OFFICIAL REPORT
AITHISG OIFIGEIL

COVID-19 Recovery Committee

Thursday 3 March 2022

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 3 March 2022

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COVID-19 RECOVERY COMMITTEE
7th Meeting 2022, Session 6

CONVENER

*Siobhian Brown (Ayr) (SNP)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Jim Fairlie (Perthshire South and Kinross-shire) (SNP)
*John Mason (Glasgow Shettleston) (SNP)
*Alex Rowley (Mid Scotland and Fife) (Lab)
*Brian Whittle (South Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Fiona de Londras (University of Birmingham)
Abbey Fleming (Money Advice Scotland)
Professor Paul Hunter (University of East Anglia)
Jamie MacNeil (South Lanarkshire Council)
Professor Donna W McKenzie Skene (University of Aberdeen)
David Menzies (Institute of Chartered Accountants of Scotland)
Anthony Smith (Westminster Foundation for Democracy)

CLERK TO THE COMMITTEE

Sigrid Robinson

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

COVID-19 Recovery Committee

Thursday 3 March 2022

[The Convener opened the meeting at 09:31]

Coronavirus (Recovery and Reform) (Scotland) Bill: Stage 1

The Convener (Siobhian Brown): Good morning and welcome to the seventh meeting in 2022 of the COVID-19 Recovery Committee. This morning, we will take evidence on the Coronavirus (Recovery and Reform) (Scotland) Bill at stage 1.

I warmly welcome our first panel of witnesses, who are all participating virtually: Professor Fiona de Londras, professor of global legal studies, Covid-19 review observatory, University of Birmingham; Anthony Smith, chief executive of the Westminster Foundation for Democracy; and Professor Paul Hunter, professor in medicine, Norwich medical school, University of East Anglia. Thank you for giving us your time.

This will be the first of the committee's evidence sessions on the bill, and we will start by looking at the public health measures in part 1. We will take evidence on the bill at two further meetings—on 10 and 24 March—before we hear from the Deputy First Minister on 31 March.

Each member will have approximately eight minutes in which to speak to the panel and ask their questions. If a witness would like to respond to an issue that is being discussed, I ask them please to type R in the chat box and we will try to bring them in. I am keen to ensure that everyone gets an opportunity to speak. I apologise in advance, therefore: if time runs on too much, I may have to interrupt members or witnesses, in the interests of brevity.

I ask the witnesses briefly to introduce themselves.

Professor Fiona de Londras (University of Birmingham): Good morning. I am a professor of law at Birmingham law school, and I lead the Covid-19 review observatory, which analyses ways in which Parliaments have effected oversight during the pandemic. I look forward to speaking with you.

Anthony Smith (Westminster Foundation for Democracy): Good morning. I am chief executive of the Westminster Foundation for Democracy. I am a substitute for my colleague, Franklin De Vrieze, who is a co-author of a relevant paper, but who, unfortunately, is ill today. I will do my best to fill in for his much deeper knowledge.

The Convener: Thank you. I think that there is a slight problem with your sound. We could hear you, but it was a bit fainter than the previous witness's sound.

Professor Paul Hunter (University of East Anglia): I am professor in medicine at Norwich medical school at the University of East Anglia. I am a medical doctor, specialising in medical microbiology and virology. Most of my research for the past goodness knows how many years has been on the spread of emerging infectious diseases, epidemics and outbreaks of infection.

The Convener: Thank you. I will start the questioning.

With the great benefit of hindsight, we can all acknowledge that no country on the planet was prepared for Covid when it hit. In my opinion, Governments around the world have a moral duty to reflect on the past two years, learn lessons and put in place measures to ensure that we are never again in the position in which we found ourselves in March 2020.

On 21 February, the Prime Minister confirmed that certain temporary provisions for England relating to improvements in the delivery of public services will be made permanent via the Westminster bills.

As we move forward to put in place legislation to keep the public safe in the future, what principles do you believe underpin good-quality and effective legislation for emergency situations? We will start with Professor de Londras.

Professor de Londras: There are a couple of things that are important here. The first is to ensure that the legislative framework that is put in place to enable emergency responses envisages the kinds of situations of urgency and strain that Executives and Parliaments find themselves under in emergency situations, which involves designing it in a way that balances the need for a rapid response and flexibility with the need for effective parliamentary oversight.

That is more difficult than it sounds, but there are a couple of principles that are helpful: one is to ensure that the law allows for fast and co-ordinated responses; another is to ensure that, in those responses, human rights concerns are recognised as effective limitations on what the state may do. That means, of course, that measures should be targeted and limited, potentially in time but also in scope, to what is required in a particular situation and that there should be no policy laundering or use of emergency powers to address things other than the emergency in question.

It is useful for emergency measures that are introduced to be limited in time and for there to be an effective review mechanism to ensure not only that there will be a review, but that there will be a way for that review to be meaningful and to cause change, if needed. In addition, it would be welcome for there to be the maximum possible transparency in decision making, to the extent that that can be imposed through a legislative framework.

Those are some starting principles, which I would be happy to expand on as they relate to the bill.

The Convener: I ask Anthony Smith to answer the same question.

Anthony Smith: I hope that the sound is clearer now.

The Convener: It is slightly better.

Anthony Smith: Our paper on the use of sunset clauses made the point that when emergency measures are introduced in legislation, provision is often made for them to be temporary, but the way in which those provisions are framed can sometimes be inadequate in a number of ways. First, they can sometimes set up an expectation that the measures will be renewed. Therefore, even though it is stated that they will be temporary when the draft legislation is debated, in some ways the way in which they are framed makes it easier for them to be renewed without significant debate.

Secondly, the way in which the review provisions are framed can sometimes be unclear. It must be very clear exactly which provisions will be reviewed and what the review mechanism will be.

Thirdly, the provisions need to provide the type of scrutiny that is appropriate to the measures in question. If we look at some of the legislation in a number of countries, including the United Kingdom, we can see that a very small amount of parliamentary time is devoted to reviewing the provisions before they are extended. There are some things that need to be thought through carefully if there is an expectation that the measures are temporary.

The second issue that I would comment on is whether, in addressing a situation such as the coronavirus pandemic, the types of emergency measures that were used and that are being made permanent in the new legislation have shifted the boundary between what are considered ordinary levels of executive power and what are considered extraordinary levels of executive power, and, if they have shifted that boundary, whether the Parliament has considered that fully before that step is taken in the new legislation.

The Convener: Thank you, Mr Smith. I ask Professor Hunter the same question: what do you believe are the principles that underpin good-quality and effective legislation?

Professor Hunter: I have heard it said that military planners are always planning for the previous war, not the next war, and the same applies to infectious diseases. Whatever we do has to be flexible, because there is no guarantee that the next outbreak—a major pandemic or infectious disease threat—will be anything like what we have just lived through. It has to be flexible to cope with new threats, whatever they may be, and they may not be anything like what we have experienced with Covid.

Another question is, how much did our existing legislation fail us? To a large extent, I cannot speak about the Scottish legislation, but most of the English legislation, certainly in the early parts of the pandemic, was, in my view, fit for purpose. It certainly was not until well into the initial pandemic that additional legislation was needed.

The Convener: I thank you all for your answers and for raising valid points. We move to questions from Murdo Fraser.

Murdo Fraser (Mid Scotland and Fife) (Con): Good morning to our witnesses. I suppose the key issue that the committee has to consider in relation to the bill is whether the measures that are before us are necessary and proportionate, or whether they represent ministerial overreach.

We have been presented with a lot of evidence from interested parties and from members of the public. A strong theme has come through regarding the issue of civil liberties, which I want to ask you about. The bill will allow the Scottish ministers to impose quite substantial restrictions on people's activities, as we have seen over the past two years but on a permanent basis. There will be particular impacts in the area of health, where individuals can be required to

"submit to medical examination ... be detained in a hospital or other suitable establishment",

or be forced to

"be kept in quarantine".

What is your view on that? Does the bill strike an appropriate balance between the protection of public health and respect for civil liberties? How will the question of proportionality work through in practice?

Perhaps Professor de Londras can start.

