolio is designed to meet the very specific needs of the hypothetical investor, and it

was arrived at on the basis of professional advice and expertise. The Government Actuary's Department carried out detailed analysis of a number of funds that were categorised as low risk by a firm called Morningstar, which is a third-party investment research firm that is widely recognised across the industry. The notional portfolio was built with reference to those funds. The Scottish Government believes that the portfolio would, therefore, meet the needs of an individual who is in the circumstances that we are describing.

The committee should also note that a small majority of respondents to the 2017 consultation were of the view that the idea of a mixed portfolio of assets was the right way to go, as it balances flexibility with the best way of managing the risk. In addition, some respondents suggested that the approach most closely matches the actual behaviour of pursuers when they are investing. I hope that that answers your question.

The Convener: Do you have a view on how often you will need to use the regulation-making power to change the contents of the notional portfolio? Who will monitor market conditions to decide when and if that needs to be done?

Ash Denham: The intention is to review the portfolio—and the adjustments, which we have not mentioned yet—ahead of every regular review. That would give us the opportunity to change the adjustments if we thought that that was necessary as they were not meeting the needs of the hypothetical investor at that time. In addition, the bill gives Scottish ministers the power to call for an out-of-cycle review. That offers a failsafe, so the portfolio should always match the economic conditions.

On your question about monitoring market conditions, we envisage that we will work in partnership with the Government actuary on monitoring conditions. We will have good and open communication to keep the portfolio constantly up to date.

The Convener: There have been some suggestions about how the discount rate is set up. The current assumption is that the discount rate should be calculated on a risk-free basis, but under the bill, we will move to the assumption that it should be based on a cautious investment strategy, which might fit in with what you were saying about safety and flexibility in the notional portfolio. Do you have a view on whether that change transfers investment risk to the pursuers? If so, is that unfair, or does it strike the correct balance? If the latter, why do you think it does so?

Ash Denham: I heard the question raised in some of the committee's previous evidence sessions. Our belief is that the portfolio in the bill is very cautious, for the reason that you have highlighted. The committee will also have heard evidence from the other side—the defender interest—that the portfolio is equity light and overly cautious. The Government is trying to tread a careful line down the middle—between the interests on both sides—to ensure that we strike the right balance.

The Scottish Government now accepts that it is appropriate to move away from the index-linked gilts approach that was taken in Wells v Wells and towards a very cautious but low-risk portfolio. We recognise that the hypothetical investor will need to take professional advice that is tailored to them, but we are making further adjustments to reduce the risk to the investor. Wells v Wells did not force pursuers to invest in a particular way, and nor does the new legislation. As will have come out in some of the earlier evidence to the committee, what pursuers actually do is irrelevant. The method is intended to provide a standardised approach that will apply across a broad range of cases.

Dean Lockhart (Mid Scotland and Fife) (Con): Good morning, minister. I have a couple of questions on the adjustments that are to be made to the discount rate. We have heard some evidence that the 0.5 per cent adjustment for tax and investment advice might not be sufficient, given the market uncertainties and other unknowns in the process. Is it, in your view, a reasonable level of adjustment?

Ash Denham: We sought views from GAD on that very topic—the appropriate level of adjustment for tax, investment management costs and those sorts of things. Although GAD considered that a reasonable allowance would be somewhere between the 0.5 per cent that you have mentioned and 2 per cent, it took the view that the lower end of that range would be more appropriate. It gave a number of reasons for that, one of which was that it thought that investors would typically shop around to get the best possible rate. In its report, GAD suggested that the Scottish Government should seek further advice on the level of the adjustment, and work is being undertaken on that. I do not know whether any of my officials would like to say a little more about that.

10:00

Jill Clark (Scottish Government): GAD's other reason for opting for the lower end of the range was the likelihood of the portfolio being full of passive funds that would not need a lot of management, and the current shape of the market means that there is no pressure with regard to higher tax charges. The fact that there is another adjustment in the bill also compensates on the way down. GAD thought that the adjustment was

reasonable for a range of reasons, but we are looking at the matter further.

Dean Lockhart: You mentioned the further deduction—the further margin of 0.5 per cent to reduce the risk of underperformance. We have heard evidence to suggest, and the Scottish Government has said, that there might very well be overcompensation as a result of the further adjustment being introduced. Does the minister accept that that is a potential departure from the 100 per cent compensation principle?

Ash Denham: That is a good question. The answer is no, we do not think that it is a departure. By now, it will be clear to the committee that, as I have said, this area is not an exact science. For a range of reasons, there will always be to some degree the probability of undercompensation or overcompensation, and that is why the adjustments are there. The particular adjustment that we are discussing recognises that an investment, however cautious, will always carry some sort of risk. The methodology that we use acts as a proxy and is therefore unable to take account of individuals' needs, because factors can vary. That is the reason for that.

The further adjustment is being made to improve the chances of a pursuer having exactly the right amount of funds to cover them. When we talk about the idea of undercompensation, and the likelihood or probability of it happening, it is worth stressing that there are no absolutes. No matter the award basis, there is risk involved. However, there has been some analysis, which I will share with the committee, on the distribution of returns generated by the investment portfolio in the bill, and it shows that, if the return were not to be adjusted in the way that we are describing, it would result in a 50 per cent chance of the pursuer being undercompensated and a 50 per cent chance of overcompensation. The question, therefore, is whether a 50 per cent chance of undercompensation would be acceptable. I would say not, so the further adjustment is needed to reduce the risk of undercompensation.

Dean Lockhart: What is the evidence base to support the 0.5 per cent figure?

Jill Clark: It came from the analysis that GAD carried out for us, in which it applied different margins of justice to drive down, at the lower percentiles, the risk of overcompensation or undercompensation in order to get to a position that was more acceptable than 50 per cent.

Dean Lockhart: Did GAD again give you a range of figures?

Jill Clark: Yes. We sent GAD's report to the committee, and it is also on our website, where the information is laid out in tabular form.

Dean Lockhart: Thank you.

Andy Wightman (Lothian) (Green): Can you explain why you chose 30 years as the period over which a hypothetical investor would invest?

Ash Denham: The investor damage profile is 30 years. There is no authority on which to base that figure; it was chosen merely as a useful duration that was neither too short nor too long. We should remember that it is meant to cover a broad range of cases. As there will be cases at either end of the scale, a 30-year period was taken as correct for the damage profile.

Andy Wightman: To what extent do you believe that it will impact negatively on, for example, pursuers with a very short life expectancy?

Ash Denham: It is possibly true that shorter awards might lead to a greater chance of undercompensation. Some work that has been completed on that area indicates that more than one rate would not be necessary at this time. However, the bill provides for the opportunity to set dual or multiple rates to address any issues. Perhaps my officials can add to that.

Jill Clark: We asked GAD to model over a 30-year period on the basis that it was an average, but it also looked at periods of 15 years and 50 years, and its report contains a graph showing the difference between the shorter and longer durations. Ahead of each review, GAD will do the same work and offer advice. If the differential gets too big, it might point to a more sensible option of having more than one rate—one for a shorter duration and one for longer—but the evidence does not currently point in that direction. That said, the bill leaves it open for more than one rate to be applied in the future, should the analysis indicate that it would be better, and fairer, to do so.

Andy Wightman: Section 1 makes it clear that

> "the court may take a different rate of return into account if a party to the action shows that the different rate is more appropriate in the circumstances of the case."

I presume that it was always intended that that provision would never bind the hands of the court.

Jill Clark: Absolutely. Under existing law, the court can look at the particular circumstances of a case and decide that the rate set is not appropriate. We are retaining the same provision in the bill. The provision is used very rarely, but it is nonetheless there.

Andy Wightman: In what circumstances is it used?

Jill Clark: It might be used if the court thought that the circumstances of a particular case were so far outwith the broad application of the rate that it would be more appropriate for another rate to be

applied, but such a case would have to be at the extreme end.

Andy Wightman: If ministers were minded to set more than one rate, what circumstances might lead to that happening? How would that apply in practice?

Ash Denham: We have not yet come to that conclusion. As Jill Clark has said, we will be getting more data from GAD, and if it is clear from further evidence that shorter awards might lead to undercompensation, and if we thought that there was a need for different rates to be set, we would need to look at the matter in detail and see how that would work. It is something that we are looking at.

Andy Wightman: One factor might be different durations of life expectancy. Are there other circumstances that might lead ministers to conclude that different rates should be set?

Jill Clark: In general, what is taken into account is the duration of the award rather than a person's life expectancy. Jurisdictions that have more than one rate will have different rates for 10 years and 15 years, and a different rate for longer periods. A jurisdiction will choose a duration, and the time periods will differ between jurisdictions—there seems to be no consistency in that respect. One would settle on something that, where a differential has been created, would try to close that gap by applying two different rates. Indeed, one could apply three rates—there is nothing to stop multiple rates being applied. Any such change would need to be made because actuarial advice had suggested that, on the basis of analysis and evidence, it was the best way to go.

Andy Wightman: So the calculation is basically about life expectancy and the duration of the award. Are there no other circumstances, such as the capacity of the injured person or their age at the time of the injury, that might lead to different rates being set?

Jill Clark: In general, that all gets tied up in the duration of the award, which lasts until the point at which a person either improves or gets better or until the termination of their life.

Andy Wightman: Thank you.

The Convener: I want to follow up on one aspect of that question: the 30-year period. The Association of British Insurers suggested in its written submission that 46 years would be more appropriate. The ABI said:

"46 years is appropriate because it is the mean duration of future damages in those cases where the discount rate is a significant factor. The GAD report demonstrates clearly that if a more appropriate period of 46 years were to be applied, then the probability of under-compensation decreases. As such, an explanation as to the use of the 30 year period is required."

Can you answer the point about the probability of undercompensation being higher if one uses the 30-year period? In addition, can you tell us whether a specific methodology was considered to be preferable to others in arriving at the decision to use a 30-year period?

Ash Denham: I will ask my officials to give more detail on that.

Jill Clark: My answer is almost the same as my previous one. Higher or lower, 30 years is a kind of average, if you like, or an appropriate level. GAD applied the same analysis to each duration—we understand that it put each period through its economic scenario generator, and the figures popped out at the end. There was no different methodology applied; GAD simply applied different durations of award.

