The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

FINANCE COMMITTEE

Wednesday 19 February 2014

Session 4

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FINANCE COMMITTEE
5th Meeting 2014, Session 4

CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Gavin Brown (Lothian) (Con)
Malcolm Chisholm (Edinburgh Northern and Leith) (Lab)
*Jamie Hepburn (Cumbernauld and Kilsyth) (SNP)
*Michael McMahon (Uddingston and Bellshill) (Lab)
*Jean Urquhart (Highlands and Islands) (Ind)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Nicky Harrison (Scottish Government)
Colin Miller (Scottish Government)
Philip Raines (Scottish Government)
John St Clair (Scottish Government)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

Committee Room 3

Scottish Parliament

Finance Committee

Wednesday 19 February 2014

[The Convener *opened the meeting at 09:30*]

Decision on Taking Business in Private

The Convener (Kenneth Gibson): Good morning, and welcome to the fifth meeting in 2014 of the Finance Committee of the Scottish Parliament. First, I remind everyone present to turn off their mobile phones or other electronic devices. We have received apologies this morning from Malcolm Chisholm MSP.

Our first item of business is to decide whether to take items 4, 5 and 6 in private. Do members agree to do so?

Members *indicated agreement.*

Revenue Scotland and Tax Powers Bill: Stage 1

09:30

The Convener: Our second item of business is to take evidence from the Scottish Government bill team and revenue Scotland as part of our scrutiny of the Revenue Scotland and Tax Powers Bill. I welcome to the meeting Colin Miller, head of the bill team; John St Clair and Greig Walker, from the Scottish Government legal directorate; and Nicky Harrison, chief operating officer of revenue Scotland. I believe that Colin Miller would like to make a brief opening statement.

Colin Miller (Scottish Government): Thank you, convener. As you will know, the bill establishes revenue Scotland as the tax authority with responsibility for the devolved taxes and puts in place a statutory framework for the collection and management of those taxes. The bill as introduced is structurally complete in the sense that there are no new issues to be added at stage 2. However, with a bill of this size and complexity, there is undoubtedly scope for improving and refining it at stage 2. With that in mind, we have continued to engage closely with the key stakeholder groups. For example, we have recently had very helpful comments and suggestions from the Delegated Powers and Law Reform Committee. We look forward to the evidence that this committee will take during stage 1, and we are very happy indeed to do whatever we can this morning to assist you.

The Convener: Thank you for that brief statement. I will start by asking you some questions, then I will open up the session to colleagues. I may have further questions towards the end of the session.

We have been provided with quite a lot of financial information, as you would expect. For some of the questions that I will ask, we have the answers to an extent, but I think that it is important to put some issues on the record.

I will start with what the financial memorandum to the bill says on the issue of costs to the Scottish Government, which is that the

"total for the areas of cost ... remains £16.7m. The revised costs are directly comparable with HMRC's estimate for administering two 'like for like' taxes to SDLT and LfT and continue to reflect the 25% saving originally identified by the Scottish Government."

Can you detail for us how that 25 per cent saving is achieved?

Colin Miller: Nicky Harrison will deal with that question.

Nicky Harrison (Scottish Government): The figures that are used to arrive at a 25 per cent cheaper cost come from a like-for-like comparison. Following the Scotland Act 2012, ministers had to decide how to deliver the devolved tax powers. One of the options was to ask HM Revenue and Customs to administer the taxes on Scottish ministers' behalf. At that time, HMRC gave an estimate of the cost to deliver and administer taxes that would essentially be similar to the existing non-devolved taxes: stamp duty, land tax and landfill tax. That amount was put on the record at the time as being £22.7 million.

By contrast, the Scottish ministers were able to estimate what it would cost were they to introduce and develop taxes that were broadly similar to the non-devolved taxes of stamp duty, land tax and landfill tax and set up their own administration within the Scottish Government for the newly devolved taxes. The estimate was £16.7 million. On a like-for-like basis for taxes that are broadly similar to the non-devolved taxes, our estimate is still that, in the cost for the set-up phase and for five years' running, which is the basis on which the two estimates have been compared, there is a 25 per cent reduction for the Scottish Government administering the taxes compared to the HMRC estimate from 2012.

The Convener: Thank you. However, new activity has been estimated and I wonder whether you could talk us through that, because it comes to £3.51 million, including, for example, £1.5 million for information technology, and £610,000 for revenue Scotland. Can you talk us through that extra £3.5 million?

Nicky Harrison: Some of these are estimates that have been newly presented to you, but the activity is not necessarily new. Forgive me for a moment; I just want to be sure that I am looking at the same table that you are looking at.

For example, one of the costs that were not included in HMRC's original estimate is the cost of an appropriate tax tribunal to administer appeals or disputes over taxes. One of the items of difference that we are now making explicit in the financial memorandum is the cost of setting up and running a Scottish tax tribunal. That is not really an additional cost because it had not been estimated by HMRC. If we had decided to ask HMRC to administer the taxes, at this point HMRC would be giving us an estimate of what it would cost to use a tax tribunal system.

Some of the other costs are, as you say, proposed additional costs. I will take it in the sequence that is presented in table 1 in the financial memorandum, if that would be helpful. The first estimate of new activity is additional compliance activity. That is an estimate of additional costs for just one year, 2015-16. It is well documented that additional investment in compliance activity by revenue authorities can generate significant amounts of additional tax yield. Although we had costed for an adequate and comparable amount of compliance activity in our baseline costs, I am sure that the committee will be as aware as the rest of us are of the additional investment that HMRC has received in recent years to generate additional tax compliance yield. We feel that we could benefit from something like that. We have proposed the amount shown in table 1 for one year and the situation will be closely monitored to see how much additional yield it generates. We are confident that we would more than recoup the investment, but we are proposing only one year of additional investment at the moment so that the situation can be reviewed.

The next item is IT investment in revenue Scotland. Previous financial memoranda have made it clear that the estimates did not include central IT development in revenue Scotland, nor did HMRC's like-for-like costs. In view of our developing understanding of the requirements to provide an effective service to taxpayers, and their agents and advisers, particularly for complex transactions, and to manage risk assessment activity and compliance effectively, it would be helpful to have a central data repository in revenue Scotland. Our current estimate is that that would cost £1 million to set up, and £100,000 per year to run, which is where the £1.5 million that is shown in table 1 comes from. Previous memoranda have stated explicitly that the costs did not include an estimate but that that would be reviewed.

I have already covered the Scottish tax tribunals item.

The final item is the cost to the Scottish Environment Protection Agency for tackling illegal dumping. One of the big differences between the Scottish landfill tax and the UK landfill tax is that the former permits the tax authority to tax illegal dumping. That is a significant issue in environmental terms and in terms of criminal activity. At the moment, UK tax authorities cannot tax operators who are found to be illegally tipping. The Landfill Tax (Scotland) Act 2014 permits illegal tipping to be taxed. We have presented estimates for what it would cost to most effectively tackle that. Again, the estimates are for setting up and for running five years of tackling that illegal activity.

The Convener: I think that your answers will generate quite a few questions from members, because some of my colleagues around the table have quizzical looks on their faces. I will ask a couple of further questions, but no doubt my colleagues will ask for further, in-depth information.

The financial memorandum states:

"Modest additional investment in compliance activity ... can generate significant increases in revenue."

When I read that, I did not think that it would be about just covering the cost of the investment in the compliance investigation activity. I was going to ask you how much more revenue would result, but you seem to indicate that it will just cover the costs. If that is the case, one wonders why you are proceeding with it. I understand that there might be further benefits years down the line if it is a one-off exercise. Can you clarify that? I have questions on a couple of other issues, but I would like you to respond to that issue first before we go on to some of the other things that you talked about.

Nicky Harrison: In saying that compliance activity would at least cover the cost, I did not wish to imply that we expect it only to cover the cost. I apologise if I gave that impression. It is well documented that investment in compliance activity often generates significant amounts of additional yield. For example, the additional funding that HMRC has received from the Treasury for investment in compliance activity generally works on a ratio of about 10:1, which means that there is a return of about 10 times the investment.

We were quite cautious and prudent in the financial memorandum because we do not have a track record for the devolved taxes that would enable us to assess the size of the tax gap, which is what the additional investment in compliance would help to reduce; nor do we have a track record to demonstrate the effectiveness of our compliance function. So, apologies if I was being rather prudent before when I said that the compliance activity would at least cover its costs.

If all that we aimed to do in the compliance activity and all that it managed to do was to cover the costs, it would obviously not be an investment that was worth making, and I certainly would not wish to suggest that. However, I certainly expect there to be a significant return on the investment. I think that earlier I was trying to reassure you that at the very least the cost would be covered.

