The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SOCIAL SECURITY COMMITTEE

Thursday 28 September 2017

Session 5

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CONTENTS

SOCIAL SECURITY COMMITTEE
18th Meeting 2017, Session 5

CONVENER

*Sandra White (Glasgow Kelvin) (SNP)

DEPUTY CONVENER

Pauline McNeill (Glasgow) (Lab)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Jeremy Balfour (Lothian) (Con)
*Mark Griffin (Central Scotland) (Lab)
Alison Johnstone (Lothian) (Green)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Ruth Maguire (Cunninghame South) (SNP)
*Adam Tomkins (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Nicola Dickie (Convention of Scottish Local Authorities)
Richard Gass (Rights Advice Scotland)
Rob Gowans (Citizens Advice Scotland)
Simon Hodge (Scottish Association of Law Centres)
David Semple (Public and Commercial Services Union)
Paul Smith (Law Society of Scotland)

CLERK TO THE COMMITTEE

Simon Watkins

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Social Security Committee

Thursday 28 September 2017

[The Convener opened the meeting at 09:00]

Social Security (Scotland) Bill: Stage 1

The Convener (Sandra White): Good morning, everyone, and welcome to the 18th meeting in 2017 of the Social Security Committee. I remind everyone to turn off their mobile phones, as they interfere with the recording system. I have received apologies from Pauline McNeill MSP and Alison Johnstone MSP.

Item 1 on our agenda is the continuation of evidence on the Social Security (Scotland) Bill. We will have two panels this morning. I welcome our first panel: Paul Smith, who is a member of the administrative justice committee of the Law Society of Scotland; David Semple, who is chair of the Scotland committee at the Public and Commercial Services Union; and Nicola Dickie, who is policy manager at the Convention of Scottish Local Authorities.

I will kick off with a general question before I open up the discussion to other members. In previous evidence sessions, we have asked our witnesses for their views on the bill's principles and the proposed charter. What are your views? What impact, if any, will the principles and the proposed charter have on the organisational culture of the new social security agency?

Paul Smith (Law Society of Scotland): Good morning. The Law Society warmly welcomes the fact that the principles surrounding the new social security arrangements in Scotland have been placed on the face of the bill. When they are supplemented by further information in the charter, we feel that they will lead to a fairer and more just social security system than currently exists. We would have liked to see included in the principles an additional point about preserving the integrity of social security in the new system in Scotland. Other than that, however, we warmly welcome the principles. They will probably also help to foster a better, more mutually respectful relationship between agency staff and the customers that they deal with day to day.

Nicola Dickie (Convention of Scottish Local Authorities): COSLA remains supportive of the bill's principles and the approach that has been taken to devolved social security to date. The principle that social security is a human right is one that local government recognises is important, and we note the Scottish Human Rights Commission's narrative about the key elements being things such as the availability, adequacy, accessibility and affordability of social security. Those elements will all have to be determined and evaluated so that social security being a human right is genuinely borne out.

We are also supportive of the Scottish ministers ensuring that individuals are given what they are eligible for, and we think it is really positive that that principle is on the face of the bill. That will go some way towards assisting individuals to claim their full entitlement. Local government is actively involved in making sure that everyone claims what they are entitled to from the various elements of social security.

Our membership has pointed to the fact that the provisions could be strengthened by making the principle a bit stronger around people having access to independent advice and support to enable them to get what they are eligible for. We know from our work with the most vulnerable in our communities that those who need the most help are the ones who are least likely to claim what they are eligible for. That is one thing that local government is interested in strengthening and expanding.

David Semple (Public and Commercial Services Union): Like my colleagues who have already spoken, PCS very much welcomes the inclusion of the principles on the face of the bill. For us, the key issue is not so much the principles, on which there does not seem to be a huge amount of disagreement between us and ministers, but how things are implemented.

We welcome many things about the bill—the commitment to a face-to-face service and the dignity and respect that that can provide; the plans for determination without application, which, from the perspective of colleagues who work in the Department for Work and Pensions, go back to the good old days of the pensions local service and benefit uptake work, which was the positive face of social security; and the open-handed way in which the Minister for Social Security and social security agency colleagues have worked with the union to bring forward implementation.

There are a range of ways in which the bill could give better impact to the principles, and I will mention a few of those. A commitment in the bill to the exclusion of private providers is a key issue. I do not need to tell the committee about the impact that private providers have had in relation to reserved benefits and the destruction of the reputation of the Department for Work and Pensions.

We would welcome the inclusion in the bill of a commitment to an annual uprating of benefits. Decoupling the annual uprating from being in line with the retail prices index and inflation has been a significant move by the Westminster Government.

We also call for a commitment to mitigate sanctions using the short-term assistance that is included in the bill, a commitment to vigorous scrutiny—having spoken to the minister, I know that she is far from opposed to that, but it is for the committee to decide how best to give force to such scrutiny—and a commitment to all devolved benefits having a payment pending appeal process, which is a step beyond what the bill includes at the moment. The bill allows for short-term assistance, but it should go back to the system before the Welfare Reform Act 2012, when claimants could continue to receive their benefits until their appeal, if a decision was made against them.

Those commitments would give much greater force to the principles, which we broadly welcome.

The Convener: Thank you very much. We will investigate that further as committee members ask their questions.

Mr Smith, I am interested that you consider that the charter will foster a better relationship with the clients or customers. There are charters in other public service bodies such as health boards, although I do not know whether there are any at the DWP. Will you elaborate on what you mean by fostering better relationships? Will the charter be better than charters that we already have in other public service bodies? Perhaps our other witnesses will also want to say something about that.

Paul Smith: The basis for the point that I made was that, over time, as the administration of benefits has become more centralised and been taken out of the local area, the gap in the face-to-face relationship between DWP staff and the clients who they deal with has become ever wider. As a result, contact between them is now largely by post, telephone or email. As David Semple suggested, that has led to a breakdown in the relationship between the staff and the clientele, which needs to be fixed. It would not be overstating the position to suggest that, at the moment, there is a relationship based on mutual distrust. That should be turned around so that there is a mutually trusting relationship between the staff and the clients who they deal with. To bring that about, a good deal of work will be needed by way of customer service training, as well as the other training that staff will need.

David Semple: I absolutely agree with that. However, we cannot have a conversation about distrust without talking about sanctions, which are what began the distrust between claimants and staff, who have always been there and believed that their job was to support the claimants.

Nicola Dickie: I do not disagree with anything that has been said. COSLA welcomes the intentions of the charter. Anything that can foster a good relationship between the most vulnerable in our society and those who are charged with helping them to claim social security seems a good thing. In conversations with local government officers, they have been clear to me that the charter should be a two-way process and it should have rights and responsibilities. That is the way to breathe life into it, so that staff at the agency do not see it as something to beat them over the head with. It is the opposite: it is a contract between them and the people who they are serving.

There should be lots of plain English in the charter. It should be usable. We should be able to display it and people on both sides of the table—those who are claiming assistance and those who are helping with it—should be able to buy into its ethos. There is a real opportunity for us to do that, and it helps that the bill commits ministers to co-producing the charter with those who will use it.

We would emphasise that there is an awful lot of experience across the public sector landscape in Scotland. It is not only people who claim benefits and those who are charged with giving them out who should be involved; everyone in the public sector landscape should bring what they know about relationships with customers to the forefront. We are absolutely in agreement, and we stand ready to help from a local government perspective.

The Convener: Thank you very much. That is certainly what I heard when I spoke to staff and claimants in jobcentres and so on. Technically, they are not called jobcentres now, but you get the drift.

Ben, do you want to come in with a supplementary question?

Ben Macpherson (Edinburgh Northern and Leith) (SNP): Yes please, convener. For clarity and transparency, I note that I am no longer a non-practising member of the Law Society of Scotland, but I am still on the roll of Scottish solicitors.

Paul, your point about the principles of general acceptance and agreement was really interesting. Your proposal for ensuring the integrity of the system has not been made elsewhere. Would you like to elaborate on exactly what you mean by that and why you think it is important?

Paul Smith: It goes back to the question about rights and responsibilities. As well as ensuring that everyone who is entitled to a benefit actually goes

on to receive it, it is important to recognise the inherent risks of fraud and overpayment. Over the years, the Comptroller and Auditor General has refused to sign off the DWP's accounts because of the unacceptably high level of fraud in the system. The majority of the principles in the bill relate to how we make the system better for users. The Law Society feels that there is also a need to recognise the risk to expenditure and the taxpayer.