It is usually the case that the longer the award period, the more time someone has to recover from any dips in the market and get back to a better place. As I said, the figures that GAD provided indicate that more than one rate is not currently necessary. If that has not answered your question, we can provide something more.

The Convener: Perhaps you can provide a further explanation to the committee in writing—that might be helpful. You said that 30 years is an average. I suppose the question is, an average of what? Secondly, why were different factors chosen for that? A further explanation in writing would be appreciated.

Ash Denham: We would be happy to write to the committee with further information.

The Convener: Thank you.

John Mason (Glasgow Shettleston) (SNP): To build on the questioning so far, I want to ask about political accountability and who makes all the decisions. From what I understand, the Government and you, minister, will be more involved in the notional investment portfolio, but the actual discount rate is much more under the control of the Government actuary and so on, which is a slightly different system from that which applies in England. How do we get the balance right? Could we go one way or the other?

Part of me wonders whether, in this world of automation, we could simply automate the whole process. The portfolio could be tied to the market and discount rates could all be set by formulas, and there would be no political involvement, which sounds quite good. On the other hand, some people would like to put the minister up in the chamber so that we can ask her questions and shout at her about these things. How do we get a balance?

Ash Denham: That is a good and fair question. A bit of comparative work has been done on how

other countries do things, and it seems that there is huge variety in the way that different jurisdictions approach these matters. In some jurisdictions, the responsible party is a legislator. In other jurisdictions, it is the judiciary. In some jurisdictions, there is a hybrid system that involves both parties, to differing extents. Obviously, the decision is one in which policy choices come into effect. We have taken a policy decision to place the duty to review the discount rate on the Government actuary because we think that that is consistent with our overall policy of reforming the law so that method and process are clear, certain, fair and transparent.

It is important to mention that our decision is consistent with responses to the 2017 consultation, which showed more support for options that did not involve ministers. The Scottish Government's view is that the determination of the rate is purely an actuarial exercise; there is no need to exercise political judgment. The decision has been taken to give that duty to a suitably qualified and credible professional, and the Government actuary has been selected because of its expertise and standing in that area. GAD will publish its reasoning along with the rate, which will allow complete transparency in the process. We think that that is the right approach in this case. Would Jill Clark like to add anything?

Jill Clark: Probably not.

John Mason: I am broadly persuaded by your argument on the rate, but why would that not also be the case for the notional portfolio? It has been suggested that, although we have a nice Government at the moment, we might not have such a nice Government in future, and that Government might manipulate the portfolio.

Ash Denham: That is a fair point. That is why it is really good to remove the rate from the political arena—which, as I am sure that the committee is aware, is not the case in England and Wales—and from people who would seek to influence it or ministers who might be under pressure.

The methodology for the portfolio needs to be developed over a longer time and requires more analysis. The portfolio is able to be reviewed by Government ministers in order to ensure that it matches up with economic conditions. It will also be subject to scrutiny by Parliament, which adds an extra level of credibility and transparency to the process.

10:15

Jill Clark: A constant in the bill is the description of the hypothetical investor. The notional portfolio can be changed only in line with the hypothetical investor. Somebody could not come along and suddenly make the portfolio very risky, because that would not meet the needs of the hypothetical investor. That is the grounding part of the bill. The powers to change the portfolio and the adjustments are simply intended as a way to keep them up to date and relevant as investment markets change. The constant is the description of the hypothetical investor, which will have been agreed by the Parliament.

John Mason: I see that Alex Gordon wants to come in on that.

Alex Gordon (Scottish Government): I have a technical point to aid navigation of the bill. The Government and the minister have put all the figures before the committee, so if the bill is ultimately passed, Parliament will have endorsed those figures at the outset. Even if ministers were to come forward with regulations to change anything—the period of 30 years, the figures in the notional portfolio or the standard adjustments—those regulations would all be subject to the affirmative procedure, so any such changes would need parliamentary endorsement.

John Mason: That is helpful, thank you. Minister, you said that we could—well, we obviously will—end up with different systems in Scotland and England. Is that a problem? Does it cause any concern, given that some insurers, for example, operate throughout the United Kingdom if not beyond?

Ash Denham: I do not have any practical concerns about that. We consulted jointly with the Ministry of Justice on setting the PIDR. The Lord Chancellor is responsible for setting the terms in England and the Scottish ministers are responsible for doing so in Scotland, so it is appropriate that we took the work forward separately. That might or might not result in different rates being set north and south of the border, and at this time, we do not know how insurers would react to that in setting their premiums. However, it is important to note that the number of catastrophic, high-value cases will be really quite low, and the amount of business will be quite small in relation to the insurance business overall.

John Mason: Insurers are only one of the categories of defender in such cases—the national health service is another. A lot of us are probably sympathetic to the idea that we should be a bit more generous to the injured party, but in reality that would have an impact on the NHS. Presumably, if the NHS was paying out slightly more than elsewhere, we would have to find that money from its budget. Again, I wonder whether we are getting the balance right. Is there a problem for the NHS budget in the future?

Ash Denham: That is a good question. The proposed higher PIDR rate would, in comparison

with the current methodology that relates to Government gilts, if the same exercise were carried out simultaneously, produce awards that were on average closer to the principle of 100 per cent compensation. The application of that rate should result in less overcompensation than under the current system. The cost to defenders such as the NHS—which, as you mentioned, is a major player—should be less in terms of the awards that they are required to make. The committee will have heard from the NHS and other stakeholders that they support the continued facility to settle future losses by way of PPOs, and they welcome the changes in the bill accordingly.

John Mason: Can you clarify something? You said that the cost to the NHS would be less. It might be less than the NHS is currently paying, but it would perhaps be more than the equivalent cost in England.

Jill Clark: At this point, we do not know. We simply do not know what the discount rate will be in England and Wales, and we will not know until the end of the review in that regard, because that is when the rate will be set. It is difficult to say.

John Mason: That is fair enough.

Ash Denham: We will keep the matter under review.

The Convener: I suppose the question of whether we have a “nice Government” at the minute depends on whom you ask and which Government the deputy convener was referring to, but we will put that to one side.

I would like the minister to clarify one point. You quite rightly said that different approaches could be taken to this matter. Is it the Government’s intention to effectively institute independent decision making in, and remove political influence from, the specific process for the discount rate, by having the UK Government actuary deal with it?

Ash Denham: Absolutely—the process will be fully transparent and independent of ministers and political interference.

The Convener: Andy Wightman has a brief follow-up, and we will then move to questions from Gordon MacDonald.

Andy Wightman: To follow up on John Mason’s line of questioning, I would like to have one point clarified. I might have missed something, but it seems that the Government actuary will be responsible for setting the rate. Ultimately, that will be down to ministers, but the Government actuary will be the professional adviser in that regard. However, there are no provisions in the bill that relate to what advice ministers will take in making any changes to the notional portfolio, which is a role that is given exclusively to ministers. Do you think that there might be a role for the Government actuary in that regard as well, or am I reading the bill wrongly?

Ash Denham: No, there will be—ministers and the Government will take advice from GAD on that.

Andy Wightman: As far as I can see, there are no statutory provisions for taking advice—or am I wrong?

Scott Matheson (Scottish Government): There is no statutory provision to that effect, but there is no statutory provision in many areas in which the Government takes appropriate professional advice in a range of circumstances as a matter of course.

Andy Wightman: I am just wondering, because, although the bill makes it clear that the Government actuary—unless the Government appoints somebody else—is responsible for setting the rate, it does not make clear what role any party such as the Government actuary would play in potential changes to the portfolio.

Scott Matheson: The actual determination of the rate is a function that is conferred on the Government actuary. There is provision in the bill to allow, by regulation, the Scottish ministers to change that in due course if it is necessary for somebody else to exercise that function.

At that stage, the Government actuary’s role is one of decision making within a very narrow range of parameters that are set out in the legislation. GAD is not acting as an adviser to ministers who are determining the rate—it will be determining the rate and producing a report. It will be the rate as set out in that report that the courts will take into account, subject to the discretion that was referred to earlier.

Andy Wightman: So the statutory provisions are there because the Government actuary is a decision maker and that has to be made clear, but there is no statutory role for the Government actuary or anybody else in advising ministers on the make-up of the portfolio. My question is, therefore, should there be such a role or should the decision be left totally to the discretion of ministers?

Ash Denham: With parliamentary oversight.

Andy Wightman: Of course, all those elements will be subject to regulation-making powers in Parliament, but when an affirmative procedure comes forward, there is huge depth behind it and one cannot expect Parliament to drill down on every issue. In order to assist Parliament in that job, I suggest that there might be merit in making statutory provisions for advice, in order that such advice can be interrogated in exactly the same way as the GAD report can currently be interrogated by interested parties.

Ash Denham: I come back to the point that Jill Clark made earlier. Under the legislation, the portfolio has to take into account the interests of the hypothetical investor. Any changes to the make-up of the portfolio will bear that in mind, and it will be further scrutinised by the Parliament. I am fairly comfortable with the process as it is.

The Convener: Jamie Halcro Johnston has a brief follow-up question, before I bring in Gordon MacDonald.

Jamie Halcro Johnston (Highlands and Islands) (Con): It is just a quick point. Paragraph 43 of the financial memorandum to the bill states:

“a 0.25% differential could add around £2m to £5m”

to the cost of claims against public bodies.

South Lanarkshire Council, in its submission to the Finance and Constitution Committee, suggested that it would expect the Scottish Government to cover any fluctuations in costs as a result of claims against public bodies or increases in their premiums. Has the Government looked at that? Is it ready to do what the council suggests?

Ash Denham: We are keeping the matter under review, but I will ask my officials to give you a little more detail.

Jill Clark: The answer is the same as the one that the minister gave earlier. Relatively speaking, we expect the discount rate to increase under the new method, so costs to defenders should therefore decrease. Nonetheless, we will keep the matter under review.

Gordon MacDonald (Edinburgh Pentlands) (SNP): In previous evidence sessions, it has been suggested that five years, or even seven years, would be a more suitable time period for the discount rate review. What is the justification for having a review period of three years in the bill?