It is important to say that we expect that the additional investment in compliance will bring in significant additional yield that will more than justify the investment. We will do more work to try to understand exactly how much it will bring in. That is partly why we have suggested investment only for one year. That will be our first year of operation, and by the second year we will be much clearer about the expected rate of return. The performance of revenue Scotland can then be challenged on the rate of return that would be expected for the investment.

It is also important to recognise that this sort of additional investment in compliance activity can often bring in additional yield in two ways. Part of it is a direct yield in terms of the money that we bring in from the cases that we investigate, but there is also the deterrent effect that is generated by this sort of activity when it is clear that the revenue authority is at the top of its game in identifying and tackling both evasion and avoidance activity. That can help to increase the voluntary compliance rates. We expect to be able to map our estimates of the impact of investment on both those forms of additional yield.

The Convener: Thank you.

Again on the subject of estimates for new activity, the cost to SEPA for processing and administering Scottish landfill tax revenue from taxing illegal dumping is estimated to be £1,050,000. Why was that figure not in the financial memorandum to the Landfill Tax (Scotland) Bill? I would have thought that such a huge cost of over £1 million would have been integral to that bill.

09:45

Nicky Harrison: As it has become clearer with the passage of time what the powers will be to tackle illegal dumping, what the extent of illegal dumping is and what additional effort will realistically be required to pursue the tax that is at risk, we have been able to update the figures for the financial memorandum to the Revenue Scotland and Tax Powers Bill. I cannot comment on why the information was not in the Landfill Tax (Scotland) Bill financial memorandum.

Much of the information is provided in the spirit of being as open as possible. As our ideas develop and as we develop greater understanding of what could be involved in administering the devolved taxes, we wish to share information about the costs with the committee. The financial memorandum to the Revenue Scotland and Tax Powers Bill has provided a helpful opportunity to do that.

That is in a way linked to the conceptual approach to the additional investment in compliance activity. Now that we know that we have the ability to tackle illegal dumping, we can work out more clearly exactly how much investment would be needed to make the measures effective to counteract and deter illegal tipping. I remind members that that is over the five-year period.

The Convener: The financial memorandums to the Land and Buildings Transaction Tax (Scotland) Bill and the Landfill Tax (Scotland) Bill did not refer to IT costs, but the financial memorandum to this bill talks about £1 million plus £100,000 a year for

five years. Surely that should have been anticipated—we are not talking about a few thousand quid here or there.

Nicky Harrison: Much of this reflects where we have got to in our thinking about how best to administer the devolved taxes. The previous financial memoranda stated explicitly that they did not include costs for a central IT system in revenue Scotland and included only minimal IT costs for web page development, for instance.

As we have worked through mapping out and developing our thoughts on the systems and processes that would ideally be needed to produce the most seamless service for the taxpayer and to provide the best customer service and the most effective risk assessment and compliance approaches, we have come to the understanding that a central secure repository in revenue Scotland, which the partner agencies could access, would be the best way of meeting the requirements that we are now clear we have.

The position reflects the progress that we have made in setting up the devolved taxes administration. Now that we are much further through the system, we have a much deeper understanding than we had before.

The Convener: Audit Scotland has made a brief submission, which says:

"the Explanatory Notes say that 'Revenue Scotland will have the status of a non-ministerial department ... Revenue Scotland is expected to have the status of an office-holder in the Scottish Administration, within the meaning of section 126 of the Scotland Act 1998, by virtue of an order under that Act' ... In the absence of explicit provisions in the Bill about accounting and auditing it is important that the order is made and applies from the same date as the commencement date for the Bill as a whole."

Will that happen?

Colin Miller: Yes. Precisely because office-holders in the Scottish Administration are defined in the Scotland Act 1998 and are therefore a reserved matter, it is not possible to put such a provision in the bill. We have been in touch with the Scotland Office about a section 104 order, and it has been in touch with the relevant United Kingdom Government departments. It has been agreed at ministerial level that a section 104 order will be made. Among other things, it will designate revenue Scotland as an office-holder in the Scottish Administration. As Audit Scotland's submission makes clear, that will trigger the relevant provisions of the Public Finance and Accountability (Scotland) Act 2000 and therefore the requirement to prepare accounts, which Audit Scotland will audit.

The Convener: Thank you for that clarification. I will ask one more question and then open up the session to colleagues.

Our adviser, Professor McEwen, has produced an excellent paper, which I will probably touch on later, as will colleagues. Part 4 of and schedule 2 to the bill deal with the Scottish tax tribunals.

Professor McEwen has stated:

"a striking contrast is that Revenue Scotland is set up in 11 sections and a Schedule of 9 paragraphs while setting up the Tax Tribunals takes 39 sections and a Schedule of 42 paragraphs."

That seems awfully cumbersome and disproportionate. Can you explain why there is such an apparent imbalance?

Colin Miller: The issue is the interaction between the bill, the devolved taxes that will come into force on 1 April 2015 and the Tribunals (Scotland) Bill, which is currently before Parliament and will establish a unified Scottish tribunals system that, in due course, will take over the jurisdiction for all the existing devolved tribunals including, we envisage, the tax jurisdiction. The problem is that, although the Tribunals (Scotland) Bill is expected to complete its passage through Parliament this year, the first devolved tribunals will not transfer across into the new tribunals for Scotland until the end of 2016 at the earliest, whereas we need to be able to provide for appeals to be heard by an independent tribunal from 1 April 2015 onwards.

In part 4 of the Revenue Scotland and Tax Powers Bill, we have therefore replicated all the corresponding provisions of the Tribunals (Scotland) Bill to create a self-standing two-tier tax tribunal to hear tax appeals during that interim period until the new Scottish tribunal service is up and running. When it is, the intention is to transfer the jurisdiction and members of the tax tribunal into the new unified tribunal. The intention of going into the detail—which we have done—and consciously replicating the provisions of the Tribunals (Scotland) Bill is to make the transfer of that jurisdiction into the new one as seamless as possible, with no adaptation or amendment necessary. We hope that that will take place somewhere around the end of 2016 or in 2017.

The Convener: Thank you. That is very helpful. I open up the questioning to committee members.

Jamie Hepburn (Cumbernauld and Kilsyth) (SNP): I, too, will refer to Professor McEwen's briefing. He identifies the proposal to remove the privilege in relation to information that was extended to tax advisers and accountants in the Finance Act 2008, although it will remain for lawyers. Can you set out the thinking behind that?

Colin Miller: It is an interesting issue, which we have discussed with the professional bodies. Legal professional privilege is well established across the board, not simply in relation to the tax world but generally. The starting point is that

revenue Scotland's powers to require information would not interfere with legal professional privilege, and that is what the bill provides for.

As you said, in the Finance Act 2008 the UK extended protection to tax advisers. In the 2008 act, tax advisers were defined simply as anyone who provides tax advice, which is a very wide definition indeed. It extends beyond those who have a recognised professional qualification or belong to a recognised professional group—it can be literally anyone who sets themselves up to offer tax advice—and the professional groups have told us that there are some fairly unscrupulous operators at one end of the spectrum. In judging where to strike the balance and where the public interest lies, we have retained legal professional privilege but have not followed the UK in extending that privilege to tax advisers.

Jamie Hepburn: Is it your perspective that there might be unscrupulous tax advisers but not unscrupulous lawyers? [*Laughter*.] I am not really asking you to comment on that.

Does that put lawyers on the same footing as tax advisers? Their privilege is limited, so if information is required that a tax adviser—whoever that might be—has provided, a lawyer would have to provide the same information under the bill.

Colin Miller: The tax adviser has no protection. Bear in mind that we are talking about protection in the context of information notices, which revenue Scotland will issue when it seeks information on tax compliance. The bill's provisions on information notices are designed to allow revenue Scotland to engage in compliance activities. The question is what exceptions there should be.

We do not seek to intrude on the very well-established concept of legal professional privilege, so the issue is whether there ought to be an extension across the board for tax advisers. We very much understand the views of groups such as the Chartered Institute of Taxation and the Institute of Chartered Accountants of Scotland. There is no question but that they are reputable organisations, and it is easy to understand why they do not see why, in relation to tax, they should not share the same privilege that legal advisers have.

The argument against that, which you might want to weigh yourselves, is the question of where the public interest lies. We have chosen to put the emphasis on effective compliance; of course, the provisions relating to information notices are subject to safeguards.

Jamie Hepburn: I will dig into that a little further. Under the powers that are set out in the bill, lawyers do not have absolute privilege. They can still be required to provide the same information that a tax adviser may be asked to provide. Is that correct?

Colin Miller: No, I do not think so. I will ask my legal colleagues to elaborate on this in a moment, but, as the bill stands, legal communications between a lawyer and their client are protected—

Jamie Hepburn: Absolutely?