Professor de Londras: One of the challenges with a bill of this kind—this relates to what Mr Smith said in his first response—is that Parliament is thinking about introducing a permanent legislative edifice within which responsive

measures could be taken. The questions of necessity and proportionality that you raise are, in substantive terms, likely to arise most urgently in respect of individual regulations that are introduced under the powers in the bill. Much will depend, therefore, on the modes of scrutiny of those regulations, if and when they need to be introduced.

Broadly speaking, it is worth noting that, within the structure that the bill proposes to introduce, there are a number of safeguards. The bill has thresholds for triggering safeguards, with which the committee will be familiar. There has to be a public health emergency, and the measures themselves must be "proportionate" or considered to be proportionate. For more intrusive powers such as medical examinations, there is an additional safeguard that requires that they must be the least intrusive method available and so on.

The bill has safeguards built into it that are welcome and worth noting, but the challenge lies in how regulations would be made and the extent to which Parliament would be enabled to challenge assertions of the proportionality and necessity of individual regulations. As you know, that takes us into the territory of questions around affirmative or made affirmative lawmaking and so on. Those questions may arise later, but that is an important consideration at this stage.

Questions of proportionality in responding to public health emergencies will have an element of judgment to them—as you know, they are not an exact science—and that is why I think those matters of process, combined with the safeguards that are built into the permanent edifice within the bill, are particularly important to dig into at some point.

09:45

Murdo Fraser: I might come back to you on the issue of process, but I ask the other witnesses on the panel for a view.

Professor Hunter: One of the issues that has come out very strongly during the Covid pandemic is who decides what is, or is not, proportionate. There are very different groups—individuals and individual scientists, not all of whom have any prior experience of infectious disease—who have very strong views one way or the other. To a certain extent, some of them could be accused of maintaining those views despite the evidence, not because of it.

Ultimately, who makes the decision? Is it the minister, who generally will not be somebody with a public health or infectious disease background? How will that person be advised? How will they come to a decision about what is proportionate, often in a setting where there is considerable uncertainty? We saw that in 2020 in relation to the uncertainty around the future of Covid.

On the point about requiring people to undergo medical treatment, my understanding is that the bill specifically excludes that, which I think is appropriate. We have a long history in the UK of having powers to remove patients to hospital if they pose a threat to others. That already exists, certainly in English legislation, and I believe also in Scottish legislation. It is relatively rarely implemented, but I think that we need to ensure that such restrictions are only ever brought in as a very last resort.

Anthony Smith: I have nothing much to add, except to say that, in looking at the experience of emergency legislation around the world during Covid, I think that the key issue has been the extent to which the emergency legislation allowed real oversight and scrutiny by the legislature of provisions, and too often, it did not. In a situation where the knowledge and understanding of what is required change over time, it has often been felt to be even more important to build into the legislation the opportunity to understand and review its provisions on a regular basis.

Professor de Londras: I will add two things. First, the bill includes a power to require someone to submit to medical examination, but the ability to trigger it is at the highest threshold. Not only does there have to be a public health emergency, but the measure in question must be

"made in response to a serious and imminent threat to public health",

and it must also be proportionate. There are multiple levels of safeguards, reflecting the more invasive nature of that

"special restriction or requirement".

That is important to note.

Secondly, I return to the point about proportionality. One thing that the Scottish Parliament is well aware of and extremely good at doing is digging down into the distinctions between the idea of something being proportionate from a scientific perspective and something being proportionate where proportionality is understood as a test of public law and human rights law. Of course, the questions whether a measure is rationally connected to an outcome, and the likelihood of its success in achieving that outcome, are issues on which a minister would need to be advised by scientists. The ultimate question of balancing—the fundamental proportionality question—is not answerable by scientific methods, as you know; it is a matter of judgment, weighing all the different costs, including human rights costs, against the likelihood of success and considering whether the measure is the least intrusive available.

Alex Rowley (Mid Scotland and Fife) (Lab): Good morning. I note Professor Hunter's comment that the military plans for previous rather than future wars.

Is there any evidence that there is a real need for the bill? Covid has exposed many issues, such as in health and social care in Scotland. Social care currently sits in chaos, and the Government is not being seen to act on that. Suddenly, however, the Government comes forward with the bill and says, "We need this legislation."

What is your take on that? Has Covid exposed Government's inability to respond quickly? Is there a need for the legislation, or is it—as many people have put it—a desperate power grab in order to shift the agenda away from the major weaknesses in public services?

The Convener: To whom would you like to direct that question?

Alex Rowley: To anybody.

The Convener: Would Professor Hunter like to come in?

Professor de Londras: My microphone is on, so I am happy—

The Convener: I think that Professor Hunter would like to come in.

Professor Hunter: Sorry—my R in the chat box related to a previous question.

To a certain extent, the issue, certainly in the English setting, was not so much a lack of legislation. It was more about preparedness, and having let our preparedness slip in recent years.

In 2019, the Bill & Melinda Gates Foundation ranked the United Kingdom as the second best country in the world in terms of preparedness for pandemics. However, when we came to it, we were not, because we had not maintained our preparedness. For example, we had not maintained our stocks of personal protective equipment as we should have done.

To a large extent, the legislation that we had in place would, in my view, have been adequate. What failed us was our preparedness, which was reduced because we had not maintained stocks or acted on the findings of the Cygnus exercise. In the UK, we used the influenza pandemic plan, not the coronavirus pandemic plan, despite the fact that we had a coronavirus plan written up and available.

Alex Rowley: Do you believe that the bill will lead to the Government being better prepared? Alternatively, is preparation not so much about legislation but about getting the work done and ensuring that things such as PPE are in place? I would have thought that the Government would not need to legislate for that.

Professor Hunter: Again, I cannot speak for Scotland, although I know about some aspects of the Scottish legislation; I have worked with colleagues in Scotland for many years. From a public health perspective, the failure in the first months of the pandemic was, to a large extent, a failure not of legislation but of preparedness, which we were already obliged to have undertaken.

Alex Rowley: Do the other witnesses have any views on whether the bill is actually needed?

Professor de Londras: I have one point to note, to build on what Professor Hunter said. Schedule 19 to the Coronavirus Act 2020, which part of this bill builds on, effectively levels up public health powers in Scotland to make them comparable with those in the Public Health (Control of Disease) Act 1984 that the Westminster Government had available to it. Other schedules to the 2020 act do the same for Northern Ireland and for Wales.

As a general matter, my understanding is that, if one considers that powers of that kind are necessary and useful should there be a public health emergency, some kind of legislative provision is required, because—as you know—the Coronavirus Act 2020, including schedule 19, will expire. That is one element of my response.

The second part of my response is that one benefit that the Scottish Parliament now has is that it can make legislation that looks forward to potential future public health emergencies, outside of the context of a public health emergency—in other words, without the pressures of urgency and time and the exigencies that are experienced by Parliaments when an emergency is right in front of them. That was the context in which the Coronavirus Act 2020 was passed. One question, therefore, that the committee might want to consider is whether it is appropriate to take schedule 19 as the blueprint for the part of the bill that we are talking about, given that it was introduced in an emergency setting, albeit that it mirrors long-standing powers in the 1984 act in England.

Thirdly, I cannot speak to the political dimension to which I think you were inviting us to respond, but I will just say that there will be multiple strands of preparation for any kind of emergency or exigency. Some relate to resources, some relate to planning, some are logistical and some are legal. This is about getting ready by having a legal framework available, should it be needed. The activities are divisible in that way. The fact that the Government does this thing does not necessarily

mean that it is not involved, or ought not to be involved, in doing other things.

Alex Rowley: I will leave it there. Thank you.

Jim Fairlie (Perthshire South and Kinross-shire) (SNP): The witnesses have already given us a huge amount to think about. Professor de Londras, you talked about forcing people to have a medical intervention. Will you clarify what that means, please?

Professor de Londras: If I understood correctly what we were referring to, I was talking about the proposed section 86E of the Public Health etc (Scotland) Act 2008, on special restrictions and requirements. That includes, in section 86E(2)(a), submission to a medical examination; in section 86E(2)(e), disinfection or decontamination; and, in section 86E(2)(h), having a person's health monitored and the results reported.