Ash Denham: That is a good question. In general, the bill is meant to ensure that we avoid the previous situation, in which there were very long periods between reviews. It was considered that the three-year period would be a suitable compromise. The Government is certainly open to considering alternative periods, including a five-year period if that would be more acceptable. I would be interested to read the committee’s views on the matter in its stage 1 report if it is considering such a proposal.

Gordon MacDonald: We also heard concerns that, as it can take several years to settle some personal injury cases, either party involved in the case could try to delay or speed up settlement to take advantage of a rate change if they know in advance what it will be. Can any safeguards be put in place in the bill to minimise that risk?

Ash Denham: For the very reason that you have outlined, the three-year review period would seem to strike the right balance. If a routine review is carried out every three years, such gaming of the system might not occur.

In addition, we should bear in mind that, even though a regular review will be carried out every three years, it will not necessarily lead to a change in the rate every time. The bill also gives ministers the opportunity to carry out an interim review. It would be possible to do that at any point, if necessary—for example, if economic circumstances changed drastically, and suddenly the rate was not appropriate—to keep the rate up to date. Again, I would be interested to hear the committee’s views on that. We thought that a three-year period would be appropriate, but I would be interested to hear other views.

Gordon MacDonald: Thank you.

Colin Beattie (Midlothian North and Musselburgh) (SNP): In previous evidence sessions, there has been some discussion about periodical payment orders and their impact. Are the provisions in the bill sufficient to increase the use of PPOs in Scotland? Does the Government have any other plans to encourage their use?

Ash Denham: The number of cases in which a PPO could be used is quite small to begin with, so we are not anticipating a large increase in take-up. We simply hope that providing courts with the option to encourage people to use PPOs where that is appropriate might lead to a slight increase in numbers. In addition, there might be some influence in cases that do not go to court but are settled by agreement—even though people would not be forced by a court order to use a PPO, they might consider using one anyway.

We know that PPOs are not suitable for all pursuers or in every case. For a variety of factors, some pursuers might prefer to have a clean break, so they will not want to enter into such an arrangement. In addition, not all defenders will be sufficiently financially secure to use a PPO. Nevertheless, we hope that greater use will be made of PPOs.

Colin Beattie: The evidence seems to indicate that virtually 100 per cent of PPOs are used by the NHS and that virtually no one else uses them. Do you see that changing?

Ash Denham: Jill Clark might want to respond to that.

Jill Clark: There might be a marginal change as people feel more encouraged to use them but, as the minister said, the numbers are not very high in the first place. The NHS is the predominant user of PPOs.

Colin Beattie: The numbers are not high, but the value is significantly higher.

Jill Clark: Yes.

Colin Beattie: In last week's evidence session, the committee noted that the bill's provisions on reasonable security do not appear to cover the Motor Insurers' Bureau. Is that omission deliberate? If so, what was the thinking behind it?

10:30

Ash Denham: The bill's provisions allow the Scottish ministers to add additional bodies to the list. That would be the process for including the Motor Insurers' Bureau. I know that the issue has been raised by a number of consultees.

In addition, there was a bit of concern about Brexit, given the timing of the bill and the fact that the UK's leaving date will coincide with the later stages of its parliamentary passage. It was decided that the inclusion of a power to enable the Scottish ministers to add or remove bodies to the list—in the case that you mentioned, the MIB—was the most appropriate and sensible option.

Colin Beattie: To be clear, are you saying that the Government will consider adding the MIB to the list, or that it will do it?

Ash Denham: At this point, we are considering it.

Jill Clark: We will wait and see. The courts have found the MIB to be a secure provider, but article 4 of the second European directive on motor insurance contributed to the courts' thinking in that respect, and we want to see what will replace the directive in a Brexit world. Once we are confident about that, the MIB could be added to the list. There is a lack of clarity at the moment—if the directive were no longer in place, what would replace it? Obviously, the UK Government would put something in place.

Colin Beattie: So we must wait for the UK Government to give some sort of indication on that.

Jill Clark: Yes.

Colin Beattie: At present, therefore, you could not add the MIB to the list, given where we are currently situated.

Jill Clark: I think so. One of the factors that has contributed to the courts' consideration of the MIB as reasonably secure is about to change, so we think that it would be a bit premature to add the body to the list at the moment.

Scott Matheson: The bill's provisions on reasonable security set up an assumption that allows the court to proceed on the basis that the defender or payer in question will have sufficient financial backing for their PPO payments during the course of an award. However, setting up an assumption does not exclude the possibility that a defender who is not on the list in statute could persuade the court that they have sufficient financial backing. The fact that a defender is not currently included under the provisions in the bill would not prevent them from making a case to the court that they should be seen as being reasonably secure.

Jill Clark: That is what the MIB currently does—it has to convince the court case by case—but normally the court finds that it is secure.

Colin Beattie: Thank you for that clarification.

The committee has heard evidence to suggest that the risk of satellite litigation would be reduced if the wording in the bill on seeking a variation of a PPO mirrored existing legislation. Is the Government considering that?

Ash Denham: We have looked at that matter, and we do not think that the model in the Administration of Justice Act 1982 is an appropriate fit. I will let the officials give you a bit more clarity on that.

Alex Gordon: Again, I am speaking on a technical basis—I hope that I am answering the right question. As a drafting technician, I find it useful to look at other legislation by way of example, but I am wary of picking up something as a precedent that might not be the best fit in the context that we are currently dealing with. I am always open-minded as to how one might go about things, and there is always more than one way to go about anything.

In Government, we choose our approaches very carefully in each particular context. The gateway to variation, and how variation applies once one is through the gateway, rests on two conditions. The court must be satisfied, first, that there is a chance of change in the pursuer's condition at some point in the future and, secondly, should that change occur, that there would be overcompensation or undercompensation.

At present, we do not weigh the amount of change that is required in the condition or what the chance of change is. That just takes us to the real root of the issue, which is whether there is likely to be significant overcompensation or undercompensation. Perhaps it is not necessary to measure the amount of risk of change or how much change there would be, because it is unlikely that there would be significant overcompensation or undercompensation if there was no change, or no meaningful change, in someone's condition.

Although we could, on a different day, try to calibrate that differently, I think—or rather, I hope,

because I helped to put the provisions on the page—that we can go straight to the root of the problem: namely, the issue of whether there is significant overcompensation or undercompensation. I do not know that we need to clutter the legislation with some other qualifier for the first part of the twofold test, given that the main element of that test is the second part.

Colin Beattie: Staying on the question of pursuers returning to court to request a variation of a PPO, concerns have been raised about the costs involved. Perhaps the minister can consider whether she could commit to ensuring that those costs fall on defenders, which would be a fairer approach.

Ash Denham: That is an interesting point, which raises some questions about the provision for qualified one-way costs shifting, or QOCS, in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, which was recently endorsed by the Justice Committee and the Parliament as a whole. We would need to look at the interaction between the 2018 act and the bill before us, and consider the matter further. We would be happy to write to the committee with further information on that.

Colin Beattie: That would be interesting. Although we have no feel for how much it would cost for a pursuer to come back for a variation, some witnesses have indicated that the cost could be substantial. There is a question of fairness involved.

Ash Denham: We will be happy to give the matter a little more thought and write to the committee with our thoughts.

Willie Coffey: Good morning, minister. As the new boy on the committee, I will ask a slightly less technical question, although I am very impressed by my colleagues' rigour in examining the issue in front of us.

You said in your opening remarks that the bill's intention was to put people back, as far as possible, in the position that they would have been in before they suffered serious injury. Are you confident that it will deliver on that objective? Are you satisfied that there will be sufficient scrutiny opportunities to enable Parliament and the committees to examine the matter in future?

Ash Denham: We are. The bill has been requested, and its principles have been subject to consultation not once but three times, so it is clear that there is quite a desire for a change in the law. There was not exactly a consensus on some of the policy choices, but the Government has been careful to choose a course of action that is intended to strike the appropriate balance between the interests of the pursuer and those of the defender, and to make the method and the process for setting the rate as clear and transparent as possible, with the ability—as you rightly said—for scrutiny by the Parliament. I am very comfortable that the bill does those things.

The Convener: Are there any further questions from committee members?

Andy Wightman: Jill Clark said earlier that she expects the discount rate to increase as a result of the bill. Can she explain why?

Jill Clark: I said that any increase would be relative to what currently exists. Investment markets have changed since 2017 when the current rate was set. The portfolio is a higher risk than the index-linked Government securities investment, so it should follow that the discount rate will be slightly higher, if there is a level playing field and analysis of both options is carried out at the same time.

Andy Wightman: So the Government believes that there is currently overcompensation.

Jill Clark: Yes—under ILGS, the probability of overcompensation is significantly high.

Andy Wightman: Thank you. I just wanted to get that clarification on the record.

Jamie Halcro Johnston: I have a quick question on something that you might be able to clarify, minister. The bill that became the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 initially capped payments for no-win, no-fee arrangements at 2.5 per cent, but that was overturned by a Scottish Government amendment that allowed the current situation to continue for one-off payments. However, that does not apply to PPO settlements. How does that impact on decisions by pursuing solicitors? Might it make them discourage their clients from entering into PPO settlements?

Ash Denham: I will ask my officials to give you some more detail on that.

Scott Matheson: It is difficult for me to speak for the entire legal profession—as an adviser to the Scottish Government, I do not feel that I can really do so.

I believe that some firms, at least, have put in place practices to ensure that the intended recipient of the damages has taken independent actuarial advice; that the decision on whether to take a periodical payment settlement rather than a lump-sum award is taken on the basis of such advice; and that steps can be taken to ensure that the advice is given independently to the recipient of the damages rather than being filtered through the solicitors concerned so that its independent nature is not skewed by the interests of those solicitors. I give that as an example rather than as a statement of universal practice.

The Convener: It would indeed be a brave man or woman who claimed to speak for the entire Scottish legal profession.

I thank the minister for coming in.

10:41

Meeting suspended.

