OFFICIAL REPORT
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Social Justice and Social Security Committee

Thursday 7 March 2024

Session 6

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SOCIAL JUSTICE AND SOCIAL SECURITY COMMITTEE
7th Meeting 2024, Session 6

CONVENER

*Collette Stevenson (East Kilbride) (SNP)

DEPUTY CONVENER

*Bob Doris (Glasgow Maryhill and Springburn) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Katy Clark (West Scotland) (Lab)
*John Mason (Glasgow Shettleston) (SNP)
*Roz McCall (Mid Scotland and Fife) (Con)
*Marie McNair (Clydebank and Milngavie) (SNP)
*Paul O'Kane (West Scotland) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Michael Clancy OBE (Law Society of Scotland)
Diane Connock (Stirling Council)
Richard Gass (Rights Advice Scotland)
Jon Shaw (Child Poverty Action Group Scotland)
Erica Young (Citizens Advice Scotland)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Social Justice and Social Security Committee

Thursday 7 March 2024

[The Convener opened the meeting at 09:00]

Decision on Taking Business in Private

The Convener (Collette Stevenson): Good morning, and welcome to the seventh meeting in 2024 of the Social Justice and Social Security Committee. We have received no apologies today.

Our first item of business is a decision on whether to take agenda items 3 and 4 in private. Are we agreed?

Members *indicated agreement.*

Social Security (Amendment) (Scotland) Bill: Stage 1

09:00

The Convener: Our next agenda item is an evidence session on the Social Security Amendment (Scotland) Bill. The bill was introduced to the Scottish Parliament on 31 October 2023 and is currently at stage 1. It amends the Social Security (Scotland) Act 2018 to make changes to the Scottish social security system. Its general aims are to enhance the Scottish system of social security, including by improving the experience of people using the service that Social Security Scotland provides; delivering increased efficiency and value for money; implementing the findings of an independent review into the remit and operation of the Scottish Commission on Social Security; and revoking the emergency provision that was inserted into the 2018 act in 2020, at the height of the Covid-19 pandemic.

Our first evidence session will provide general context and a good overview of all eight substantive parts of the bill, and we have a panel of witnesses with expert knowledge of how the social security system works. I welcome to the meeting Jon Shaw, who is a welfare rights worker with the Child Poverty Action Group Scotland, and Erica Young, who is a policy officer for social justice with Citizens Advice Scotland. They are joining us in the room.

We also have Michael Clancy OBE WS, director of law reform at the Law Society of Scotland; Diane Connock, advice services and welfare reform team leader at Stirling Council; and Richard Gass, welfare rights and money advice manager at Glasgow City Council. They are joining us remotely.

Thank you very much for accepting our invitation. I have a few points to mention about the format of the meeting before we start. I ask that, before speaking, you please wait until I, or members asking the question, say your name. Do not feel that you have to answer every question. If you have nothing to add to what has been said by others, that is perfectly okay.

I ask our witnesses online to please allow our broadcasting colleagues a few seconds to turn your microphone on before you start to speak. You can indicate with an R in the chat box in Zoom if you wish to come in on a question.

I ask everyone to keep questions and answers as concise as possible. We will start with the questions now and will try to finish at about 10:30.

Roz McCall (Mid Scotland and Fife) (Con): I welcome everyone, whether you are online or in the room. My questions are on the new forms of benefits. I will start with the online witnesses. First, I have a question for Ms Connock, although I will also address it to witnesses in the room. The bill would give the Scottish Government more flexibility over rules for the Scottish child payment. I am happy that you are here, Ms Connock, because you represent a rural environment, which we do not often have represented in the room. From your perspective, what changes should be prioritised?

Diane Connock (Stirling Council): We are more than happy with the changes that are being introduced in the bill.

Stirling comprises an urban and a very rural area, and we know that people in rural areas tend to need a more substantial income to start with, in order not to be in poverty. Anything that comes in to help and that is transparent can only be beneficial. It is also very much about taking the services out into the communities through the local delivery team and local services.

Roz McCall: Thank you. That is very helpful. I ask Mr Shaw the same question.

Jon Shaw (Child Poverty Action Group Scotland): Thank you for the opportunity.

Generally, we think that priority should be given both to increasing the value of the Scottish child payment and to fixing the specific issues that come from its current legal status as a top-up benefit to other entitlements. The obvious one is that, where there is a gap—even a short one—in entitlement to a qualifying benefit, the Scottish child payment simply cannot continue.

We have other groups that cannot get a qualifying benefit, even though their income level is in a similar place to those of people who can. That might be due to somebody's housing tenure or perhaps because they are getting maternity allowance rather than statutory maternity pay, due to their different treatment within universal credit. There are also some people from abroad who are excluded from reserved benefits.

Other than that, we think that priority should be given to backdating new claims for the Scottish child payment, which currently cannot happen unless somebody already gets the Scottish child payment for another child, and to addressing the issue of the cliff edge, whereby a small increase in income can result in a drop in Scottish child payment because universal credit stops, which leaves someone worse off overall.

Finally—sorry, but my list of demands continues—priority should be given to the issue of qualifying young people, because it is increasingly expected that people beyond the age of 16 will remain in school and dependent on their parents. At present, 16 is the cut-off point for the additional support that is provided by the Scottish child payment.

Roz McCall: Thank you, Mr Shaw. By my reckoning, that is about seven priorities, but thank you very much.

The Convener: Bob Doris would like to come in with a supplementary question.

Bob Doris (Glasgow Maryhill and Springburn) (SNP): Given that Mr Shaw has set out priorities for using the greater flexibility in the bill and the provision for a stand-alone benefit, I will direct my question to him.

The Scottish child payment is not about providing more money; it is about providing greater flexibilities, which might require more money. Will you say a little bit more about the cliff edge, not just in relation to universal credit but in relation to better-off calculations for people? They might lose their entitlement to universal credit because they increase their hours of work or get into full-time employment. Does that mean a hard landing for some families, and is there a disincentive for some people to go into work because there is no taper or roll-on in relation to Scottish child payment levels as folk get employment or go into full-time employment?

Jon Shaw: That is certainly something that we see and that we get asked about. The effect of a couple of hours of increased work is that it can lift somebody off universal credit entitlement. Right now, the Scottish child payment is not the only entitlement that is lost—you also lose access to best start foods at exactly the same income point, and you can no longer get a best start grant.

As to how that is addressed, one option would be to allow the Scottish child payment to taper away in a similar way to universal credit, but above the point at which universal credit stops. A run-on would be another option that might be more administratively simple, but, where there is a sustained increase in income, it would not continue to provide support in the longer term. Both of those options should be considered, and we are happy that the translation of the Scottish child payment into childhood assistance will give the option to do either of those things. We look forward to seeing concrete improvements made.

The other side of this is that there is no compulsion to do any of those things at the moment. All that the bill will do is change the legislative basis; there is nothing in the bill that would force either of those things to happen.

Bob Doris: It is the legislative basis that we are scrutinising rather than the policy positions once

that legislative basis has been changed, but that is very helpful.

Diane Connock: One of the priorities has to be separating childhood assistance from Department for Work and Pensions benefits such as universal credit, because, in practice, some people do not apply for the Scottish child payment because they go in and out of eligibility for universal credit, which greatly impacts that. In order for people to apply for that much-needed benefit, it needs to stand alone.

Richard Gass (Rights Advice Scotland): To continue Jon Shaw's point, a run-on is an immediate necessity. Across Scotland, many employees get paid four-weekly, or they get an extra bonus at Christmas or a pay award that is not settled but is paid in a lump sum at a later stage. Often, a double payment or extra payment can be sufficient to take somebody out of universal credit for that period, which could prevent them from qualifying for the Scottish child payment. That is an unintended consequence—the person might not necessarily feel any better off, particularly if they are on a four-weekly pay cycle; to then also lose their Scottish child payment would be a double dunt.

An unobvious omission is that only one means-tested benefit does not have a two-child policy: the council tax reduction, which is under the control of the Scottish Government. We would like to think that our own benefit could be a qualifying route to entitlement.