As you know, some things cannot be required under the bill. The power to impose the special restrictions and requirements that are in section 86E is subject to a higher threshold, which is in proposed section 86C(2) of the 2008 act: the regulations can be made only

"in response to a serious and imminent threat to public health".

Jim Fairlie: For a layman such as myself, what immediately springs to mind is that if someone who had Ebola, for instance, comes into the country, they could be required to take a medical intervention in order to protect the public. Is that what that means?

Professor de Londras: The provisions include restrictions and requirements for a person to

"(a) submit to ... examination ... (b) be removed to a hospital ... (d) be kept in quarantine"

and so on. However, proposed section 86D of the 2008 act expressly excludes "vaccination" and "prophylactic treatment". Those can never be required through a power under the bill.

Jim Fairlie: So, people who fear and oppose the bill could not say that it would allow the Government to force people to get a vaccination, but if someone came into the country with an infectious disease that we do not have a control for, it would allow the Government to take action on that. Is that a fair assessment of what you have said?

Professor de Londras: I think that that is a fair assessment of the content of those provisions—subject to the caveat that numerous significant safeguards are built in.

Jim Fairlie: Thank you. I want to pick up on a second point—I am sorry for jumping about a bit; I have written spider-scribble notes all over the place.

Professor de Londras: That is fine.

Jim Fairlie: On what the Gates foundation said in 2019, am I right in thinking that the preparedness that we had was UK-wide and was therefore more about what Westminster was prepared to do? Scotland did not have that same legal preparedness and the bill brings us into line with Westminster. Is that correct?

10:00

Professor de Londras: I do not think that the Gates foundation referred to that, although I am not familiar with that report. The part of the Coronavirus Act 2020, which was passed by Westminster, that gave the Scottish ministers powers to make public health orders and with which you are familiar, is schedule 19 to the 2020 act.

The idea behind schedule 19 was to ensure that the Scottish Government—and, in other schedules, the Northern Irish Government and the Welsh Administration—had powers to make regulations that were equivalent to those that the Government in Whitehall enjoyed. From my reading, the bill would put those powers on a permanent footing because the 2020 act, in totality, is temporary and will expire.

Jim Fairlie: That raises another question that I had not thought about. If the Coronavirus Act 2020 expires, would that remove the Scottish Parliament's ability to make provision in the event of another outbreak of an infectious disease?

Professor de Londras: I am not an expert in Scottish public health law, but my understanding is that the Public Health etc (Scotland) Act 2008 does not, at this time, include those kinds of powers, and that the idea of this bill is to insert such powers into the 2008 act. If the bill is not passed, the Scottish Parliament would, if it wished the Government to have similar powers, need to pass another piece of legislation.

Jim Fairlie: I am trying to gather all my thoughts here. Alex Rowley talked about preparedness. We were absolutely caught short on PPE and all the rest of it. Does this bill allow for that level of preparedness to be put in place at a time when we are not in an emergency? Should we have that level of preparedness in statute in order to be ready if something else comes along?

Professor de Londras: There is a danger of conflating multiple things here. For example, ensuring that Scotland has sufficient stocks of PPE or certain forms of medication almost certainly would not require legislation. The kind of preparation that the bill, in part 1, seeks to put in place would enable the Government to say that there is a legal structure that it can use to

introduce restrictions, in essence, that it considers to be proportionate and necessary if there is a public health emergency situation.

Other things such as resourcing, workforce management and so on may be dealt with elsewhere in the bill—I apologise, as I focused only on part 1—but, to my knowledge, they would in any case be unlikely to require significant legislative preparation. They are probably more about resource management, although I could be corrected on that.

Jim Fairlie: No, no—I absolutely take on board what you are saying. I go back to your statement that "multiple strands" are needed. In my view, the bill is just another strand that we, in this Parliament, need to have for preparedness. We can, by all means, go back to preparedness in the physical sense, with hospitals and healthcare—we can do all those things separately. The bill simply means that, in a legislative sense, we are preparing ourselves for the future so that, in the event of another emergency, we have the legislative competence to enable us to deal with it in this Parliament. Is that a fair assessment?

Professor de Londras: Yes, that is exactly right.

Brian Whittle (South Scotland) (Con): Good morning, panel. I am interested in the potential impact of the bill. I want to look back on the way in which legislation was initially introduced in the Parliament two years ago, and the way in which we responded to coronavirus over the period of the pandemic. I note that it was an extended period—the pandemic did not happen to us suddenly. We watched coronavirus move around the world: from China, across Europe and into the UK and Scotland.

If it had existed back then, what difference would the legislation that is before us have made to the way in which we responded to coronavirus? The Parliament legislated quickly once a decision had been made, and I am struggling to understand what difference it would have made had the legislation existed in the first place. I ask Professor Hunter to answer that in the first instance.

Professor Hunter: A lot of the restrictions are what we would generically call non-pharmaceutical interventions and include getting people to wear masks, social distancing, the isolation of patients and border controls. All those things fall within the sphere of NPIs.

We have known for centuries that NPIs never stop the spread of infectious disease. Instead, they delay infections and therefore spread. You can see a classic example of that in New Zealand, which now has a higher incidence rate than the UK has ever had, I think—or it is certainly heading that way. Ultimately, all those interventions fail, but what you can do is use them to delay infection long enough to make preparations and develop treatments and vaccines. That is what has happened. Although the UK's Covid mortality rate is dreadful, it could have been a lot worse.

Early on, certainly in the English setting, we managed pretty well in identifying cases coming into the country and caring for them in secure hospital isolation. However, once you have more than a certain number of infections, that sort of control breaks down and fails, and we went into the setting that we had. The value, therefore, of such interventions lies not so much in stopping the pandemic—ultimately, it is going to happen anyway—but in delaying it to the point where you can reduce the disease burden, mortality and the pressure on health services.

Brian Whittle: My question, though, is: what difference would the bill have made to the impact of Covid and the decisions made during that time?

Professor Hunter: It would not have ultimately stopped the pandemic in the UK. One of the difficulties that the UK has had is that the four different nations have been doing quite different things. In that context, the spread in one of those nations will always have an impact on the others, whatever anybody does. That is not a criticism of the UK; the same thing happened in Germany and, indeed, across the whole of Europe. Any legislation should be about trying to do the right thing across the whole UK, not just in one of the countries, because ultimately restrictions in one country are not going to have much of an impact. Some of the restrictions could well have delayed the initial peaks of infection, giving people more time to prepare and health services more time to get better treatments in place, but the pandemic would have hit us anyway.

Brian Whittle: Perhaps I can move to Professor de Londras for my next question. Now that we understand what legislation is required to address the pandemic, would it not be more appropriate for it to lie dormant now and give the Parliament the potential to resurrect it quickly, as we have done in the past, should such a pandemic come along?

Professor de Londras: Again, we can distinguish between two different sets of legal measures that are needed here. First, you need legislation that empowers the Government to make restrictions, which is what the bill that we are discussing is, and secondly, you need the regulations that will introduce those restrictions in order to address the public health emergency as it exists at a particular time. In some ways, therefore, you could argue that the entire bill—or, at least, this part of it—could be debated now and then lie dormant to be promulgated or commenced in the event of a public health emergency. That would be one way of doing this, but it is not clear

that doing so through the broad enabling legislative framework adds a huge amount of process or rigour.

It would be interesting to think about whether it would be possible to look at the types of restrictions that might be required and to try to model, say, different levels of restrictions—lockdowns, partial lockdowns, public health restrictions, education restrictions and so on—and to have almost a set of templates or potential drafts for different levels of regulation that could be introduced. Those templates or drafts could be debated and scrutinised by the Parliament and then triggered through a ministerial power in the framework legislation in the event of a public health emergency.

There are, therefore, two models, the first of which is just to put everything on ice. In that respect, you could look at, for example, the enhanced Terrorism Prevention and Investigation Measures Act 2011, which has been on ice at Westminster since 2011, ready to be commenced and used if needed. In the second model, you just introduce the legislation but try to predict different levels of regulation that might be brought in. You would have to leave space for flexibility in your response to the realities of a pandemic on the ground, but you could have a general sense of the situation that schools or public institutions could plan for. If you had, say, three levels of restriction—full lockdown, partial lockdown or no lockdown at all—for different institutions, they could plan around that.