10:47

On resuming—

Subordinate Legislation

Common Financial Tool (Scotland) Regulations 2018 [Draft]

The Convener: We turn to the draft Common Financial Tool (Scotland) Regulations 2018. I welcome our panel of witnesses: Alan McIntosh, who is senior money adviser at Inverclyde Council; Angela Kazmierczak, who is financial inclusion team leader at Aberdeen City Council; Nicola Birrell, who is senior money adviser with the money advice and rights team at East Renfrewshire Council; and—last but not least—Scott Milne, who is director of WRI Associates. I thank all four of you for coming in today. You do not need to press any buttons—that will all be done by the sound desk. If you want to enter the discussion, please indicate by raising your hand and I will ensure that you can come in. You should not feel obliged to respond to every question; we will see how the discussion and the questions develop. I turn first to John Mason.

John Mason: I have a range of questions. To start, one of the arguments for the adoption of the standard financial statement is that it would standardise procedures across the United Kingdom, given that a lot of creditors are organisations that operate across the UK or more widely. How important is it that we have the same standard across the UK? Alan McIntosh made the point in his written evidence that debt has never been treated in the same way in both Scotland and England. How do we balance those views?

Alan McIntosh (Inverclyde Council): You are absolutely correct: there has never been a single market—to use a phrase that is quite common these days—in debt recovery across the UK. Scotland has always had its own distinct legal system, and its own debt solutions and debt recovery laws. Creditors who operate in the Scottish market—they pretty much all do—accept that separate legal procedures and debt recovery procedures have to be used for someone who is in debt. They also accept that separate debt solutions will be applied. One such example is the Scottish Government's debt arrangement scheme—there is no comparable scheme anywhere else in the UK, although the committee will probably have learned from the recent budget that the UK Government is now seeking to learn from the Scottish scheme and introduce a similar scheme in the rest of the UK.

There is not necessarily a need per se for a standard financial statement across the UK, but I do not object to one. The important point is that

whatever solution is put in place must be the correct solution for Scotland and for our system. As I said, I have no objection in principle to a UK standard financial statement. I accept that it will benefit creditors and, if it is possible to implement such a statement, I do not see why creditors would object to it. I also accept that it will benefit large national organisations such as StepChange Debt Charity, which can then operate one computerised system across the UK. My opinion is that there is no need for a standard financial statement, although it has some benefits. The important point to consider is whether it will be an appropriate solution for Scottish consumers and will provide fair outcomes for both consumers and creditors.

Nicola Birrell (East Renfrewshire Council): Previously in practice in Scotland, we had one model that was used with creditors and one model that was used specifically for insolvency. Before we had the common financial tool, two sets of trigger figures were used in Scotland for different debt solutions. That difference was an issue, but I do not think that it would be a bigger issue across the UK especially, as Alan McIntosh said, for people who are giving local debt advice and working only with Scottish clients.

In addition, the Financial Conduct Authority "Consumer Credit sourcebook", which covers how debt collection practices should be undertaken, still says that creditors should use the common financial statement, which is what our common financial tool is based on, or an equivalent. We are still covered, given that creditors are instructed to use the common financial statement or the SFS, so there is no real need for one tool.

John Mason: There seems to be an argument that some creditors were not signed up to the common financial tool, and that it is more likely that they would sign up to the standard financial statement. Are you saying that that is not the case?

Nicola Birrell: I do not know if the committee has had any representations with regard to specific creditors that would sign up to the SFS. I know that it was suggested at the start of the process that public sector creditors would buy into it. However, we have not seen any evidence of that, and I think that it is highly unlikely. Somebody aged over 25 who is on jobseekers allowance will get approximately £317 a month, which is less than the housekeeping trigger figure in both tools. We could quite fairly turn round to a public sector creditor and say that that person has no disposable income by virtue of the fact that they are on benefits. A public sector creditor will not accept either a token payment or a period of non-payment—they will go straight in and try to deduct money.

It has been said that public sector creditors will buy into the SFS, but I do not see that happening. In the committee's evidence session last week, it was mentioned that the Insolvency Service of England and Wales is using the SFS, but there was no talk of Her Majesty's Revenue and Customs, the Department for Work and Pensions or local authorities that collect debts, and those are the organisations that we struggle with.

John Mason: I would like you to clarify something. At present, would a Scottish public authority such as a local authority be signed up to the common financial statement, or not?

Nicola Birrell: Local authorities operate case by case—there is no national agreement. We have agreements with some departments with which we work closely that they will sign up to the use of the CFS, but it is done case by case; there is no national agreement on that.

John Mason: Thank you. Does anyone else want to come in?

Angela Kazmierczak (Aberdeen City Council): Local authorities, like HMRC and the DWP, have to comply with the common financial statement only in the case of a statutory debt option. I concur with Nicola Birrell and Alan McIntosh. Most people whom we see who have local authority or DWP debts are claiming benefits; they would get nowhere near the trigger figures, because their income is simply not high enough. Organisations do not use the common financial tool when putting in place a council tax or rent arrears arrangement, because the person would be paying nothing towards their debt, when it is expected that they should be paying something. I would not agree with the statement that the SFS would help Government agencies that are collecting debt.

John Mason: Does Scott Milne want to come in?

Scott Milne (WRI Associates): I tend to deal mostly with situations after the event as part of the formal insolvency process; I do not generally have any engagement with creditors prior to that point in the way that Nicola Birrell, Angela Kazmierczak and Alan McIntosh do.

John Mason: Is the use of the SFS practical? If we carried on using the common financial statement rather than switching, would that have an impact on creditors?

Alan McIntosh: If all creditors across the UK started using the standard financial statement, I do not know whether it would have an impact. I think that they would continue to use the common financial tool in the way that they currently do; they are legally obliged to accept it for statutory debt remedies. I accept that creditors would probably

prefer to have a common financial statement across the UK, but in reality the process would simply continue as before.

I emphasise that, even if we have a standard financial statement across the UK, practice will not be uniform. In Scotland, there are additional layers of guidance on the way in which the current tool is implemented, which is crucial. The use of a standard financial statement across the UK will never be uniform—the key difference is how it is implemented in Scotland, and that is where money advisers have really struggled in the past three years.

Nicola Birrell: From a regulatory perspective, the Financial Conduct Authority instructs creditors that they must be mindful of the legal differences given the different debt solutions in Scotland. There is no reason why the FCA cannot give similar instructions that creditors must have regard to the differences when the standard financial statement comes in.

John Mason: Colleagues will follow up on some of those points—thank you very much.

The Convener: Perhaps Alan McIntosh can clarify one point. In your written submission, you discussed the differences—which you have mentioned today—between the Scottish and English legal positions. You said:

> "even if Scotland was to adopt the Standard Financial Statement, this will not result in a common approach being adopted across the UK, as the Scottish approach is distinct".

You went on to say with regard to the common financial tool that

> "an additional layer of guidance is applied to it by the AIB, over and above that which is applied elsewhere in the UK by the Governing body of the SFS."

Are you saying that, even if we adopted the SFS in Scotland, there would still be an additional layer of guidance from the Accountant in Bankruptcy to take account of the different position here? Would that be a good or bad thing if the SFS was brought in?

Alan McIntosh: I will quickly explain the background. I have used a common financial statement in Scotland since 2003, prior to its adoption as a common financial tool. I supported the adoption of a common financial tool, and I still support the continuation of a common financial tool. In 2015, I supported the adoption of the common financial statement as that common financial tool, because it worked well—it was flexible, and creditors accepted it quite easily. It involved common sense and in general, in my experience, it provided good outcomes for clients and creditors.

What we did not take into consideration in 2015—I am speaking with the benefit of hindsight—was how the character of the common financial statement would change when it came into use as the tool, as a result of the additional layer of guidance that was brought in and the evidential requirements and verification standards that we now have to meet. That is one of our big concerns.

The majority of agencies that responded to the common financial tool consultation that the Accountant in Bankruptcy carried out last year—there were more than 70 responses—did not want the standard financial statement to be brought in because they feared that it would exacerbate the current situation. One of our primary concerns is that, even as the regulations that we are discussing have been laid, we still do not have a final version of the guidance for the standard financial statement. We are forgetting the lessons of the past, which is what happened in 2015, when we got the regulations followed by the guidance. This time round, I would rather that the guidance was finalised and brought forward at the time that the committee makes a decision on the regulations.

The Convener: In effect, you would like to see the guidance before a decision is taken on the regulations.

Alan McIntosh: I have a draft version of the guidance in front of me but I would like to see the final version. The common financial tool working group, at its most recent meeting, took the decision that, if the regulations are approved, it will create a subgroup in December to look at them. During that meeting, David Hilferty said that we had to go through the guidance line by line and assure ourselves about how the standard financial tool will work when it is implemented.

11:00

The guidance should be finalised at the same time as the regulations are scrutinised—that is really important. The guidance raises some issues, on which I can provide more evidence if the committee wants me to do so. Some of those issues are about putting meat on the bones of the regulations, and the committee really needs to look at them. They include issues around child maintenance and verification. Some of my colleagues can expand on what I have said, because those issues are relevant—

The Convener: We will not have time to go into those issues in evidence today.

Alan McIntosh: I understand that.

The Convener: If you want to write to the committee to illustrate any additional points, that

would be helpful. I see that Angela Kazmierczak is nodding in agreement. Does Scott Milne have any comments to make at this stage?

Scott Milne: Again, in general, I undertake my role during or after a formal insolvency appointment. I am not involved in the same way as the other witnesses, especially in the area of creditor engagement. I effectively present creditors with a package as a fait accompli, so there is less scope for me to have a great amount of input to the process.

The Convener: We move to questions from Colin Beattie.

Colin Beattie: I want to look at trigger-figure breaches and the administrative impact on advisers. Various witnesses have commented on that, and I would be interested in hearing an explanation of how such breaches would impact on you.

Nicola Birrell: The first point to remember is that a breach of trigger figures does not always have to be justified. As David Hilferty pointed out in last week's evidence session, a financial statement is not just a way for us to get a solution for someone; it should be a budgeting tool. It should stay with the person as something for them to work towards. It is an on-going conversation between the adviser and the client. We will draw up an income and expenditure chart and, if we see that there is a breach of trigger figures, we will need to have a discussion with the person about why that is the case. That process has already been made quite difficult—we cannot tell people by how much they have breached the trigger figure, or what they are aiming to get to, because we are not allowed to tell them the figure in the first place. Given that most of the money advice process is built on trust—it is a very intrusive process, and we are asking people to give us a lot of detail about their life and household—that is very difficult for us.