Jeremy Balfour (Lothian) (Con): My question is for Erica Young. To broaden things out slightly, this is an opportunity for the Parliament to introduce a new social security benefit, if it wants to. Given the work that you do, if you had a magic wand and could introduce a new benefit, what would that be and who would you target it at?

Erica Young (Citizens Advice Scotland): At the moment, we have a significant concern about the energy costs that are faced by those with health conditions, so we would like to see the extension of support for energy costs to disabled people of working age. At the moment, it is possible to get that additional support if you have a disabled child in the household but not if you are a working-age disabled adult. That is one thing that I would prioritise.

Following on from what others have said about introducing the Scottish child payment on a different legislative footing, the crux of the matter is the development of needs-based criteria around the new version of the Scottish child benefit when that is introduced. We have particular concerns about the impact of the treatment of maternity allowance as a benefit for the purposes of universal credit, which means that people fall out of universal credit qualification and Scottish child payment qualification simultaneously.

We would also seek an alignment of the Scottish child payment with best start foods, to facilitate access to that support for those who have no recourse to public funds. At the moment, they clearly have access to best start foods, but that is the only benefit that is delivered in Scotland that can be accessed by people who have no recourse to public funds.

Jeremy Balfour: I open the question to others. If we could introduce a new benefit, what should it be?

Jon Shaw: Specifically in relation to the Scottish child payment, I am not sure whether this would quite be a new benefit, but, right now, only one person can be responsible for a child. Something that should be looked at is the situation of care that is shared equally between two separated parents, particularly if universal credit continues to be the trump card for deciding on the responsibility for a child. The universal credit rules seem to prevent the Scottish Government from paying Scottish child payment for one child to one parent and another child to the other parent, which would seem to be a perfectly logical approach.

The Convener: I remind the witnesses who are here in person that they do not have to work their console. It will come on automatically when we invite them in.

I believe that Michael Clancy would like to come in.

09:15

Michael Clancy OBE (Law Society of Scotland): Thank you very much, convener. I draw attention to something that Jon Shaw said about the upper limit for the Scottish child payment being 16. As members and everyone in the room will be aware, the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 ensures that the age of a child is 18 in Scotland. Article 26 of the convention states:

> "States Parties shall recognize for every child the right to benefit from social security".

You can see where I am going with this. If the current upper limit is 16 but the convention, which will be in force in the near future, defines a child as a person under the age of 18, there is a gap. The Scottish Government might already have a plan for that, or one of the panel members might be able to inform you that it is all taken care of, but we should at least acknowledge it in all this discussion.

The Convener: That is helpful, Michael. That is noted.

Roz McCall: My second question is on the proposed care leaver's payment, which is a bit of a passion of mine. I am slightly concerned that we cannot see a lot of the detail behind it yet. We are still not 100 per cent sure what the definition of a care leaver is, and we are still not 100 per cent sure what the process will be—whether it is £2,000 up front or whether it will be a split payment. There is a whole raft of information behind the question that we might not have, but I am going to ask the question anyway, because it is about social security. CPAG suggests that the care leaver's payment should be delivered by Social Security Scotland unless there is a good reason to use a different agency. Why is that, and why would delivery by Social Security Scotland be your first choice, if it is your first choice?

Erica Young: On your final point, the key is consistency and predictability for those who are accessing their right to social security. Everything being within the one agency is critical, given that a number of agencies are already operating in this space, such as local authorities for council tax reduction and the Department for Work and Pensions for reserved benefits. For someone then to be asked to engage with a fourth agency, potentially, and to be told that they might also be involved with other support services would be quite overwhelming for them.

For the sake of consistency and because of the learned agency experience that Social Security Scotland has built up, it is the appropriate agency to deliver the new benefit.

Jon Shaw: I agree with all of Erica Young's points. Social Security Scotland—I guess that the clue is in the name—feels like the logical first choice, because, if you are going to have a single body delivering the new payment across Scotland, the principle in the 2018 act is that delivery of social security is a public service. We might go further and say that we think that it should be assistance under part 2 of the 2018 act, because, as Erica said, it gives consistency with mechanisms of challenge.

I know that the policy memorandum cites best start foods as a reason why payments delivered by Social Security Scotland do not have to come under part 2 of the 2018 act, but that does raise an issue. There is no right to appeal to an independent tribunal if you refuse best start foods, because it does not come within the framework of the 2018 act, and the same applies to job start payments.

I suppose that the other logical option might be delivery by local authorities, but, as Erica said, there is an advantage to central delivery with a single set of straightforward eligibility criteria that are the same across Scotland, simply because, by the sound of the consultation proposals, local authorities are not going to have any discretion in whom they award it to and how much they award.

There is also a question about children who have been looked after in England and which local authority would administer a claim made by a child who was not actually looked after by that Scottish local authority.

Roz McCall: Thank you. That is informative.

Convener, I whole-heartedly accept the answers and the evidence that we have heard. However, equally, I think that we should know a little bit more about what we are trying to do, considering that the consultation is now over. Is it possible for the committee to write to the cabinet secretary to get a little background information that, although it might not be pertinent to this evidence session, would be nice for the committee to know?

The Convener: I am happy for us to write to the cabinet secretary in that regard. The clerks will note that in the report, too.

The second question theme concerns applications for assistance, and John Mason will lead on it.

John Mason (Glasgow Shettleston) (SNP): Part 2 of the bill concerns late applications and will remove some options. Do you think that it is okay to leave the rules around the other applications as they are, or do you think that they should be relaxed or tightened up? I invite Mr Gass to comment first, followed by Mr Clancy.

Richard Gass: The intended rules for appeals and redeterminations are welcome, but you are right in saying that there is a gap when it comes to claims for benefit. During the pandemic, it was recognised that we were dealing with an exceptional circumstance, so backdated claims for benefit were allowed. The fact that not many folk took up that option should not be a reason not to have that provision in the future. Indeed, the fact that not too many folk have taken up the option provides security that it will not result in an unpredictable expenditure.

There are circumstances in which the option is useful. For example, why should somebody who is unable to make a claim because they have been left in a coma after being involved in a car crash, or because they have severe mental health problems, lose out on entitlement? I am not saying that we should leave an open door, but we should provide for exceptional circumstances. Where those can be evidenced, it would seem only proper that payments could be backdated.

John Mason: I will press you on that. What is the logic for backdated payments? I can see why a funeral payment, which is a one-off payment, would need to be backdated. However, if the payment is for food or heating, that issue has

already passed, as it were—the person has already gone without food or heating. What is the logic of a backdated payment in such circumstances?

Richard Gass: They might have had a cold house and they might have heated their house but not yet have received the heating bill, so the cost could still be outstanding. Someone who has been in hospital with mental health issues or a physical disability might not have been living in their house, but their on-going costs will have continued.

John Mason: Mr Clancy, from a legal point of view, should people always be entitled to late payments, and should there be a limit to how far back they can go?

Michael Clancy: I would hesitate to say that my view would be a legal point of view, but I will try my best. There is always an interest in having latitude, because hard cases make bad law—we all know that maxim.

Our general view on the issues that you raise was that laws that make the situation for people who are in a vulnerable position more complex or reduce accessibility are not really good laws and that we should be wary about introducing additional complexity. That comes out in terms of the time limits for appeal and the way in which 31 days can be extended to a year. However, there is also a difference between having a good reason for delay in making the application and transforming that to exceptional circumstances when it comes to the appeal stage. Sometimes, the difference between a good reason and exceptional circumstances might be difficult to get a grasp of—I know that I struggled a little with it when looking at the bill. Our administrative justice sub-committee has been thinking that we should make things as easy as possible for applicants, that we should make sure that the routes to redetermination and appeal are clear and that we should not introduce unnecessary complications to the system.

John Mason: Okay. Thanks.

Ms Young, if we throw in “good reason” and “exceptional circumstances” all over the place, will that cover all eventualities, or will it just make it all very vague?

Erica Young: What is important is that there is a structure. At the moment, it can be very daunting and psychologically exhausting for people to go through the application process for adult disability payment, which is an extremely complex benefit. Advice is essential in many circumstances, but it can take time to organise that. It can even take time for a client to psychologically prepare to ask for help. We therefore believe that consistency is needed in the benefit journeys for complex benefits such as adult and child disability benefits.