What you have suggested is an option. From the policy memorandum, it does not seem to have been foreseen or considered as an alternative approach, but even if you passed the bill, you could still think about developing a set of potential regulations, a system of tiers or a set of approaches that would be available as a blueprint or starting point in the event of an emergency in the future.

Brian Whittle: I turn to Anthony Smith for my final question. One of the concerns is that the impact of Covid restrictions on non-Covid health issues is still being collated. What are your views on the impact of bringing in this legislation before we can make any judgments in that respect? The use of the word “proportionate” with regard to the restrictions that the Scottish ministers might be required to bring in is, I suggest, subjective, and I feel that, under such a provision, they would not have to seek any advice. For example, with any requirement to submit to certain medical interventions, such a judgment will be subjective—albeit that the threshold might be higher—and the Scottish ministers will be able to make those decisions on their own.

Anthony Smith: The expertise that I can bring to this is not so much on that specific issue but on the general point that there has to be a political judgment on the balance in public health measures. However, when those judgments are being made in the midst of an emergency, it is far more likely that there will be a greater risk of overreach and an inability for the public debate on the matter to get a proper hearing. That is what we saw during the pandemic in a range of countries around the world, with measures being brought in without public consideration.

The only comment that I could make about this particular process is that there is a potential benefit from being able to have that debate in a proper way at a time of non-emergency so that we can confirm what we have learned from the—[*Inaudible*.]—in Scotland and other countries about the types of measures that were appropriate and their impact on the rights of individuals and other public policy priorities in place.

10:15

John Mason (Glasgow Shettleston) (SNP): I would like to stick with Mr Smith on the issue of scrutiny. I am still trying to get my head round what should be in primary legislation and what should be in secondary legislation. Would you argue that, generally, the scrutiny of primary legislation is easier and better than that of secondary legislation?

Anthony Smith: That is not necessarily our experience. However, Parliaments tend to include the possibility of post-legislative scrutiny more frequently in primary legislation, and it seems more likely that secondary legislation will be less subject to post-legislative scrutiny, which will go back and test whether the provisions are being implemented properly and achieve their objectives. There is a greater risk that secondary legislation will not be reviewed as effectively and deeply, although that can also happen with primary legislation. It needs to be ensured that the right provisions are put in that are clear, set a timescale for the review and enable the review to be done early.

John Mason: We are spending longer on this piece of legislation as primary legislation, and your paper on post-legislative scrutiny is very critical of Parliaments generally—the Scottish Parliament is one that is guilty of not going back and looking at legislation enough. There is also the point about things being rushed in under the made affirmative procedure. It seems to me that there will be better legislation if we spend more time over it, think about it, and it is given a proper review, and that anything that is rushed in at the last minute will inevitably be weaker.

Anthony Smith: Yes—exactly.

John Mason: Do the other two witnesses want to comment on those points? Is primary legislation more solid and dependable than secondary legislation?

Professor de Londras: That goes back to your preliminary comments on what goes into primary legislation and secondary legislation. Primary legislation that is made in a non-emergency context and is subject to a robust legislative procedure, such as this procedure, will have a higher level of scrutiny than, for example, a regulation that is made using the made affirmative procedure. However, the point is that there needs to be a balance.

As members know, primary legislation provides the framework through which the secondary legislation can be made. Some space has to be left in secondary legislation for things that could not be foreseen at the time of the primary legislation, because it has to respond to the concrete realities of a particular situation that cannot be foreseen in an abstract situation such as this one. The question then is what can be done in the primary legislation to try to ensure an appropriate level of scrutiny of the secondary legislation.

There are a couple of things in the bill that the committee might want to explore further. For example, the default position under the bill is that regulations would be made using the affirmative procedure, but the usual capacity to use the made affirmative procedure in a situation in which a Scottish minister considers that it is urgently required remains. We know that, during the pandemic, the made affirmative procedure has been used with unprecedented frequency in Scotland and at least sometimes in situations in which it has not at all been clear that there was an urgent need for it and no other mode—a more scrutiny-heavy mode—of making the secondary legislation was possible. The question is whether there is anything that can be done to up the threshold of urgency, such as requiring a ministerial statement to explain why it is considered that the approach is urgently required rather than using the affirmative procedure.

In proposed new section 86G of the 2008 act, there is a very welcome provision that all regulations that are introduced must be reviewed every three weeks. However, the bill does not say what should happen to the review. Does it need to be published? Does a parliamentary committee have to consider it? The review is supposed to inform whether the regulations would be continued. Therefore, if it is simply a ministerial review that is not scrutinised by Parliament, is it useful in ensuring that there is robustness and rigour throughout the process?

In case we get to the end of the session without mentioning it, I will flag one last point: proposed section 86F(d) would give a Scottish minister the powers to make a regulation that could

"modify any enactment (including this Act)".

That is an extremely wide Henry VIII power, and I cannot see where it came from. It does not seem to be in the equivalent provisions of schedule 19 to the 2020 act and, although it is mentioned in the explanatory notes, it is not explained. Can you imagine a power like that being used with the made affirmative procedure? That would be hugely and extremely concerning. That is something to press when you are figuring out how the scrutiny, through the primary legislation, could be enhanced for the justified and necessary use of secondary legislation in the future. I am sorry; that was a very long comment.

John Mason: No, that was helpful. If I am not mistaken, the section 86 that you refer to is in the 2008 act, which is now being amended in this bill.

Professor de Londras: That is correct.

John Mason: You used the word "balance", which is exactly the word that was in my mind. From what you know of the 2008 act, did it get the balance wrong? Was there not enough in it?

Professor de Londras: I am sorry to say that I do not know, because I am not sufficiently familiar with that act to give a view on it.

John Mason: That is okay. Does Professor Hunter want to say anything on that point?

Professor Hunter: In relation to proposed section 86E of the 2008 act, there is a difference in terminology with regard to what we class as a medical intervention. For example, getting people to have antibiotic treatment for multidrug-resistant tuberculosis is excluded, and I think that that is right; I do not think that we could do that in the UK. However, a lot of the requirements under section 86E are things that we can already do in England. It is very rare to use those powers but, for example, in my career, I have seen people with multidrug-resistant tuberculosis be required to be relocated to healthcare establishments, because of the risk that they pose of spreading a very difficult and serious disease to people in the local pubs. A lot of those provisions are already available to us. If a patient who clearly has Ebola is coming into Scotland and flying into Glasgow but does not want to stay in hospital, what are the powers in Scotland at the moment regarding their release? If those powers are not available to you, there is an argument to have them available.

John Mason: To push you on that final point, if some powers are specific for Ebola and some for TB, should we not leave them until the situation arises and have them in the secondary legislation?

Professor Hunter: Why do you need to delay secondary legislation on Ebola patients until you get cases? If there is not already a power in Scotland to maintain them in hospital, and an Ebola patient flies into Glasgow and wants to self-discharge from hospital, there will not be enough time for secondary legislation to be enacted. From what I have heard from the other speakers, you might not have that power, so you need to have some thought about how you could deal with that situation.

John Mason: Thank you; that is very helpful.

The Convener: We have a couple of minutes left, so I will bring in Murdo Fraser.

Murdo Fraser: I will go back to Professor de Londras to explore further the issue, which we touched on earlier, of the use of the made affirmative procedure. You covered that in detail in your written evidence and you are clearly critical of the overuse of the made affirmative procedure. From a practical point of view, how would you amend the bill that is in front of us in order to reduce the reliance on the made affirmative procedure, which is clearly an objective that you want to achieve?

Professor de Londras: That is a very good question. There are two pathways: one is to change the threshold by which the made affirmative procedure can be used, which, at present, is the Scottish ministers' determination of urgency. It strikes me as not necessarily very desirable to change that because, of course, the MAP is designed to enable lawmaking in a situation of urgency.

