OFFICIAL REPORT
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Social Security Committee

Thursday 5 October 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 5 October 2017

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SOCIAL SECURITY COMMITTEE

19th 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:

Peter Hastie (Macmillan Cancer Support)
Steven McAvoy (Enable Scotland)
Hugh Robertson (Industrial Injuries Advisory Council)
Bill Scott (Inclusion Scotland)
Morna Simpkins (Multiple Sclerosis Society)
Craig Smith (Scottish Association for Mental Health)

CLERK TO THE COMMITTEE

Simon Watkins

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Social Security Committee

Thursday 5 October 2017

[The Convener opened the meeting at 09:00]

Decision on Taking Business in Private

The Convener (Sandra White): Welcome to the Social Security Committee's 19th meeting in 2017. I remind everyone to turn off their mobile phones, as they interfere with the sound system. I welcome our witnesses and thank them for coming—I know that you had an early start to travel here.

We come to agenda item 1. Is the committee content to take in private agenda item 4, which is on increased time to consider the Social Security (Scotland) Bill?

Members *indicated agreement.*

Social Security (Scotland) Bill: Stage 1

09:00

The Convener: Agenda item 2 is continuation of our evidence taking on the Social Security (Scotland) Bill. We will hear from two panels of witnesses today. I welcome Bill Scott, who is the director of policy with Inclusion Scotland; Morna Simpkins, who is director for Scotland of the Multiple Sclerosis Society; and Steven McAvoy, who is a senior welfare rights adviser with Enable Scotland and is, I believe, taking the place of Kayleigh Thorpe.

Steven McAvoy (Enable Scotland): Yes, I am.

The Convener: Thank you very much for coming.

I will start with what might seem to be a very simple question. In fact, it is simple, although I do not know what the answers will be. In your opinion, what are the greatest strength and the greatest weakness of the bill in relation to the people whom you represent? I do not expect you to give me all the strengths and weaknesses, because members will want to ask about some of those.

Bill Scott (Inclusion Scotland): We consider the greatest strength to be some of the principles in the bill; for example, that social security is seen as an investment in people to realise their potential to live in society, and that people who use the system will be treated with dignity and respect. Those are important rights that disabled people have sought for many years but have often been denied in the current United Kingdom system. We see the principles that underpin the bill as being an important signal of how social security will be delivered. The greatest quality of the bill is that human rights-based approach.

The Convener: I want to know about the weaknesses, but I am sure that you will come on to those in answer to members' questions.

Morna Simpkins (Multiple Sclerosis Society): I echo Bill Scott's comments. We welcome the principles in the bill. We are also pleased to see the reference to a Scottish social security charter. Obviously, we want and welcome the embedding of human rights within the principles. We hope that the approach will help to tackle the stigma that sadly affects many people who claim benefits, including people who are affected by MS.

Steven McAvoy: Enable Scotland also echoes the point about the principles. I will also mention the extra support for carers.

The Convener: That was very succinct. I am sure that we will have questions on various other issues.

Adam Tomkins (Glasgow) (Con): I want to ask about the structure of the bill. We have explored in previous evidence sessions a number of questions about that, including the legal status of the charter and the enforceability of the rights that Bill Scott just talked about. Feel free to reflect on any of those issues if you want to.

My specific question is on the relationship in the bill between primary and secondary legislation. That might seem like an arcane lawyer's point, but actually it goes to the core of what we are trying to do, which is to expose the newly created devolved Scottish social security system to as much parliamentary scrutiny, openness and transparency as possible. Clearly, Parliament can scrutinise primary legislation more fully than it can scrutinise delegated legislation, and it can scrutinise delegated legislation more fully than it can scrutinise guidance or other forms of informal rule making that might govern the way in which the new Scottish social security agency gets on with the job that it will be required to do.

In its evidence, the Scottish Association for Mental Health argues that

> "key principles should be placed within the Bill itself rather than regulations."

Inclusion Scotland has said that the people it consulted were "very concerned" about the lack of detail on eligibility criteria in the bill. Enable Scotland argues that the purpose of benefits and the framework for their operation should be placed in the bill.