If we are going to introduce the words “good reason” and “exceptional circumstances” in respect of redeterminations and appeals, it is vital that we also introduce them in respect of the completion of initial applications and the submitting of review forms. At the moment, people have only 28 days in which to submit review forms, regardless of whether they are scheduled by Social Security Scotland or triggered by a change in circumstances. The two concepts need to exist across the benefit journey in order to alleviate distress, but there also needs to be some structural guidance on them so that people can understand the complex differences that we have just heard about from a legal perspective. There might also be some differences in the way that the tribunal views redeterminations and the way that Social Security Scotland views them, because they are independent entities. It is important that we have guidance that helps both bodies to apply the rules consistently. At the moment, if someone submits their application for adult disability payment late, they may provide a good reason, but that is not elaborated on or defined in either decision maker’s guidance or the legislation. We need to have a think about that.

What are at stake here are the finances of the claimant. If an application has to be made afresh or has to be treated as having being made from a later date, that will have a financial implication for both the claimant and their network around them. For example, someone who is waiting for the outcome of an adult disability payment claim before they can access carers allowance will be waiting for additional finance when they may have just given up work to care for someone. There are a lot of complexities here that indicate the need for a consistent approach.

John Mason: Mr Shaw, do you want to comment?

Jon Shaw: Yes. I will try to explain this simply and quickly. There are two types of late applications. The other witnesses made some excellent points about what happens if, after the initial contact, it takes someone some time to complete their application, and there is existing flexibility in that regard. The other type of late application applies where entitlement begins before the person contacts Social Security Scotland. Carer support payment is an excellent example. When someone applies for that, all that they need to do is say that they met the conditions for up to 13 weeks before the date of their application, and Social Security Scotland can award the payment if they meet the conditions. In that case, there is no need for a good reason. That policy choice allows backdating of up to three months. Scottish child payment is another example. It can be backdated, although at present there is no provision in the rules for an application

for Scottish child payment to be treated as having been made before the date when it is submitted to Social Security Scotland.

Richard Gass made some excellent points about the fact that someone might be accruing bills that they are unable to pay. People might have borrowed money in order to manage their circumstances until their universal credit is sorted out.

John Mason: Would you argue that there should be a 13-week period for everything, with no reason being necessary, or should there just be more flexibility, as Ms Young suggested, given that some benefits are more complicated than others?

Jon Shaw: I think that it should be considered case by case. Being who we are, we would obviously argue that Scottish child payment should be a priority. A mitigating factor for the disability benefits is that there is a 13-week qualifying period and people are never going to get paid until they have had the needs for 13 weeks, unless they are terminally ill. That provides some mitigation in relation to the disability benefits, but the approach that is taken for a lot of the reserved benefits is a kind of halfway house in that there is provision for claims to be treated as having been made earlier than the date of first contact if there is a good reason.

None of the current Scottish benefits do that. We think that it is administratively simpler if the only decision that Social Security Scotland has to make is on whether someone meets the entitlement conditions. If it also has to go into why someone was not able to get in contact sooner, that simply creates more of a burden for the decision maker. Looking at carer support payments, the decision has been taken that they will be backdated to before those regulations were introduced, simply because it can take so long for someone's disability benefit to be awarded.

09:30

We need to look again at all the Scottish benefits—most of the other ones are one-off payments. The question is, again, whether someone should be able to apply outside an application window if they would have met the conditions had they applied in time.

The take-up strategy is a laudable aim, but it will never be 100 per cent successful. The other side of that coin is that, if we acknowledge that there will not be 100 per cent take-up on the first day that entitlement could have started, a way of mitigating the impossibility of reaching everyone in all circumstances is to allow decision makers to look at whether someone would have been entitled to that payment had they been in touch sooner.

John Mason: Okay. I am conscious of the time. Thanks, convener.

The Convener: Jeremy, do you want to come in with a supplementary?

Jeremy Balfour: Yes, I am happy to do so. My understanding is that, during Covid, hearings of the First-tier Tribunal either went online or took place over the telephone. A number of people have told me that those tribunal hearings are still happening over the telephone. From your experience, is that the best way to do it, or should we go back to their being face to face, as they were pre-Covid? Erica, it looks like you want to jump in.

Erica Young: Thank you, Jeremy. That is, indeed, a significant issue that the citizens advice network is experiencing. An approach is supposed to be in place by which a face-to-face hearing should be accommodated if there is a good reason for its having been requested. However, the experience of our network is that those hearings are not being accommodated and that telephone hearings are the default position.

That is problematic for many reasons. Most importantly, consultations as a last resort are an incredibly laudable aim. It is impossible to overstate the progress that has been made in relation to that. However, what that means is that, by the time a claim reaches the appeal stage, face-to-face contact with the person has not happened at any stage of that claim, and that person might be desperate to speak to someone to demonstrate and present their circumstances in the most powerful way.

It is an important part of the function of the tribunal that it is able to tease out that evidence, as it is often cogent oral evidence that makes the difference in a tribunal's decision. It is also the case that people with certain mental health conditions or neurodivergence will find it very difficult to communicate via the telephone and to fully express their circumstances. Face-to-face contact is a vital part of the tribunal service, but, at the moment, there seems to have been a significant shift away from it.

Jeremy Balfour: Richard, do you have experience of that in Glasgow?

Richard Gass: We favour face-to-face appeals when that is the appellant's choice. We have tried to exercise a right to have one, but the appeal letter itself does not give the option to tick whether you want a face-to-face appeal. We have queried why we are being refused them, and we have been advised that they will take place only in exceptional circumstances.

The disadvantage to that is that somebody could tell you over the telephone that they are able to do something, but the tribunal will be denied the opportunity to see with its own eyes the difficulty with which someone enters the room, how they rise from their seat to leave the room, and how they conduct themselves during the hearing. Simply relying on the person's verbal expression really misses too much of the available evidence.

I was about to say something else, but I will stop there.

Jeremy Balfour: I should point out, for the record, that I was previously a member of the First-tier Tribunal.

The Convener: Thank you, Jeremy, for making us aware of that.

We will move to theme 3, which is on challenging decisions.

Marie McNair (Clydebank and Milngavie) (SNP): Good morning, panel. It is great to see you all this morning. Thanks for your time.

The bill makes changes to revisions for late requests for redeterminations and appeals. Will those changes improve the client experience? What other changes to redetermination and appeals timescales are needed? I ask Erica to respond first, if that is okay.

Erica Young: We anticipate that that will dramatically improve the claimant experience. Our advisers see people for whom picking up the phone to ask for help can take more than two weeks of psychological preparation, or who are consumed by on-going and intensive medical treatment or by court processes involving abusive former partners. Those circumstances are not well accommodated by the existing system, and we think that the changes will improve that.

We would support the provision of robust guidance, which should be co-designed to ensure the effective implementation of the changes. Even under the existing provisions, we see wide-ranging reports of inaccurate information being given by call-handling staff, who inform people that the six-week timeframe for requesting a redetermination is an absolute limit. People assume that that information is correct, which can cause drop-out because they decide that they cannot face any further challenges.

To summarise, we think that there will be significant improvements as a result of the changes.

Marie McNair: Does anyone else want to come in before I move to the next question?

Jon Shaw: In relation to the second part of your question, the background paper helpfully sets out the different timescales. Erica Young made a point about people understanding simplicity and consistency. We think that the deadline for requesting a redetermination without having to give a good reason should be equalised across all the different benefits and should also be extended. To go back to my previous point, people struggle to provide and articulate that good reason.

On the issue of the timescales for Social Security Scotland carrying out a redetermination, even if there is a justification for having different timescales, depending on the complexity of the benefit, there is no justification for some times being counted in working days and others in calendar days. That feels like needless complexity. There is also an argument for aligning appeal deadlines, but that would require changes to primary legislation.

Richard Gass: I agree that the proposed changes will make things better, but a bigger change, and one that would make things even better, would be to do away with mandatory reconsiderations, which add an extra hurdle. We know that the changes will allow Social Security Scotland to make another decision when an appeal has been lodged, so why have mandatory reconsideration? People should simply be able to say, "You've made your decision. I'm not happy with that, so I'd like to pursue that further," with the ultimate stage of that pursuit being a tribunal. If the opportunity arises to improve benefits to our satisfaction prior to getting there, that is great, but mandatory reconsideration is unnecessary.