If you leave the threshold as it is, the other pathway is the procedure. Although, in some ways, it would appear rather weak or proceduralised, the thing to do would be to require justification of the claim of urgency through a ministerial statement or otherwise. You have to find the right balance, so you cannot overproceduralise or overbureaucratise the process, because it is about being able to respond quickly. However, it would be useful to require a statement to the Parliament to justify the use of the MAP, so that its use can be challenged. You have seen in our evidence that the Scottish statutory instruments that have been made using that procedure have, largely, not been subjected to debates in the chamber but have been voted through. However, where they have been debated, it has been in response to a disagreement or somebody expressing concern. The point is to try to create situations where, if there is concern, there is a prompt to express it. That would lead to a question of justification and, therefore, an attempt to ensure that the Government uses self-restraint with regard to the made affirmative procedure.

Murdo Fraser: Thank you. That is very helpful.

The Convener: I thank the witnesses for their evidence and for giving us their time this morning. If you would like to raise any further evidence with the committee, you can do so in writing, and the clerks will be happy to liaise with you about how to do that.

I briefly suspend the meeting in order to allow a change of witnesses.

10:27

Meeting suspended.

10:31

On resuming—

The Convener: We continue to take evidence on the Coronavirus (Recovery and Reform) Scotland Bill. The second evidence session will focus on the bankruptcy measures in part 3 of the bill. I welcome our second panel: Abbey Fleming, the policy and communications lead at Money Advice Scotland; Jamie MacNeil of the money matters advice service and social work resources at South Lanarkshire Council; Emerita Professor Donna W McKenzie Skene of the school of law at the University of Aberdeen; and David Menzies, the director of practice at the Institute of Chartered Accountants of Scotland. I offer a warm welcome to you all and thank you for giving us your time this morning.

Each member will have approximately eight minutes in which to speak to you and ask their questions. If you would like to respond to an issue that is being discussed, please type R in the chat box and I will try to bring you in. I apologise in advance—if time runs on too much, I may have to interrupt members or witnesses, in the interest of brevity.

As all our witnesses are participating remotely, I ask you all to introduce yourselves to the committee.

Abbey Fleming (Money Advice Scotland): Good morning. I am the policy and communications lead at Money Advice Scotland, which is a membership organisation. We work to support money advisers to secure fair policy for people who are in debt and to improve financial wellbeing in Scotland. Thank you for having me along this morning.

Jamie MacNeil (South Lanarkshire Council): Good morning. Thank you for having me. I work for South Lanarkshire Council as a money advice manager and a money adviser. I hope that I can describe any practical challenges that we are having at the moment from that perspective.

Professor Donna W McKenzie Skene (University of Aberdeen): Thank you for having me along to give evidence to the committee. I recently—[*Inaudible.*]

The Convener: I am sorry, Professor McKenzie Skene, but we are having a few problems with your sound. We will move on to David Menzies for the moment.

David Menzies (Institute of Chartered Accountants of Scotland): Good morning. I am the director of practice at ICAS. We authorise and regulate many of the insolvency practitioners who work in Scotland in the area of bankruptcy. Prior to my present role, I worked as a licensed insolvency practitioner for almost 20 years, so I have lots of practical experience of the issues that are under discussion today. Thank you for having me.

The Convener: I think that we still have technical issues with Professor McKenzie Skene. I will bring you in to see whether we have resolved those issues.

Professor McKenzie Skene: I am on audio only now—I hope that that will work. I have recently taken early retirement from the University of Aberdeen, having researched and published in the area of insolvency law, particularly personal insolvency law, for the past 30 years. I remain active in research and I am delighted to be able to make a contribution to the committee today.

The Convener: Brilliant. Thank you very much, and a warm welcome to you.

My first question is about the proposed bankruptcy threshold. The emergency coronavirus legislation increased the debt threshold at which a creditor can make someone bankrupt from £3,000 to £10,000 during the pandemic. The bill proposes to set the threshold permanently at £5,000. What is the panel's view on the level of the bankruptcy threshold?

Abbey Fleming: Although this is a bill on Covid recovery and we are coming out of the pandemic, it is important to look at it in the context of the cost of living crisis that we are entering. The legislation cannot be looked at without considering that context.

At Money Advice Scotland, we agree that there is a need for a permanent increase from £3,000. However, we are unsure whether £5,000—[*Inaudible*.]—in the context of the long-lasting effects of Covid and the likely long-lasting cost of living crisis will be sufficient. We are of the view that the £5,000 threshold may be too low at this point.

The Scottish Government has indicated plans to extend the duration of the current £10,000 level, which we believe is the correct approach. However, as that will be only a temporary measure and the cost of living crisis is likely to endure for some time, we are not convinced that £5,000 will be sufficient after that. A level of £6,000 or £7,000 might offer better protection for people in debt—not only debt incurred by the pandemic, but debt that will be incurred because of, or exacerbated by, the current cost of living emergency.

We are worried that the £5,000 level might put at significant risk of bankruptcy people who, due to the pandemic and the current situation, either do not have or no longer have the disposable income to access other debt solutions, such as the debt arrangement scheme or a trust deed. We worry about what might happen to people's assets, which they might have wanted to protect by going into something such as a DAS. That is the main point that we want to raise at the moment.

The Convener: Thank you, Abbey. You raise some very valid points in relation to the increase in the cost of living.

Jamie MacNeil: My colleagues and I believe that the threshold of £5,000 is too low. I am sure that everybody here would agree that bankruptcy is the ultimate sanction and therefore should have a proportionate value. If somebody had their car repossessed, for instance, they could potentially lose their property if they were made bankrupt.

With the cost of living increasing, especially as it has over the past couple of months, we believe that a lot of other people are going to be put under severe pressure in relation to debt.

Even the extension of six months would be good, but we think that £10,000 should be the permanent limit. A lot of people would feel safer when taking out credit—because it works both ways. Otherwise, somebody taking out a loan for £5,000 could unknowingly be putting their house at risk.

Professor McKenzie Skene: As the committee will be aware, there has been an on-going review of bankruptcy solutions and I have been chairing working group 3. The current figure that is in the bill corresponds with the figure that working group 3 recommended. The—[*Inaudible.*]—finalised again—[*Inaudible.*]

The Convener: I am sorry, but we are still having technical issues with your audio.

Professor McKenzie Skene: —but I think that there is a question of balance here.

The Convener: I am sorry, but we will have to come back to you, because you are cutting out as a result of technical issues. I apologise for that. I will bring in David Menzies.

David Menzies: [*Inaudible*.]—context of the situation. It is not just about coming out of coronavirus, nor is it just about the cost of living

crisis that will come about. The figure is going into primary legislation, so it should, we hope, last for much longer than any of the relatively short-term crises that we are experiencing.

What we are really talking about is balancing the rights of creditors with the rights of debtors. The issue here is purely about whether creditors can take steps to declare someone bankrupt. It is important that we put it in its overall context. Each year, roughly 96 to 98 per cent of bankruptcies are debtor led—in other words, it is the debtor who takes that step. It is in only approximately 2 to 4 per cent of bankruptcies, overall, that creditors initiate that step.

Therefore, the number of bankruptcies that the measure affects is very low in overall terms. In normal times, about 1,000 to 1,200 bankruptcies per year involve creditor-led petitions. The vast majority of those are made by local authorities, on the back of council tax debt, and Her Majesty's Revenue and Customs. Therefore, many of the decisions in this area come back to local authority and Government policy on debt recovery. That has a significant bearing on who is petitioned for bankruptcy.

It is also important to mention that the vast majority of consumer debt, which is what most individual bankruptcies relate to, comes from financial services—banks, credit cards, hire purchase and so on, all of which are regulated by the Financial Conduct Authority, whose guidance requires those entities to treat customers fairly and not to take the ultimate step of bankruptcy without first having worked through all possible provisions to get the debt sorted out.

In addition, bankruptcy never comes without warning. Debtors will be aware of the issues that were already there, so they have the opportunity to deal with the situation in advance.

Overall, we believe that the increase from £3,000 to £5,000 represents a fair balance. We are concerned that not enough thought has been given to possible unintended consequences, such as the knock-on effect for protected trust deeds. Will the increase to £5,000 of debt force more people into trust deeds rather than bankruptcy, or vice versa?