Does the bill get the relationship between primary legislation, secondary legislation and informal guidance right?

Steven McAvoy: I will be representing people at social security tribunals, so I am very interested in the legislation. As far as the principles are concerned, there is a comparison to be drawn. At social security appeal tribunals, there is an "overriding objective" rule that tribunals must deal with issues fairly and justly. It would be good to have a similar rule in the Social Security (Scotland) Bill, which might provide people with practical redress in cases of principles being breached.

Some bits of the bill could be strengthened. We would like it to be made clear that the purpose of disability benefits is that they are a cash transfer that is paid to cover additional costs that arise through disability. I can see reasons why you would not necessarily want every small detail to be included in the bill, but setting out the overarching purpose of each benefit would provide a framework to work to and through which to measure whether or not you are being successful.

Morna Simpkins: I support my colleagues. In the society's written response to the committee, we said that much of the stuff—on timescales and entitlement criteria, for example—that can impact on a person who is living with MS, which is a very unpredictable condition, is not in the bill but will be in regulations. Because MS is an unpredictable condition, as I said, we want to allow people to plan and to have some certainty in their lives. Timescales and entitlement criteria being included in the bill would provide greater certainty.

Bill Scott: As Inclusion Scotland has said in our evidence, and as I continue to believe, the balance between primary legislation and regulations is not right. However, we are where we are.

We were in discussions about entitlement criteria with the Minister for Social Security. We have a particular concern around disability benefits. The minister was open to an amendment that would place entitlement criteria for disability benefits in the bill, although she also said that, if we were to do that, we would have to think about including entitlement criteria for other benefits, too.

The Inclusion Scotland policy team considered that with the policy officer for Camphill Scotland, who has been working with us for several days on drafting amendments. Our problem is that, because we are a membership-based organisation and disabled people make our policy—it is not made by me or the chief executive officer, or even the board—we are normally given general direction on what policies to pursue. On this matter, which is so essential to the lives of disabled people, we would have preferred to enter into detailed consultation about what entitlement criteria they would want for the new disability benefits.

When we consulted on "A New Future for Social Security: Consultation on Social Security in Scotland" last year, there was no general agreement about whether to take a disability living allowance approach or a personal independence payment approach. There was near unanimity that we would like a return to the 50m walking rule, but there was not that sort of consensus on the daily living component or the care component. We would have had to work with people for quite some time to narrow things down to ensure that the entitlement criteria that we were proposing were in line with disabled people's wishes. We are not able to do that and to develop amendments in the time that is available for further consideration of the bill.

We ran four consultation events across Scotland last year and engaged with 160 to 170 disabled people. We also engaged with several hundred disabled people online through social media, so we had a fair basis on which to give a response then. We do not have that at the moment. The practicalities and our wish to be sure that the entitlement criteria are definitely in line with disabled people's wishes have prevented us from developing amendments.

Adam Tomkins: That was a full and helpful answer. You are right that that is the area that the committee is concerned about.

Where does that leave us? Your opening remark was that the bill gets the balance wrong. Your closing remark was that there is not much that can be done about it because we do not have enough time. Is that your advice?

Bill Scott: No. We came to that conclusion, then I met the minister last week. The minister was still keen to offer reassurance to disabled people that the criteria could not be changed easily once they had been set and that there will be consultation on them.

She agreed that the super-affirmative procedure will be used when the entitlement criteria are put before Parliament. That will allow organisations such as Inclusion Scotland, Enable, the MS Society and SAMH to make representations to the committee about whether the entitlement criteria are in line with disabled people's needs. We will then have the chance to carry out the sort of consultation on the entitlement criteria that we would like to do.

Any changes to the regulations in the future will also be subject to the super-affirmative procedure. Again, that gives some reassurance that they cannot be changed easily, without public consultation.

Ruth Maguire (Cunninghame South) (SNP): You have almost answered my question, which is to ask whether one of the benefits of having the criteria in secondary legislation might be that there can be the extensive consultation that you want. You will get that consultation, anyway.