Marie McNair: I will stay with you, Mr Gass. What measures are needed to ensure that individuals are not pressured into either lapsing their appeals or withdrawing their redetermination requests? You raise that issue in your written submission, and we know from the 2022-23 statistics that 22 per cent of personal independence payment appeals were lapsed. Can you give us any insight into current DWP practice? Are there any lessons there for Scottish benefits?

Richard Gass: In the DWP system, someone who has a mandatory reconsideration may have uttered the words, "I want to appeal the decision," but the next step is mandatory reconsideration. If they get awarded something at that reconsideration, they may feel that they have had a bite of the cherry and might therefore feel that there is no point in going to a tribunal after that, because they might not get anything more.

We are concerned that folk who are offered a wee bit more will accept that, thinking, "That's the best it's going to be" and that going to a tribunal would be reaching for something that is out of their reach. Instead, it should be the case that people can progress to a tribunal because they have not been awarded everything that they have asked for. There should be an option for people to withdraw

their appeal, rather than a situation in which they have to initiate the next step. I hope that that makes sense.

Marie McNair: It does. Thank you.

The Convener: Michael Clancy and Diane Connock want to come in.

Michael Clancy: The question about mandatory redetermination stages is an interesting one. We have heard the argument that some people oppose mandatory redetermination because it places an obstacle in the way of appeal rights. We think that having an immediate right of appeal would not preclude Social Security Scotland from undertaking a redetermination review to ensure that a decision is correct and can be defended before an appeal. That would be one distinct possibility.

At a United Kingdom level, mandatory reconsideration accounts for about 70 per cent of UK disability living allowance and PIP appeals that are still successful. We suggest that the bill has not necessarily reached the correct position there and that we need to think carefully about it.

On the question of lapsed appeals, we suggest that one way in which they could be properly evidenced is by having the individuals concerned confirm in writing that they are content for their appeal to be lapsed and for their redetermination request to be withdrawn. We need to have informed consent to such exercises, and that is particularly important in terms of the social security principles and respecting the dignity of the individuals concerned.

Diane Connock: I wish to respond on a couple of points. First, on the mandatory redetermination process, I think that going straight to an appeal would potentially put a lot of our vulnerable clients off the appeals process. The whole prospect of having to go to an appeal can sometimes be too much for people, and I would be worried that people would not challenge a decision. With mandatory redeterminations being dealt with that bit quicker, the payments should potentially come through that bit quicker than if people wait for payments to be made and backdated after the appeal has been heard. It is more cost effective to use the mandatory redetermination process, and we would be in favour of there being a process, whether or not it involves Social Security Scotland going back and using that as part of the appeal process. That is not a stage as such, but I would be worried about that possibility disappearing completely.

The other thing about withdrawing a mandatory redetermination or an appeal is that it all comes down to claimant choice. If claimants are looking to withdraw, they should be asked whether they have sought advice, and they should be encouraged to do so. It may well be that they will lodge a mandatory redetermination, and they might then get advice from an advice service and find out that they actually have the benefits that they feel they are eligible for. They might then want to withdraw it, or they might decide to put in a mandatory redetermination at that stage. That definitely needs to be possible.

It is the same when people are withdrawing an application. I like the idea of a cooling-off period being reinstated. I would be concerned that somebody who had withdrawn their application and then sought advice after that might find out that they did have grounds for appealing, so there definitely needs to be—

The Convener: Sorry, Diane, but I will stop you there, because we will have a line of questioning on that later in the evidence session.

Marie McNair: CPAG has suggested that it should be possible to reinstate redetermination requests that have been withdrawn because the client changed their mind—as we have just discussed. How would that work in practice?

Perhaps Diane Connock could come back in in a wee second.

Jon Shaw: The ability to reinstate or withdraw an appeal, which Diane mentioned, provides a good model for that. There is no secondary legislation around redetermination, however, so such a provision must come in via an amendment to the 2018 act. We would argue that it should be enough simply for someone to change their mind.

The issue is that, if you have to make a further redetermination, it might be late. That would place a burden on the applicant to justify lateness and explain why they had changed their mind, and it would put a decision-making burden on Social Security Scotland. We would suggest a simple amendment saying that somebody who has withdrawn a request has a fixed time period in which to reinstate that request and does not need to give any reasons for doing so.

09:45

Marie McNair: Diane, do you want to expand on that, or do you have anything else to say?

Diane Connock: I think that Jon has covered it. Something has to be written that says people are able to withdraw an appeal, but there also needs to be that time period given to people during which they can change their mind. That has to be a reasonable time period, too, because people might want to seek advice, which can take time.

Marie McNair: More generally, I am also interested in how the First-tier Tribunal hearings are operating in relation to the Scottish benefits.

Are there any concerns that you want to highlight to us while you are here? Is there anything you want?

Diane Connock: Not at this stage. I think that it is too early within the process to be highlighting much. Given the time that it has taken for things such as adult disability payments to be processed, we are just starting to see the challenges coming in. We might be able to answer that question at a later stage.

There have been a couple of occasions when we have ticked the box for a face-to-face hearing and that has not been offered, so more needs to be done around that. I know that timescales are part of the reason, because it is quicker to do the hearings over the phone, and those appointments can be made sooner than appointments for face-to-face hearings, but there are situations in which a face-to-face hearing is preferable for the client.

Richard Gass: One of the suggested questions in the SPICe paper is whether we would recommend any changes to current practices that would not necessarily require legislation. I think that Marie McNair's last question pointed towards that. If it did not, I will hold my fire and come back. If that was part of the question, I have something to say.

The Convener: Richard, I will stop you there. I am going to bring in Paul O'Kane, who will draw on that question.

Paul O'Kane (West Scotland) (Lab): Good morning to the panel. First, I will address one of Citizens Advice Scotland's asks with regard to redetermination, then we can discuss things more generally, if that is all right.

The bill does not change the requirement to have a redetermination before an appeal, but Citizens Advice has said quite clearly that it wants that to change. Erica Young, will you explain a bit more about that process, including its advantages and disadvantages?

Erica Young: The focus of all the reforms should be on breaking down barriers to realising the right to social security. Simpler, more accessible mechanisms would improve accountability and engender trust. Being refused an adult disability payment, for example, triggers very complex responses and mixed emotions. It is a difficult thing. A system that delivers dignity, fairness and respect should not expect people to wait a minimum of two months for Social Security Scotland to, in effect, mark its own homework and then require those people to go through a further administrative process to raise an appeal.

The journey from applying for an adult disability payment to having an appeal heard can take more than a year. That is not acceptable. Our advisers can struggle to support people to remember what their circumstances were at the date of the claim, as so much time has passed. Again, that is not acceptable.

A simpler process would allow a client to submit only an appeal, at which point the process of allowing appeals to lapse could be used to reduce unnecessary hearings. We believe that that would offset any additional pressure that might be placed on the tribunal service. We also think that the emphasis on the appeal being lodged to an independent body, without the necessity of an appeal hearing taking place, will alleviate some of the anxiety that clients might have about appealing.

I highlight that the data suggests that the success rate—that is, awards in favour of the person—is about 52 per cent for redeterminations and about 54 per cent for appeals, so it is roughly equivalent. A redetermination is just an additional process, in effect.

It is also always important to bear in mind that the friends and family members on whom the person has become increasingly reliant for support frequently feel pressure. It is impossible to overstate how significant the awards are for helping people to manage their day-to-day lives and access the support that is essential for them. We know that a lot of the money is diverted into fundamental things such as nutrition and energy costs. People cannot afford to wait the length of time that we are talking about, and the mandatory redetermination process is simply an additional step.

I am sorry to go on, but our network is currently advising people who are going through bowel cancer treatment or complex court processes in relation to domestic abuse. At the same time, when they present with an unsuccessful redetermination, we have to tell them, "We're really sorry, but we have to advise you that the next step is to raise an appeal." It is exhausting and overwhelming for people.