Colin Miller: In the circumstances that are set out in the bill. An information notice would not bite in that regard. Revenue Scotland would not be able to use its powers to issue information notices to obtain communications between a legal adviser and his client, but it would be able to obtain communications between a tax adviser and his or her client. I ask my legal colleagues to elaborate.

John St Clair (Scottish Government): Section 130(2) says:

> "For the purposes of this Part, information or a document is privileged if it is information or a document in respect of which a claim to confidentiality of communications as between client and professional legal adviser could be maintained in legal proceedings."

That very well-known—almost hallowed—expression is found in a great number of bits of legislation. It enshrines the Scottish and English doctrine that there are certain communications between lawyers and clients that you cannot get under any circumstances.

Where exactly the same material is being communicated between a tax adviser and his client, it is difficult to say why that should not be privileged in the same way and enshrined in statute. That is not yet the case in England and we know that last year the Supreme Court turned down the idea of extending the privilege to accountants and other tax advisers—the court said that it is up to Parliament to do that.

It is very much a policy decision, and one that the Supreme Court said should not be taken lightly, because it may have the unintended consequence of opening up that very important cornerstone of the constitution.

Jamie Hepburn: Are you saying that only certain documents held by a lawyer are privileged, or is every document privileged?

John St Clair: Not every document is privileged.

Jamie Hepburn: That is what I am trying to establish.

John St Clair: There could be documents on fee charging or something ancillary to what is going on. A document is privileged when it is to do with legal advice in relation to a legal case.

Jamie Hepburn: So that is the difference. The privilege does not extend to tax advisers, whoever they may be, but is there a degree of equivalence between the documentation that a lawyer might hold and that which a tax adviser might hold?

10:00

John St Clair: There could be. If, for example, lawyers were selling and promoting avoidance schemes and tax advisers were doing the same, neither would be covered by legal privilege because they would not be dealing with the client on the basis of giving legal advice.

Jamie Hepburn: It could become a matter of interpretation. I presume that the number of cases will be limited—we hope that there will be none. Who will be the arbiter in any case where the tax authority says, "We think that this is something that we should look at", and the lawyer says, "No, it absolutely isn't."

John St Clair: The case would ultimately go to the tribunal, but the initial decision would be taken by revenue Scotland.

Jamie Hepburn: I have a final question on anti-avoidance measures. Our adviser has suggested that it could be helpful to have—I do not know whether this is the right term, but it is the only one that comes to mind—a general purpose clause whereby, in interpreting a matter, the tax authority and the courts, if it becomes a matter for them, could look at the Parliament's will in passing the bill. That is not routine, but has it been looked at?

Colin Miller: We do indeed have something along those lines. Section 59(2)(a) covers the definition of "artificial". As you know, one of the central concepts in the Scottish general anti-avoidance rule, as opposed to the UK one, is artificiality. In section 59, we have tried to give clear pointers as to what constitutes artificiality. Among those are

"any principles on which"

the relevant

"provisions are based (whether express or implied)",

"the policy objectives of those provisions",

and

"whether the arrangement is intended to exploit any shortcomings in those provisions."

Those are deliberately purposive tests. They will allow revenue Scotland and then the courts and the tribunal to do more than just look to the words in a tax statute, given that avoidance activity, by definition, is intended to try to get round those plain words. The tests will also allow revenue Scotland, the courts and the tribunal to look at the declared policy intention in, for example, any statements that have been made in the Parliament during the passage of the bill about what the tax legislation or reliefs incorporated within it are designed to achieve.

We have gone rather further than in previous attempts to allow revenue Scotland to apply a purposeful approach in taking counteraction under the general anti-avoidance rule as set out in the bill.

Jamie Hepburn: Thank you, Mr Miller. That is helpful.

John Mason (Glasgow Shettleston) (SNP): I declare that I am a member of ICAS.

I am intrigued by the debate between the witnesses and Mr Hepburn, and I would like to take it a little further. As I understand it, specifically legal advice that only a lawyer could give has a certain amount of protection around it. I am comfortable with that. We then get into advice that is specifically on tax, which can be given by a solicitor, an accountant or another tax adviser.

Do we have a level playing field? I hope that we do, because I presume that it is not part of the job of the Scottish Parliament or the Westminster Parliament to favour one profession over another. If Mrs Jones wants a wee bit of tax advice about whatever, is it the case that, if she goes to her solicitor, that advice will be kept more secret than if she goes to her accountant or somebody else, where it will be more liable to come out into the open? That is the area that I am interested in.

Colin Miller: I can offer two comments on that, to which John St Clair might again want to add.

In section 130(2), the bill does not distinguish between legal advice on the one hand and tax advice on the other. What it says is that information or a document that revenue Scotland would otherwise be able to obtain under an information notice

"is privileged if it is information or a document in respect of which a claim to confidentiality"

could be made

"as between client and professional legal adviser".

In other words, that goes to the general principles relating to legal professional privilege. What we have not done is make available to tax advisers, however defined, a corresponding claim to privilege. Therefore, in those terms, you are perfectly right—there is not a level playing field between legal advisers and tax advisers.

If we wanted to achieve a level playing field, we could do one of two things: we could remove the privilege that extends to lawyers, which would be a fairly extraordinary step, because legal professional privilege is very well recognised

across the board; or we could extend that privilege to tax advisers, however defined.

John Mason: For simplicity's sake, I would rather have things more open than more closed. Can we take some of the privilege away from the solicitors but still leave a bit there—the pure legal bit—or is it not possible to make that distinction?

Colin Miller: John St Clair will tell me if I am wrong but I think that the difficulty with that is that legal professional privilege goes to the nature of the relationship between lawyer and client—it does not matter whether it is tax advice as opposed to family law advice or some such. It would be very difficult to make inroads into legal professional privilege—

John Mason: To be fair, in my experience solicitors have had to split up a lot of their advice over recent years because of financial regulations and so on. For example, they often do not give advice about financial investments, which they used to do. It seems possible to split up advice from a solicitor into different sections.

Colin Miller: I take your point that there are precedents in relation to financial services, but if we went down that road it would still leave the question whether a similar, watered-down protection should be available to tax advisers, however defined. My concern remains that if you offer any form of privilege to tax advisers at large, which really means anybody who purports to set themselves up to provide that sort of advice, you are creating scope for abuse at the unscrupulous end of the spectrum.

John Mason: Mr Hepburn did not press the point but I will: I do not have any more faith in solicitors than I do in other professions.

Jamie Hepburn: Good luck, John. [*Laughter*.]

John Mason: Thank you. I realise that I am in a minority in Parliament.

The Convener: Well, I agree with you.

John Mason: I am not suggesting for a minute that we give privilege to other people. It is about more openness.

Colin Miller: We would be very happy indeed, if the committee was giving us a steer in that direction, to go back and have another look at section 130 and see whether it was possible to narrow the scope of the protection that solicitors are accorded without driving a coach and horses through concepts that the legal profession, and no doubt the judiciary, are very attached to.

John Mason: I am pleased to have that reassurance that you could have a look at it. We do not want to drive a coach and horses through things but, in one sense, this is quite an important piece of legislation because we are going to set a precedent here and potentially we will get other taxes somewhere along the line. A lot of this will fit into place, so if we are going to change it a bit, this would be the time to do so. However, I am not suggesting that we throw everything out.

Colin Miller: The steer that you are giving us is a helpful one because, curiously enough, in the engagement that we have had with stakeholders, they have been rather pushing us in the opposite direction. The professional groups such as ICAS and CIOT are arguing essentially that they should have the same protection that the bill accords to solicitors.

John Mason: I hope that you are reassured that I am not speaking for ICAS.

John St Clair: Perhaps I could provide a little bit of clarification on the question of slightly diluting legal professional privilege. I mentioned before that legal professional privilege was a sort of constitutional thing. It is interwoven into European law and the European convention on human rights. If it was helpful in relation to a move in the direction that you obviously want, we could delineate where the privilege did or did not apply. That might give people a steer so that they realise that it was not a complete blanket thing.

John Mason: Personally, I would be comfortable with that, but I cannot speak for the rest of the committee.

The convener asked about the fact that we could tax illegal dumping, which we have not been able to do in the past. It may just be me, but I struggle a wee bit to get my head round that. At the moment, we find a huge amount of illegal dumping in Mr McMahon's constituency and elsewhere. There is a fine and a penalty, and people might go to prison. The only extra thing would be our sending them a tax bill. There would not be much cost in sending that tax bill, would there?

Colin Miller: That point goes back again to the one that Nicky Harrison raised. The fact that we are now able to tax illegal dumping provides SEPA, which is obviously engaged in such enforcement activity already, with a new set of tools. It does not mean that SEPA will not continue to prosecute people for environmental offences; it means that it can now take action in conjunction with other agencies—such as, in large cases, the Crown Office civil recovery unit—to recover what might be large amounts of unpaid tax. However, that involves a cost in relation to litigation, court proceedings and so on.