Bill Scott: We could already have had that consultation if the criteria were in the primary legislation. If we had had the proposed criteria over the summer, we could have done the consultation. Because they are not in the bill, we could not ask people whether they like the entitlement criteria or would prefer others.

It could have been done either way. I still believe that the balance is a bit wrong, but there will be a great deal of reassurance from use of the super-affirmative procedure.

Pauline McNeill (Glasgow) (Lab): This is the central area for the committee to scrutinise and on which to make sure that we have understood the evidence and can take a view on the balance.

I presume, based on your evidence, that if we could get more principles into the primary legislation, that would be a protection. The regulations should not undermine the basic principles.

Steven McAvoy: Yes.

Pauline McNeill: Secondly—I want to be clear about this—are you content that you will be consulted, for example on entitlement to disability benefits, and have a say in the criteria, and to have them in regulations and not the primary legislation? Is that the right model for other benefits? Is that the right balance? The committee needs a steer.

The Convener: Mr Scott may respond, too, as can other members and witnesses, if they wish.

Steven McAvoy: We would like to see some parts of the bill strengthened, particularly in order to make it clear that disability benefits are a cash transfer, non-means-tested benefit that has the specific purpose of covering the costs that arise through disability, and that carers allowance is an earnings-replacement benefit. The bill should set out clearly what the purpose of each benefit is. If the regulations are then properly scrutinised, that could be a way forward. It is important to include the purpose of the benefits in the bill so that it is known what the regulations are being measured against.

Morna Simpkins: The Multiple Sclerosis Society would support that. As we have said, we also want the bill to include timescales for decisions and such things.

09:15

Bill Scott: There are definitely things that we still want to see in the bill. For example, we do not think that the wording on overpayments is in line with the policy intent. We drafted an amendment that would require that ministers give due regard to the principles in exercising their functions as ministers. We believe that that would make the principles stronger and more effective in their action. In setting regulations, for example, ministers would have to have regard to those principles.

Alison Johnstone (Lothian) (Green): On the same subject, I have a question about future proofing. It sounds as if you are having constructive discussions with the current Government and the current minister, but what if the situation changes?

I raised with the UK Government the issue of its using secondary legislation to undermine a tribunal decision on PIP eligibility. You say in your submission that your fear relates partly to the fact that the UK recently made changes to the scope of entitlement to PIP via changes to regulations. Can the bill be future proofed? Even if you have a really good relationship with the current Government, is that enough? In the future, a different Government may simply disregard, or find it easier to disregard, agendas that are set in secondary legislation.

Bill Scott: If the super-affirmative procedure is in the bill, it would be very difficult for a future Government to ignore that, because it would have to change the primary legislation to get around it. That provides some reassurance that making such a change would not be easy. There would be a chance for Inclusion Scotland and others to mount a campaign against any changes with which we did not agree.

I would have preferred the criteria to be in the bill—but we are where we are, as they say. We can work with the bill as it is. The greatest degree of reassurance that it could offer us would be for it to include the requirement to use the super-affirmative procedure and, if possible, a reference to a Scottish social security advisory committee like the current UK committee. If such a body was brought into being, that would offer some reassurance because it would provide independent advice to the social security agency and the minister on how the regulations would fit recipients. That would, I hope, provide some reassurance to current recipients that things could not easily be changed without somebody having something to say about it.

The Convener: Jeremy Balfour has a supplementary.

Jeremy Balfour (Lothian) (Con): I want to follow up on what has been said. It would be interesting to get a view from Steven McAvoy, given his tribunal experience.

There has been a reasonable amount of latitude in the interpretation of rules on DLA and, to a degree, on PIP. Tribunals can reach very different decisions, as can the upper tier and even the House of Lords, or the Supreme Court now. Would you want the regulations to be a lot tighter so that it is clear who is in and who is out, or is flexibility in interpretation helpful?

Steven McAvoy: It would be difficult to design regulations in a way that ensured that no disputes would arise and no one would fall into a grey area. The rules on entitlement to disability benefits are only ever a means of calibrating disabilities. Those benefits are intended to cover a wide range of people with different and combined conditions, so it will always be very difficult to get a system that is 100 per cent perfect. If the regulations are left relatively open, that will provide for a degree of flexibility to cover people who do not necessarily fall completely within the rules.