Jon Shaw: The process that has been described here is very similar to the pre-2013 DWP appeal process. A person would only have to make one challenge and, if the decision was changed, that could only be to increase their award. That is similar to the protection that we want to be introduced through the bill.

We have not seen a lot in the redetermination process, which we opposed during the passage of the Social Security (Scotland) Bill, to show that it is meaningfully different from mandatory reconsiderations at the UK level. The advantage of a direct appeal is simply that it never has to get to the tribunal service. If somebody identifies a decision that is more favourable to the person,

they can make it and the tribunal service never has to be involved. That is why we argue that consent should not be required in order to lapse an appeal. It simply adds more confusion and debate.

I realise that I am not saying the same as the other witnesses, but the protection that the decision must be more favourable makes the process administratively simpler. It would also fit well with removing redeterminations entirely. We are worried that the fact that redeterminations can make the award go down as well as up might have a chilling effect on people challenging decisions. If someone has been awarded some benefit but thinks that they have not been awarded enough, that possibility becomes a barrier to challenging the decision. However, if you go straight to an appeal and the decision maker can lapse that appeal only if they make you a more favourable award, that will remove the disincentive to challenge.

As Erica Young said, the justification for having two steps is difficult to see.

Paul O'Kane: Thank you. That is helpful to our consideration.

The bill would also clarify the actions that a tribunal and ministers can take in a process appeal. The committee is keen to understand the advantages and disadvantages of having different procedures for challenging process decisions and other decisions. Does Richard Gass or Diane Connock have a view on that?

Richard Gass: Process appeals and appeals determining the facts should use the same process. I do not see a justification for them being different. That is perhaps not a well-stated answer, but it is my answer.

Paul O'Kane: Does anyone else want to comment?

Jon Shaw: I agree with Richard Gass. We might come back to this, but overpayment liabilities will have a separate challenge process. We will also have reviews of appointeeships, which look like they might be subject to a different challenge process.

There is an obvious advantage to a simple, straightforward and unified process to get from not liking what has happened to an appeal tribunal. The only advantage of the process for process appeals that I can see is that, otherwise, there would simply be no challenge to the failure to accept an application or a redetermination request. It is better than nothing, and it felt like it was introduced as a way of ensuring that there was some oversight and ability to get to an independent challenge. However, we agree that unifying all those processes would be a positive step.

The Convener: I invite Jeremy Balfour to come in.

Jeremy Balfour: I have no questions in this area, convener.

The Convener: In that case, we will move on to theme 4, which is overpayments.

Bob Doris: This section of questioning is about where the liability for overpayments sits. The bill will bring in the potential for client representatives to be liable for overpayments. The intention of the provision on liability is that the person who benefits from an overpayment will be liable for it, regardless of whether that person is a representative of the claimant or the individual who has the right to the underlying claim in the first place. Has the Government got the balance right in its framing of the provision? Are there alternatives that the witnesses might want to suggest? Erica Young is twitching her head. Is that an indication that you wish to speak?

Erica Young: I am happy to kick off the discussion on that. We are broadly supportive of the policy intent, which is to make sure that the beneficiary of an overpayment is the person who is liable to repay it when it is lawfully recoverable. Our difficulty with the provision on liability is that it seems to conflate different types of advice and third-party representation. There are advice workers in agencies who, rather than managing a client's affairs or acting as a conduit in the manner of an advocacy worker, take instructions and apply the regulations, and they might be deterred from acting.

There are different types of third-party involvement. When that involves a person with a financial stake, any overpaid funds are likely to go into a household pot, so it might be very difficult to delineate who has benefited from any overpayment. That is our fundamental concern.

In some instances, there might be more than one type of advice work involved. There might be a welfare rights worker who works for a formal advice agency, but there might also be a friend or family member who has filled in the initial application, and the matter has then gone to an advice agency for redetermination. There might also have been advocacy involved at some point in the process. At the moment, the provisions do not seem to make any distinction between the different forms of third-party involvement that there might have been in a claim at different stages in the process.

Bob Doris: Are you saying that the general principle is correct but that there needs to be clarity on where the liability sits, given that the

advice sector might offer advice and then act on the instructions of clients, regardless of whether they follow the advice that was offered, and that account needs to be taken of whether there has been a direct financial benefit to the individual or organisation concerned after an overpayment has been made?

In other words, the underlying principle is okay, but the provisions need to be set out more clearly. I do not want to put words in your mouth, but we are considering whether the bill needs to be beefed up or made clearer. Is that what you are saying?

Erica Young: That is precisely what I am saying. There is a need for clarity. We do not oppose the overall policy intent; we simply think that there is a need for clarity on the different types of third-party involvement.

Bob Doris: Is there a general consensus among the witnesses that that is the case, or do others have views that are contrary to that or additional comments to make?

Jon Shaw: I have a slight addition. We do not follow how the liability provision will be implemented. It will be really difficult to work out who has benefited. There might be situations in which both people have benefited. How will we be able to work out what the proportion is?

As far as alternative suggestions are concerned, it is worth remembering that there are more situations in which devolved social security assistance can be recovered than there are for the benefits that that assistance replaced, such as DLA and PIP. If there was liability in a more restricted number of situations—for example, if someone was liable only because there had been a failure to disclose or something had been misrepresented and Social Security Scotland could therefore take the money back—it would be much easier to decide who it was who had failed to disclose or who had misrepresented, and that would be the starting point for whom the money was recoverable from.

If we want more clarity on liability and on who should be responsible, going back to the previous DLA and PIP system in which an overpayment was not recoverable unless there had been a specific failure by somebody would certainly make it easier to identify who that person should be.

10:00

Bob Doris: I can see nodding heads—in the room, anyway. Would anyone online like to come in?

Richard Gass: I think that I heard you mention the role of advice agencies in your question, Mr Doris. I want to make it clear that we would not support the idea of advice agencies being covered as a representative in this situation. Advice agencies enable folk to make claims for benefits—we take at face value what people tell us and it should never be the case that a representative from the advice sector is held to account for that, unless there was some real charlatan and their actions were fraudulent, but let us assume that that is not the case. At the end of the day, we help folk to fill in a form, and they sign the form to say that they are happy with what is on it. Therefore, I want to clarify that advice agencies are not representatives within that definition.

My second point is about the confusion and the complication, which have already been alluded to, when money goes to a household. The situation could be further complicated if the appointee is managing a DWP benefit, such as pension credit, as well as a Scottish Government benefit, such as the adult disability payment, which will become the older person payment in the months to come. If there has been some misspending of money, how do you determine which money was spent and who benefited from the Scottish benefit as opposed to the UK benefit?

Bob Doris: It is helpful to have some real-life examples of how the provision will have to be applied in practice, so I appreciate that.

I will move on. I will turn back the clock slightly to talk about redeterminations and appeals. I suppose that this question is for Jon Shaw, because the issue was raised in CPAG's written evidence. The bill will allow for a review of a decision on overpayment liability. The legislation refers to a review, but, Mr Shaw, I think that your organisation refers to a redetermination. Are those just different words for the same thing?

Jon Shaw: No, because they are different processes. I would describe the bill as a copy-and-paste job. If you look at the proposed new sections that the bill will put into the 2018 act, they are identical to the redetermination and appeal provisions in relation to a determination of entitlement. We risk replicating the confusion in reserved benefits whereby someone must challenge separately the decision that they have been overpaid and the decision that the overpayment is recoverable. In the reserved system, because there is a unified tribunal system—we do not know whether it is the Scottish Government's intention to have that here—you can end up at an appeal that could deal with both decisions but you have to have challenged both of them for the tribunal to be able to have that jurisdiction.

When we argued that there should be a right to challenge liability, we expected that the policy solution might be to add it as a decision under section 50 of the 2018 act, so that, as part of your

determination of entitlement, you would get to the issue of whether there is liability and who is liable to repay that liability. That would then create the possibility of using the redetermination and appeals process that already exists elsewhere in the act to get to a single hearing, which would then consider whether the person overpaid. If it has been decided that there is no overpayment, you do not need to get into the question of whether there is a liability to repay that overpayment at all.