Ben Macpherson: Thank you for clarifying that.

Ruth Maguire (Cunninghame South) (SNP): May I ask a tiny supplementary, convener?

The Convener: Yes.

Ruth Maguire: Is it not the case that fraud makes up a tiny percentage of expenditure, and that administrative errors make up a bigger proportion?

Paul Smith: Yes—absolutely. I think that the figure is about 3 per cent of overall expenditure, which is, as you say, a very small amount. However, it is concerning that the Comptroller and Auditor General will not sign off the accounts because of that.

David Semple: I add that we also have to take into account the amount of benefit underpayment in the system at the moment, which runs to billions of pounds.

The Convener: Thank you for that.

Adam Tomkins (Glasgow) (Con): I want to ask the panel two questions, but before I do so, may I pick up on something that Mr Semple said? I saw in PCS's written evidence that it is strongly opposed to the involvement of the private sector in processing disability living allowance and personal independence payments. Is the union equally opposed to the use of the private sector in the delivery of devolved employability services?

David Semple: Yes. We have spoken about that with the minister and the implementation colleagues who are involved in employability work. For context, I want to be clear that our opposition is not purely ideological; it is based on performance. None of the privatised employability contracts have had the same delivery outcomes as previous state-run programmes. If we go back a little way—this was two Governments ago—the outcomes of the new deal in terms of finding people employment were 0.5 per cent higher than the equivalent in the private sector.

Adam Tomkins: I appreciate that clarification. Thank you.

The first question that I want to ask the whole panel is about the structure of the bill, and in particular the relationship between what it is proposed will be in the bill and what it is proposed will be done by regulations thereafter. Last week, the committee heard from eight witnesses, and the note from the clerk says that there was a universal view that the balance between primary and secondary legislation is not right. Do you agree? If you do, what should be in the bill that is not in the bill?

09:15

Paul Smith: As you will see from the Law Society's submission, we did not have any particularly strong issue in this area. However, having seen the responses from people who have submitted to the committee, I think that the key issue would relate to the need for some sort of independent oversight of the system. Many people advocate putting in the bill a body such as the Social Security Advisory Committee, and that is a good idea. Whether it should be a body that looks like the SSAC or a better body is for the Scottish ministers to decide.

The general view is that anything that is in the bill becomes difficult to change thereafter, whereas any provisions that are in secondary legislation can be changed. At the same time, I recognise others' concerns about the scrutiny of secondary legislation. Perhaps that issue should be considered further.

Adam Tomkins: I am sure that we will come to questions about advice and scrutiny in due course. Perhaps I did not make my question very clear. I am particularly interested in whether the rules for the eligibility and operation of the devolved benefits are appropriately left to secondary legislation, as the bill proposes, or whether we should replicate existing United Kingdom legislation and have much more detail about eligibility and operation of the benefits in the bill so that we can scrutinise it as the bill goes forward. I should probably have made that clearer.

Paul Smith: All that I would say in response is that I need to stick by what the Law Society says in its submission. The current level of detail in the bill is more or less right.

David Semple: We concur. Broadly speaking, the balance between the two is right. That is not to say that other things should not be included in the bill. I have already mentioned the uprating of benefits, which I presume will be included in the secondary legislation when the regulations are devised. I would prefer that to be stated up front in the primary legislation.

There are a number of other things that we want to be included. The process for mandatory redetermination is controversial, and we argue that it replicates too closely what is included in the reserved benefits. Changes should be made to that in the bill. In general, however, the balance between the two is fine.

Nicola Dickie: From a local government perspective, we understand the rationale for much of the nuts and bolts being in the secondary legislation. That said, I agree with David Semple that some things, if they are to be applied consistently across the whole of devolved social security—things such as uprating and residency requirements—should be in the bill, and we were quite surprised that they were not included.

Another aspect is backdating. When universal credit was introduced, full-swoop backdating went from something that was quite long to one month. We would see some benefit in putting things such as that into the primary legislation. That is not to say that we do not understand the reasoning behind putting some stuff into secondary legislation.

The other thing is that, if the parliamentary process means that it takes three or four years to scrutinise this, we might well end up with backdating for one benefit being entirely different from backdating for another, just because of the way the parliamentary process works. The Scottish Government has been clear that devolved social security is an opportunity to simplify the system, but it might look a lot less like simplification if that is how things pan out.

Those things are worth another pass.

Adam Tomkins: My second question concerns the power to create new benefits. We know that section 45 of the bill includes a provision for the top-up power, but there is no section in the bill that enables the Scottish ministers to create new benefits. Is that an omission that, in your view, should be rectified, or is that okay?

Paul Smith: I do not think that the Law Society has a strong view on that, and neither do I, personally.

David Semple: We undertook a huge degree of consultation with members in the Department for Work and Pensions on precisely these kinds of issues. Some of our members harked back to previous benefits and argued that there were advantages to them. Arguably, in any area that is not covered, you could say that there should be a space for the Scottish ministers to enact a new benefit. However, that is surely something that would need to come back to the Parliament for further discussion, scrutiny, public consultation and so on.

Nicola Dickie: I agree with David Semple. That provision is not in the bill but, in the grand scheme of things, it might be something that is worth another look at a later date. However, what we are hearing is that the safe and secure transfer of powers is far more important than having a conversation about new benefits. That is certainly what is exercising the minds of people who are supporting vulnerable customers on the ground.

Paul Smith: Listening to colleagues, I have had a further thought. We are talking today about a system that has not yet been fully devolved. It is not difficult to imagine that, with greater devolution of powers from the UK to the Scottish Government, social security will be devolved entirely to the Scottish Parliament. That makes me think that it might be helpful to include in the bill the power to create new benefits that suit the needs of Scottish people.

The Convener: The evidence that we are hearing in the committee is that it is very important that the transition of powers goes smoothly for the people who are accessing benefits.

Jeremy Balfour (Lothian) (Con): We have had quite a lot of submissions and discussions about independent advice, how it should work, whether it should be provided for in the bill and, if so, what those provisions should be. I would like to hear views on that and on how it should be funded. Should there be a special Government grant? Should it be similar to the legal aid system that we have at the moment?

My second question is aimed at David Semple and is about the involvement of private sector organisations. I assume that we all want to have in place the best possible service for claimants. We can have a debate about whether that is happening at the moment, but, in principle, why could a private company that trained its staff properly and had a proper chain of accountability not be able to provide that service as well as the public sector? Is it simply because a company is private that you are opposed to its involvement? I am not saying that the system is working at the moment; I am asking whether, if it could be shown that a private sector company could provide the service as well as the public sector could, you would still be opposed to its involvement.

David Semple: I will answer the second question first. I do not believe—no evidence has ever shown me or my colleagues across the union—that the private sector can deliver what the public sector can deliver in that regard. I suppose that comes down to a matter of motivation. The motivation of the private sector is to extract the maximum amount of money from a contract in order to make a profit, whereas the motivation of the public sector is always to deliver a quality service. With regard to any private sector service provision under the DWP—whether it be jobseekers allowance telephone lines, some of which are run by Capita, the employability contracts, the situation with healthcare providers and PIP claims, and so on—there is a continual issue around quality.

There are continual issues with staffing, investment in staff training and so on. The service is never delivered to the same standard as the DWP service, which is why—repeatedly and routinely, for all private contracts—DWP staff end up being moved across to the private sector provider to support its delivery because it cannot deliver the service by itself. I think that that comes down to the private sector motive being profit as opposed to public service.

To respond to the more general point on independent advice, we do not have particularly strong views on that. We would say, without wishing to denigrate in any way the excellent work of many of our colleagues in the independent advice and guidance sector, that such advice is required these days because of sanctions and the distrust between DWP staff and claimants. If there were no sanctions regime, claimants could get that advice from DWP staff. That would be the ideal way to proceed, bearing it in mind that I believe that a lot of services should be delivered purely as public services. In the fullness of time, we should have all those services delivered at one point by the public sector.

Jeremy Balfour: Twenty years ago, when DLA was introduced as a new benefit, there was as much representation at tribunals as there is for PIP these days—in fact, there was probably more. Are you saying that people will not need independent advice under the new system if we get it right?

David Semple: No, sir. Obviously, we want people to have as much opportunity to get as much advice as possible, and there is definitely a role for the independent sector in that. However, people would not need to go to independent providers to ask about small things such as eligibility rules and how to claim a benefit, because they would not be afraid to walk into whatever the Scottish equivalent of a jobcentre will be to get that advice.