We have looked at a potential way in which the regulations could be fixed while still allowing people who desperately need support to be covered under the criteria. For employment and support allowance, there are rules on exceptional circumstances. If it was found that a person did not meet the ordinary criteria but would be at substantial risk if they were not entitled to the benefit, the exceptional circumstances rules could be used to give them entitlement. There could therefore be firm regulations regarding who qualifies but also exceptional circumstances criteria so that somebody with a disability who would otherwise be at a disadvantage if they did not qualify for support could get in via that route.

Morna Simpkins: I echo what has been said. We would like the criteria to be more defined as well. We want to ensure that MS is recognised as an unpredictable and fluctuating condition. We do not want what happened previously, whereby one in three people with MS who received the higher rate mobility component of DLA had their payments cut after being reassessed for PIP. We want to avoid such things happening in future.

Jeremy Balfour: I am interested in hearing the witnesses’ views on this, but the two tests regarding a typical day are obviously quite difficult for people with certain conditions, particularly MS. There is also the issue of not knowing how long a condition will continue. I think that all members are concerned about what happens at the coalface. We can talk about great principles, but the issue is how somebody gets on when they apply. How would you get round the issue of providing a snapshot of one day? How would you redefine that?

Morna Simpkins: You probably already know about the unpredictability of MS. It is a long-term condition and there is currently no cure for it. One difficulty in the current system is the 20m rule, which does not work for someone with MS. They could wake up tomorrow morning and be able to walk 20m, but the next day they might not be able to walk at all. We want to ensure that the criteria capture conditions such as MS and its unpredictability, and that people with such medical conditions are assessed by people who understand them.

Steven McAvoy: Disability living allowance was slightly better than PIP, which refers simply to the majority of days; whereas under DLA decision makers were supposed to take a step back and look at the overall pattern of a person’s life in deciding whether they met the criteria. That was one of the ways in which DLA was definitely better for those with fluctuating conditions.

George Adam (Paisley) (SNP): Good morning, everyone. I declare my membership of the MS Society. My wife Stacey has had MS since she was 16, and I am only too aware of the issues that the MS Society has to deal with.

The problem with the current system is that it is so flawed that about 60 per cent of individuals who are knocked back for PIP during the transition period get it on appeal. Bill Scott mentioned in evidence previously that the older system was a paper-based one and that less than 1 per cent of claims were fraudulent, which in social security terms is incredible. Does the bill not set out how we can ensure that people with MS, for example, get what they need and are treated with dignity and respect? In the current system, people with MS can be asked to walk 20m, for example. They might be able to do it that day, but they could then be in their bed for the next week. Is it not the case that we are moving away from the heartless approach of PIP to something that is a lot better and based on the individual?

Morna Simpkins: Absolutely. We want MS to be included as one of the conditions that do not require people to go through a face-to-face assessment. We have discussed that with the minister, and the suggestion has been quite welcomed. As George Adam said, there is the unpredictability of the condition and the fact that it costs someone living with a neurological condition £200 extra a week just to exist.

Bill Scott: That will be determined by the regulations on assessments. The current policy intent and the commitments given by the minister are that there will be fewer face-to-face assessments. That is a step forward, because a lot could be determined from evidence that already exists—care assessments, general practitioners' health records, community psychiatric nurses' opinions and so on—about how the condition or impairment affects the disabled person's functionality, and that is what PIP assessment really measures.

As well as having far fewer face-to-face assessments, having longer awards would also reduce the number of reassessments. Some people who transferred from DLA to PIP less than two years ago are already being reassessed, because their awards were for only two years but the period is backdated to when they claimed, even though people are often not assessed until five or six months after that.

The idea that somebody gets an award but, only a year later, has to go through another assessment process to determine exactly the same things as before seems ludicrous to us, and it is a waste of public money. If there is a follow-through in regulations to a more paper-based approach where all the evidence is collected prior to a decision being made, that will improve things for everybody. It will reduce public expenditure and will give a certain amount of certainty, which will reduce the stress for disabled people going through that process.