Only yesterday, the Crown Office civil recovery unit recovered a large amount at the end of a long and expensive investigation and subsequent litigation.

John Mason: So the calculation of the tax would be quite straightforward. The big problem occurs thereafter.

Colin Miller: Yes—securing the money, especially, by definition, at the illegal end of the spectrum.

John Mason: One of the criticisms of HMRC is that it seems to have had quite a lot of latitude to make concessions to taxpayers, especially—some people would argue—larger taxpayers. It pursues small taxpayers thoroughly, but sometimes it does a deal. Our adviser referred to some of that having come about through the Fleet Street case, when there was a change in the way that people were paid, and it was accepted that the Inland Revenue, as it was then, had a fair degree of flexibility.

Will you comment on where we are going with that? The issue links to the openness of revenue Scotland's internal advice.

Colin Miller: I will make two or three points on that and then, perhaps, ask Nicky Harrison to come in with the revenue Scotland point of view.

The intention is that revenue Scotland will proactively prepare and publish guidance, including internal guidance to its staff and investigators, on the way in which it proposes to exercise the significant discretion on taxes and penalties with which the bill provides it.

I think that it would be fair to say that the direction of travel in HMRC in recent years has been quite similar. For example, the extensive use that was made of what were called extra-statutory concessions has, as I understand it, gradually become more and more formalised—such concessions are less the subject of open discretion and much more the subject of clear, specific guidance.

Your point is fair, but the direction in which HMRC is moving is probably where we would like to start, which is to ensure that any discretion that revenue Scotland has is exercised in accordance with clear, published guidance.

Nicky Harrison: John Mason's question probably goes to the heart of the collection and management principle, which we have incorporated in the bill. It has a long history of application and interpretation through litigation over the years going back to its previous incarnation as care and management.

The collection and management principle is very helpful because, in the administration of taxes, it is important to be able to apply judgment and discretion in certain circumstances. However, Mr Mason is quite right that that needs to be sufficiently open and curtailed so that the boundaries within which the discretion is exercised are clear.

10:15

On how that will look operationally, it will be important for revenue Scotland to be open about its guidance to staff on how it administers taxes and when it will exercise discretion so that it strikes the appropriate balance between pursuing tax and being sufficiently forceful in counteracting non-compliance, evasion and avoidance, while not being unduly punitive in pursuing people whose tax affairs are not in order to the degree that we would expect, sometimes because of circumstances beyond their control.

This is partly about the performance reporting of revenue Scotland. In a written response to the Public Audit Committee, we have already indicated that revenue Scotland will, of course, be quite open in reporting its performance in pursuing tax, its customer service standards, how effectively it deals with taxpayer transactions, and how effectively it tackles non-compliance. It will also be open about the extent to which it exercises discretion in non-pursuit. That will give openness and transparency. To be fair, that is something that HMRC has done increasingly over the years.

John St Clair: I can add a bit of clarification. We are consciously incorporating the jurisprudence in relation to collection and management. John Mason mentioned the Fleet Street casuals case. That was not quite an extra-statutory concession. We are very aware of the recent jurisprudence, and HMRC and revenue Scotland must be careful not to give concessions that Parliament has not intended. However, that is a different issue from the issue that arose in the Fleet Street casuals case, where the court said that the workers should not be pursued because the chances of getting any money out of them was zero; there were big political reasons why they should not be pursued. That is to do with discretion; it is not an extra-statutory concession.

John Mason: That is helpful, and it takes us on to the charter that has been mentioned a few times. There has been some suggestion that the charter would be a bit one-sided in that it would emphasise the duties of the taxpayer but would not put enough emphasis on the duties of revenue Scotland. Would the reporting that you just mentioned be against the charter and would a comparison be made?

John St Clair: The point that you make about equality or even-handedness between the tax authority on the one hand and the taxpayer on the other is a good one. That was what we had in mind but, during discussions with the stakeholders, we have realised that the language that is used in section 10(2) does not give that impression. It was intended that there would be matching commitments. The section actually says:

"The Charter must include—

(a) standards of behaviour and values which Revenue Scotland will aspire to"

and

"(b) standards of behaviour and values which Revenue Scotland expects people to aspire to".

The language has given an impression that we did not intend it to give. On the one hand it says, "Here is what revenue Scotland will hope to do," and on the other, it says, "Here is what revenue Scotland expects the taxpayer to do." We will consider that with a view to lodging at stage 2 amendments that will make it clear that the charter is even-handed. The charter will set out something about the standards of service that the taxpayer can expect of revenue Scotland, but it will also set out the other side of the coin. It is intended to face both ways; revenue Scotland will be expected to report performance against the charter.

John Mason: Okay. We look forward to seeing such amendments.

Another question about wording is around the general anti-avoidance rule and what has been called the "double reasonableness test". The Finance Act 2013 says:

"Tax arrangements are 'abusive' if they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action".

I think that I have said before that I do not like using the word "reasonable" twice in one sentence. In a sense, it could be used three times, because the concept of what a reasonable person would think could be brought in. What was the thinking in making the bill slightly different from the UK legislation?

Colin Miller: To be perfectly honest, our thinking was exactly the same as yours. We are not entirely sure what section 207(2) of the Finance Act 2013 means when it sets out the double reasonableness test; it is certainly complex.

In designing the Scottish GAAR in part 5, we tried to do two things. First, we tried to go further than the UK has gone so far in tackling artificiality as opposed to simply abuse. Secondly, we tried to set out simpler tests, one example of which is precisely the one that John Mason has mentioned. Our reasonableness test in section 59(2) is an entirely standard and orthodox reasonableness test. One of the tests of artificiality is whether an

"arrangement is not a reasonable course of action in relation to the tax provisions in question having regard to all the circumstances".

As I mentioned earlier, the circumstances expressly include the more purposive tests, the principles on which they are based and the policy objectives. We have consciously stepped away from the UK double reasonableness test simply because it seems to be unnecessarily complicated. I am not entirely sure what a double reasonableness test adds, or in whose eyes the reasonableness is.

John Mason: Is the word "reasonable" one that the courts are comfortable dealing with in all sorts of legislation?

Colin Miller: Absolutely. I think that the courts and, indeed, lawyers, would regard our reasonableness test as a standard one. Perhaps what is more novel in our GAAR is that we have attached somewhat purposive tests to the interpretation of reasonableness, but the reasonableness test in itself is entirely orthodox. I am not aware of any precedents anywhere in UK legislation for the double reasonableness test that the UK GAAR has adopted, and I do not think that anybody will be very clear about what it means until jurisprudence emerges.

John Mason: That is great. Thanks very much.

Gavin Brown (Lothian) (Con): It seems that the treble reasonableness test will not get in at stage 2.

Colin Miller: It certainly will not.

Gavin Brown: Nor, indeed, will it get in at stage 3.

I have a couple of comments to make, one of which is on penalties. We have had briefings from stakeholders, among whom there are two schools of thought: one is that penalties should be nailed down very precisely in primary legislation, and the other is that as little as possible should be in primary legislation and that regulation should be used to outline penalties more clearly, in which case it is obviously easier to update numbers based on inflation and so on. Can you give us a bit of background information on how you have approached penalties in the bill?

Colin Miller: We have debated that matter with stakeholder groups, and the Delegated Powers and Law Reform Committee has picked up the point. We recently replied to it on the subject.

The approach that we have adopted to penalties in the bill is not entirely consistent. In general, we have not specified amounts in the bill—although there are a few examples of our having done so—and we have not provided complete detail about the box within which the penalty fits.

We accept that we need to look at that again in the light of points that have been made. Indeed, in our response to the Delegated Powers and Law Reform Committee, we undertook to consider bringing all the penalty amounts into the bill, and to examine the scope for bringing further detail about the circumstances surrounding the penalty

in to the bill. We will still suggest to the Finance Committee at stage 2 that we should retain the order-making powers. The ideal would be to provide clarity in the bill so that everyone can see the four corners of the penalties and the amounts from 1 April next year, and also to provide flexibility for adjustment in the light of experience, which is where the order-making powers come in.

Gavin Brown: Thank you.

Schedule 1 sets out the structure of revenue Scotland. There will be between five and nine members on the board, who will then appoint a chief executive and so on. Again, there appear to be two schools of thought on that, one of which is that the chief executive and other executives ought to be members so that there is a board of executives and non-executives. The other school of thought is as you have laid out in the bill; the chief executive will not be on the board and there will be five to nine members. What are the background to and thought processes behind that structure?

Colin Miller: The issue is the arrangements for accountability within revenue Scotland and between revenue Scotland and the Parliament. The structure that we have put in place is that the "office-holder" in the Scottish Administration will not be a single person; it will be the collective—the members—and therefore the board. In simple terms, the thinking is that the job of the board will be to hold the executives, including the chief executive, to account. In turn, the board itself will be accountable to Parliament. That is quite a clear line of accountability.