A few years ago, it was the case that claimants would come in with no idea about what they were eligible for or what to claim. A member of staff would sit with them and fill in the claim form. That was 40,000 job cuts ago. If we went back to having a properly staffed public service, people could get that level of support from it. That is not to take away the role of the independent sector in tribunal representation and so forth, because in those circumstances people are appealing against decisions that are made by DWP staff.

The Convener: Does George Adam want to ask a supplementary before the other witnesses come in?

George Adam (Paisley) (SNP): Yes. Those points go back to an issue that we were discussing earlier.

I am sorry—I forgot to say good morning to the witnesses.

Paul Smith said that there is a culture of mistrust between claimants and the DWP. The bill is about trying to create the type of atmosphere that David Semple is talking about, in which a claimant will get the opportunity to sort things out at that level.

On the subject of advice, I know, as a former local councillor, that local authorities already have a duty to ensure that people have access to such advice. If a requirement was placed in the bill, would that not involve, to a certain degree, the centralisation of independent advice? That would affect delivery in local communities, especially given the differences between rural and urban communities. Is not local government best placed, therefore, to continue to provide the types of advice services that they already provide?

There are two sides to my question, but it is all about independent advice.

The Convener: Does Nicola Dickie want to come in on that, given that George Adam mentioned local government?

Nicola Dickie: From a local government perspective, we believe that, regardless of how well we do in making the system much better for people to navigate, if we are to ensure access to social security as a human right, people must be able to access independent advice.

I agree with what David Semple said. If we design good processes, people will not necessarily have to seek help from advice agencies to fill in a form as they might do at present. People would be able, through whatever means they find accessible, to navigate the system themselves. However, there will be a point at which, regardless of how we set up the agency, and with the best will in the world, some people will have to be told, “I am sorry, you are not entitled” or “You don’t qualify”. At that point, the person surely has the right to step outside and access independent advice and support.

Mr Adam’s point is correct—local government does have internal welfare rights teams. In recent years, the vast majority of local authorities have moved those teams into the realm of social work and they have become advocates for the customer. How we do it and whether the Scottish ministers should allow local government to commission that support locally is a different conversation. Our principle is that if the agency is coming in and it is expected that people will require advice and advocacy, someone has to pay for that. I am sure that some members will have

visited the advice and advocacy projects that are running in Scotland and will know that there are queues of people accessing them.

09:30

We have to be aware that there are two things at play. In principle, do we think that people accessing devolved social security will need independent advice and support? Local government would say, "Yes, they do". Then there is a conversation about the best way in which to deliver that. The local government take on that would be that those who are closest to the communities are in the best place to decide how and when that advice and support should be provided.

Paul Smith: I agree with everything that Nicola Dickie and David Semple have said. Over the years, and especially in the last 20 years, the local advice sector has been squeezed year on year, with the result that it is struggling to meet the demand placed on its services. However, it is heartening to see the minister's announcement about providing better face-to-face contact with clientele at the very beginning of the claim. If you get things right from the beginning there will be fewer cases at the end that have problems that need to be resolved.

We already have a fairly well established network of advice givers across Scotland. We could look at how they might be better co-ordinated. We also need to look at how those services are funded and think about what kind of demand is likely to continue to come to their doors once the new arrangements are fully in place.

On the question of independent advice, Mr Balfour mentioned legal aid. As the committee probably already knows, there is currently no provision for legal aid to take an appeal to the first-tier tribunal or the upper tribunal, unless a case is of such complexity that the upper tribunal judge suggests that legal aid should be provided. However, that is the exception to the rule.

Tribunals were never intended to be overly formal forums for decisions—they were meant to be informal, quick and cheap in comparison to the courts. However, as we know, over the years the law becomes more complicated and in reality people need legal advice.

David Semple: I will respond to Mr Adam's point. I do not disagree that my colleagues in welfare rights organisations across local authorities have an important role to play in the system. On delivering to both rural and urban communities, we welcome the commitment by the minister to have a presence across communities in Scotland and a face-to-face service to allow the new social security agency to interact with claimants in such a way. Whether that involves the agency having its own premises or being co-located in local authority premises is a discussion about resources rather than about the principle. We support the principle.

Ruth Maguire: I want to tease this out a bit. When we talk about advice and advocacy what is brought to mind is an outside organisation. However, we heard last week that informal advocacy that is sought out by the person who is entitled to the benefits is equally powerful.

I think that David Semple has already touched on this, but is it not the case that if we change the relationship between the agency and the people entitled to benefits we can be just as effective? I was struck by a local authority worker's comment that where they once used to do income maximisation they now did income defence. Surely if we get the agency's relationship right and ensure that those who work in it are empowered to maximise people's entitlements, the need for the formal aspects will be reduced.

David Semple: I absolutely agree. We have already discussed the need to get the culture of the organisation right, and I think that that is crucial.

However, as far as culture is concerned, I point out that new DWP staff are inducted with the idea of eradicating poverty. It is all very well to say the right words, but if you do not have the resources, you will not, even with the best will in the world, deliver the outcomes. With regard to staffing, for example, you should not be running around, doing 15 cases instead of the three that are appropriate, and you should be giving full support to the people involved. After all, for a lot of our staff, these are people, not just numbers on a page.

Paul Smith: We are talking about a culture and a mindset. At the moment, the emphasis appears to be on quantity rather than quality, and that needs to change.

Nicola Dickie: I do not disagree with my colleagues on this. I go back to the principle of social security as a human right. In my view, if that is the principle and if we know that people need help to access that right, the provision of access to independent advice should be a principle, too. I absolutely take the point that if we design good processes and if there is a culture and ethos of doing things the way in which Scotland wants them to be done, that will go some way towards dealing with lower-level tasks such as form filling and so on.

Ruth Maguire was absolutely right about local government. It has been a long time since we in local government have been able to prioritise what we want to do with income maximisation, because we have had to spend a long time dealing with

potential service failure elsewhere in the public sector.

For me, it comes down to two questions. Do we agree with the principle that if people are to access what is a human right they will need support? If so, what are the ways in which we can take that forward? I know of a number of ways, and all of the things that have been mentioned will definitely be relevant.

The Convener: Mark Griffin has a supplementary, but I think that he will then ask some other questions.

Mark Griffin (Central Scotland) (Lab): I want to come back to the point that, if we can get the culture in the agency right, the people who come through it will not have as great a need for independent advocacy and advice. Of course, even if the culture is right at the beginning, that does not mean that it will be right in perpetuity.

We have spoken about the system at the DWP, where a political change has led to greater need for independent advocacy and advice, and it might well be that, regardless of how well the new agency is set up, a change in Government or a minister who goes in the direction of reducing the benefits bill and charges the chief executive of the agency with altering its culture might lead to more of a need for independent advice and advocacy. If we are to safeguard social security as a human right, regardless of the culture of the organisation, we should ensure at the outset that people have a right to independent advocacy so that there is no abuse of state power and the right of the individual is always protected. The way to do that is to put it in the bill.

David Semple: I agree that a change of Government or priority can change the culture of any organisation, but that situation is not specific to the proposed social security agency; it is also true of organisations that have to deliver welfare rights, which have also been subject to cuts. Cuts to the legal aid budget, local authorities and so on have driven changes to the organisations affected, because they do not have the resources to deal with the claimants as they would like. The key priority is for everybody in the room to be committed to properly funding the organisation as well as independent advice and guidance.

I do not have a horse in the race about whether the provision of advice should be enshrined in the bill but, on the idea that the culture might change, we should set everything in place at the start to make sure that it does not change. That should be a key focus of the bill.

Nicola Dickie: Mark Griffin spoke about how things might change in future. I note that the bill includes a redetermination process. If you spoke to independent or local government welfare rights teams and advice teams, I am sure that they would tell you that they spend an awful lot of their time helping people to navigate the current mandatory reconsideration process. We recognise and are totally on board with the ideas about culture change in an organisation, but the bill as drafted does not do away with the fact that people might still have to have an internal review by the Scottish Government or the agency and then have to move to another stage. Right away, we have designed in an aspect that means that we are already seeing significant spikes in the services that we provide.

Marrying up the two things is important to us as we move forward. There is a balance to be struck between making the processes good and usable and ensuring that people get the right outcomes. There is also a requirement to note that people will want to step away, in the same way that they often step away from local government. People might not want to come to local government welfare rights teams. They might want to go independently, and that is why local government does a bit of both. We do what we do internally, but we also fund external services because we recognise that, at some stage, people will want to step away from services that are provided by local government.