The snapshot assessment approach is very unfortunate for people with fluctuating conditions, including people with mental health conditions. We have seen people denied the benefit on the basis that they wore make-up and were well dressed when they attended the assessment, which was seen as evidence that they were not severely depressed. I am sorry, but that is just not on. We should look at all the evidence in the round in making a determination. I hope that that will reduce the number of face-to-face assessments and the number of repeat assessments that have to be made.

Steven McAvoy: The regulations will obviously be really important, but there has been a historical issue across benefits. I have seen really poor assessments and decision making under incapacity benefit, employment and support allowance, disability living allowance, attendance allowance and PIP. Although the regulations will be important, we need to fix what goes on behind them. Irrespective of the benefit that is being assessed, the decision-making quality has been so poor, historically, that something else behind it needs to be fixed as well to do with how regulations are applied. It is about the evidence that is gathered and empowering decision makers so that they can go to the most appropriate source rather than just do things by rote, and it is about fixing some of the silly examples.

Our appeal success rate is well into the 90 per cent range. I would like to say that that is because we are so good at what we do but, if the decision making was of a better standard, our success rate clearly would not be at that level. We represent people who appeal. For example, recently a man who gets 24-hour support was given no mobility component, yet he got it at the enhanced rate at tribunal. People who attend additional support needs schools are getting no points for communication, reading or budgeting. Those are things that could be fixed very easily.

Although the regulations will be really important, it is also important to focus on how they are applied because that is about the person getting the letter through the door telling them what their entitlement is.

George Adam: We have all been to various events with the minister and we can ask her about that when she comes here, but she has said that the road that she wants to take is the getting it right first time approach so that people do not have to go through that whole process, because it is the process that causes more heartache than anything else.

Morna Simpkins: Yes. As has been said, the stress can cause a major relapse for someone with MS, for example. That is exactly what we want to avoid.

Alison Johnstone: It sounds as though assessment is absolutely key to the whole process and, in far too many instances, it has been going horribly wrong. I feel astonished that, despite advice from physios, consultants and GPs, people are still being subjected to what is, in many instances, a non-expert assessment, which results in their losing cash, being very stressed and becoming even more unwell. Do you think that regulation is the right place to deal with the assessment process? Are we giving the area enough attention, given that it is so key to people's day-to-day lives?

09:30

Bill Scott: It is extremely difficult to set that out in primary legislation. Steven McAvoy is correct that the way in which regulations are interpreted and the standard of decision making are also very important, and those cannot always be changed by legislating. It is about the ethos of the new agency and the leadership, at political level and within the agency, which will set the standards that people look to.

I have been taking part in the duration of awards working group, which is a sub-committee of the expert advisory group on disability and carers benefits. The duration of awards is a key issue. The assumption with PIP is that awards will be short—one, two or three years—but, as we have said, many disabled people have lifetime conditions. Although many of those may be variable, the key point is that they are not likely to improve. In other words, they may get worse, and they are quite often progressive conditions. If somebody is awarded the highest rate for the mobility and daily living components on the basis of a lifetime condition, what is the point of assessing them again? I can see no rhyme or reason why somebody should be subjected to an assessment when there is no prospect that their condition will improve so there can be no improvement in functionality.

If the new agency adopts regulations that include the possibility of longer awards, that should, we hope, improve things for disabled people. Even if the decision making does not improve much, people will have longer periods of entitlement once they get an award.

Mark Griffin (Central Scotland) (Lab): I want to ask about assistance in cash or in kind. Steven McAvoy has been pretty clear on that, but what views do Morna Simpkins and Bill Scott have on whether assistance should be provided in cash by default?

Morna Simpkins: We support the calls from other organisations for cash benefits to be the default position. As I have already said, there are additional costs of living with a neurological condition such as MS and we feel that cash awards provide greater certainty and give people the flexibility to live as well as they can with such a condition.