If the chief executive and other members of the executive team were members of the board, there is a danger that it would become much more difficult for the board to hold the chief executive to account. Particularly with a small board of five to nine members, if one or more were executives, the danger is that we would be placing rather too much authority in the hands of the chief executive, who will, of course, also be the accountable officer for revenue Scotland.

That said, there are various precedents. Parliament has established three new statutory non-ministerial departments since devolution: the Scottish Court Service, the Scottish Housing Regulator and the Office of the Scottish Charity Regulator. It is fair to acknowledge that in relation to the Scottish Court Service, the chief executive is a member of the board, but it has a much larger board of 16 members that is chaired by the Lord President and of which half the members—I think—are judicial members. It is fairly evident that the chief executive of the board would not have a dominant voice.

In relation to the Scottish Housing Regulator and the Office of the Scottish Charity Regulator, the model is exactly the same as that which is set out in schedule 1, in that the "office-holder" is the board and the chief executive is not to be a member of the board.

Gavin Brown: That is helpful; thank you.

Has the bill in its entirety, with the organisations that it will create, been developed with an eye specifically on the two taxes that will be devolved in April next year, or has it been set up with one eye on future taxes—potentially the whole lot, or one or two more—being devolved? Again, there seem to be two schools of thought on that among stakeholders to whom I have spoken. Which is it? Is it a blend of the two?

Colin Miller: I have two things to say on that. First, every provision in the bill is necessary for the purposes of the two devolved taxes. If that were not the case, there would be a question about whether provisions that did not relate to either or both devolved taxes were within devolved competence. That said, we have also tried to put in place a statutory framework for collection and management of taxes that could readily be adapted in the event of there being more devolved taxes or, indeed, in the event of all taxes being devolved through independence.

10:30

We expect that we will, when Parliament acquires responsibility for further taxes, have to develop more tax-specific bills that will set out the rules relating to those taxes. The intention would be to link each new tax to the framework that is set out in the Revenue Scotland and Tax Powers Bill. We hope that that could be done with minimum modification. Any modifications that were required to reflect the peculiarities of individual taxes could be dealt with under the relevant tax-specific bill, although we also have amendments to the RSTPB. We would not need to put in place a new overarching framework.

The answer to the question whether the bill and the organisations that it will set up have been developed with a view to either of the things that Gavin Brown mentioned is that they have been developed with a view to both. We certainly have an eye to ensuring that the framework that is being put in place could be adapted in the event of there being more devolved taxes—just as the work that Nicky Harrison and her team are doing to establish revenue Scotland is scalable. Revenue Scotland will be responsible for two devolved taxes from day 1, but it is also being established as the tax authority that would be responsible for further devolved taxes or all taxes, should that materialise.

Gavin Brown: This is a slightly off-the-cuff question. Do you need a GAAR for two taxes?

Colin Miller: One of the taxes is land and buildings transaction tax; there has been a great deal of avoidance activity in relation to its precursor tax, which is stamp duty land tax. The point is that any GAAR is only one tool in an armoury of measures that are designed to combat tax avoidance. The committee will know, having dealt with the Land and Buildings Transaction Tax (Scotland) Bill, which is now the Land and Buildings Transaction Tax (Scotland) Act 2013, that that bill was designed to address known abuses by way of TAARs—targeted anti-avoidance rules. The nature of tax avoidance is such that people seek to get round the TAARs and to devise new avoidance measures.

A GAAR is designed as a last line of defence and is not specific to any particular tax. It is designed to allow revenue Scotland to take counteraction against avoidance activity generally. The lesson of stamp duty land tax is that this is an area in which there is—and in which there will no doubt continue to be—avoidance activity, regardless of our efforts to design it out of the LBTT.

Gavin Brown: The convener has asked some of the questions that were in my mind regarding the references to revenue Scotland in the financial memorandum, but I have one or two others.

The additional IT investment in revenue Scotland is £1.5 million. I think that £1 million is set-up costs, with £100,000 a year for each of five years. Was that genuinely not envisaged when we got previous estimates? I felt that the previous estimates were low. They were in tens of thousands of pounds, which I and other members challenged at the time. We were, however, given assurances that everything was being taken into account. Indeed, there was a contingency in the figures. How is the figure now so much bigger than it was?

Nicky Harrison: You are right to say that the previous financial memoranda included items for IT development. They were quite explicit, however, in saying that the estimates did not include any amount for a central IT development in revenue Scotland, and that a different design might be chosen for administration of the taxes. There were no costs included for that—it was specifically excluded.

Over the past year, we have developed the two devolved taxes and we have worked through the systems and processes to understand what taxpayer service requirements there might be, what different approaches we might take to meeting taxpayer and agent customer service standards, the approaches to risk assessment and the approaches to compliance. We have decided that a different design is very much needed—one that will require a central data repository.

That is a reflection of where we have got to. We now have a much more detailed understanding of the approach that we want to take to administering the taxes. It is very much a design decision rather than something that had not been considered previously. We have been quite explicit in including the figures in the financial memorandum now that we are clearer about that design decision. Those are costs that would not have been in the original estimates from HMRC or the like-for-like estimates that were in the previous financial memoranda.

You can imagine that much of the discussion that we have had around, for instance, dealing with avoidance and evasion has informed views about the design. We certainly need a design that will enable us and our delivery partners—Registers of Scotland and SEPA—to be able readily to access and look up an individual taxpayer's records. Such records can be quite complex and involve different entities and transactions over a period of time. The design must also enable us to do much more sophisticated risk assessment, perhaps considering patterns of behaviour by taxpayers and taxpayer groups by factors such as age and population. In that regard, we feel that investment in a central data repository and IT system will be a much more effective way of enabling us to administer the taxes as efficiently as possible.

Gavin Brown: Is there anything that is explicitly IT related that is not included in the estimate, or is that the final figure?

Nicky Harrison: That is our current estimate. As with all estimates, it is our best estimate based on what we know at the moment. I do not have a crystal ball that allows me to say that it will be exactly that amount.

Gavin Brown: I would not ask you to do a crystal-ball act—that is always risky. The impression that I got from the previous discussion was that everything was included—you were right to say that that is what it says in black and white. My question is basically to ask whether anything is specifically excluded.

Nicky Harrison: No, nothing is specifically excluded.

Gavin Brown: Nothing?

Nicky Harrison: Nothing is specifically excluded. That is our best estimate of what it will cost, in its entirety.

Michael McMahon (Uddingston and Bellshill) (Lab): I have a question for the purposes of clarification. On information notices, section 144

outlines the course of an appeal. Does that reflect adoption of the current practice, or is the refusal to allow an appeal beyond the tribunal something new that will be introduced through the bill?

John St Clair: My recollection is that there is no departure from the stamp duty land tax practice in relation to the provision.

Michael McMahon: So, the provision is not new.

John St Clair: No.

Jean Urquhart (Highlands and Islands) (Ind): When we took evidence about the landfill tax charge, most people felt that it should not diverge from the cost in England. Would taxing illegal dumping introduce such a difference? Will HMRC introduce such a tax?

Colin Miller: Our approach to the taxing of illegal dumping is new. It is clearly designed to provide an additional tool in relation to criminal activity. It does not, by definition, impact on legal operators who are working within the laws that are passed by Parliament.

Jean Urquhart: Yes, but the point was made that should we charge a slightly higher rate in Scotland than is charged in England, people might take their landfill to England and pay less. By the same token, if somebody is going to dump illegally and they are not far from the border, what happens if they dump illegally in England?

Colin Miller: The charges in Scotland are entirely a policy decision for ministers and the Scottish Parliament. Whether the UK chooses to follow our approach to illegal dumping is entirely a matter for the UK Government and Parliament. It is fair to say that we have consciously adopted a different policy from England and Wales. One aspect of that is the provision of greater deterrents to those who engage in illegal dumping activity.

John St Clair: Criminals do not usually factor in the level of fines or tax, because they expect not to get caught, so the argument is probably theoretical.

Colin Miller: If we and SEPA have greater success in compliance activity with regard to illegal operators, I hope that at the very least—as I think we said earlier—that will be a deterrent to such activity. The power to tax and, for example, the power that the Crown Office exercises in both civil and criminal proceedings to recover the proceeds of crime are very effective measures.

The Convener: See, Jean, if only you had the mind of Ernst Stavro Blofeld.

That concludes questions from committee members, but I will ask a couple of questions to round things off. I had intended to ask a number of questions based on the report from our tax adviser, but time precludes that.

In evidence that we took on the landfill tax, revenue Scotland stated:

> "There will need to be a formal agreement between revenue Scotland and SEPA. The two organisations are already clear that we will need to develop that once the tax management bill is sufficiently far through its consideration. That should be a public document that the committee will have an opportunity to scrutinise."—[*Official Report, Finance Committee*, 19 June 2013; c 2830.]