The Convener: Yes—they have choice, to an extent. Do you want to comment on that, Paul?

Paul Smith: I have nothing further to add, convener.

The Convener: Jeremy Balfour has a supplementary question before Mark Griffin comes back in.

Jeremy Balfour: On Nicola Dickie's point, there is a danger that we will paint a picture that shows that, if we change the culture, everybody will be really happy. Whatever system we design and however friendly it is, some people will get an award and some will not. We need to design a system that protects those who get turned down but might still deserve an award. That brings me back to David Semple's point, because is that not the role of independent advice?

There must be a difference between advice and representation. We often use those words as if they are the same things, but there is a difference between someone getting advice when they go in at an early stage and someone getting representation at whatever level they need it. I am just slightly concerned that people think that, if we redesign everything, everybody will get an award, because that will clearly not be the case. There will be people who do not get an award, and it is about how we look after those individuals.

Paul Smith: The problem partly stems from the toxic relationship that exists between claimants

and DWP staff. Another factor is people taking decisions to appeal tribunals, where the success rate is running at 63 per cent for employment and support allowance and PIP appeals. As long as that is the success rate, people will be distrustful of the decisions that are made in the DWP.

There is also an issue about how we improve decision making. Given that mandatory reconsideration was meant to enable the DWP to get its decisions right or to correct them at the earliest opportunity, why is the appeal success rate not reducing? Why is the percentage of mandatory reconsiderations that are successful in the claimant's favour running at only 13 per cent? Those issues are all relative.

Mark Griffin: I want to ask about the new offences that the bill creates and about applicants providing the wrong information.

Under the current DWP system, the prosecution has to prove dishonesty in the application, whereas the evidence that the committee has received is that the system proposed for Scotland is that there would be no requirement for a prosecution to prove dishonesty. An honest mistake made by an applicant could result in a criminal prosecution. What is the panel's view of the legislation as drafted? Do the witnesses agree with the evidence that we have received on the new offences regime? Should any changes be made?

09:45

Paul Smith: Prosecuting people for accidentally providing incorrect information is quite an unhealthy proposal. Some evidence of intention to defraud has to be the basis for any decision to prosecute someone.

David Semple: I completely agree with that. If what Mr Griffin has just outlined is in the bill, and the obligation on the department to prove that there has been dishonesty at the outset has been removed, that is unhelpful. The fraud and compliance officers that I work with are serious and specific about exactly that issue; they have to prove dishonesty before referring to the courts. Off the back of that approach, many things are settled informally, which is the way that things should go.

The Convener: My understanding of the bill is that dishonesty has to be proved. I suppose that whoever reads the bill can project from there, but that is my understanding. Does Mark Griffin want to come in again?

Mark Griffin: No; I was just reflecting the evidence that we have received.

Ruth Maguire: On the point about redetermination, I understand the pain that folk are going through with the current system. Would it not usually be quicker for the agency to set something right, rather than a person having to go to a tribunal? Even if a case goes directly to tribunal, would that not slow things right down, even for a simple case? I care about my constituents getting the money that they are entitled to; the quickest way to do that feels like the agency having an opportunity to put something right if they have not got it right the first time.

Nicola Dickie: I am not advocating that the agency should not have the opportunity to do an internal review. If they do an internal review and do not change the decision to the customer's benefit, I am advocating that the case then proceeds to a tribunal. That system goes back a number of years, beyond the Welfare Reform Act 2012.

Local government subscribes to the notion that decisions that are incorrect or need revisiting should be handled at the lowest possible level. That is what we in the public sector are signed up to do. We suggest that some of the barriers—perceived or otherwise—in a mandatory reconsideration process, around feeling disempowered, having to put in a second request to go to tribunal or having to provide additional information, would be retained in the system.

Ruth Maguire: Can we remove some of those barriers, rather than saying that redetermination is not the right way to go?

David Semple: Members with constituency work will remember the way that things used to be done with form GL24, which claimants filled in whenever they appealed against a decision. That form would wind up with the tribunal, but, before that, it would go through the internal review process. That process was changed for the purpose of removing benefit, pending appeal. Once it was decided that a person was disallowed benefit, the benefit was stopped. The person then had to put in a request for mandatory reconsideration and wait for that to come back, after which they could put in a request for an appeal and benefit payments would resume. The purpose of mandatory reconsideration was to remove benefit entitlement.

The problem is that mandatory redetermination does not allow for the continuation of benefit entitlement, but it does allow for short-term assistance to be applied. The bill does not say how much that will be or whether it will be at the same rate as benefit entitlement, so the problem is exactly the worry that Ruth Maguire raised about supporting constituents as they go through the process. We would like to see full payment of allowance pending appeal—the existing benefit entitlement rate being paid all the way through any redetermination of a case or looking at it again, until the tribunal itself. That has to be key.

What we call it or what we do between those times will matter less to the claimant if they are not struggling to pay for what they eat. However, on the question of terminology and having the "MR" term, a lot of claimants coming through from reserved benefits will be familiar with that term and hostile to it. It is absolutely right that we should look at everything again when it comes back to us by way of going to an appeal. That is the most helpful thing for the claimants. However, we should definitely look at changing the terminology as well as making sure that benefit entitlement is not challenged by the redetermination process.

The Convener: Paul Smith, would you like to come back in on any of that?

Paul Smith: When mandatory reconsideration was brought in through the Welfare Reform Act 2012, all that it really did was put another barrier in front of people before they got to a tribunal. The system that was in place beforehand was that a claimant had an immediate right of appeal but that the agency undertook a review. If it changed the decision in the claimant's favour, the appeal was cancelled. MR was almost an acknowledgment by the Department for Work and Pensions that it might have got its decision wrong, so it reserved the right to have another bite of the cherry and, until it got that, the claimant would not have access to a tribunal. The other problem was that there was no time limit for mandatory reconsideration to be carried out. Benefits stopped and people were left in perilous situations.

Ruth Maguire: Just to be clear, there will be a time limit on the redetermination process, and short-term assistance is proposed. I hear what the panel says about benefits pending appeal. The challenge that springs to mind is what we do with overpayments if appeals are not successful.

David Semple: Under the old system, if an appeal was unsuccessful, the date of disallowance was the date of the appeal decision, so there was no overpayment—and that is what we want to see.

The Convener: I am being reminded that the Government has published a paper on redetermination. I presume that the panel has seen it. I will not ask panel members for their comments on it; I am just checking whether they have seen it.

Adam Tomkins wants to come in with a supplementary question.

Adam Tomkins: It is on a different issue, convener. While we have COSLA in front of us, I think that it is important to get on record its views about discretionary housing payments. There are some quite powerful remarks in paragraph 11.4 of COSLA's submission, which I will quote:

"It is imperative that there is clarity over the future use of DHPs, as early as possible."

It goes on to say that its reading of the bill

"suggests that there is no duty on Scottish Ministers to provide funding more widely for DHPs going forward. Without clarity, there is a risk that Councils continuing to provide DHPs will find that the funding is not available in the future for this."

While we have Nicola Dickie in front of us, I invite her to expand on that, because it seems to be a very important point.

Nicola Dickie: We have long called for a whole-system review of DHPs. We welcome the fact that bedroom tax will be taken care of at source. That said, that does not get us away from the traditional DHP and takes us back to the way that such payments were before the bedroom tax became the mainstay of what was going on. As we see it, the bill points to local authorities not having to have DHPs. I am not aware of any local authority that is planning to do so, to be honest.

Our membership said that the other thing that the bill does not do is require the Scottish ministers to provide funding for DHPs. If we look at the Scottish welfare fund, which is a similar fund but does something slightly different, there is a statutory requirement on local authorities to provide welfare funding as long as moneys are paid in by the Scottish ministers. Our members point out that it is imperative that we get clarity. If the Scottish ministers are taking care of their commitment around bedroom tax at source, where does that leave us with the traditional side of DHPs and also, increasingly, cases that are being used through DHPs around the benefits cap? Those matters will not be sorted at source and there will still be a requirement for local authorities to deal with them.

The Convener: Does anyone else want to come in on that point?