Bill Scott: We have exactly the same point of view. Currently, all disability benefits are provided as cash assistance. Even when a disabled person chooses to use the cash in another way—for example, to lease a Motability vehicle—they still have an underlying entitlement to the cash assistance. That is not in-kind support because it is that person's choice. The arrangement is that the Department for Work and Pensions pays the benefit to the Motability scheme rather than directly to the person. It is much like an arrangement for rent in which the rent is paid directly to the landlord rather than to the tenant. That does not mean that the person is not entitled to housing benefit—they retain the entitlement, but they have chosen where the payment will go.

That is what we would like to see in future. If people are offered in-kind support—for example, reduced fuel bills—that should be a choice that they make rather than one that is imposed on them, so cash should be the default.

Mark Griffin: That seems to be the Government's position as well. The policy papers set out that cash assistance should be given in all instances except when the applicant makes the choice. That decision is clearly not a choice for the agency to make. Do you feel that it should be set out clearly in the bill so that there can be no movement away from it?

Bill Scott: Absolutely. That is another instance where the policy intent is not matched by the wording in the bill. The wording would allow the agency to substitute cash payments with in-kind assistance. We would prefer it if that was amended—the indications are that the minister will lodge an amendment—to make it clear that it is for the claimant or the recipient of the benefit to choose whether to take in-kind support rather than cash.

The Convener: Jeremy Balfour can come in with a small supplementary.

Jeremy Balfour: I will be brief. I am interested in that issue. At the moment, for the care part of PIP rather than the mobility part, people can get only money. Could that be reversed so that a claimant who wants it could get practical help rather than a cash payment? For some people, depending on where they live, a cash payment might not meet the cost of the service that they require. If somebody needs someone to come into their house for one hour a day, there could be a statutory duty to provide that. Would you like such an option in the bill, or do you think that cash is the best way forward?

Bill Scott: Cash is the best way forward. We are moving towards a self-directed support system in which cash is provided to the recipient and they can choose who provides their social care, when it is provided and in what form. Therefore, it would not make sense to bring something into the benefit system that would give people less choice.

Ruth Maguire: We have heard a fair bit of evidence on independent advocacy. From reflecting on that, it seems to mean different things to different people. How would you define advocacy, and what makes it different from advice and representation?

Bill Scott: Along with several other organisations—Disability Agenda Scotland, the Scottish Independent Advocacy Alliance, Camphill Scotland, AdvoCard and the Health and Social Care Alliance Scotland—we have put together an amendment on that, because we believe that advocacy is essential for some groups of disabled people.

We have to be clear that advocacy is not advice, although advice workers often talk about being advocates on behalf of claimants and disabled people. Advocacy workers perform an essential role for people with learning difficulties, mental health issues, and cognitive impairments such as autism and brain injuries. The advocate tries to make questions intelligible to the disabled person. It is almost like having a translator. The advocate tries to get the disabled person to understand the nature of the question and then to give the answer that is required rather than the answer that they might immediately give.

For example, to go back to self-directed support, I note that learning disabled people are often told to say that they can manage a budget so that they can get self-directed support. In that scenario, a social worker will ask, “If we gave you that money, could you manage it?” The answer that the person is encouraged to give is yes, but it is actually “Yes—with support,” because they cannot really manage the money on their own. They need support to do that. In a PIP assessment, when the same person is asked whether they can manage a budget, because they have been told before that the answer that they are supposed to give is yes, they say yes, and then they get no points, even though there is no way that they could manage a budget without support.

An advocacy worker’s role is to drill down and make sure that the disabled person really understands the nature of the question and gives a full answer rather than just the immediate answer that they might give without an advocacy worker being there.

Ruth Maguire: You use the term “advocacy worker”, but I suppose the person who advocates for a disabled person can be someone who they choose and not necessarily a professional.

Bill Scott: Yes—it could be a peer advocate. The Mental Health (Care and Treatment) (Scotland) Act 2003 defines advocacy and sets out the circumstances in which it must be provided, and we would like a similar right to be embedded in the bill to ensure that disabled people with the greatest need for advocacy can access professional advocacy support. Of course they can choose somebody else to be their advocate—we are not saying that they cannot—but they should have the choice and be able to obtain the support when it is needed.