However, those are just the unintended consequences. We are satisfied that reducing the current threshold from £10,000 to £5,000 will mitigate some of the risk of unintended consequences. Therefore, we think that, in overall terms, the increase to £5,000 is a fair balance to strike.

The Convener: Thank you. That was very interesting. I was not aware of the number of bankruptcies that are initiated by the Government and local authorities.

Murdo Fraser: Good morning. I want to raise a slightly different issue—that of electronic notification of bankruptcy documents. I note that the bill proposes to make permanent the temporary provisions in the coronavirus legislation that allow electronic notification rather than service in hard copy. Do the witnesses have any concerns about that being made permanent? Are there any practical implications to it?

Speaking from personal experience, like many of my MSP colleagues, I probably receive hundreds of electronic communications every day and people not infrequently say to me that they sent me an email that I did not receive because it went into the spam folder, was quarantined or, as sometimes happens, disappeared into the ether. How reliable is the system of electronic notification? Are there enough safeguards in the bill to protect people?

10:45

Abbey Fleming: Despite our name, Money Advice Scotland does not deliver money advice, so I do not have all the evidence to comment on the effect of the proposal on clients other than by making a general point about the importance of taking account of digital exclusion. Many people who present for money advice might not be the most digitally literate and might not have the best access to digital services—that wider point needs to be taken account of. Unfortunately, I cannot provide figures at the moment.

It is important that the bill builds in a safeguard in the sense that the recipient must have indicated to the sender that they are willing to receive the documents and notifications in a particular way. That should go some way to preventing documents being sent electronically when that is not appropriate for the client. If a wide volume of electronic documents is being sent, it is important to ensure that that is not overlooked.

That is all that I have to say. I do not have any massive concerns about the provision being made permanent, but I do not deal directly with clients.

Jamie MacNeil: We have concerns. When somebody goes into debt, they tend eventually to start disconnecting services. The internet will go first and the telephone will go next, just to keep their gas and electricity on. Although the person might have made the application online and ticked the box to say that electronic communication was great because they were in those circumstances at that point, at the point where they are in debt and potentially facing bankruptcy, they are likely not to have that service available and are more likely to miss the notification. The consequences of bankruptcy are too great for somebody not to receive the notification, so a personal visit by a

sheriff's officer or a recorded delivery is still the most effective way of communicating potential bankruptcy or notification of bankruptcy to the person.

David Menzies: Communication is made at many different points of delivery and in different situations pre, during and post a bankruptcy. It is important to offer some distinction between those.

I absolutely take Jamie MacNeil's point about the pre-bankruptcy situation, in which communications being cut off can be a difficulty. Once an individual is in bankruptcy, the situation is completely different when communicating with them and their creditors. Distinctions need to be made between such cases.

On communication from the trustee to the creditors, I reflect on my previous comment that many of the main creditors that are involved in consumer bankruptcies are large institutions such as banks, credit card providers and local authorities. They very much prefer electronic communication and have robust systems in place for it. We have had many years of experience with the other personal insolvency regimes in which electronic communication is used, and there are no indications that there are issues with it.

Similarly, we have moved to electronic communication in corporate insolvency. That was introduced in England and Wales in 2016, and in Scotland in 2018. Again, there is no evidence to suggest that there have been substantial problems with it.

There are many advantages to electronic communication. I absolutely take Murdo Fraser's point about having experienced situations in which he was told that emails had been sent but they were not received. Equally, I have experienced lots of situations in which I have been led to believe that a letter has been posted to me but it has never been received. In electronic or old-style communication, there is always a risk that things are not received because of the infrastructure or for various other reasons. However, in broad terms, electronic communication is the way that things are going and it is absolutely the way that the Government wants to go in relation to a digital first policy. From the evidence that we see in relation to the temporary measures and equivalent provisions within corporate insolvency, the creditors, trustees and those who are affected by the insolvency are not—at any stages—experiencing many difficulties.

Murdo Fraser: Thank you. Professor McKenzie Skene, can we have your view on that?

Professor McKenzie Skene: [*Inaudible.*]

The Convener: If we continue to have technical issues with Professor McKenzie Skene's connection—

Professor McKenzie Skene: I am here. I had not been unmuted.

I am not aware of any particular practical difficulties that have arisen. I very much support everything that David Menzies said in relation to the electronic communications issues. Things occasionally go missing, whether that is electronic or—[*Inaudible*.]

The Convener: Professor McKenzie Skene, you have cut out again. I apologise for the technical issues. If we continue to have those issues, we can send you the committee's questions and you can respond in writing.

Alex Rowley: David Menzies talked about normal times; I found myself asking what normal times are. We had the global economic collapse in 2008, then we had austerity, which had a major impact on public services.

I will ask a general question about the on-going support that is available for members of the public who are trying to access money advice and debt services. We have certainly seen a rise in demand for those services, but have we seen a rise in their availability? In Fife, the local authority made big cuts in those areas. In relation to provision of and pressufgitalre on services, are people getting the support and services that they need? That question goes to Jamie MacNeil.

Jamie MacNeil: As there was for every agency across the country, there was a big change for us. We were predominantly a face-to-face organisation; people used to walk in and see us or make an appointment to see us, but one day that just changed. As everybody did, we had to change how we delivered the service. Now we have to communicate mainly by telephone, which has practical challenges. A lot of stuff is now done by post or sometimes, if the client is able to do so, by email.

We have provided a service throughout the pandemic; we have adapted as best we can and are continuing to adapt as we come out of the pandemic. We are putting plans in place to try to catch the people whom we have not seen, because we are almost sure that we have missed a lot of people. The increase in demand for the service has continued; even since October, there has been about a 30 per cent increase, which is huge.

Wellbeing is an issue, at the moment—not just for clients but for money advisers, too. As managers, we have to consider that advisers take on a little bit of the stress of each client whom they see. The clients whom we are seeing are what we

would call complex cases. We call them complex cases because they are not the normal consumer debt cases that we saw in 2008, when people had overspent or there had been irresponsible lending. We are now seeing people who cannot afford to heat their homes, to pay their rent or to feed themselves, so referrals for food banks and fuel vouchers are up. The cases are just about affording the normal cost of living.

The demand on the service is such that a lot of people are coming to us, but there is no quick and easy fix. It is not just a case of telling people that they could go bankrupt, because going bankrupt for rent, council tax, gas or electricity arrears does not help; it just puts a band-aid on the problem. Next year, they will be in the same situation again.

What is required from a money advice point of view is for budgeting and income maximisation to be looked at, but that is being delayed because the Department for Work and Pensions has a backlog relating to assessment periods, which means that it is taking longer for people to be awarded disability benefits. Normally, when we maximised someone's income it would happen relatively quickly, but nowadays everything is taking so much longer.

We are managing as best we can, but the resource is under a lot of pressure, which we can only see increasing. Month on month—especially since October—the increase has been dramatic. I hope that that answers your question.

Alex Rowley: Yes it does, thank you.

Abbey, is there adequate provision to support the level of demand for such services?

Abbey Fleming: Funding for the free advice sector has been a long-standing issue since well before Covid. We raised it time and again before the pandemic came along. As has been mentioned, advice services have been cut over the years; it was happening before Covid and that is having a knock-on effect, now that demand has increased.

As Jamie MacNeil said, advice agencies are trying to meet the needs of their clients as best they can with what provision they have, but, as he also said, it is not simply that there are more cases, but that there are more cases that are complex. Advisers are reporting to us that it is getting harder to know what to advise clients to do because they are presenting with complex debts. People are struggling to heat their homes and to afford their essential outgoings. The fact that they simply do not have the income or the finances to meet their outgoings makes it very difficult for advisers; it makes the situation much more complex.

We conducted some research that was published in 2020, as the pandemic began—in other words, it was done in the context of so-called normal times. It found that people were under significant hardship before they reached a money adviser. For example, it was not until someone received a letter with a court summons or got a visit from a sheriff officer that they would think, "Okay, I need to seek money advice." People would go without many essentials and would endure significant hardship before eventually seeking money advice. That means that by the time that they get in front of someone who can help, their situation will be complex, which, in turn, extends the process.