Bob Doris: That is very helpful, because I now realise that there is a very clear difference between reviews and redeterminations, which I was not aware of. Thank you for that, Mr Shaw.

If there is a review, is it unclear whether that will still progress to an appeal if that review is not successful for the individual? Is that one of the more substantive issues in relation to why redeterminations and reviews are different? I just want the committee to be clear on that point. I am sorry if I have not understood correctly, Mr Shaw, but I want to tease out the importance of a redetermination as opposed to a review.

Jon Shaw: No. I am sorry—I think that my answer might not have been very clear either. The review provisions mirror the redetermination provisions, and then there is provision to appeal against a review, which mirrors the appeal provisions against a determination of entitlement that has been placed in a separate section of the 2018 act. In essence, a legal process that is identically worded to the existing provisions will be created through the bill to sit alongside those provisions.

The policy memorandum suggested that the options were to do nothing or to create that new process, but there was nothing about the possibility of ensuring that the existing redetermination and appeal process could be utilised in relation to liability. There is 100 per cent a right of appeal—it is worded identically to the existing right of appeal, but it sits in a different place in the legislation.

Bob Doris: Okay. I think that I will be looking back over the *Official Report* and digesting that information. We will see what the Government says in response. I will move on.

Ms Young, your organisation spoke about an income threshold in relation to debt recovery. Provisions in the bill would require Social Security Scotland to look at the financial circumstances of each individual where liability has been determined, any appeals process has been exhausted and it is clear that there has been an overpayment. Why should there be an income threshold?

Erica Young: We feel that that would be the fairest, most sustainable and most efficient way of recovering lawfully due overpayments. We argue that because there is no structure in legislation or guidance as to what constitutes hardship. Social Security Scotland's debt management strategy that

"No individual will knowingly be placed into hardship"

is a vague concept that is not defined. For example, the Disability Assistance for Working Age People (Scotland) Regulations state that deductions have to be taken at "a reasonable level", which means

"a level that is reasonable having regard to the financial circumstances of the individual."

That is not further defined; there is no guidance on it. There is no guidance threshold for the percentage deduction from someone's on-going benefit.

I will give you an illustrative example of the kind of problems that that causes on the ground. We dealt with a person who had recently been released from prison and had been on remand for five months. During that time, he accrued an overpayment due to the practical difficulties in reporting changes in circumstances. The social security agency suggested a recovery rate of £195 a month. The debt was only £670. Given that gentleman's circumstances—he had just come out of prison, was dependent on universal credit and was already subject to deductions from his universal credit for an advance payment and from rent arrears and council tax arrears that had accrued during his time on remand—£195 was an entirely unfeasible level.

Such things are happening and those kinds of suggestions are being made because there is no structure. An income threshold that worked much in the same way as happens for recovery of student loans, for example, would be a much fairer and more sustainable basis for recovery of lawfully due overpayments.

Bob Doris: It is always helpful to get a real-life example, because it makes the situation real rather than our just dealing with dusty legislation, if you like. Was that repayment figure requested by Social Security Scotland?

Erica Young: Yes, that is correct. An overpayment of adult disability payment had accrued.

Bob Doris: I appreciate your concerns.

Ms Young, you said that there are no fleshed-out criteria by which the ability to pay or what a reasonable rate would look like would be determined. One option could be to provide decent guidance on that, rather than to provide an income threshold. I suspect that Ms Young would still want an income threshold. However, I ask about

guidance because income thresholds could change over time—

Erica Young: Yes—

Bob Doris: —and there is an issue of whether a threshold would be in the bill or whether the bill would provide the power for an income threshold to be set at a later date, on the basis that secondary legislation could amend the income threshold, as appropriate. However, I am conscious that any agreed income threshold might be a bit arbitrary. There are other things that might be happening in an individual's life that must also be taken into account. Are you wedded to an income threshold? If so, should that be in the bill? Might more meaningful guidance also be a way round that situation?

Erica Young: Guidance would certainly be helpful. We would seek the development of a mechanism to determine the minimum income threshold, similar to that for student loan repayments, as opposed to being prescriptive. For example, we have been looking at the minimum income standard and the minimum income guarantee and how that might work in practice as a tool to determine what the threshold would be. That is still in development. However, our thinking is more about the mechanism by which we determine what the threshold should be, as opposed to prescribing what it should be.

Bob Doris: That is helpful. Thank you.

The Convener: I invite Paul O'Kane to take us on to theme 5—appointees.

Paul O'Kane: Do the witnesses have any comments to make on the extent to which DWP appointees are already recognised in the Scottish social security system and the time that it takes for authorisation to be obtained under the Scottish social security rules?

Jon Shaw: The existing provisions that transfer people from disability living allowance and the personal independence payment to the new disability payments allow for recognition of DWP appointees, so it looks as though the bill is simply mirroring that. For example, when somebody has an appointee for universal credit and claims Scottish child payment, it looks as though the intention is to allow a temporary treatment of someone as being appointed under Scottish legislation.

There is a slight concern about the drafting of the bill. As far as I can see, it does not prescribe that somebody must be transferred into the mainstream appointment under the 2018 act or that the deemed appointment must be terminated, so it will be interesting to see what the regulations say. That is simply because the Scottish legislation allows somebody to raise concerns about an appointee, but there is nothing in the bill that indicates that there will be an ability to raise concerns if someone is not transferred into the Scottish system.

We do not have a lot of evidence on the time that it takes to appoint people, but we certainly have evidence of delays when there is no appointee. One of the distinct features of the Scottish system is that, if there is a parent who has parental responsibilities for a child and who lives with the child and is willing to act, there is no power to make an appointment. An issue could arise when parents separate and they both still have parental rights, and one of them acts for the child in relation to child disability payment. There have been long delays when the other parent has said that they want to take over because the other parent has left. There are difficulties with interacting with Social Security Scotland in such cases.

I am afraid that that is not a direct answer to the question, but it is the best example that we have of a difficulty that is caused by changes of responsibility. That is another area in which it would be helpful for clear guidance to be made publicly available so that advisers can support people to make their case and get a resolution.

The Convener: Before I move on to theme 6, I apologise to Diane Connock, because I believe that she wanted to come on Bob Doris's line of questioning. Do you still want to come in, Diane?

Diane Connock: No, it is fine, thank you. I am aware of the time pressure, so I am happy for you to move on.

The Convener: Thank you. I now bring in John Mason.

John Mason: I will ask about part 6 of the bill, which is on the provision of information. I will go first to Mr Clancy, although not for a legal point of view. Do you have any comments on the balance in the provisions in this part of the bill between the right to social security and the principle that Social Security Scotland must ensure that it gets value for money and that it does not pay out to people who should not be entitled to benefits?

Michael Clancy: Thank you for that interesting question, Mr Mason. Of course, we recognise that there is a balance to be struck between the country getting value for money in relation to the payments that are made, but we would also like to highlight the other element of the social security principles, which is respect for the dignity of the individuals who are at the heart of the social security system. Getting the right balance certainly piqued the interest of our administrative justice sub-committee when it looked at the provisions in the bill.

When one takes a look at proposed new section 87B, "Obtaining information for audit", which section 16 of the bill seeks to insert into the 2018 act, one sees that

"The Scottish Ministers may request an individual who is entitled to assistance ... to provide, within such period as Ministers specify ... information about—

(a) the individual's entitlement to assistance, and

(b) the payment of assistance to the individual."

Such a request

"may only be made for the purposes of—

(a) auditing the monetary value of error and fraud in the Scottish social security system, and

(b) carrying out corrections of apparent errors and investigations into potential fraud".

We took a dim view of the linkage that is made in the bill between an error and fraud. That certainly strikes us as being a rather harsh approach, particularly given that proposed new section 87B(7) states that the Scottish ministers can

"issue a decision to suspend the assistance to the individual",

which they can do if, under section 87B(6), the person

"fails to provide the requested information by the end of the period"

that the ministers have specified.

That is probably the crux of the issue. If someone cannot come up with the information that is being sought for an error or a fraud investigation within the time limit allowed, the person can end up having their assistance suspended. That seems a rather harsh penalty, even if there are ways to have that looked at later on in the succeeding sections of the bill. It seems strange to intermingle error and fraud in that way.