A lot of learning disabled people will, we hope, live into their old age, but when they are in their 50s, their parents, who might have been their advocates in dealing with issues such as social security, might die. All of a sudden, they are deprived of that support, and who will advocate on their behalf then?

Steven McAvoy: We are clear that advocacy and advice are really important. In the past three or four years, with relatively small projects, we have helped people to claim over £4 million in previously unclaimed benefits. We work with client groups that might not necessarily go to traditional advice services, because we are a bespoke service for people with learning disabilities and their families and carers. We have built up referral networks with other professionals, who can refer clients to us for extra support. They are people who might not ordinarily contact an advice centre, and we can maximise their income. It is important that advice is not only available, but available across a range of services.

Another issue that we would like to be taken into account is the growing complexity in providing advice and the importance of ensuring that it is properly funded so that there is stability in the resources that are available to provide it. New benefits such as universal credit are being introduced, and that system is working alongside the legacy benefits system. We now have the devolution of benefits. A system that was already complicated is getting increasingly so. It is important that people have not just advice, but good advice that is up to date and—

Ruth Maguire: Sorry to interrupt, but do you agree with Bill Scott that advice and advocacy are two different things?

Steven McAvoy: They are different. Advice on social security is quite specific. It is about helping people to maximise their entitlement, how the legislation is interpreted and representing people at tribunals. Advocacy can be used in a range of settings, including for health and legal issues—it applies to any decision that people have to make. The two are separate, and there is a need for both. With social security, there is a real need for representation. Although advocates play an important role in getting people's message across, representatives can help people to challenge and to take issues to a level that unsupported people would not be able to reach, such as to upper tribunals or cases involving the interpretation of the legislation.

Morna Simpkins: I agree with my colleagues. There should be provision for advice and advocacy, and those are two fundamentally different things. We support the call for that to be put into the bill. That is really important for the MS Society, because 80 per cent of our members have said that they found the process of claiming benefits very stressful. There are huge cognitive issues associated with MS, so there is a need for pre-advice on entitlement and for advocacy as appropriate.

Bill Scott: Having such a measure in the bill would be in line with the minister's idea that the new agency should get it right first time. If we can give somebody access to a service that helps them to be understood and lets them be heard by the professionals who do the assessments—whether they are officials in the new agency or health professionals—and that gives them a better understanding of the system that they are trying to navigate, we are more likely to get the correct information from the get-go. That is better than having to go to an appeal tribunal to argue the difference because the information that was supplied at an early stage, although not incorrect, did not expand in a way that somebody with no learning difficulties, mental health issues or cognitive impairments would have no difficulty in ensuring. Such a measure would improve decision making, because the correct evidence would be provided at an early stage.

09:45

Ben Macpherson (Edinburgh Northern and Leith) (SNP): Good morning, panel. I want to ask about the same point, because it is very important and AdvoCard in my constituency has been in touch with me about it. The distinction that has been made between advocacy and advice is extremely helpful to us, as is the commentary on it that is provided in paragraph 3.9 of Inclusion Scotland's submission. It proposes that advocacy be provided in a range of scenarios for individuals in certain circumstances—for example, to people with certain disabilities.

With regard to advice, if the Scottish social security agency is able to get the advice right, will there still be a need for independent advice? Is the fact that independent advice is a necessity in the current scenario a manifestation of the way in which social security is managed at present by the DWP? I hope that my question is clear—it is a complicated area.

Steven McAvoy: Even if we manage to get the devolved system 100 per cent perfect, we will still have the UK system and the devolved system's interaction with the UK system, so I think that clients will still need somebody who is able to understand the whole picture and advise them on it. People will want to know whether getting a devolved benefit will change their entitlement to a reserved benefit and whether they will be able to claim other things, so I think that there will still be a need for advice to be provided.