Ben Macpherson: My question is also for Nicola Dickie. In paragraph 12.2 of its submission, COSLA touches on no recourse to public funds, on which I am doing work with Shakti Women's Aid in my constituency. Why do you think that it is important for that to be considered in the framework of the new system, given that it is principally an immigration issue, and immigration is reserved? It is a very complex area to navigate as things stand, and it is right that you have raised it.

Nicola Dickie: We are looking for consistency on that. With the way in which the regulations will be developed across the various benefit streams, we might well come across some quite odd connotations as we move forward. We expected to see something in the bill about whether access to devolved social security would be on the

prescribed list of things that people who have no recourse to public funds can access. We are not looking for all the answers to be put in the bill, but we would look for that principle to be in there. From the Scottish ministers' perspective, should those with no recourse to public funds be accessing devolved social security?

That is the clarity that we are looking for. If there has to be a distillation between on-going benefits and access to one-off payments, we should have a conversation about that. We were pointing to the fact that there has been no such conversation, as far as we are aware, and the principle is not dealt with in the individual schedules for the secondary legislation. We do not have the answers, but we need to have that conversation, given the number of people who are in that situation in Scotland already. Very often, local government finds itself picking up such people if they become destitute.

Ben Macpherson: I agree. It is an important point that has not been emphasised so far, so I thank COSLA for highlighting it.

The Convener: I thank our witnesses for the very interesting evidence that they have given, which the committee will certainly look at.

09:57

Meeting suspended.

09:59

On resuming—

The Convener: I welcome the second panel of witnesses. Simon Hodge is a solicitor at the Scottish Association of Law Centres, Rob Gowans is a policy officer at Citizens Advice Scotland and Richard Gass is the chair of Rights Advice Scotland.

I will start with a question that is similar to the one that I asked the previous witnesses. You were here, so you probably heard their answers. In previous evidence sessions we have asked our witnesses for their views on the principles of the bill and on the proposed charter. What are your views? In what way, if any, will the principles and the proposed charter influence the workings of the new benefits agency?

Rob Gowans (Citizens Advice Scotland): CAS generally welcomes the principles. In particular, we welcome the principle that the Government has a role in ensuring that people receive all the income that they are entitled to—that is very important—and the principle that social security is a human right. We have suggested the inclusion of a couple more: first, that the system should be accessible and fair and, secondly, that procedures, decision making and reviews should be handled quickly and effectively.

It has also been suggested that there should be a right to independent advice. We agree that that should be in the bill, although I am not sure whether it would be a principle; it might sit better in another part of the bill.

We welcome the charter as having the potential to allow individuals to secure their rights, but we are not clear about what status the charter would have in terms of conveying individual rights. Our understanding from the Government's consultation last year is that the charter would almost be a bill of rights that would set out people's rights and responsibilities and would allow those rights to be achieved and allow people to seek redress. It is not clear from the bill that that is the purpose of the charter, so there should perhaps be some clarity on that. As well as the right for them to achieve redress if people's experience falls short of the principles, there should also be a right to give feedback and make complaints.

Richard Gass (Rights Advice Scotland): RAS is pleased to see the principles laid out at the start of the bill, which makes it clear up front that the social security system in Scotland will be that bit different from the system in the rest of the UK.

The list of principles could go slightly further to include what to do if one is dissatisfied with one's treatment in the social security system, and it could include a commitment that the value of benefits that are paid in the Scottish social security system will be protected in real terms, with regard to inflation.

We welcome the fact that there will also be a charter—it is not one or other of the principles and a charter, but both. The charter will be very valuable. It will be a readily accessible document: a section in an act of Parliament could seem somewhat distant, but a charter—provided that it is not too long—could be up on the walls in social security offices, so that folk who are waiting to be seen can see it. That might be the first time that folk read it; they will get an understanding that the system here is a bit different. Furthermore, the charter could be incorporated into the personal development plans of staff working in the agency.

The Convener: Thank you. One of my follow-up questions was to ask what you think of the charter. I will maybe come back to that.

Simon Hodge (Scottish Association of Law Centres): The SALC is in a similar place. We are very pleased to see that the principles have been included and that there is a starting point for making a real effort to make the system very different to the previous one.

I reiterate the importance of people having the right to be provided with independent advice: I would include it as one of the principles. There are a variety of reasons why I think that that is important, which I can elaborate on if you wish.

I also reiterate what was said at an earlier session about private providers. Our experience of working in the field for many years has not been happy, especially with the system of private providers of medical assessors. Something needs to be included in the bill to protect against that type of system being put back in place. Not having private providers would probably be helpful.

I agree with Richard Gass about the charter: if it is intended to be a guide for people who are coming into social security benefit offices, it really does have to be in clear language and to be straightforward.

I also agree that some form of complaints procedure is necessary, and would be helpful. It should go right across the board and not be just in relation to general members of social security staff, but should include medical assessors. A complaints procedure should be in the charter to cover people's treatment so that claimants can complain about how they have been treated by the medical assessors.

The Convener: I just have a comment on what Richard Gass said. Many people have said that the charter should be visible so that people know what their rights are. It is important to get such a charter correct for the benefit of the people who access social security benefits. It would be good if it was up in every office and people had access to it.

Adam Tomkins: I want to pick up on a point that was made very strongly in CAS's written evidence, for which I offer many thanks. It is CAS's strong view that the balance between primary and secondary legislation is not quite right, and that a number of issues that are not in the bill should be in it. Would Rob Gowans expand on that, for the record? I invite the other members of the panel to then reflect on the extent to which they agree.

Rob Gowans: CAS's view is that things that will be common, that will be essential to the system and that will cut across social security benefits should be in the bill. I have already mentioned provisions for people to make complaints, get redress and give feedback. That could work in a similar way to the provisions in sections 14 and 15 of the Patient Rights (Scotland) Act 2011, which provides a good model.

The bill should also make provision for independent scrutiny or independent scrutiny bodies that can play a similar role to that of the Social Security Advisory Committee at UK level, although there could be slight differences in design. For example, it could report to Scottish Parliament committees to aid their scrutiny as well as to help the Scottish Government to design regulations.

There should be provision for uprating of benefits annually in line with RPI, and additional things could be taken into account, including energy costs and transport costs. We want to make sure that the benefits have the same value each year and that things that have to be paid for, such as funeral costs, which are a great example, because we have seen rising funeral poverty—

The Convener: Can I just come in there? You mentioned funeral costs and said that uprating of benefits should be in the bill, and that they should be uprated for things such as energy costs. Energy is reserved to Westminster and the Scottish Parliament does not have control over those costs. Are you saying that if the energy companies put their prices for electricity and gas up by a great percentage, as has happened recently, provisions to cover that should be in the bill, and the benefits that are devolved to the Scottish Parliament should be raised? What would happen with the benefits from the Westminster Parliament?

Rob Gowans: We suggest that the devolved benefits be uprated annually according to the RPI. It would be helpful if ministers had the power or the responsibility to consider things including energy costs. There would not necessarily need to be a formal lock in to the process, but benefits would not lose value over the years and would pay for the same as they had paid for in the previous years.

In terms of how that would break from reserved benefits, it might well be the case that the value of benefits in Scotland would be higher than the value of equivalent UK benefits, but that is a potential feature of devolution. In the Scottish context, we would welcome benefits being adequate and keeping their value as the years go on.

The Convener: If energy costs go up, should Westminster give more money to the Scottish Government? Should the benefits extend to that?

Rob Gowans: We would always say that action should be taken to ensure that energy costs are low anyway. Social security has a vital role in tackling poverty and is one of the best ways of doing that, but that does not mean that there is not other action that can and should be taken. Action on energy costs is a good example.

The Convener: I am sorry for interrupting Adam Tomkins with that question.

Adam Tomkins: That is absolutely fine. I just want to get back to the structure of the bill and the relationship between primary and secondary legislation. In its written evidence, CAS goes even further than the opinion that Rob Gowans has just shared with the committee. It states:

"Details of eligibility and operation of many of the reserved benefits are included in primary legislation",

but that does not appear to be the case in the bill. We are still at stage 1—would you be looking for amendments at stage 2 to put some of those details into the bill?

Rob Gowans: That is possible, although my understanding is that the eligibility criteria for the benefits are still to be developed. There might be something, at least for the basics, for which the rules are a bit more developed. The best start grant could be brought in, as has been suggested by the Child Poverty Action Group in evidence. Perhaps when benefits are up and running at a future point, provisions could be brought in to primary legislation to set out the eligibility process. The system could probably operate without that at this point, but I return to my earlier point about independent scrutiny of regulations, which will be massively important if so much of the system is to be developed through regulations. There are good arguments for including the details, but some criteria are quite detailed and it would not be appropriate to have them in primary legislation. It is important that provision be effectively scrutinised and that there is independent expert input.