If we do not consider that the client's explanation of why the figures were breached would be reasonable in the view of creditors or the AIB, we need to work with them to get their level of spending down. That is the first impact in terms of the administrative work that we may need to do. It could involve looking at comparison sites or helping clients to complete discount forms. It might include doing a spending diary exercise with the client to try to get them to reduce what they are spending, or advising them about cheaper places to buy food—all that sort of stuff.

The breach may be reasonable—in general, we tend to see such breaches where there is someone with a disability in the house or where someone has a particular dietary need. Another example would be where someone has joint care rather than full care of a child and therefore does not have the allowance for that child in their budget. We then have to try to evidence the breach—we show that there is definitely an overspend, but we provide evidence for the cause of that breach. As I said, that is not always an easy discussion to have with someone who is potentially already at their lowest point. We say to them that they need to go and get evidence that they spend a certain amount on petrol, and we need to write down a reason, such as a health condition, that explains why they spend more than they should. Other reasons could be that they live rurally, or the job that they have. We need to have sufficient evidence for the breach, and we need to explain to the client that we are asking for that evidence not because we mistrust them, but because later down the line we will be asked to provide an explanation.

Colin Beattie: From what you are saying, it sounds like there is potentially quite a lot of work in each case. Can you quantify the notional cost of that work?

Nicola Birrell: No, unfortunately, I cannot give you a notional cost. It is not really something that local authorities measure. I do not know whether the other witnesses have done any cost exercises.

Angela Kazmierczak: I want to mention another thing. Nicola Birrell spoke about getting evidence for trigger-figure breaches. If we adopt the standard financial statement, we will need to gather more information as evidence for fixed costs. The common financial statement refers to essential expenditure, which is usually fairly easy to evidence; it includes rent, council tax, gas, electric and the television licence. The standard financial statement shifts more of those areas of expenditure across to fixed costs, which we will then need to evidence. That includes travel costs. Previously, as long as those costs were within the trigger-figure amount, we could just accept them and move on.

If we adopt the standard financial statement, we will need evidence to explain not only trigger-figure breaches but other things too. At present, if we write to a creditor with a voluntary payment plan, they accept that we have done the work and verified the client's expenditure, and they will accept the payment plan. However, when we are looking at statutory debt options, we have to send evidence to show that what we have put on the statement is correct.

Colin Beattie: It is not just about the breach of the trigger figures—the administrative difference between the SFS and the CFS means that, right from the beginning, the latter is more onerous.

Angela Kazmierczak: Yes.

Colin Beattie: It is always difficult to quantify such matters, but can you put any sort of percentage or cost on that extra work? You can even give me a time cost.

Angela Kazmierczak: The cost probably would be in time. There are currently challenges for people in gathering evidence. As Nicola Birrell said, people who are in debt come to us at their lowest point. The need for us to gather more evidence to be able to get a solution can delay the point at which they can walk out the door and feel that they have something in place and are back in control of their finances.

For the standard financial statement, we will need to gather even more evidence, which will prolong the process, potentially by an extra three or four weeks. If we are producing a monthly financial statement and we need to show a person's fuel costs for a month, we will have to gather evidence for a full month to be able to show what the actual costs are.

Colin Beattie: That is a huge difference.

Angela Kazmierczak: Yes.

Scott Milne: This subject is probably one that is dear to the hearts of those in the insolvency profession. Trigger figures appear to work for what has clearly been defined as a standard individual. Sadly, however, we do not deal with standard individuals—we deal with self-employed individuals, people who are on zero-hours contracts or those who are managing five part-time jobs at any given point in time. The common financial tool as it stands does not provide for the system to work in such cases, and the standard financial statement even less so, because of the issues that Nicola Birrell has just outlined. The current system is very inflexible. For 20 years, creditors as a group accepted the insolvency profession's assessment of what was a reasonable amount of income and expenditure, and therefore what was a reasonable contribution. We have a lot of experience of doing that, as have the other witnesses. The common financial tool restricts us in that work, and it appears that the standard financial statement is even more restrictive, simply because there are fewer categories and some elements of expenditure are lumped in together.

I can give you an idea of the cost in terms of time simply from having to deal with trigger-figure breaches. Three weeks ago, an individual came to seek insolvency advice from me with a view to his personal bankruptcy. He was self-employed and worked as a designer with some months on and some months off. We knew the minute that that gentleman walked in the door that his income and expenditure were such that there was no prospect whatsoever that he would be able to provide any contribution towards his debt. It took us between two and a half and three weeks of to-ing and fro-ing with the Accountant in Bankruptcy's office to reach agreement on a zero contribution. We made an application and there was a breach of the trigger figures, so we tried to garner evidence from the individual. That involved trying to read from bank statements—once we get the evidence, we have to explain it.

I have been asked to provide payslips from somebody who is self-employed. Self-employed people do not get payslips—they generally issue invoices or operate through self-billing. When we deal with the AIB, there sometimes seems to be a lack of understanding of what evidence we are actually able to provide. At no point are we asked to give our professional opinion or judgment on whether something is correct. I can certify an individual's insolvency by signing a bit of paper, based on my professional knowledge and years of experience and the evidence that has been presented to me. I can make somebody bankrupt, but I cannot suggest what the contribution should be. The current situation is very restrictive for the insolvency profession.

A trigger-figure breach can result in 10 or 15 hours of extra work in order to process and proceed fully with the insolvency application. From a human perspective, the individual who is suffering problems with debt, and who is being pursued by creditors—"harassed" is perhaps too strong a word, although the person may feel that way—is unable to get the resolution that they want and deserve because of the additional time and effort that is spent to-ing and fro-ing with the AIB over what ultimately amounts to a fiver here or a tenner there.

The insolvency profession faces another major issue. It costs me more to administer a contribution of £12.74 every month than the amount by which the creditors benefit; there is no de minimis. As it stands, the tool operates in such a way that whichever number it spits out the bottom is the level at which the contribution order is set. I have worked for various firms, some of which charge rates that the committee would find exorbitant—to be frank, I would have to agree with that view—and some of which charge much lower rates. Even at the lowest rate for an insolvency practitioner, which would be a general assistant in a practice, it would cost us more to administer a monthly contribution of £12.74 from a bankrupt individual. There is zero benefit to the creditors.

Colin Beattie: Where is the trigger point, for want of a better word? At what point does it become financially viable to collect a payment?

Scott Milne: Realistically, from my perspective as an insolvency practitioner, it becomes viable

around the £50-a-month mark, given the income that that generates over a four-year period.

Colin Beattie: How many orders would be for contributions of £50 or more rather than lower amounts?

Scott Milne: I can speak only for cases in which I am directly involved. We do not deal with a massive amount of personal bankruptcy. However, a disproportionate amount of the overall number of orders that I see are for contributions below the £50-a-month limit, if you want to call it that, above which the collection of the payment becomes economically viable.

The Convener: What do you mean by “disproportionate amount”? Disproportionate in relation to what?

Scott Milne: There are too many such orders. I would suggest that, if I am looking at 10 bankruptcies, more than half of those involve contribution amounts that are set, following the use of the tools, at less than £50.

The Convener: Jackie Baillie wants to come in at this point; we will then come back to Colin Beattie.

Jackie Baillie (Dumbarton) (Lab): I have a specific question that relates to the Accountant in Bankruptcy’s letter about trigger-figure breaches; perhaps I could put it to Alan McIntosh first. There seems to be a degree of controversy over which financial statement results in the most trigger breaches. The AIB’s letter states:

> “owing to significant concerns raised by the money advice sector, the way in which SFS trigger figures were calculated was changed before the figures were uprated for 2018. On the basis of the 2018 trigger figures for both the SFS and the CFS, there is a clear fall in cases where trigger figures are breached”.

Is that correct? Do you know what changes the AIB made? Should we found on its analysis?

Alan McIntosh: From my understanding, this is what happened. In 2017, the SFS was introduced, and comparative studies were done with Money Advice Scotland, which involved a relatively small number of cases—I believe that the Accountant in Bankruptcy did a comparative study that involved about 1,500 cases. Comparisons were drawn between the SFS 2017 and the CFS 2017. The SFS 2017 produced quite a number of breaches; I cannot remember the specific amount.

A lot of pressure was put on the money advice sector, primarily by David Hilferty, about the level of breaches. In SFS 2018, the figures were uprated, some of them by as much as 100 per cent. Universal credit claimants—benefit claimants—were taken out of the statistics, which raised the average and allowed the SFS 2018 figures to go up. Unfortunately, that was not done for the CFS 2018, which is still the tool that we are using in Scotland. At a time of rising living costs, people on universal credit were seeing their income drop in real terms, and the amount that they were spending dropped, so those figures were actually downgraded.

11:15

Unfortunately, although the governance groups for both tools include pretty much the same people, they did not see fit to apply the same tweaks to the CFS 2018 that were applied to the SFS 2018. When we compare the SFS 2018 and the CFS 2018, therefore, it looks as if there are fewer breaches, because the SFS 2018 has got better. However, if the same comparison was made with the CFS 2017, before the figures were downgraded, it would probably—although I do not know what the outcome would be—give you a better idea of the situation. That is my understanding.

Jackie Baillie: Would you go so far as to say that there has been a degree of sleight of hand there?

Alan McIntosh: Some people may take the view, to which I am certainly sympathetic, that the intent was to nudge Scotland into accepting the SFS 2018. I cannot say so with any authority—that is just my view.

Jackie Baillie: Do any of the other panel members know any different, or would they concur with Alan McIntosh?

Angela Kazmierczak: I concur.

Nicola Birrell: I do not know any different, but I can tell you what has happened as a result of the changes. We have clients who did not breach any trigger figures last year, so we could send out their offers. We are now bringing them back in to review their circumstances and, although their incomes have not changed, we are having to tell them to spend less because the CFS figures have gone down. Again, we cannot disclose the amount by which they have to reduce their living standards, because we are not allowed to tell them what the trigger figures are. We simply have to tell them that their creditors now expect them to spend less.

Jackie Baillie: Thank you very much.