John Mason: It almost seems to be the opposite of what we normally do in the courts, which is to assume innocence until guilt is proven. It seems that we are assuming guilt until innocence is proven. Is that fair?

Michael Clancy: I toyed with that idea myself, but, of course, we are talking here about auditing the monetary value of error and fraud. It is not about saying that an individual has committed fraud; it is about looking for evidence that fraud has been committed. Those are two different things.

On what basis is the audit being made? The explanatory notes say that the Scottish ministers thought that having a sanction such as suspension of assistance was important because there was no way to get that information voluntarily. I am not well versed in extracting information from people, but I suspect that there are agencies that could give the Scottish ministers advice on getting information without their having to go to the extent of imposing such sanctions. There might be softer ways of encouraging people to provide information on the error side.

I accept that, if a person has committed fraud, they will not be happy about being investigated on the basis that there is a suspicion of fraud, but that is a different category of issue. However, even that is not necessarily a derogation from the right to a presumption of innocence. It is clear in my mind that investigating potential fraud does not undermine the presumption of innocence—it is simply an investigation. However, error and fraud should not be intermingled.

John Mason: That is an extremely helpful answer.

I will move on to Ms Connock and widen out the question. We are asking whether the balance is right between value for money on the one hand and human rights on the other. Mr Clancy raised the point that, if the system was entirely voluntary, nobody would give any information. Are there enough safeguards in place? Do you have anything to say on that, Ms Connock?

Diane Connock: If the system was voluntary, you might struggle to get enough information. However, we need to get a balance, and that is very much about safeguarding. My concern is that vulnerable people will not be sufficiently supported to participate when they are required to do so. We need to ensure that people are clear on what is being looked for and that there is not just one-off contact or a letter but that attempts are made to obtain the information on multiple occasions through multiple channels. I would also be concerned about benefits being stopped for people, especially our most vulnerable claimants.

John Mason: Do our other three witnesses have any comments?

Jon Shaw: I absolutely agree with the points that have been made so far.

Another point is that there would not need to be suspicion of fraud for people to end up losing their money. There would not need to be any indication that anything was wrong with a person's award, which makes it vital that safeguards are in place for vulnerable individuals.

If we are piling in on the principles—with which the measure does not sit particularly well—I would add that the measure is not designed for the people of Scotland on the basis of evidence and that it does not put the needs of those who require assistance first.

The safeguarding could be improved if SCOSS were to scrutinise regulations that are made under

the power. That is not currently provided for in the bill, so there would not be any independent oversight of that.

It is important that people can challenge the "good reason" provision. It is also worth looking at the drafting of proposed new section 87B(4). In contrast to the care that has been taken elsewhere on inclusive communication and making the system accessible to people, the proposed new section has a completely different style of drafting that talks about "an interview in person", which will feel to people as if they are being interviewed under caution because they are suspected of fraud.

I realise that that issue might partially be mitigated by the way in which the system is implemented, but I come back to the comment that we could not have such a system without making it compulsory and using the threat of suspension of benefits. We have been told that

"it would not be possible to get a statistically robust sample"

without doing that. What approaches have been tried? What else are we looking at? We will have evidence coming through the system anyway on determinations and the extent to which they are overturned at redetermination and appeal.

With disability benefits, the criteria are very subjective, so, if two decision makers reach different decisions about the same person, that is not an indication of error in the legal sense, or fraud. There are a lot of issues with the measure, particularly the lack of prior consultation.

John Mason: That is helpful. My use of the word "audit" includes a lot of ways of auditing a figure in accounts, for example, but it would certainly not always include cross-examining somebody.

Unless either of the other two witnesses wants to come in, I am happy to leave it there. I think that Ms Young does.

Erica Young: I will just add a few words. We are in danger of exaggerating a problem that is quite well and easily dealt with by the current law on fraud and official error.

To put the issue in context, a recent freedom of information request, which was answered in January of this year, indicated that, in 2023, there were 3,509 allegations of fraud. In October 2023 alone, there were 10,145 ADP applications—that was the figure for just one Scottish benefit in one month. That gives a sense of the scale. The issue is tiny.

The critical point about the mix-up between error and fraud in the provisions simply must be addressed. The provisions also highlight the need for a safeguarding structure within Social Security Scotland. The fact that that does not currently exist in the same way as it does for certain other reserved benefits is a concern. The provisions have highlighted the gap that exists there, which needs to be addressed.

For example, the claims process for adult disability payment can have an enormous impact on people, so safeguarding mechanisms are required in order to keep people safe. Adult disability payment is used for lifeline purposes, such as help with additional energy costs, travel that prevents social isolation and other ways of managing a condition, so there is a natural requirement for some kind of safeguarding process.

The Department for Work and Pensions was forced to implement an entire system of advanced customer support leads when someone was about to lose a benefit as a result of such provisions. It did so to prevent—to be absolutely blunt—suicide and serious self-harm. We do not want Social Security Scotland to end up in a situation in which it is forced to implement such a system retrospectively because horrific things have happened.

John Mason: Would the counter to that not be that Social Security Scotland is built on different foundations? Given that it is meant to be a more caring system, does there have to be so much checking?

Erica Young: I absolutely appreciate that, but because of the nature of the service that is being delivered, it is very important that we have the right processes in place to capture people who are at risk. We are talking about some of the most acutely vulnerable people in our society. That is not to make any sweeping generalisations about who accesses the benefit, but it is factually correct to say that it will incorporate some of the most vulnerable people in our society.

Richard Gass: I have a comment to make on the safeguards. Proposed new section 87B(5) of the 2018 act says that ministers "may" make regulations—not that they shall make regulations—to create exemption categories. That should be tighter; there should be a requirement to make regulations to define who would be exempt. I hope that an exempt category would include anybody who had been to an appeals tribunal, because any case that has gone to an appeals tribunal will have been adjudicated on at a higher level.

John Mason: Could the circumstances not have changed after the appeal?

Richard Gass: I guess that there could have been a change in circumstances. It would depend on the timeframe that was audited. However, if somebody had recently been to an appeals

tribunal and had gone through a difficult route to get their entitlement, I do not think that it would be fair on them to find that they were subject to another process. Folk would feel that they were being picked on. We can probably avoid such situations by assuming that stuff that has recently been considered at a tribunal ought to be correct.

There is a right to ask that a request for information be withdrawn for "good reason". I hope that one good reason would be that such a request had had an adverse effect on someone's health. I recognise that there is a duty to do the audit, but, in the process of doing the audit, let us not make vulnerable folk more vulnerable by losing their entitlement.

John Mason: That was helpful. Mr Clancy, do you want to say a final word?

Michael Clancy: Yes, if I may. It would be remiss of me not to point out to the committee the existence of Social Security Scotland's "Code of Practice for Investigations", chapter 3 of which sets out what a person should expect if they are being investigated. It says that one of the things that they should expect is to be interviewed under caution. That applies in a fraud investigation.

Looking closely at proposed new section 87B, I do not think that it makes reference to any kind of caution. It has already been highlighted that proposed new section 87B(4) requires there to be an interview in person, a telephone call and so on, but there is nothing about the statement of rights that someone should expect to have. We do not want to impugn—I am sure that the Scottish ministers have no intention of impugning—the presumption of innocence, so people ought to be put on their guard.

10:30

To a certain extent, there is a recognition that the Scottish ministers are treading cautiously here—I draw attention to proposed new sections 87D and 87E, which relate to, respectively, a right to support for a response to a request and a right to advocacy. It is important that we understand that such things are easy to say in a statute but less easy to ensure when it comes to the practical experience of people on the ground.

John Mason: That is helpful. I think that we will explore that further in the future.

The Convener: I am conscious of the time, so I will move on to part 7 of the bill. Do witnesses agree with the principle of compensation recovery, and is it consistent with the social security principles? I will go to Diane Connock and Richard Gass.

Diane Connock: There is a responsibility to manage public funds, and that is how things operate with DWP benefits at the moment. That needs to be clearly explained to claimants by their solicitors and their advocates, because people could be expecting money and have spent it, not realising that the money has to be paid back at that stage. I definitely think that that needs to be explained clearly, but I agree that, within the principles of social security, the compensation should be paid back.