I am not sure whether that answers your question about provision. As we have said, funding was an issue before Covid. The complexity of the cases that people are presenting with is compounding the limited availability of advice services, which are having to spend more time on each client, as a result.

Alex Rowley: David Menzies mentioned the number of bankruptcies that are pursued by local authorities in relation to council tax debt. Do we need to look at that? There is a feeling that local authorities will go after individuals, but every year they write off millions of pounds that are owed to them by corporations and others. Is the public sector's approach fair? Is it just the case that it is easier to go after individuals for small amounts than it is to go after corporates and companies?

David Menzies: That is a really interesting question, but I am not sure that I have the knowledge to talk about that in much detail. Much of the issue is to do with public sector financing and how that is done.

I seem to recall that there some issues around how local authorities treat write-offs and the impact that that has on their budgeting and suchlike. Again, unfortunately, that is not an area that I have an awful lot of knowledge of, so I am not sure that I can add much, I am afraid.

Alex Rowley: Okay. Thank you.

11:00

John Mason: I declare that I am a member of the Institute of Chartered Accountants of Scotland.

Professor McKenzie Skene mentioned earlier—I am not sure whether she is available to speak or not—that there is a working group and that a review of wider bankruptcy legislation is going on. Having been on finance and other committees in the past, I know that that is quite a complex area.

My main question is this: should the bill touch on bankruptcy or should we leave it for the review to come, in due course?

I am not hearing Professor McKenzie Skene—I am not sure that she is there.

Professor McKenzie Skene: There is certainly some merit in—[*Inaudible*.]—it is important to bear in mind that that wider review is going on—[*Inaudible*.]

John Mason: We are hearing bits of what you are saying, but I am afraid that we are not hearing enough.

Are any of the other witnesses involved in that process?

David Menzies: I am involved in the process and have been sitting on the working group that has been dealing with the moratorium and the common financial tool.

Your general question, Mr Mason, on whether we should be looking at bankruptcy at this point, is a good one. I think that I caught Donna McKenzie Skene saying that she probably would agree that now is the time to look at it. I agree with that.

There are some very easy fixes, in some ways. There are good things in the temporary measures that were brought in through the coronavirus emergency legislation that have aided the process in the meantime and which are generally uncontroversial.

The wider review includes some of the more controversial or difficult matters and aspects that go across multiple areas, so it is right to leave those for later stages. However, the aspects that are included in the bill can probably be tackled now. There is concern that, if they were kicked down the road, there would be consequences for individuals in relation to how the process works just now, with unnecessary delays.

John Mason: If we do not address bankruptcy in the bill, how much longer might it be before the review carries on?

David Menzies: I understand that all the working groups have drafted their initial reports, which should be with ministers imminently. Beyond that, consideration will be down to ministers and whatever parliamentary time is available.

It is important to say that the measures that we are looking at are still very much short-term measures. You will be aware that ICAS has for many years been calling for a much wider review of bankruptcy overall. It is known as the stage 3 review, to which ministers have committed. However, it will be many years down the line before many of the bigger issues can be looked at in detail.

John Mason: Thanks. That is very helpful.

Nobody else is jumping in on that point, so I will move on to the moratorium on diligence. As I understand it, that used to last for six weeks and was extended to six months in emergency legislation. Should we go back to six weeks? Should we stay at six months? I think that the suggestion was that if we stay at six months, some clients might disengage from the process. Maybe Mr MacNeil could start on that one.

Jamie MacNeil: We had a big discussion yesterday with all our money advisers. They see the moratorium as a useful tool.

From the other side, there was a concern that people might disengage if they are told that they will be absolutely fine after six months, but we never tell people that. The six-month moratorium allows breathing space for people who have found themselves getting into debt. Many times, that happens through no fault of their own, especially nowadays. They might have been on furlough, been off sick, lost their job or got into debt through the increased cost of living.

There is much uncertainty in the world today. When people come to a money advice service, they want a little bit of certainty and a wee bit of breathing space. That is all. Six months might seem to be excessive in some cases, but the average bankruptcy or debt arrangement scheme that we do probably takes 12 weeks to arrange—if everything goes to plan, by which I mean the client being able to provide all the information that is required because they are statutory solutions.

We suggest extending the six-month moratorium until September, which is allowable. After that point, a review should be done and 12 weeks could be considered. Consultation on moratoriums is going on right now, but it is too early to make a change just as we are coming out of the pandemic. There is much uncertainty in the world. Imagine how people's mental wellbeing is after two years of the pandemic. In addition, when we turn on the news, there is no good news. Prices are going up and there are potential wars everywhere.

John Mason: In summary, you are saying that we should stick to six months just now and consider 12 weeks later.

Ms Fleming, would you go down the same route?

Abbey Fleming: Yes. I agree with Jamie MacNeil. The six-month period has given clients a bit of breathing space.

On what the moratorium period should be in the long term, we need to consider how long it takes for someone to get through the process because, if—[*Inaudible*.]—to get through the money advice process, a six-week moratorium period is far too

short. One of the aims of the moratorium is to allow people appropriate time to seek advice, so we need to ensure that the moratorium is realistic about how long that takes. Some of the points that have been raised about why it is now taking longer need to be considered when we decide what the long-term moratorium period should be. Money Advice Scotland is of the view that it should be no shorter than 12 weeks.

I am part of the working group that is looking at the moratorium. It might be useful to share some of the discussion from that group about longer-term suggestions for moratoriums. One of the points—

John Mason: We are a little bit pushed for time, so it would be useful if you could make a quick comment on that.

Abbey Fleming: There is a suggestion that it might be useful in the longer term for advisers to be able to apply for an extension to the moratorium, should there be extenuating circumstances. That could be considered; it is being discussed in the working group.

John Mason: I have used up my time, but Mr Menzies wants to come back in.

David Menzies: I was going to say that the working group is considering the matter. I think that I am correct in stating that the bill does not deal with the moratorium at all. Although there are no provisions on it in the bill, there is an indication that the Government intends to introduce something at stage 2.

On Abbey Fleming's comments on where the working group sits on the matter, it is fair to say that there is no consensus as to what the period should be. There are wider considerations that need to be taken into account. Some of the discussion that we had related to creditors. Typically, they are UK creditors rather than Scottish creditors.

We also need to consider the impact of the debt relief scheme in England and Wales. The equivalent moratorium, or breathing space, there is 60 days. That is more than six weeks but, to reflect on some of the comments about access to money advice, the question is whether that would be enough. There is a feeling that 60 days might be a good starting point, with the ability for money advisers to apply for an extension to take it up to 90 days.

John Mason: I am sorry, but I think that we will need to leave it at that. If an amendment on the matter is lodged, the witnesses might like to write in with their comments on it.

Brian Whittle: I will be brief. My interest lies in the impact of Covid. Before the pandemic, business debt and personal debt were being managed, but the impact of Covid has put a lot of strain on that. I know that we are talking about having a moratorium that would enable people to get back on to an even keel. However, at the end of the day, bankruptcy is about trading while insolvent, so how do we square that circle? How do we enable people to get back on an even keel if that means that they might potentially be trading while insolvent during that period?

David Menzies: That is a really difficult issue to deal with and, to be clear, the moratorium will not resolve it. We are talking about allowing a short period of time for someone to access appropriate advice in those circumstances. As Jamie MacNeil and Abbey Fleming said earlier, there is a distinction to be made between money advice and debt advice. Money advice is about looking at someone's future income and expenditure as well as their debt position. There are different solutions that need to be looked at as part of that. That is part of the stage 3 bankruptcy review that I spoke about earlier and which involves taking a wider and more fundamental view of some of those issues in order to come up with a solution for the modern working day.

Brian Whittle: Finally, on that point, leaving aside the £5,000 threshold, which it has been suggested is perhaps too low, should the bill contain anything to do with the issue that I spoke about with regard to the time to address the way in which Covid has impacted on debt?

David Menzies: I do not believe that Covid itself has necessarily impacted on debt. The biggest issue at the moment is around the cost of living crisis, which involves many people not having the income to deal with their expenditure because of rising fuel costs and so on. Those are not debt issues; they are much wider issues that impact on social care funding and all sorts of other issues. Again, this particular circumstance is not really a debt issue.