Adam Tomkins: Would you rather have that level of detail scrutinised by independent experts than by Parliament? Do you think that independent scrutiny is more important than parliamentary scrutiny?

Rob Gowans: Either could work. The level of scrutiny is very important, whoever scrutinises it.

The Convener: Does Richard Gass want to comment on that?

Richard Gass: The bill lays out very broadly what the social security system will look like, and leaves much of the detail to regulations that we have yet to see. I think it correct that regulations are where the detail will be expanded on. However, we are creating a new system; we have only one chance to create it for the first time, as we have heard from Scottish Government ministers. In order to have it correct the first time, we need to ensure that there is extra scrutiny of the regulations in their first iteration.

10:15

The negative procedure or the affirmative procedure would be insufficient—that would be an all-or-nothing approach. Parliament, however, is not constrained by the need to use such crude procedures. It could introduce in the bill a requirement for the first iteration of the regulations to be given to external organisations for scrutiny. The draft regulations could then come back to elected members so that they could consider further amendments. I recommend that some kind of super-affirmative or greater process is introduced for the first draft of the regulations.

The Convener: That is a very interesting suggestion. Does Simon Hodge want to come in on that?

Simon Hodge: I reiterate that the Social Security Administration Act 1992, which brought in DLA, and the Welfare Reform Act 2012, which brought in PIP, set down the basic framework—the primary conditions—for the operation of those systems. The details were then dealt with in regulations.

There is a good argument that the details should be laid before Parliament so that we can all have a good idea of, and can properly scrutinise, the basic pillars of the system. There is also an argument that those details should be dealt with in regulations. I can see a good argument for setting out the pillars of the new system in the bill itself, along the same lines as the legislation for the current and previous systems.

There is a caveat. I know from working within the system that the detail is where the devil resides. The real problem is that benefits being designed in a particular way is often subverted by regulations. Unfortunately, therefore, including the primary conditions in the bill would not necessarily safeguard the operation of a benefit in the way that it was first intended it would operate.

Other than that, I reiterate what we heard earlier. There are elements—uprating, backdating and residency—that it would be useful to include in the bill. It is important that residency is in the bill, given the current climate.

The Convener: Do you want to come in again, Mr Tomkins?

Adam Tomkins: I can come in later.

Jeremy Balfour: I have two questions. The point about residency is interesting. We had quite a long discussion the week before last about cross-border residency issues and what happens if people who are on a particular benefit move to England or Wales. Do you have any views on how we can define residency in the bill?

All three of your organisations do a lot of representation. Do you see advice and representation as two different things? Should they be defined differently, or can they be defined collectively?

As I asked the previous panel, should there be statutory funding for those services? How would that be accessed? Although you would probably not want to say this, you are slightly in competition with each other for who you represent. How do we divide the money up to ensure that the right people represent the right individuals? I am sorry for the long question—there was a lot in there.

Richard Gass: We are talking about a Scottish social security system for folk who are resident in Scotland. If someone relocated south of the border, they would no longer be entitled to Scottish benefits. However, a person's entitlement could continue for a period—three months or whatever; a figure could be arrived at—while they established their entitlement to UK benefits, and there could be something similar for folk who come to live in Scotland.

We have habitual residence rules in the DWP regulations. They are quite cumbersome, but they contain examples of when it would be appropriate to commence paying a benefit to someone—in effect, that is when someone has shown beyond doubt the location of their new address.

As for advice versus representation, they are very different. The agency can provide advice on benefits, within the constraints of how it perceives entitlement, but it cannot advocate for someone. Representation can push the boundaries of entitlement by taking matters to tribunals and courts and establishing case law. Advocacy is a third category; it ensures that a person's voice is heard and stands aside from advice and representation.

The question whether there should be a pot of money to bid for is loaded. There should be adequate funding for advice services, but it is not the duty of simply the Scottish Government to fund them. Local authorities have a vested interest in their populations receiving advice. Some local authorities may choose to invest more, and there should be no hindrance to that. It would be nice if there were a guaranteed sum of money for the future, but the danger is that other funding providers could step back and say that, as the money was allocated by the Scottish Government, they did not need to come forward.

The Convener: That is a good point.

Rob Gowans: The cross-border issue is slightly complicated. We would like to see residency provisions in the bill. Cross-border issues might be addressed by using criteria; for example, if someone worked in England but lived in Scotland, their entitlement would depend on where they spent most of their time. If someone moved to England, they would probably fall under the remit of the UK system. The Scottish and UK Governments should work together on a reciprocal arrangement system.

We consider independent advice to be an essential part of a well-functioning social security system, regardless of how good the agency is and what services it provides. We particularly welcome the commitment to a face-to-face element with the agency staff, which is important. However, independent advice will always be needed. Last year, we provided advice on more than 94,000 issues that related to the benefits that are due to be devolved. That number might reduce over time if the system is well designed, but advice will always be needed. Our experience is that, when changes are made, there is always a bit of an increase in demand, particularly from people who come in for information about how changes might affect them.

We support including in the bill a duty on the Scottish ministers to make provision for access to independent advice, and they should be required to make sure that that would be adequately resourced. Such advice is largely funded currently through local authorities; the assumption is often made that there will always be citizens advice bureaux, but they require funding and it would be helpful to guarantee that in the bill.

Separately, we would also support having in the bill a right to independent advocacy, which is different from independent advice.

The Convener: Ben Macpherson wants to ask a supplementary.

Ben Macpherson: For clarity, Mr Gowans, if you were to put a right to independent advice or advocacy in the bill, would you do so strictly in relation to devolved benefits?

Rob Gowans: One of the particularly helpful things about the independent advice that Citizens Advice provides is that it is holistic. For instance—

Ben Macpherson: I am sorry to interrupt, but I will reword my question. The bill deals with the social security benefits that are devolved to this country. Surely it would be appropriate for any advice that was attached to the bill to relate only to the powers that are applicable to this Parliament.

Rob Gowans: If funding or advice were provided, you would find that they sat within the wider advice landscape. For instance, if someone came in for advice about devolved benefits, that advice would be provided in addition to other services, so they would be able to get advice about reserved benefits, such as employment and support allowance, and about housing problems or problems at work.

Ben Macpherson: I appreciate that Citizens Advice Scotland gives advice across the spectrum of social security, and the bureaux in my

constituency do remarkable work in that respect, but if the bill placed a duty on the Scottish Government that affected its budget—I am asking a question, not making a proposition—would it be unfair and unreasonable for those resources to be used to advise people on complications with the reserved system? There is a nuance—an important distinction about what advice is provided. If an advice provision were included in the bill, perhaps providing specialised advice to do with devolved benefits would be a more meaningful way to move forward.

Rob Gowans: I take your point. I think that the position would depend on how such a provision was drafted.

Simon Hodge: There is a problem of practicality. If a person came into an advice service with a raft of problems that had to be dealt with, but that service was funded to give advice only on devolved benefits, it would be in the odd position of being able to give advice on a particular area but not being able to expand that advice to include reserved matters.

I understand that the committee is looking at the areas that the bill deals with and that funding should therefore really be given only for those areas, but there is an alternative approach. The people who are seeking advice are Scottish subjects, and it is for the Scottish Government to ensure that they have the best possible independent advice. If that advice goes across the board, as it often has to, that is really a matter of practicality.

Ben Macpherson: I absolutely appreciate that practicality on the ground. What I get from ministers and from the content of the bill—this was touched on in the evidence session earlier this morning—is that it is their ambition, through the bill and through the creation of the new agency and of a new culture, to reduce demand on advice services.

There is a practical issue on the other side of the argument: if a right to advocacy, advice or representation is included in the bill, we need to be careful and specific about it. As Mr Balfour said, resourcing and funding are an issue, and we must ensure that the principles and requirements that are in the bill are deliverable, given that the bill deals only with devolved benefits.

That complication is born out of the fact that the bill does not cover the whole social security system; it demonstrates the complexities that result from that point. There was not necessarily a clear question there; it is more of an issue for discussion.

10:30

The Convener: Does Mr Hodge want to come back on that?

Simon Hodge: No—I have put my position. We are getting an indication of Mr Macpherson's worries and concerns. There is a finite pot of money, and that is where the stress lines meet. I simply made the point that, although a good policy can be introduced through the bill, it might be quite difficult to achieve in practical terms.