Colin Beattie: To go back to our earlier discussion, I am not hearing much good about the SFS from an administrative point of view. Which tool would you judge as the fairest to both sides in the process: the SFS or the CFS?

Alan McIntosh: I believe—my colleagues may agree or disagree with me—that a lot of these tools can provide fair outcomes for both creditors and debtors. The key is how they are applied. One

question that came up in last week's evidence session was about which creditors are the easiest to deal with. I have found consumer creditors—except perhaps some of the high-risk lenders—relatively easy to deal with. They are pretty trusting, and they accept that we are reputable agencies. I am sure that the same goes for citizens advice bureaux and for insolvency practitioners. If we tell them stuff, they generally accept that we are following good practice as drawn up by the Financial Conduct Authority, and they accept what we do.

Public sector creditors can be a wee bit more difficult, especially because they may be able to take recovery action through sheriff officers. The biggest problem that we have is not with a creditor but with the Accountant in Bankruptcy. That is one reason why it is so important that we work to the standard that is set for us in every single case. Colin Beattie asked about the cost implications. There is an impact if we do not get the figures right. Our client may apply for minimal asset bankruptcy, for which there is a £90 application fee, or for full administration bankruptcy, which costs £200; many clients struggle to get the money for that. If the AIB accepts the application and then decides that further verification is required, our client gets a letter that gives them 21 days to produce the necessary evidence. If they do not do that, the application falls, and they lose their money.

That is why, from a reputational point of view and from the perspective of giving advice—I am sure that my colleagues would all agree—we need to ensure that we double-check and get everything correct every single time, because we cannot risk clients losing money that they may have spent months saving up. We have to ensure that we are right every single time.

Colin Beattie: I appreciate all that you have said, but I am looking for a judgment that is based on your knowledge and experience of both systems. Which is the fairest all round?

Nicola Birrell: There is a difference in the amounts, arguably because different methodologies are used. In terms of principles, I would say that the CFS is fairer—I have a specific reason for that. In the CFS, there is a separate category that captures lifestyle choices or spending that is led by someone's household circumstances. For example, it may include vet bills if someone has a pet, school meals or meals at work, kids' days out, pocket money, hobbies or leisure—all those sorts of things. If someone exceeds the limits in that category, we have a conversation with them about choices and what they can and cannot afford. Those types of spending are easier—although that is not always the case—to set off against each other. However, some of them are now moving into the housekeeping category. That means that we will have to turn round and say to people that they cannot afford either vet bills or food, and tell them that they have to make a decision. I would not want to go down that route with my clients—it does not follow a natural budgeting process.

The idea is that someone has their housekeeping expenditure, their travel expenditure and their phone and connectivity spending, and everything else is more choice based. That allows us to discuss with clients what they can afford within that. As I said, that facility is being taken away in the SFS. Personally, I think that that will make it harder for us to have budgeting discussions with clients, because we will be asking people to make much more difficult choices.

Colin Beattie: Does anyone else have a view on that?

Scott Milne: I certainly agree with what Nicola Birrell said. If pushed, I would say that neither of the tools is particularly friendly or helpful, certainly from the perspective of my profession. However, there is a greater degree of inflexibility in the standard financial statement that will undoubtedly make the process harder.

Angela Kazmierczak: I just want something that gives people decent and reasonable living costs. I have been using the common financial statement since I began working in money advice back in 2004, and there has never been a big issue with it. However, I am now dealing with more onerous administration in order to implement the standard financial statement, and I am aware of the impact that that might have on clients. There is inflexibility, as other panel members have mentioned. We need something that gives people a reasonable standard of living and means that they can pay their debts back as well. That is what I want to see from whatever tool that we use.

Gordon MacDonald: My understanding, from the evidence that we have heard this morning, is that the SFS provides fewer categories, for which different expenditure limits are set. Given that costs for things such as housing and heating—whatever they happen to be—tend to be different in Scotland, what will be the impact on the individual debtor if we move over to the standard financial statement? Putting to one side Jackie Baillie's point about whether we are comparing like with like in terms of the two systems, what will be the impact on the ordinary individual?

Nicola Birrell: Off the top of my head, I do not think—

Gordon MacDonald: In general terms.

Nicola Birrell: The costs for heating and housing that you mention would come under the

fixed category, in which there are no limits, so there would be no particular impact in that regard. However, there are a lot of rural populations in Scotland, and spending on items such as petrol has moved to a different category. The things that are left over are items such as food, phone and broadband. The big issue for people in rural communities may be the cost of broadband. Again, if someone is breaching trigger figures, it is up to the person who receives the application to understand and accept our justification for why that is happening. I would hope that, if someone was incurring extra costs because they were based in Scotland, the AIB would understand that. As I said, however, we still have to provide evidence whenever there is a breach.

Alan McIntosh: It is hard to say what the impact would be—it would depend on the individual case, so it is difficult to make generalisations. However, the Scottish Government has made provisions in its recent changes to the debt arrangement scheme, which were approved by this committee in September and came into force on 29 October. Debtors who are on the scheme do not now need to disclose their full disposable income to their creditors. That recognises to some extent the restricted nature of living on a budget for a period of time. The Government felt that people on the debt arrangement scheme should not be restricted in that way—that is understandable, and I supported those changes.

However, we should bear in mind that debtors who have entered into bankruptcy or trust deeds still have to offer information on their full disposable income, and they continue to live with restricted budgets. As budgets become tighter in the future, that will make it harder. There is a greater chance that people will default and miss payments, which I am sure has consequences for insolvency practitioners such as Scott Milne as well as causing problems for money advisers. If a trust deed fails—although sequestration can never really fail—the client gets their debt back, and they will come back to us. We spend a lot of time dealing with people who have entered into a solution that does not work—it fails, and they come back to us and we need to start from scratch again. That means that clients will not get their debts resolved within four years—it may take six or eight years. The SFS will not be a good thing if it puts people on a more restrictive budget.

Gordon MacDonald: In general, does either system—whether it is the common financial statement or the standard financial statement—provide a reasonable standard of living for the person who is trying to make the repayments?

Alan McIntosh: That is subjective, because it depends on what one considers to be a reasonable standard of living. We have clients who live in poverty, but that is not because of the common financial statement—it is because they are on very low incomes.

For the majority of the clients whom my money advisers see in Inverclyde, the big issue is not whether they are breaching the trigger figures—it is verification. The majority of my clients never get near the trigger figures, because they are on universal credit and so on. It depends on what you see as a reasonable standard of living. I put a definition in my submission—that is just one definition. I will not read it out, because that would take quite a long time.

Generally speaking, I think that a reasonable standard of living means being able to go to work, live in a warm house and have various types of clothing. Sometimes I go to my kids' schools and I see children wearing clothing that is totally inappropriate for the winter—that is the effect of low incomes. Those are the sorts of things that I would associate with a reasonable standard of living. That would include being able to have some social time and going out for a meal. It really depends on your view of what constitutes a reasonable standard of living. I would hope that we have moved on from Victorian times. Whether we would allow certain things would be decided case by case, but there is the potential not to have a limit in some cases.

Nicola Birrell: I would say no, for a couple of reasons. First, I should say that the tools are not based on the need to provide a reasonable standard of living—they are meant to ensure that people have a lifestyle that is based on the average standard of living of those on the lowest incomes. We do not start out by trying to give people a reasonable standard of living; we are not measuring that, because it is definitely not what the tools are devised to do.

There are two reasons for that. First, although the common financial tool is given a lot of credit for bringing in a savings provision, which we did not have before, it provides for 10 per cent of someone's disposable income to a maximum of £20. If someone has a disposable income of £200, they get only £20 a month to put away. If they have an income of less than £100, they are saving less than a tenner a month, which is nothing. To be honest, it is very unlikely that clients will be saving that amount. If there is an unexpected school trip or the washing machine breaks down, they do not have the money to deal with those things. In my view, we are not providing for an adequate standard of living if we do not allow people to save enough money to enable them to deal with an emergency, or even an extra birthday or anything like that.

The second reason relates to the Scottish Government's work on child poverty. The Government already talks about material deprivation and the need for people to save a tenner a week, but the financial tool does not allow for that. We do not say that an adult must have something to spend on themselves every week. The current tools would fail according to the measures on poverty that the Government is already discussing.

Gordon MacDonald: What changes should we make to the system in order to reflect your suggestions?

Nicola Birrell: If you want a tool that gives people a reasonable standard of living, you have to start by asking what constitutes a reasonable standard. You ask what you need to give people, and what is left over goes towards their debt. If that is not what you want—if, instead, you want people to live on the average standard for those on a lower income—you should go ahead and use the current tools. You cannot retrofit the tools to ensure that they give people a reasonable standard of living, because that was not what they were designed to do.

Scott Milne: That is absolutely correct. We see a huge skew in the standard of living. If someone is a wealthy individual with a large house and a huge mortgage, that is apparently okay. I have dealt with bankrupts who were paying thousands of pounds a month on a mortgage. They can choose not to have to do that if they see fit, but because there is no trigger figure for the mortgage cost and it has no bearing on the rest of the arrangement, it is quite all right. To some degree, the current system almost favours the better-off, notwithstanding the fact that they might expect a higher general standard of living in terms of their expenses. If they choose to channel a huge amount of their income into housing costs such as a very expensive mortgage or rent payment, they are not penalised for that.

I am looking at the issue from a creditor perspective. Fundamentally, once I am appointed, my clients are the creditors, and my job is to get money back for them, while still having a duty of care to the insolvent individual in terms of their wellbeing—not only financial but mental wellbeing, although that is something that we all have to deal with.

11:30

From a creditor's perspective, I genuinely do not see that there is a standard-of-living problem. In a scenario in which expenses have been calculated for a hostile bankruptcy appointment with a creditor, and the debtor is clearly clever enough to beat the system, we have no scope for any adjustments or potentially to attack that arrangement. There is nothing more distressing for a creditor who is owed thousands and thousands of pounds than seeing the bankrupt living in a £5 million or £1 million house and still driving a nice car on hire purchase because it is a necessary expenditure to get them to and from whatever self-employed or trust-employed job they may have. There is a great disparity between the less well-off in society and those who are somehow able to beat the system. I am talking about those who come from a much greater position of wealth to begin with and who have declared themselves bankrupt or wish to do so.