When is that likely to take place?

Colin Miller: The requirement in section 4 of the bill is for revenue Scotland to publish and lay before Parliament the terms of any delegations to the Registers of Scotland or SEPA and any directions that revenue Scotland gives to accompany those delegations. Those will be formal documents—they will almost be legal documents.

Underneath that, there will be more detailed and more operationally orientated memorandums of understanding. I invite Nicky Harrison to comment on the timescale and the manner in which those are being developed.

Nicky Harrison: I will explain the approach that we—working with Registers of Scotland and SEPA—are adopting. We are working on the basis of mapping out taxpayer journeys to develop systems and processes for the administration of the taxes. Once we have a clear view of the end-to-end processes, we will assess the strengths—if you like—of the organisations involved to decide where the boundaries should lie for the delegated functions.

We could have done it the other way round. We could have started by saying, "The boundary will lie here," and we could have developed our systems and processes independently, but we feel that the value of our approach to tax administration lies in making the systems as efficient and seamless as possible. That is why we do not yet have clarity about where the boundaries will ultimately lie. However, we have certainly got working agreements at the moment about where the boundaries lie as we are developing the process and putting the systems in place.

As we progress through 2014, the boundaries will become clearer, and that information will be condensed into the documentation that will constitute the formal schedule of delegation, which will be published as required under the Revenue Scotland and Tax Powers Bill. We will also publish memorandums of understanding that will set out in an operational context what we expect with regard to service delivery by the organisations to which we delegate functions.

10:45

Colin Miller: We intend to publish the MOUs, with the possible exception of anything that might assist someone who is trying to evade compliance activity.

The Convener: In the joint six-monthly progress report on the implementation of the LBTT that is dated 4 October 2013, revenue Scotland and the Registers of Scotland state:

"The result of this work will be a comprehensive catalogue of user interactions with the collection system which in turn will be translated into system requirements."

As you will recall, concerns were raised during the LBTT bill process about how ordinary members of the public would be able to interact with the system following its implementation. There was talk about help desks, the frustration of dealing with HMRC and so on. Can you outline how the public will be able to access the system, and where we are with that at present?

Nicky Harrison: Yes, certainly. Among the streams of work that are being undertaken to develop the administration of the devolved taxes, there is a stream around customer contact; I use the word "customer" to encompass taypayers and their agents. As part of that workstream we are focusing on understanding what users' requirements will be, how those requirements are best met and the importance of understanding them.

For instance, as the land and buildings transaction tax is administered largely by solicitors as the intermediary for the taxpayer, we have been keen to understand the processes from the solicitors' point of view so that we can provide a contact mechanism that most effectively meets their needs. We are still in the process of developing the requirements for that and making decisions within the governance framework for the programme with regard to how it is delivered.

I am sure that, when the next six-monthly update is produced, Eleanor Emberson, John King and John Kenny will be happy to give you more detail on it. We are actively working on that area at present, and we are focusing on the importance of getting contact opportunities with customers and their agents right to meet their needs, rather than the process being driven by the bureaucratic needs of the organisation.

The Convener: Thank you for the comprehensive answers that you have given today. Do you wish to make any further points to the committee?

Colin Miller: I will add one final word on the charter—I should have made this point earlier when one of the members asked about the balance. As the committee will know, the provisions in the bill require revenue Scotland to prepare a charter, publish it and keep it under review. However, the point has been raised with us that the bill does not expressly require revenue Scotland to consult, either on the first charter or on any revisions to it, so we propose to lodge an amendment to address that at stage 2.

The Convener: Thank you—that is very helpful. I thank colleagues for their questions, and I thank everyone for attending.

10:49

Meeting suspended.

10:56

On resuming—

Children and Young People (Scotland) Bill: Financial Memorandum

The Convener: Our third item of business is to take evidence from the Scottish Government bill team on the supplementary financial memorandum to the Children and Young People (Scotland) Bill, which has been lodged following amendments at stage 2.

I welcome to the meeting Philip Raines, who is acting deputy director, children's rights and wellbeing division, and Gordon Wales, who is deputy director, finance programme management division. Would either of you like to make a statement before we proceed to questions?

Philip Raines (Scottish Government): No, we are happy to answer questions on the supplementary financial memorandum. As you know, the stage 3 debate takes place this afternoon, so we will be happy to do anything that we can to clarify the issues that arise from the stage 2 amendments now or, if that is not possible during the oral evidence, afterwards.

The Convener: Thank you. We will move straight to questions. I will ask the initial ones, after which colleagues will ask theirs. Some of the questions will relate directly to the financial revisions.

As you will know, significant revisions have been made, with the additional costs going from £14.7 million in 2014-15 to £71.7 million. The supplementary FM appears to reflect the costs associated with the expanded provision that was announced on 7 January, but it does not appear to include the additional costs that were outlined in the Minister for Children and Young People's letter of 12 September, which, as you may recall, mentioned an increase of some £4.2 million. Will you give us a wee explanation of that, please?

Philip Raines: Absolutely. The best way to explain it is that the letter of 12 September dealt with funding issues. In a sense, it was to do with how the bill for the early learning and childcare elements of the original financial memorandum—which, of course, have now changed—would be picked up. It did not touch on the costs.

As I recall, the letter of 12 September dealt with two elements: the funding for the vulnerable two-year-olds who were to be included in the extension of hours; and the element of the costs that would arise for the partner provider uprating—the element for which local authorities negotiate funding, for other organisations to provide the early learning and childcare. The letter set out how that would be funded as a result of the budget discussions and negotiations, but it did not touch on the costs. The costs for two-year-olds and for the partner provider uprating should not and would not have changed as a result of that letter. How that would be funded—the division between local government and central Government—is what was addressed as part of that letter.

The letter set out that the extension of provision for the cohort of two-year-olds as set out in the original financial memorandum would be paid for from an additional £4.5 million a year, some of which—the money for 2014-15—would incorporate the early years change fund, which operates up to the end of this financial year.

An additional element would cover the difference—the inflationary uprating, if you will—between the partner provider floor, which is the national figure that was used for calculating the funding between local authorities and private sector providers and which was last set in 2007, and what that figure might look like currently as a result of inflation, which was set out in the original financial memorandum.

11:00

The Convener: The original financial memorandum set out the childcare costs in 2011-12 prices, but the supplementary FM does not state what price basis is used.

Philip Raines: I confirm that the same price basis is used.

The Convener: It is the same. I also wonder why capital costs have not been included with regard to the planned extension to the policy. The supplementary FM states:

> "It is not possible to provide an accurate estimate of the level of infrastructure investment required at this stage."

That contrasts with the approach taken in the original FM, in which capital costs were included. Why is there a difference of approach?

Philip Raines: That is purely down to time. There just was not enough time between the conclusion of the stage 2 amendments and the point at which the supplementary financial memorandum had to be submitted to calculate the capital costs that we recognise there will be. We are in close discussion with the Convention of Scottish Local Authorities and the Association of Directors of Education in Scotland about what those costs will be.

The approach also reflects the fact that the capital costs for the vulnerable group of children will not necessarily be the same as we would expect to be the case for three and four-year-olds. For three and four-year-olds, we are talking about

a more universal provision and therefore a different staff to child ratio. We are also perhaps looking at providing more standardised service to those children through early learning and childcare. However, the group of vulnerable two-year-olds covered by the January announcement may have more significant needs, so we will be considering different staff to child ratios, and the capital costs will be quite different.

It will take time to get in the estimates, do the calculations and work through them with COSLA and ADES. Unfortunately, there just was not that time in the window that we had for providing the supplementary FM.

The Convener: When will those figures be available?

Philip Raines: I cannot confirm when they will be available but, because the policy commences in August, the costs will have to be developed very quickly. I can provide additional information to the committee about the timescale and, perhaps as importantly, what those costs will be.

The Convener: Who will be expected to meet those capital costs?

Philip Raines: As ministers have set out, all additional costs for local authorities arising from the Children and Young People (Scotland) Bill will be picked up by the Scottish Government. The understanding—COSLA understands this—is that, although we do not know exactly what the costs will be, those additional costs will fall to the Scottish Government, as is the case with all the other early learning and childcare costs.

The Convener: Thank you very much. I am keen to let in colleagues, but I have one or two wee other issues that I want to ask about.

The first is about the amendment to eligibility for continuing care. Table 13 of the supplementary FM estimates the costs of that to be £9.3 million by 2019-20. Concern has been raised that there is a wide variation in the costs of the different types of care and that they have not been provided for

"because no sensitivity analysis has been presented."