I have a point about residence that the committee might want to consider. I agree that, when someone moves away from Scotland and becomes habitually resident down south, they should not have access to the benefits that are in the bill. However, you might want to consider a temporary period of overlap, such as the one that we have for carers allowance—when a person dies, carers allowance goes on for a time thereafter.

People might have to move for any number of reasons, and there might be a period during which the benefits that are contained in the bill stop and the benefits down south take time to catch up. That could mean a period without funds that a person could well do with. It would be worth considering having some sort of on-going entitlement to allow such a person to get up to speed with what they need to apply for down south.

The Convener: That is interesting. I will just make a point about the practicalities. As MSPs, we cannot carry out work in relation to social security matters that are reserved, which is a problem.

Another problem might arise when people come for advice and have the charter—whether it is included in the bill or is introduced by an affirmative or negative instrument—and think that they have recourse to court. That could present a bit of a problem. If they go for advice and they do not get their social security moneys, they might think that they could take that to court—as some have suggested—but the particular benefits might be reserved. Perhaps we should talk to our counterparts in Westminster about that.

Simon Hodge: Yes.

Ben Macpherson: I will bring things together. I am very supportive of the advice sector and I am looking for a way to bring in realistic support for the sector, if there is room in the bill. I would be interested in any clear propositions on how to do that, given the complexity of what we are handling.

Richard Gass: The agency will be able to give advice and information only on devolved matters, but its staff will need to be trained to be aware of UK benefits and the interactions. The agency's

role should be to signpost people to the advice sector.

If funds were available for the advice sector to expand, services could bid for that funding. However, the sector would provide that advice alongside the rest of the advice that it provides. Someone who was signposted to the local authority advice service or the CAB could then get advice on how the Scottish benefits interacted with the UK benefits.

The Convener: That needs to be looked at.

Ruth Maguire: My colleague Ben Macpherson made some interesting points. No one would deny the complexity of people's lives and the assistance that we have to give them, but the question is how we include the point about advice in the bill. That was not a question but a small reflection.

My questions are about overpayments. The Scottish Government has suggested that there should be a minimum income floor to try to protect people from being driven into poverty. Would that help and how do you see it working? [*Interruption*.]

Richard Gass: There are people coming through the door—I will wait while the audience arrives for this important question.

On overpayments, the proposal to take into consideration someone's financial circumstances before seeking recovery is welcome, although working out exactly how to set the level will be a challenging task. There are other aspects of overpayment. The policy memorandum refers to the bill, but the bill suggests that official overpayments that are made in error could be within the scope of recovery, whereas the policy memorandum suggests that they would be out of scope. The bill needs to be amended to make it crystal clear that agency error payments will not be recovered unless there are exceptional circumstances and, perhaps, those circumstances are spelled out.

Rob Gowans: We welcome the commitment to the minimum income floor. There are other things that could be done, such as using the common financial statement and limiting the amount that can be directly deducted from someone's benefit to repay an overpayment, to ensure that people do not experience hardship.

I share Richard Gass's concerns about the bill in relation to overpayments because of agency error. I understand from the policy memorandum that the Scottish Government does not intend to pursue recovery in such cases unless a large overpayment has been made. We would prefer the bill to set out that overpayments that result from agency error are not recoverable at all, even if they are large. That would reflect the practice with most UK benefits. Someone who received an overpayment through no fault of their own would not be required to pay it back, and that would create an incentive for the agency to perform well in making accurate payments.

Simon Hodge: I agree—the overpayment provision is certainly one of our concerns. One of the biggest areas that the bill deals with is disability benefits and, as it stands, the bill will make very different provision on overpayments up here from that down south. The position will be far more stringent up here. Currently, misrepresentation or failure to disclose has to be shown in order for such an overpayment to be recovered, but that will not be the case under the bill. The approach also seems to fly slightly in the face of some of the principles relating to dignity and human rights that are set out at the beginning of the bill.

If we are looking to have a good relationship between the agency and claimants, I certainly know from experience of representing clients that, if they feel that they have not contributed to an overpayment error—so it is not their fault—but they nevertheless have to pay back the overpayment, that is a problem. That would undermine any good work that was done in creating a new system.

Another issue—a curious one—is that it would come out to claimants that, if they happened to live in England, they would not have to repay, but because they live in Scotland, they do. That would further undermine any good work that might be done on the relationship between the claimants and the agency.

I reiterate what my colleagues said about the financial floor, but it is also important to take people's personal circumstances into account. That is missing from the bill. There can be many reasons why somebody does what they do and why the agency should not necessarily try to recover money from them. One of the primary reasons is that domestic abuse may be involved. A person who was in such a situation would currently be caught by the overpayment provisions. They would then be in the even worse position of having to make repayments, which could lead to the domestic abuse increasing. The overpayment could even have occurred as a result of domestic abuse. Mental health is another consideration. Recovering an overpayment could lead to a deterioration of a claimant's mental health.

The discretion not to recover overpayments because of financial circumstances is welcome but, given the stress and other issues that recovering overpayments can lead to, the provisions ought to be broadened out to take a claimant's entire circumstances into account.

Ruth Maguire: Do you agree that there should be a differentiation between unintentional error and intentional fraud in the bill? How does the DWP treat that difference at the moment if there has been anf overpayment?

Richard Gass: As Mr Hodge has described, under DWP regulations, intentional fraud is when someone has failed to disclose material facts or has misrepresented their circumstances, while unintentional error might happen when a claimant does not advise of a change in circumstances. A person might not know that a fact is a circumstance that should be reported, but if someone is clearly aware that their circumstances have changed and that they ought to report it, failure to do so would be considered intentional.

Ruth Maguire: Should that be detailed in the bill?

Richard Gass: Something in the bill should make it clear that there is a duty to disclose your information. However, it should also say that in the case of an error lying outwith the duties on the individual or an official error, overpayments will not be recoverable—although we could concede that that should not be the case if the person ought to have known that they were being overpaid. For example, if someone gets a lottery win rather than their normal weekly payment, clearly something has gone wrong, and it might not be appropriate for them to have the right to retain that money. If someone reported a change but their benefits remained unaltered, it would be somewhat unfair if, five or six years later, it was discovered that they had been overpaid a quantity above the threshold and it had to be recovered.

The Convener: Mr Hodge, did you want to come back in?

Simon Hodge: No. I was just wondering whether we were moving on to the question of fraudulent penalties.

Jeremy Balfour: Ben Macpherson has raised an interesting issue about who funds what. I just want to push a bit harder on one of those questions. Should we separate advice, assistance and representation into three different areas? If someone were to come in for, say, general advice, that would be funded from a particular pot of money, but as far as assistance and representation were concerned, that would be only for devolved benefits. Would it be helpful to make a clear distinction between the three areas of work to ensure that there is no confusion, or would that make things even more complicated in practice?

Rob Gowans: Making a distinction between independent advice and independent advocacy is important, but we would be cautious about making a distinction between independent advice and representation, particularly because of the nature of the independent service that we provide. People who come to a CAB are able to get advice on a whole range of things related to social security benefits, from making the application all the way through to representation at tribunal.

There are considerations to be made about funding but, even with a well-functioning system, advice will still be needed on some of the more basic elements, such as making applications, as well as the representation function. It is important that the representation function remains independent—it cannot really be provided by the agency.

Richard Gass: There should be a duty on the agency to provide information on the benefits that it is delivering and to signpost people to the advice sector for information on reserved benefits.

As for what advice agencies will provide to individuals who come through the door, the fact is that, without funding, they are going to provide information on everything—that is the nature of such organisations. If extra funding is available to make that easier, that will be great, but it will be difficult to constrain advice agencies to saying, "This is the piece that I'm funded for, and this is what I'm not funded for." That will just add unnecessary complications.

10:45

The Convener: Do you want to comment on that, Mr Hodge?

Simon Hodge: I agree. I made a similar point earlier.

The Convener: Mark Griffin has a question, and then I will bring in George Adam.

Mark Griffin: The committee has received evidence from Justice Scotland, Engender and others expressing concern that the new offences created in the bill are overly harsh in comparison with the UK system. There is potential for an honest mistake to be treated as a criminal offence, whereas in the UK system, the prosecution has to prove that there has been dishonesty in order to take the case to court. What is your interpretation of the new offences in the bill?

The Convener: Mr Hodge, you said that you wanted to comment on that.