Richard Gass: We agree that there should be some compensation recovery, but it should be done at the point of settlement, so that the lawyer who is seeking the compensation on behalf of the claimant has an amount built into their award on the basis that it will be recovered to Social Security Scotland, and so that any on-going benefits are not affected. It would be a one-off thing, almost invisible to the claimant, and, on that basis, it would replicate what the DWP does. That would be reasonable.

The Convener: On part 8 of the bill, what further regulations should be added to SCOSS's remit and why?

Jon Shaw: We think that, in principle, anything that affects an individual's rights or the processes for making decisions should be within SCOSS's remit. On the rights point, that would include the information for audit provisions.

Compensation recovery is a slightly different case, given that it does not look like it will affect the individual, but, in the reserved system, that is scrutinised by the Social Security Advisory Committee, so we are not sure what the argument would be for not including regulations about compensation recovery. There should be a very good reason for not including that in the remit, and nothing to do with an individual's rights or the processes involved in decision making should be excluded.

The Convener: We move to theme 9, which is the principles of social security.

Katy Clark (West Scotland) (Lab): There has already been reference to the principles in relation to compensation recovery, but we have heard a number of examples of aspects of the proposals that do not seem to adhere to the statutory principles and seem to simply mirror the approach taken by the Department for Work and Pensions. Jon Shaw, to what extent does the bill as a whole align with the social security principles?

Jon Shaw: That is a difficult question. There is definite potential to change the basis for paying the Scottish child payment, which could contribute to reducing poverty and promoting equality. However, as we have discussed, that depends on how many of my laundry list of asks are actually implemented by the regulations.

We have covered very well the specific sections that appear to run counter to some of the principles in the way in which they have been consulted on and implemented, so it is hard to come to a view on the bill as a whole. I would probably say that it is a mixed bag. Some sections are undoubtedly positive, whereas others raise concern.

Katy Clark: Individuals getting more money is clearly an improvement—that is a massive step forward. However, putting that to one side, with regard to the way that the process works, would the bill improve the client experience for claimants?

Jon Shaw: It would definitely be an improvement with regard to some of the technical aspects. For example, sections 4 and 6 are, uncomplicatedly, improvements to the system.

I am conscious that I should have said something about section 7 that is a bit technical. It is something that we called for, so I will be slightly cheeky and ask the convener whether she will indulge me for 30 seconds. The drafting could be improved in order to improve the client experience, particularly with regard to the requirement that there is an error—I am using the word "error" in the legal sense—before an appeal can be lapsed. However, actually, we see that lots of decisions are changed just because two decision makers can come to a different view on the facts. Therefore, by introducing a requirement for an error, you create a barrier to the decision maker, who will then put that to the individual and say, "Can you explain why this is an error?" Given that we are using that word in a legal sense, that will be difficult.

The other thing that will obviously be detrimental to the client experience is that, once an appeal has ended, if somebody decides that they want to mount a further challenge, having taken advice, they will need to go back to the redetermination stage before they can get back to the appeal stage. A determination will be looked at three times, and we are suggesting that a fourth redetermination would be needed before someone could get back to the appeal stage. Such changes will not improve the client experience, but some of the technical changes will be incontrovertibly positive for individuals.

Katy Clark: I have no doubt that we will look carefully at that later.

Do any of the witnesses want to flag up any provisions that have not been mentioned as ones that would make the experience worse? Does the committee need to look at any other aspects to improve the legislation?

Richard Gass: One area that is perhaps missing from the bill is a review of short-term assistance. I am sure that CPAG has already highlighted that to Social Security Scotland and maybe even to the committee. When someone claims short-term assistance pending an appeal, that is to their detriment, because short-term assistance does not count as a qualifying benefit for the premiums that they would get on their DWP benefits. Therefore, they could win their appeal but they would not get the backdated DWP money. The easiest correction would be for the short-term assistance to be recovered and replaced by the benefit that was the subject of the appeal. Jon Shaw might want to say more on that.

Jon Shaw: Richard Gass summarised the issue very well. To be perfectly honest, we are struggling to be clear about what the officials think that the situation is with short-term assistance. It is clear that it is not a qualifying benefit for either devolved or reserved entitlements in terms of the law. We could certainly write to the committee with more detail on that if you wanted.

Katy Clark: Thank you.

Michael Clancy: I was wondering about the balancing act that needs to be done to achieve compliance with the social security principles and everything that we have already talked about in relation to the bill. One feature of the social security principles is the declaration that

"social security is itself a human right and essential to the realisation of other human rights".

As we will soon be entering an epoch in Scotland when human rights are pushed higher and higher up the agenda, with the prospect of a Scottish human rights bill coming to the Parliament later this year, it is important that we get this right—no pun intended. That will become far more visible with the use of legislation such as the Social Security (Scotland) Act 2018.

It is important to remind ourselves of what is involved in the connection between social security and human rights. The UN High Commissioner for Human Rights set out the key elements of

"availability, adequacy, affordability and accessibility".

If the committee is going to use that as a test for the extent to which the bill complies with that idea of social security as a human right, that could be a route forward for you.

The Convener: That is very helpful.

Jeremy Balfour: I have a couple of technical questions, and I will perhaps start with you, Mr Clancy.

Due to timing, the Delegated Powers and Law Reform Committee has not fully examined the delegated powers in the bill, but they are quite far reaching and wide. From a legal perspective, are you satisfied that the balance is about right

regarding the powers that have been delegated to the Scottish Government, or should we take a bit more evidence on that?

Michael Clancy: You raise an interesting question. I have not looked at the delegated powers provisions with that level of scrutiny. I can undertake that we will remit that to our administrative justice sub-committee, and we will see whether we can write to the committee in the not-too-distant future. For personal reasons, I will not be particularly involved in that, but I am sure that the committee will be able to consider that successfully soon.

Jeremy Balfour: I am grateful. Thank you for that.

Secondly, one of the issues that we debated long and hard when the Social Security (Scotland) Bill was going through Parliament was the social security charter. On the question of how it has worked in practice, has the charter made any significant difference to the client experience? We debated whether the charter should have any legal basis. Four or five years on from the Social Security (Scotland) Act 2018 being passed, should the charter have a legal status, or is it sitting in about the right place?

I appreciate that that question is slightly left field, so if you wish to take it away and write back to the committee, I would be happy with that if you do not have a view on it today.

Michael Clancy: If that question is addressed to me, then yes.

Jeremy Balfour: It is for anyone: I open it up widely.

Michael Clancy: Excellent. I will leave it to other people to reply, then.

The Convener: That is the correct answer.

Marie McNair wishes to come in. We will conclude our business after that.

Marie McNair: Richard Gass, you seemed to want to say something earlier about how the First-tier Tribunal for Scotland is operating in relation to the Scottish benefits. I believe that you were cut off. You can come in on that briefly, if you want.

Richard Gass: Thank you. I thought that I had missed my slot on that.

We have some practical problems with the First-tier Tribunal—not so much with the tribunal itself, but with getting to the tribunal. There is an insistence by Social Security Scotland that mandatory redeterminations and appeals be made using the correct form. We have a standard letter that we use in those situations. It has our contact name and details and lays out a lot of stuff, which speeds up the whole process. However, we are finding that the mandatory redetermination letters that we send in are being returned with a requirement for them to be on a specific form, and the appeal letters are not being actioned. As far as I can make out, the legislation does not require those letters to be on a prescribed form.

That was in relation to a question in the SPICe paper about changes that could be made that did not require legislative change. That one would allow folk to voice their redetermination or appeal in the form that they prefer.

The Convener: That is helpful. Apologies for missing that question earlier, Richard.

That concludes the evidence session. I know that it has been particularly long, so I thank all our witnesses. You have given us really useful content to support the scrutiny of the bill.

Next week, we will continue to take evidence on the bill, with a panel focusing on the concerns of specific groups of potentially vulnerable clients who would need support to navigate around the system.

That concludes our public business. We will now move into private to consider the remaining items on the agenda.

10:46

Meeting continued in private until 11:29.

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