You will be aware that local government is suggesting that the costs may be almost twice as much as the estimated £3,142; indeed, some local authorities estimate the cost to be £6,000. Will you talk us through that issue?

Philip Raines: There are two separate points, and I will take them in the order in which you raised them.

In order to calculate the costs for those staying in care, we need to know what type of care they will be in. As you mentioned, table 13 sets out the costs, but table 10 sets out the estimated share for the type of care. The table 10 figures are taken from the official looked-after children statistics. We have used the most up-to-date statistics—I think those are the 2011-12 figures—which show where kids left care from.

We have not looked at what those variations might be because the statistics have remained relatively stable over the years. We have no sense that the policy that we are pursuing would lead to a shift in the proportions. A sensitivity analysis would make sense if we had good reason or evidence to believe that the figures had shifted significantly either historically or over recent time, or if the policy was likely to lead to a significant shift in the proportions of children in the different types of care.

If anything, our sense from anecdotal evidence is that the use of residential care—the most expensive element—is probably reducing, so by using the historical figures we may well have made an underestimate of the number of children in other types of care. However, we must use the firm figures. That is why we used those proportions and applied them as assumptions.

Your second point was about what might be called the unit cost. For the record, paragraph 101 of the original financial memorandum set out the figure of £3,142. As with all such calculations, we must take evidence and take a view on how to make them up. One of the components that was perhaps the most difficult to get a consensus on was travel costs.

I saw in the Scottish Parliament information centre briefing that COSLA has cited a figure of £6,000 per person. That arose largely from COSLA discussions with some local authorities that felt that travel costs would be much more significant and therefore what would be provided for every care leaver might be significantly more than we estimate.

As we said before, we feel that the higher figure for travel costs does not represent an average across local authorities. It represents the higher end of the figures, which will undoubtedly apply in some rural areas, such as Argyll and Bute and the Highlands, but which will not necessarily be the costs in places that are not as large or where travel is easier, such as Glasgow. We have taken the average cost as £3,142.

The short answer is that we used exactly the same estimates and the same assumptions for the supplementary financial memorandum as we used for the original calculations to produce the original financial memorandum.

The Convener: The point, which you have addressed, was that some local authorities considered £6,000 to be a more realistic figure. Will the additional costs that local authorities incur

for geographic and other reasons be taken into account in funding?

Philip Raines: I hope so. Such costs are worked out at a global level. A distribution mechanism will be needed for the funding that goes to local authorities; that applies as much to the aftercare and continuing care elements as it does to early learning and childcare. There are well-understood and well-established mechanisms and governance arrangements for that. I believe that a distribution group that COSLA operates will work with the Scottish Government on how best to deal with that.

The Convener: I will make one more point before handing over to the deputy convener.

When we took evidence previously, we had concerns about partner providers. We understand that

"It is entirely the responsibility of Local Authorities to decide what they pay partner providers",

but some of us were somewhat concerned about that, given that some local authorities might not be as generous as others. It was interesting that you touched on partner providers. The Scottish Government has announced that it will provide an extra £800,000. Is there any guarantee that that will be used as it is supposed to be?

Philip Raines: If you are asking whether we have placed conditions on and ring fenced the use of that money, the committee will understand that that is not how our relationship operates.

The Convener: That is what I thought.

Philip Raines: The answer to your question has two parts. We are not treating the funding differently from other similar types of funding; we expect local authorities to meet their obligations and to get the adequate additional provision that they should get from partner providers, which is a matter for them. However, there is a clear role for us in setting out expectations in national guidance.

We have not taken a statutory role, which will remain the case, but we have a role in relation to how the funding provision should operate. The issue is sensitive and should properly be addressed as part of guidance. In developing that guidance, we will deal with providers. We need to bring the National Day Nurseries Association closely into the discussions on developing the guidance. I believe that that work has started and will continue.

The Convener: I think that all committee members are aware that there is no ring fencing, but I wondered whether, through COSLA and others, you have had any kind of gentleman's agreement that the money would be put where it is supposed to be put. Obviously, in some cases the partner providers are concerned about their own survival, let alone viability. It must be deeply frustrating if we are providing additional money and the local authorities decide not to put it into those areas. Is there any sort of quid pro quo, in which the Scottish Government, in discussions with local authorities, says, "We'll give you additional money; we know it's not in tablets of stone that it'll go into this but we expect an understanding that that's where it will be spent"?

Philip Raines: I am not aware of such discussions. To be honest, it is the sort of question that is probably best answered by COSLA. At the end of the day, the local authorities and COSLA are the ones that need to account for how they are fulfilling their obligations and relationships with the partners who are doing the provision.

The Convener: Thank you for that. I now pass over to John Mason.

John Mason: I want to follow up one of the areas that the convener touched on, which was the capital costs. I was a little uneasy with the questions, I mean the answers—obviously I was happy with the questions. [*Laughter*.]

The supplementary financial memorandum states:

"Capital costs have not been explicitly estimated."

My understanding is that they have not been estimated at all, so the word "explicitly" does not really mean anything. Is that correct?

Philip Raines: I would say that internal calculations are going on and that the work is being taken forward. People clearly cannot be resting on their laurels in going forward. However, if it is "explicitly" in the sense in which we would be happy to share those estimates and costs formally because they have reached the point where we can verify them, I would say that that is not the case. The work is under way, though—it has to be under way.

John Mason: I am relatively new—I have been here for only three years—and I do not remember a situation in which we were looking at a financial memorandum in the morning, we did not have the figures and the bill was due to be approved in the afternoon. Maybe that is common—I do not know.

We are sitting here with a figure of nil. We know that it will be something but we have no idea what. Could you give us even a range of figures that we might be talking about?

Philip Raines: No. I would not go as far as that.

John Mason: So will it be under £100 million—

Philip Raines: Sorry. I have just said that I would not go as far as that.

John Mason: You would not say that it is under £100 million.

Philip Raines: I would not say anything at all. I cannot provide those estimates or figures, I am afraid.

John Mason: And—

Philip Raines: All I can say is that we have shared our working and calculations with COSLA. We are working closely with COSLA, and concerns have not been raised about the capital costs from the people who are going to be the providers.

John Mason: COSLA is not going to raise any concerns if the Government is going to pay for it, is it? That is fairly clear.

Effectively, the figure of nil has been put in. Okay, there is a note saying that nil will not be the figure—

Philip Raines: No. I think that there is a difference between putting in no figure and saying a figure of nil. A figure of nil suggests that we think there is no cost. That is clearly not the case. We are just saying that, at this stage, we are not in a position to be able to offer estimates. That is not the same as zero.

John Mason: Well, I would argue that that is just semantics. However, I take your point that there is a slight difference between not having a figure and having a figure of nil. I just want to say publicly that I find it very unsatisfactory that we are being asked to approve this supplementary financial memorandum and we have not been given even a range of figures.

Gavin Brown: The convener and deputy convener have raised most of my queries. You are not in a position to tell us the figure—I hear that. When you talked about the likely cost, I think that you said that the per head cost would be different from the assumptions made per head for three and four-year-olds.

Philip Raines: Yes.

Gavin Brown: Without wanting to put words in your mouth, does different mean higher or lower? The impression that I got is that it is probably higher per head because there are more specialised things needed and so on. Would it be fair to assume that the cost is likely to be higher per head as opposed to lower?

Philip Raines: Yes, it is indeed. I believe that one of the paragraphs in the original financial memorandum sets out the staff cost ratio where that arose. The staff cost ratio is 5:1.

Gavin Brown: I am asking not so much about the staff costs as about the capital costs.

11:15

Philip Raines: I am sorry—that is different from the unit costs.

As for the capital costs, it is difficult to say because a lot really depends on how the services are provided for vulnerable children. It is a question of knowing what capacity is out there and how different local authorities have tackled the issue. I would imagine that, if we were dealing with higher staff cost ratios and we perhaps needed a different set of provisions, the capital requirements could be different. However, I am not in a position to say in what way they would be different.

Gavin Brown: Just to be clear on the point—

Philip Raines: I am sorry—I misunderstood what you meant. As far as capital costs are concerned, I am afraid that I am not in a position to be able to say whether the per child cost as worked out would be higher or lower than what we used in the financial memorandum, which related to three and four-year-olds.

Gavin Brown: So when you talked about the costs being higher, you were talking about the staffing costs per head.

Philip Raines: Yes.

Gavin Brown: And you do not know about the capital costs.

Philip Raines: That is true.

Gavin Brown: Thank you.

Jamie Hepburn: Just to clarify the issue a little more, I should point out that the Scottish Government has given a clear commitment to meet the capital costs of the bill's provisions. I think that Mr Raines has made that pretty clear. I am not going to ask for a specific figure because Mr Raines has quite fairly set out why that is not available at this time.

Given the early work, the on-going work and the calculations that are under way, are you able to give a commitment that the Scottish Government can meet these costs and that this policy is not going to bankrupt the nation?