Simon Hodge: Under the offence in section 39, intent has to be shown; however, that is not the case with the offence in section 40, which is the one that we have a problem with. Mark Griffin is correct to say that that is different from the UK system. As I have said before, it is unfortunate that a new system that is trying to engender dignity and human rights actually gives less protection to

Scottish subjects than they would have down south.

I have problems with the drafting of the bill. Section 40 is particularly weak, as it provides that

"A person commits an offence if ... the person ... ought to have known that the change might result in an individual ceasing to be entitled to assistance".

That is equivalent to saying that the person suspects that something might be wrong, and it is a very low threshold for criminalising people. We must remember that criminalising individuals has a huge effect on their lives, including in areas such as their credit rating, insurance and travel, so giving someone a criminal record is something that should not be looked at lightly.

Our position, therefore, is that a simple suspicion that something might be wrong is too low a threshold. As far as protections are concerned, the most similar to the one that we are discussing is in the housing benefit overpayment regulations, which an Upper Tribunal judge has described as draconian. The problem is that requiring that somebody be reasonably expected to realise that something is wrong is a low threshold. We have a case where a couple gave a local authority the correct information on four different occasions, but the money was still held to be recoverable because they knew or ought to have known that there was a problem. Someone may have given the right information, but at any point while the benefit continues to be in place, it can be argued that, because the person knows that their information has not got to the right place, any overpayment made thereafter is recoverable.

In another case—if I remember correctly—a gentleman who had very limited experience of the housing benefit system put in for housing benefit and gave in his wage slips correctly, but the local authority assessed his weekly wage slip as an annual wage slip and he was given full housing benefit. Immediately prior to that, he had gone in to see his housing benefit office and the person who had put in the information incorrectly and told him that he was going to get full housing benefit, but it was still held that he ought to have known because when he got the letter in which the mistake that was made was identified, he ought to have read it in full. That letter is about eight pages long and quite difficult to decipher.

The problem is that the level of protection under section 40 is far too low. Our position—and the bottom line—is that, for someone to be given a criminal record, there ought to be criminal intent, and that ought to be in the bill. It is in section 39, but it should be in section 40, too.

Richard Gass: I agree that there cannot be a crime where there is no intention to commit the crime, and it is wrong to suggest otherwise. We wonder whether the offence of fraud under Scots law or common law would be sufficient to cover offences arising under the Scottish social security system. Is there a need to have so much detail on that in the bill? Is it not sufficient to say that an attempt to obtain benefit by fraudulent means will be prosecuted as fraud under common law?

Rob Gowans: I agree with a lot of the points that have been made. We would welcome drawing as much of a distinction as possible between unintentional overpayments and deliberate fraud. If somebody were to be prosecuted for fraud, there would have to be unambiguous evidence that it was done deliberately, with intent, and that they had not been inadvertently sucked into an action because of lack of awareness of the rules or an error in not declaring something that they were not aware that they had to declare. There is the potential for work on the reasons why fraud happens in social security in the first place.

According to the official statistics, the rate of fraud in disability benefits is 0.5 per cent—a very small proportion. I am aware from speaking to advisers that they do not often encounter situations of fraud; the issue tends to be people's lack of awareness of the rules or their doing something desperate because of financial hardship. Something could be done in that respect to reduce the rate of fraud, as well as things being done in the system, but as I have said, we would welcome drawing a clear distinction between overpayments and fraud.

The Convener: Mr Hodge, you mentioned section 40, but does what you are talking about also apply to section 39? Is it section 40 that is causing most of the problems?

Simon Hodge: Yes. I think that it is actually sections 40 and 41.

The Convener: Thank you.

Simon Hodge: I would point out that the housing benefit system has similar provision regarding people who break the rules. For example, somebody who has been sent a document containing the rules will be held responsible if they break them, even if, for whatever reason, they have not read the document. It is regarded as reasonable to state that the person should have known that they were creating a problem, but under that test, people can be criminalised simply because they did not read a document fully. As a result, people have only weak protection against potentially being criminalised, and that is a significant matter.

The Convener: Thank you. George Adam wants to come in.

George Adam: I want to go back to what we spoke about at length with the first panel: the

culture change that will be required now that the powers coming to Scotland will account for 15 per cent of the benefits bill. A lot of the advice that the witnesses will be giving at the moment will relate to the disability elements of some of those powers. Do you believe that the culture change will have an impact on the services that you are giving? As the PCS suggested earlier, the idea is that the system should get things right the first time but that advice services should still be in place for people if that does not happen. I understand from my constituency work that there is still scope for your services to act in that regard, but will the devolved side of things have an impact on your services?

Rob Gowans: We hope that the change will have a positive effect on people's interactions with the system and their ability to receive what they are entitled to with much less stress and faster than currently happens. As for how the new agency might interact with CABs, that could happen in a number of ways, including, for example, through giving advisers and agency staff regular opportunities to meet and compare situations. Where we have done that with DWP staff and jobcentres, the response from both sides has been quite positive. The potential joint training of agency staff and advisers will be helpful in building a new culture. There are other issues alongside that, but we hope that a cultural change in the agency will have a positive effect in many areas of the system.

Richard Gass: An agency that sets out its stall by saying, "We want to pay you the benefit to which you are entitled, and we want to give you information about that benefit" can only breed a better culture. However, many of the folk who will be entitled to a benefit will be unable to come to an office, and completing a claim through a conversation over the phone might well not enable staff to drill down to the finer detail. In many local authorities, folk who claim disability benefits are visited in their own houses. When you visit someone in their own house, you appreciate an awful lot just from seeing how long it takes them to get to the door, the arrangement of their living room and so on, and what you see and hear in the house helps you to help that person articulate their circumstances in a form. I do not think that we are going to get away from that.

It is the more able folk who can get to an office; the folk who are unable to get to an office might still require someone to come out. If they felt that they could contact—

George Adam: I am sorry to interrupt—I was asking about how we build a culture that is different from the current culture of mistrust that we are told exists between claimants and the DWP. The idea, more or less, is to change that culture. Even if that can be sorted, advice will still of course be needed from your organisations on certain aspects, but I am talking about how we get the culture right at the beginning and move away from the current culture, which is more or less about saying, "Let's just cut the budget any way we can."

Richard Gass: If there is a change in culture—if, say, folk feel confident enough to pick up the phone to the new agency and say, "I was wondering whether I'm entitled to this benefit", and the response is, "You could qualify for it"—other links can also be made. If the person who receives the call recognises that the claimant needs to be visited in their house, they will know who to contact to put in place a referral so that the visit can take place. That would be great, as long as the agency does not fall back into the current climate of suspicion that exists in the DWP. We can set out from the start with something brand new. The principles in the charter might be just the way to achieve that.

Rob Gowans: Can I just add—

The Convener: I was just going to ask Mr Hodge if he wanted to comment.

Simon Hodge: I agree entirely with what has been said. We are looking at what we hope to achieve, and the real question is how we develop the process by which we achieve that.

I think that everybody would like to have in place the social security system that we are describing today, but it is important to look at the means of achieving that. Some elements, such as staff training, might be addressed to a degree in the charter; after all, the attitude of front-line staff in the new agency to claimants will be one of the key points. There is a litany of issues—waiting times on telephones is another one. All of those aspects make up a lot of small blocks that we need to look at carefully in order to get where we are going. I agree with George Adam that, at the point at which we achieve our aims—if we get there—there might be huge benefits for the advice agencies, because we will be able to concentrate on the other areas where we would rather be involved.

George Adam: I am going off on a tangent here, but on the uprating of benefits, which Mr Gowans mentioned, I note that the Scottish Government has already committed to uprating disability benefits. You said that industrial injuries benefits and winter fuel payments should be uprated automatically. Can you explain why?

Rob Gowans: We would like a commitment in the bill to uprate benefits annually in line with RPI.

George Adam: So, basically, you are saying that benefits should be put up. I am just asking

why you mentioned the automatic uprating of industrial injuries benefits and winter fuel payments.

Rob Gowans: I was referring to the points that I made earlier in relation to some of the other things that could be considered to ensure that benefits keep their value in the context of energy costs and so on.

George Adam: But you are aware that the Scottish Government is committed to uprating disability benefits.

Rob Gowans: Yes, and we would like to see that in the bill.

The Convener: As members have no more questions, I thank our witnesses very much. We will certainly take on board what you have said.

We now move into private session.

11:00

Meeting continued in private until 11:20.

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