There is no option box in the tool that would help to fix the situation. When we run the figures through the common financial tool and stick in all the information, there should be a discretionary box to enable those of us with the expertise—not the Accountant in Bankruptcy—to make a judgment call. That should be the case if we have to use the tools, but I still say that our profession would rather not do so. We would rather see an assessed amount for a fair living standard, which takes us back to Nicola Birrell's comments about what constitutes such a standard.

As a profession, certainly in Scotland, we would prefer that a fixed amount of a person's total income is deducted for general living expenses, depending on circumstances, and that a percentage is applied to whatever is left. Such an approach would provide consistency across the board while taking account of each debtor's individual circumstances rather than applying one fix for all potential problems. However, the tool does not give us an option box or a discretionary box, or a £10 or £20-a-week savings box. We do not have a way to provide for when something goes wrong, and things go wrong all the time—sometimes a fridge blows up for no reason, as happened to me the other day. We cannot pigeonhole everything into a set of numbers and tools. One size absolutely does not fit all.

Gordon MacDonald: Would the approach that you suggest address the issues that you have raised with regard to those who are better-off being able to beat the system and avoid making the payments that they should be making?

Scott Milne: Yes, absolutely—if we move away from the common financial tool as it is. If a debtor wants to stay in the house that costs them £3,000 a month for their mortgage or rent, they will have to figure out how to do that in a way that does not involve a cost to creditors, as is currently the case.

The Convener: On your last point about the need for a discretionary box to allow you to decide, to whom would the creditor or debtor have the right to appeal? If you were going to exercise

discretion, how would they appeal against your decision?

Scott Milne: One would apply the same rules that give creditors the right to appeal against trustee remuneration or any action of the trustee. A creditor has the ability to insist that the trustee convenes a meeting of creditors, and they can be represented at that meeting. They can seek to be elected as a commissioner in place of the Accountant in Bankruptcy in order that they can assume greater control and gain a greater understanding of the process on a daily basis. There is nothing to prevent the introduction of regulations to give creditors the opportunity to object to such a decision. The objection processes that I have described are in place as things stand. I suppose that I am asking whether the Accountant in Bankruptcy is the right person to make a judgment call on what is right or wrong in a set of circumstances.

The Convener: We move on to another question. If one assumes that the SFS were to be brought in, would you have any concerns about how the tool would develop as things progress? Alan McIntosh accepted that there would be some benefits in having a UK-wide system. Is there any concern about that, or would it be helpful to have a UK-wide system, rather than a separate Scottish CFS system, with regard to how the tool develops in the future?

Alan McIntosh: I have raised concerns. I have acknowledged that there could be benefits in having a UK-wide system, although I do not think that we need one. There are issues with accountability and transparency, and the public visibility of the figures. Even if we were to discuss the figures that currently apply—which we cannot do publicly—the reality is that those are not the figures that will be introduced in April 2019 if the regulations are passed, because the CFS figures are currently under review. One of my concerns is that, if the situation is similar to that which occurred with the CFS 2018, in which the figures went down—that seems to be nonsensical, but it is completely logical if one looks at the methodology that was used to calculate the figures—there will be no real accountability. We will simply need to accept the figures.

I will give another example. I believe that the Accountant in Bankruptcy plans to lay before the committee regulations with new figures relating to the threshold for bank arrestment and earnings arrestment. The figures are upgraded every three years, but the AIB has to come before the committee, which has to look at those figures. If the committee passes the regulations that we are discussing today, our sector pretty much has to accept the governance body's methodology for calculating the figures, whether or not it chooses to tweak them. The governance body is not going to come before the committee, so there will be no scrutiny of the figures.

That is a concern for me, because I believe that such scrutiny lies within the Parliament's authority. Personally, I believe that the Parliament should scrutinise those figures. Once the figures are signed off, they can be changed—as was the case with the CFS 2018, when they went down; Nicola Birrell expressed her concerns about the problems that those changes have created for some of her clients. The CFS 2018 changes never came before the committee, so elected members never got to see the new figures. They were not aware that that change had happened, because we cannot share the figures. That is a general concern for me.

The Convener: My specific question is about whether, if we had a UK-wide system as opposed to a separate Scottish CFS system, that would make any difference in terms of the input into how the system is run or the ability to influence it. Your point is that the Parliament should be in a position to scrutinise the figures, as the committee is doing with the draft regulations before us. Is it a concern that that would not be the case if we moved to a UK-wide SFS system?

Alan McIntosh: That is my concern—there would be no scrutiny unless regulations were brought to Parliament. The current regulations have been brought to the committee now only because the CFS is being discontinued in April. If these regulations are passed, new regulations will not come before the committee for a considerable period of time. My colleagues may want to add something on that point.

The Convener: I think that Scott Milne wants to come in.

Scott Milne: Scotland is a bit different—we are our own country, which is why we are all sitting here in the first place—and, in my view, a UK-wide system would mean a total loss of control.

Nicola Birrell: As a local authority, we always participate in the AIB's consultations on Scottish legislation, which obviously impacts on us quite a lot. Our concern is that, if we move to the SFS, Scottish voices will be diluted. There will be consequentials for us as a result of the decisions that are made about the SFS with regard to the CFT and how the AIB will go on to administer it for statutory solutions. Only Scottish advice agencies are talking about that; we are pretty much united on the matter and we speak with one voice. It is not a concern for our colleagues in England and Wales because they do not have the same products and processes. My concern is that our voice might not matter as much in those

discussions, and we might find that we cannot influence the direction as heavily as we would like.

The Convener: Running counter to that is the suggestion that moving to a UK-wide system means that creditors would be applying the same rules and principles and would be able to understand what is happening in Scotland. Do you see that as a counter-argument at all?

Nicola Birrell: Not really—as I said, we have never had an issue with using the CFS. The regulations for creditors tell them to use the CFS and not the SFS at this point in time.

Scott Milne: Far too much importance is placed on, and far too much concern given to, the concerns of creditors. Creditors genuinely do not care about which system is used; they just need to know that the arrangements are coming from somebody who is a regulated or authorised person.

The Convener: In fairness, the suggestion—to paraphrase those who have made it—is that creditors would benefit because they, in addition to debtors, would know where they are. I suspect that debtors do not care as long as they are treated fairly and can rely on a proper system being in place.

Willie Coffey has a brief follow-up question before we come to Andy Wightman.

Willie Coffey: As someone who is new to the committee and to the subject, I find it absolutely fascinating to listen to the contributions from the witnesses, which have been made with such passion. My question is for Alan McIntosh. Where does the accountability trail end up, if not in the Parliament? At the tail end of your written submission, with regard to the SFS, you state:

> "if Scotland adopts it and it produces unexpected results, it cannot just be turned off."

Does that mean that we are stuck with it for ever more?

Alan McIntosh: I can give you an example. PayPlan, which is a private company, is one of the largest free providers of debt solutions across the UK. When the SFS 2017 was introduced in April 2017, PayPlan adopted the tool and trialled it for a few months. My understanding is the company has stopped using it for over a year because it felt that it produced overgenerous results in favour of the debtor. We will not be able to do that. Once the regulations are passed, we do not get to cancel them—they are in place whether or not we like them and whether or not the tool works. In England and Wales and in Northern Ireland, agencies have the option, because the use of the tool is voluntary, to turn it off and say that they are not using it until the system is fixed or staff are given more training. We do not get that option.

My big concern is that, once the regulations are passed, Scotland will, rather than joining the rest of the UK in using those figures, be used as an example to push the use of the figures across the rest of the UK. If the regulations are passed, the figures will be accepted and used uniformly across the whole of Scotland, which has not been the case so far across the UK, where they have been widely used but not uniformly adopted. If we in Scotland turn the figures into legislation, their use will basically become uniform.

I also have concerns about accountability. For example, the gentleman from the Money Advice Service who gave evidence last week spoke about comparative studies that were undertaken with the Joseph Rowntree Foundation's minimum income figures, which were not as bad. I was on the common financial tool working group, but I have never seen that report because it has not been circulated. People will say that, as Money Advice Scotland sits on the governance body, along with the Accountant in Bankruptcy, Scotland is being represented. However, I sat on the Money Advice Scotland management committee—as Nicola Birrell currently does—and its social policy committee, and I did not see the report to which I referred; neither did I see it as a member of the common financial tool working group.

I requested at the common financial tool working group that a study be done into the public visibility of the trigger figures. A study was commissioned, and months and months went by. Eventually, I asked what had happened to it, and I was told that it had been done. I asked to see it, and was told that it would be shared only with the SFS governance group. Again, I stress that, as a member of the common financial tool working group, a Money Advice Scotland committee member and a member of the MAS social policy committee, I did not get to see that study. Although Scotland is represented by certain organisations, I believe that those organisations are restricted with regard to those to whom they can circulate information. What sort of a voice do we really have?

The Convener: We move to a question from Andy Wightman.

Andy Wightman: I have a few points to make. It is true, is it not, that the vast majority of debtors do not venture into statutory solutions. Can you quantify the rough amount of those who do?

Nicola Birrell: Not off the top of my head. I could run a report and come back to the committee with the number of people who have been on statutory solutions over the past year.

Andy Wightman: That might be helpful—thank you. Alan McIntosh said earlier that there was no role for Parliament in scrutinising the actual trigger

figures. There is no such role now and there never has been; I want to clarify that nothing is changing in that regard.

Alan McIntosh: No.

Andy Wightman: You indicated that you would like such scrutiny to take place. Would that be possible under the current legislative regime?

11:45

Alan McIntosh: It depends. The problem is that, in order to access the figures, one needs to have a licence agreement. For example, although I do not have a licence agreement, my employer, Inverclyde Council, has a licence agreement with the Money Advice Trust and the Money Advice Service in relation to the common financial statement and the standard financial statement. As part of the licence agreement, we cannot publicly disclose the figures to clients or to anyone else. We cannot put them on our website.

If Parliament wanted to see the figures, I guess that they would need to be submitted confidentially. If they appeared on the Parliament website, I take it that they would become public information. I have questions about how far Parliament could scrutinise the figures. It is quite clear that we cannot share them or allow them to get into the public arena, otherwise we would be in breach of our licence agreement.