Philip Raines: It will not. The number of additional two-year-olds we are talking about falls well within the scope of all this. In that sense, it is not significantly different from what was done for three and four-year-olds.

The Scottish Government has made it very clear that the additional costs as a whole, including the capital costs, arising from early learning and childcare for local authorities will be met. That commitment remains.

Jamie Hepburn: Again, can you clarify that a burden will not be placed on any other part of the

public sector to meet these costs and that the Scottish Government will meet them?

Philip Raines: Yes.

Jamie Hepburn: Thank you.

Michael McMahon: When the original financial memorandum came before the committee, members raised a number of concerns about the estimates and assumptions that it contained. I do not know what other committee members think, but I certainly have not been assured by the answers that have been given in response to our report on that financial memorandum.

As John Mason has said, here we are on the morning of stage 3 of the bill, discussing additional costs and the additional funds that have been introduced into the financial memorandum. Could these additional costs and the mechanism by which they were scrutinised have come at a later date when the figures were available so that we could have had greater clarity about them? Do they have to be included in today's proceedings?

Philip Raines: I am not sure why this evidence session was scheduled for today, so I am afraid that I cannot comment on that.

The costs in the supplementary financial memorandum arise largely from the stage 2 amendments and the announcements that were made barely six weeks ago in January. Obviously the time for making calculations has been shortened and accelerated, and we provided the supplementary financial memorandum as quickly as possible after the conclusion of stage 2.

Clearly we cannot put out a supplementary financial memorandum until stage 2 is completed. As soon as it was completed, we carried out some quite intensive work in an accelerated way to enable the committee to consider the costs as quickly as possible.

Michael McMahon: So it would have been possible for the committee not to have discussed this issue today. It could have waited until the bill had been passed and then a supplementary memorandum in which we could actually see the figures could have been put before the committee.

Philip Raines: No—

Michael McMahon: This morning we are discussing an addition to the financial memorandum that is based on stage 2 amendments. You say that you had only six weeks to carry out this work, but can you tell us what happens in other circumstances? After all, we do not come back with supplementary financial memoranda every time a bill is amended at stage 2, so why are we doing it today?

Philip Raines: I draw your attention to paragraph 3 of the briefing that you have received. It refers to rule 9.7.8B of standing orders, which basically sets out how to deal with what happens at stage 2. When changes are made to a bill, it makes sense for Parliament to be able to consider their cost implications.

Rule 9.7.8B also sets out a timescale from the completion of stage 2—after all, you cannot tell people what the bill is going to cost until stage 2 is completed—for producing our formal estimate of those costs. We met those timescales, produced the document as quickly as possible and provided it to Parliament.

Beyond that, the consideration of the supplementary financial memorandum by the committee is an internal matter for yourselves, as is the scheduling of today's evidence session. The document was produced within the existing timescales as set out by Parliament and according to the understood process for putting bills together. You might be asking wider and deeper questions that I cannot answer because they are to do with parliamentary process.

Michael McMahon: It is partly to do with that, but the other problem is that, whatever the timeframe might be, you have told us that you do not actually have the costs that the stage 2 amendments will incur. Why are we discussing this issue when, first of all, the timescale does not allow for the amendments to be properly scrutinised and, secondly, you cannot tell us whether the costs are up or down or what the capital costs will be? We are just expected to accept this supplementary financial memorandum and go into this afternoon's debate no wiser about the changes that are being made.

Philip Raines: I want to make it clear that we have provided the costs for everything else except the capital costs. Admittedly, the capital costs are quite complex and we are not in a position to provide that information so, in that respect, what you say is true. However, I do not think that it is fair to say that we have not provided costs.

We have provided quite a lot of costs; indeed, we have easily provided the lion's share of costs. The ratio of the capital costs in the original financial memorandum to the total costs of early learning and childcare was, although significant, perhaps not the most significant element. I think that the revenue element was probably more significant.

Michael McMahon: But what was significant about the earlier financial memorandum was that we had major concerns about the costings involved and there has been no attempt to amend, change or clarify them.

Philip Raines: That is not true. On 28 October, we wrote to the Education and Culture Committee to respond in detail to a number of the issues that

your committee raised in your report. We have responded on those points, but whether you are satisfied with our responses is another issue.

Michael McMahon: That is the point that I made earlier: the answers certainly did not satisfy me.

Philip Raines: But it is not fair to say that we have not responded. We responded in great detail to the comments that were made and which were passed to us by the Education and Culture Committee.

The Convener: Just to provide some clarification, I point out that the supplementary financial memorandum was published on 31 January. As there was a recess, we did not really have an opportunity to discuss or take evidence on it before today. I decided that it would be more appropriate to take the item today instead of a week after stage 3 so that we could get as much clarification as possible about the available information. As Mr Raines has pointed out, information has been provided except on the capital issue.

It is very unusual to have a supplementary financial memorandum and it is only happening now because of the scale of the amendments. Rule 9.7.8B of standing orders states:

"If a Bill is amended at Stage 2 so as to substantially alter any of the costs set out in the Financial Memorandum that accompanied the Bill on introduction, the member in charge shall lodge with the Clerk, not later than the end of the second week before the week on which Stage 3 is due to start, a revised or supplementary Financial Memorandum."

That is what has happened.

That said, I want to raise with Mr Raines an issue with regard to rule 9.3.2 of standing orders, which states:

"A Bill shall on introduction be accompanied by a Financial Memorandum which shall set out the best estimates of the administrative, compliance and other costs to which the provisions of the Bill would give rise, best estimates of the timescales over which such costs would be expected to arise, and an indication of the margins of uncertainty in such estimates."

The committee's concern is that it has received no real estimates of the capital costs. There are not even any margins of uncertainty; we do not have anything that says, for example, that the costs might be between £10 million and £50 million, £20 million and £100 million, or whatever. That is what the committee is frustrated about.

Standing orders make it clear that we really need that information so that even if we go into this afternoon's debate not knowing everything—and you have explained to us why that is the case—we have at least a ballpark figure, for want of a better phrase. Do you not agree? It is clear in standing orders.

Philip Raines: That would be the interpretation of that rule—

The Convener: I do not think that it needs to be interpreted—it is pretty straightforward. I have just read out the rule in standing orders word for word, and it talks about

"an indication of the margins of uncertainty".

The real issue is that there are no parameters with regard to the capital costs.

Philip Raines: I do not think that we were in a position to provide those margins within the timescale that we had to produce the supplementary financial memorandum. As you know, it was provided by 31 January, a couple of weeks after the announcement was made. It is now 19 February, and work on this issue has progressed. I apologise for not being in a position to be able to provide an oral update about those parameters, but I imagine that they are beginning to emerge. If we cannot provide those margins of uncertainty, we cannot address the question.

The Convener: We will have to deliberate further on the matter, but I have one further question on a different issue that I hope you will be able to answer.

The supplementary financial memorandum contains a significant section on individual kinship care costs for guardians. Paragraph 36 says:

"Overall, there were no additional net costs in relation to kinship care in the original Financial Memorandum. This remains the case with these amendments".

I note, however, that paragraph 35 states:

"In response to concerns about a perceived lack of detail in this Part of the Bill, Scottish Ministers agreed to make amendments at Stage 2 to provide for a clear, core eligibility test for kinship care assistance on the face of the Bill".

I find it counterintuitive that there are no additional costs whatever. Can you talk us through why that might be the case?

Philip Raines: The methodology that was applied to the calculation of the additional cohort that might be eligible for kinship care was also applied to this element. As you will know from the original financial memorandum and our evidence to the committee, our view is that this policy will lead to avoided costs or, in effect, net savings.

These particular numbers—which, as I have said, were produced using the same methodology—are set out in table 14, which sets out the gross costs, and table 15, which sets out the avoided costs. As the avoided costs are larger than the gross costs, our view is that, as with the original methodology for calculating kinship care in

the financial memorandum, the provision will not lead to additional costs.

The Convener: Because of the £3,000 margin between tables 14 and 15.

Philip Raines: Yes. It is the same principle that was applied in the original financial memorandum.

The Convener: I just wanted to get that clarification on the record.

As my colleagues do not seem to have any further questions, do you wish to make any further points or comments?

Philip Raines: No, except to say that as the further work, particularly on capital costs, is carried out we will be very keen and happy to provide that additional information at a suitable date for the committee, to enable you to carry out your rightful role of scrutinising the costs as they emerge.

The Convener: I am pretty sure that I am speaking on behalf of the committee when I say that we would very much appreciate the opportunity to take evidence once the figures are available.

Thank you very much for answering our questions; your responses were appreciated. As we are moving into private session, I ask our witnesses, the public and the official reporters to leave the meeting.

11:28

Meeting continued in private until 11:54.

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