Brian Whittle: I am happy to leave it there, convener.

Jim Fairlie: We are talking about debt in broad terms. It strikes me that debt is one of the most significant strains on a person's mental wellbeing—it is a massive issue. We are talking in abstract terms about the power to serve documents to a bankruptcy process electronically or by post and so on. All of those discussions are abstract, but we must keep in our minds that this issue is about people and what they are living through.

We have probably now covered the matter of whether the documents should be issued electronically or by post. We have also covered the power to hold meetings remotely or in a physical location. Dealing with those issues is the

purpose of the bill. However, I would like to get a general sense of how you feel that people are coping with their debt right now, given the circumstances that we are living in. Abbey Fleming, would you like to talk about that first?

Abbey Fleming: Again, I do not deal directly with clients, but the anecdotal evidence that we are getting from our members and people in our network is that, as you have said, debt and the pandemic are two major stressors on people's mental health, particularly when they are combined. There is a bit of a sense of hopelessness from people. As has been mentioned, advisers are reporting that the issue is not that people are in debt and need a debt solution; it is that they are not able to afford their costs, perhaps because they have had an income shock due to the pandemic, and that has been exacerbated by the current cost of living crisis.

There is a sense that people just do not really know what to do, and that trickles down into the advice community, too. Because of the cost of living crisis, it is hard for advisers to tell people that they can make a saving in a certain way, or that they can get more disposable income by, for example, switching to a different provider. Often, any savings that can be made might be marginal. In a meeting a few weeks ago, someone said that the problem is that people just have too much month left at the end of the money. That is the sense that we are getting.

11:15

Jim Fairlie: We have mentioned the cost of living crisis, but what causes people to get into debt in the first place? I remember the debates about short-term loan companies charging interest at 2,500 per cent and so on. Will people who are struggling to cover their cost of living go in that direction? Jamie MacNeil, what do you think?

Jamie MacNeil: In the past six to 12 months, we have found that a lot of family members are borrowing from one another. A lot of family support is being provided, but that applies only to people who have a family support network. If you look at the bank statements, you see that a lot of money is passing to and from family members. The trouble is that such support does not solve the problem; it alleviates it only for two days or a week when someone needs a top-up to cover their gas and electricity bills, for example.

People are driven into debt not by high interest rates but by the fact that their income is taken up with rent, council tax and gas and electricity bills. Food is sometimes a fourth priority for people. The biggest factor at the moment is gas and electricity bills. People need to heat their houses and to use electricity, so, as soon as those bills increase, they start cutting back on other things. They stop paying their debts, their council tax and even their rent, because they have an immediate need for gas. Although they might get taken to court for not paying their rent, they think that that will probably not be for a couple of months.

Our experience with clients is that they are having to self-prioritise what is important to them. It is easy for us to say that paying their rent or council tax is really important, but, in the immediate term, they think, "I'm cold. I'm sitting here freezing. I need to put my heating on." They need to choose between paying their heating bills and paying their rent, and they need to think about feeding their kids.

As I said, it was different when people came to us about consumer debt, which could be managed and moved away. Now, gas and electricity companies' repayment plans are built into people's on-going direct debits, so, when someone phones because they have missed a couple of payments, the company will say, "You owe us £600. We'll divide that by 12 and add it to your already increased costs, so now you'll be paying us £300 a month." The person will then say, "I cannot pay £300 a month for my gas and electricity. I couldn't pay £250 or £100 a month, so how do you expect me to pay £300 a month?".

As a result, there is a knock-on effect on people's disposable income, which is used just for living—that is all that it is. People were just managing before, and they are now no longer managing. The poverty bar has probably increased to such a level—

Jim Fairlie: I fully take on board everything that you have said; that is why I made my comment at the start.

David Menzies, how will the bill help with the situation in which we find ourselves right now? I will come to Abbey Fleming very briefly once David Menzies gives his answer.

David Menzies: Part of the issue relates to understanding the route out that needs to be taken. That is quite a difficult issue. Often, the messaging that comes across is about working your way out of your situation and finding a solution. That might involve people paying things off over a longer period or using the debt advice scheme. Sometimes, the best solution is to deal with the debt that has built up. That allows some of the cash that comes in monthly to be released to service on-going and new expenditure.

In some ways, the Scottish Government needs to make a change by saying that bankruptcy is sometimes the right solution and that it can be okay to go bankrupt. The vast majority of individuals who enter into bankruptcy have no assets, which means that they do not have much

physical stuff to lose. It will potentially affect their credit ratings, but some of those ratings will be shot in any case. Sometimes, bankruptcy might well be the best solution in order to take away the debt and allow some of the money that previously serviced the debt to be used to deal with day-to-day expenditure.

Jim Fairlie: Thank you. I think that you wanted to come in, Abbey. Please be very quick, though, as we are getting short of time.

Abbey Fleming: I just wanted to touch on what Jamie MacNeil has said and to point out that people get into debt not because they are spending too much but because they are not able to spend enough. In the list of priorities, council tax normally falls to the bottom, which is why, as David Menzies has said, the majority of creditor petitions come from local authorities. That payment gets put at the bottom of the priority list under food, heating and living expenses.

As for what the bill does to address that, it has to be seen in the context of the provisions for Covid, but there are much wider issues that come into play. David Menzies said that people who enter into bankruptcy do not have a lot of assets, but we are worried that those who have a home and assets that they want to protect might not, as a result of the cost of living and Covid, be able to access a solution that allows them to do so. That is a major concern for us, but we do not yet know how it will play out.

Jim Fairlie: Thank you very much.

The Convener: Actually, we do have a little bit of time, as we are going to 11:30.

This might be covered under the on-going bankruptcy review, but our committee received an interesting submission this week that I wanted to raise and ask your views on. Bearing in mind the cost of living crisis and the fact that families have been made bankrupt and had their wages and bank accounts arrested, I think that the person who got in touch with us asked the valid question whether the bill could be an opportunity to provide people who are struggling financially with increased protection from bank account arrestments. We have been told that such arrestments can leave people with only £529 in their bank accounts, regardless of whether they are single or a couple with three or four kids. One example that was highlighted was of a family with two children. When their bank account was arrested, they were left with £529 to survive on for the rest of the month, and they had to choose between food, gas, electricity and travel and childcare costs. Could there be an opportunity to amend the Debtors (Scotland) Act 1987 to increase the amount that people are left with in their bank accounts from £529 to, say, £1,000?

Perhaps we could start with Abbey Fleming.

Abbey Fleming: An increase is much needed. Obviously, the issue ties into the discussions about a moratorium, because those people are protected while the moratorium is in place. However, as has been mentioned, a moratorium does not necessarily solve the whole problem. An increase would be a very useful move, and we would be keen for something like that to be built in. The question, then, is whether it becomes a longer-term matter. I am not sure whether some of that has already been covered in the working groups, but the short answer is yes, the proposal absolutely needs to be looked at.

The Convener: Can I get your thoughts on that, Jamie?

Jamie MacNeil: Do not worry, convener—I will keep my answer short.

I agree with the submission that £1,000 would be more appropriate, mainly because the current situation leaves people destitute. After all, they cannot get to work, and they cannot pay for general things such as food.

David Menzies: Again, I do not have particular expertise in this area, but, with regard to the general concept of what we want to do for society, I agree with the suggestion. An increase of between £500 and £1,000 in this respect is frankly neither here nor there to most creditors.

I highlight that the Accountant in Bankruptcy has been looking at diligence in general, and there is a long-standing working group on the matter. I think that its report is nearing completion and should be with ministers shortly—at least, it should be easy for ministers to be briefed on where the working group has got to with that.

The Convener: I thank all the witnesses for their evidence and their time. If you want to raise any further evidence with the committee, you can do so in writing. The clerks will be happy to liaise with you on that.

The committee's next meeting is on 10 March, when we will continue to take evidence on the Coronavirus (Recovery and Reform) (Scotland) Bill and our inquiry into excess deaths in Scotland since the start of the pandemic.

11:25

Meeting continued in private until 11:33.

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