Andy Wightman: I will come to that point in just a minute, but first I will ask another question. You said that it is proposed that the common financial statement will not be used beyond April next year, as the regulations are intended to replace it. There is therefore a question with regard to the administration, updating and governance of both the common financial statement and the standard financial statement. If the regulations are not passed, what will happen to the common financial statement through 2019-20?

Alan McIntosh: We will need to resolve that problem, because the trigger figures will need to be upgraded. The raw data that is used to create the figures is obviously publicly available; I do not know whether someone could look at that. One of the witnesses at last week's meeting said that certain sections of the Scottish Government could take on that role. Perhaps the task could be passed on to an academic organisation such as a university department. Obviously, somebody would have to take on the responsibility of upgrading and possibly tweaking the figures, otherwise they will be frozen in time while the cost of living continues to increase.

Andy Wightman: If that work was contracted to a university or the Government did it in-house, the same licensing regime around the use of the figures would presumably have to apply, would it not?

Alan McIntosh: No, because it would be our licence. We would have come up with something else, so that we, or the Scottish Government, would be able to issue the figures.

I was probably being a bit devilish, but when the figures were introduced in 2015 I submitted a freedom of information request to the Accountant in Bankruptcy. I asked for the common financial statement trigger figures, although I already had them—I just wanted to see whether the AIB would give them to me in response to my FOI request. The AIB refused to do so on the basis that it was bound by the licence agreements. I suppose that, if the Scottish Government took on that role, it would have to disclose the figures under freedom of information rules.

Andy Wightman: That moves me on to my substantive point. Nicola Birrell spoke earlier about the importance of trust in the system in dealing with clients. At present, the licence agreement means that the figures cannot be shared. As I understand it, the argument for that is that it provides creditors with some comfort that debtors cannot game the system. Ms Birrell, do you think that the figures should be made public?

Nicola Birrell: Definitely, yes. I do not understand why they cannot be shared. I work in an integrated advice team that provides a lot of different types of advice. My colleagues who work in welfare rights can sit down with a client who has a disability and show them the scoring system for the personal independence payment. They do not worry that the client will turn round and say, "Oh, I've got that condition, and that one" in order to try to game the system. My colleagues who work in housing can explain the allocations policy and tell clients how points are awarded. Again, they do not worry about clients pretending and gaming the system.

I do not understand why we have such a deep mistrust of people who are in debt. Most of the people who come to see us are not reckless or feckless; they have got into debt not because they are badly behaved or dishonest but because something has happened in their life. They may have become ill, had a relationship break down or lost their job. They were living within their means and doing everything right, and they thought they could manage their debt, and then something happened that they did not expect. I have to operate with a level of mistrust, which does not feel right.

When we have a conversation about that, my colleagues in other advice sectors do not understand the level of information that our sector takes from people. We ask clients for their bank

details and all the details of the health of everybody in their house. We ask them about their background and what happened to them, and to explain how they go about their lives, how they pay their bills and what they spend their money on. We ask clients for a bank statement so that we can go through it and itemise everything on it. That is not a comfortable position to be in.

We have to do a lot of work to build trust and to release the shame from the person, because what money advice clients have in common is that they blame themselves, regardless of the fact that—as I said—most people have simply experienced a change of circumstances, or they have been living on a very low income that did not provide them with enough money to buy essentials. Clients who come to see us blame themselves. It is quite common—as I am sure that my colleagues will tell you—that people miss their first, second and third appointments because their bottle goes. Most people in such a situation would say to clients, "We are going to stop dealing with you, because you have abused the terms of the system." We tend not to do that, because we understand that debt clients may need a couple of opportunities to come back to us.

The same goes for evidence gathering. Much of the time, people who are in debt are not opening their mail, and we have to show them a big list of things that they need to give us within 21 days, otherwise it will cost them 90 quid or 200 quid. As I said, not releasing the figures is a shocking way to treat people who have done nothing wrong. They have done everything right. We do not tell people not to take on credit—in fact, we tell them that credit is a good thing—but as soon as they struggle to pay back that credit, we stop trusting them. That is what it seems like to me.

Andy Wightman: Thank you; that is helpful. In last week's evidence session, it was suggested that the existing system—the common financial statement—needs some review. Scott Milne has advocated the use of a very different system, as has the Institute of Chartered Accountants of Scotland. Instead of changing the basis on which we assess people's ability to pay off their debts, should we undertake a rather more fundamental review of how the system works and how assessments are done before we get to the question of which tool we should use? Is there some value in that, or do we not need to do that?

Nicola Birrell: There is a lot of value in that. One of the biggest missing pieces is the fact that no one is speaking to the debtors about what it is like to live within the trigger figures. We sign off plans for clients and send them away, and then we see those clients every six months, if they are in an informal payment arrangement, to see how things are going and ensure that they are managing things okay, and to see whether they need any other support. We also confirm to creditors whether a client's circumstances have changed, which is a duty on us. That discussion lasts for half an hour—it does not constitute research; it is simply anecdotal. We want to know how people are actually managing and whether they are sticking to their plans. As I think that my colleagues will agree, we all have clients who—with the best will in the world—go out with a plan, saying that they are going to stick to their figures, and the next time that we see them, they have had to take out another loan or do this or that, and they have missed payments.

Rather than simply asking how we fix that, we should be looking at why that is happening, and whether there is an issue with sustainability in the system. A key part of that would involve getting the debtor's perspective.

Scott Milne: Fundamentally, our profession believes that a different solution or method of calculation for a statutory debt solution would be viable for an informal debt solution. In an informal debt solution, individual debtors are doing their best to pay off their creditors. In a statutory debt solution, if we exclude the DAS, it is—

Andy Wightman: If we exclude what?

Scott Milne: A DAS—debt arrangement scheme—effectively provides for repayment of the debt in full over a period of time. Other statutory solutions in Scotland, such as a trust deed or bankruptcy, are debt forgiveness tools—creditors will not get 100p in the pound, so the calculation that we are doing is effectively for a different purpose.

We believe—I personally believe, as do those in my profession to whom I have spoken—that there absolutely is scope for a different system. I find it bizarre that trigger figures cannot be discussed. I am not party to any agency agreement or licence agreement to use the tools. I am an insolvency practitioner, so I have to use them—the statute requires that I do so. I am not signed up to using them; I simply have no choice but to use them—

Andy Wightman: I am sorry to interrupt you. If you have not signed a licence agreement, does that mean that you are not bound by the confidentiality rule?

Scott Milne: We adhere to it. We do not tell debtors what the trigger figures are.

Andy Wightman: But in law you are free to do so if you wish.

Scott Milne: I cannot answer that question just now, because I have not given the matter any consideration. I have adopted a similar approach—as far as I am aware—to that of advice

centres and agencies that operate under the pre-statutory insolvency regime.

It does not take much for a debtor to work out what the trigger figures are. If a debtor says, “I spend £500 a week on shopping”, the adviser might say, “Sorry, you can’t—that is too much”, so the debtor says, “How about £350 then?” and the adviser replies, “Yes—that works.” It is not difficult for someone with a little bit of intelligence to calculate in their head what the trigger figures are.

We do not sit down with a debtor and say, “Right—I want all your receipts and your shopping bills.” We say, “What do you spend?” If I am appointed by the court to act for a creditor, I send a document to the debtor—of course I ask them to come and see me, but I also give them an income-and-expenditure form to fill out. We then plug that information into the common financial tool and, if it breaches trigger figures, we have to disallow certain expenditures. In those circumstances, we are obtaining the evidence after, rather than prior to, the event. If a debtor says to me that they spend £500 a month on shopping, I plug the number in and the system either accepts it or not. It does not require a huge leap for someone to work out what the trigger figures are within a very close range.

I understand that creditors might be worried if they thought that our professions were working with debtors to try to ensure that they pay the minimum amount or nothing at all. However, as I said earlier, in a statutory debt process, creditors have rights to challenge all that. They have a right to question us and a right to be heard. We present them with a scenario, and more often than not they accept it.

I go back to my point that one tool does not fit all scenarios. We are being asked to use the same tool for very different scenarios. In one scenario, someone whose marriage has broken down—as Nicola Birrell suggested—and who has run into financial difficulties may want to avoid bankruptcy, and may not want to get involved in a trust deed or be tied into a debt arrangement scheme for X number of years. They just want to sort their problems out. That is a very different animal from someone who has been made bankrupt by HMRC for not paying their taxes, or someone who comes to me and says, “Scott, I really can’t deal with this—my business has gone bust and I have huge personal guarantees to the bank. Please help me deal with this.” Those are all completely different animals—some are at opposite ends of the spectrum—and yet we are supposed to use the same process in all scenarios to decide what the outcome will be.

Nicola Birrell: Like Alan McIntosh was, I will be a bit devilish. I understand the concerns from creditors about spending that will max out trigger figures in certain categories—there may be a need for lifestyle changes. However, if the figures are based on the average standard of living for those who are on incomes in the lowest quintile, why are we so worried that people are going to adhere to that standard? Why do we want to ensure that they do not possibly get there? I have a bit of an issue with that. I have never seen a money adviser go about their business by saying, “That is what you should put in that category, because I’ve worked it out, and that’s what you’ll get to spend.” As I said, there would be no point, because we could not then do the budgeting that is key to what we do—it would not be sustainable. If people are at those limits, they are not living a luxurious life—we have already established that—so why would creditors be so worried about it? That is my concern.

The Convener: We are now running out of time—in fact, we have run over our intended time. If you all think that there should be a review of the system, perhaps you could write to the committee and indicate which areas such a review might cover. You could also set out specific comments on how a better system would operate, because—as I think is commonly accepted—it is easy to criticise but often more difficult to see how to build something better. If you would like to submit any thoughts to the committee, we would welcome those.

Andy Wightman: I have a brief follow-up to the convener’s request. It would be useful if you submitted any further information quite quickly, as we will be taking evidence from the minister next week.

The Convener: That is very helpful—thank you.

You may not be able to write a 200-page thesis, but if you can provide any thoughts to us quickly, that could potentially be very useful to the committee. I thank you all for coming in today.

11:58

Meeting continued in private until 12:46.

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