Disability benefits are only ever a means of calibrating disabilities. There will always be subjective opinion, so there will always be disagreements. That means that there will always be a need for an independent person to go through someone's case and, if necessary, support them in challenging a decision. Even in a system that is 100 per cent perfect, there will still be a need for advice. Even when a person is not entitled to a benefit, it is important that it is explained to them properly why that is the case and what the rules are so that they have a grasp of the situation and can understand that they have not been treated unfairly. Sometimes, being given an explanation by an independent person of why they are not entitled to a benefit, rather than just getting the agency's interpretation, can reassure people.

We also need advice services to challenge legislation, because the original intention of legislation as expressed in the way that it is written can always be expanded through case law.

The Convener: Perhaps Morna Simpkins or Bill Scott would like to comment.

Bill Scott: It is a long time since I was an advice worker, but I know from my years of providing advice that case law often expands the understanding of the intention of policy makers. For example, with the 50m rule—or the 50-yard rule, as it was when it was introduced—the intention was to provide assistance to people who had mobility issues. What was tested in tribunal was whether that test was a test simply of whether someone could walk 50 yards or whether it was a test of whether they could do that repeatedly, safely and so on. The tribunals decided that it was not a simple yes or no test; the issue was whether someone could walk 50 yards safely over and over again. If a person cannot do that, they should pass the test and get the award.

I think that there will still be a need for independent advice to continue to test how the regulations and the primary legislation work in practice. However, there should be less need for independent advice for people to go to a tribunal if more decisions are made correctly from the get-go. Although there will still be a need for independent advice, there might not be as great a need as there is under the current system. In advance of the new system being in place, it is hard to tell whether the need will reduce, but if the intention is carried through into practice, that might be the case. However, there will still be a need for advice in relation to the UK system and on the interaction of the devolved system with the UK system, as Steven McAvoy said.

Ben Macpherson: Steven, I want to pick up on something that you said. You were absolutely right to say that there will be a need to think about the interaction between the reserved system and the devolved system. However, given that the Social Security (Scotland) Bill is on the Scottish social security system and is defined as only being relevant to the devolved benefits, would it be understandable to you if the right to advice or advocacy that is included was only on what is being devolved?

Steven McAvoy: I think that there will also always be a need in the devolved system for advice and representation.

Ben Macpherson: That is what I was saying.

Steven McAvoy: Yes. There will be a need for advocacy and advice in response to the introduction of the devolved system. Advocacy and advice can be seen as important positives for the system as we are there, in effect, to test the regulations and to see how far we can push them to get entitlement, which tests whether the regulations are fit for purpose.

We are able to help clients to present the best possible case at the earliest opportunity, and if they have advice and information, it will mean that the form will be well filled in. What is written on the form will be quite closely related to the regulations, so those who provide accurate information at the first point will reduce the workload of decision makers and help us to get the decision right the first time.

Advice and information networks can also build up referral routes and sources of evidence, which can be really helpful in reducing costs and helping decision makers to get things right the first time. If a professional refers to me, they are usually happy to do supporting evidence for me as well. That can go in with the initial application and it means that the decision maker does not have to request it at cost.

All those things can speed up the process and improve the accuracy. As well as being there to test and challenge the system, we are there to support people through it and to make decision makers’ lives easier.

The Convener: You are basically saying that there is a need for both advocacy and advice, as they are different.

Steven McAvoy: Yes.

The Convener: Okay.

Alison Johnstone: What are your views on the need for the uprating of benefits to be in the bill? Do you believe that benefits should be uprated annually, and should that be in the bill?

Steven McAvoy: We are clear that the reductions in uprating have led to a significant decrease in the incomes of the people who we support. That cut has been the cause of the biggest individual saving in the bill for social security. We definitely believe that benefits need to be uprated annually, and that should be in the bill.

Morna Simpkins: We agree that annual uprating should be there.

Bill Scott: One of the problems with the bill is that it is a catch-all, as all the benefits and assistance are included. We believe in annual uprating but, if the nature of the benefits changes in the future, that might not be how they are paid. That goes back to the question of benefits being provided in cash or in kind. For example, if, at some point in the future, funeral payments are provided by other means, such as in-kind support, it might not be possible to uprate them.

There is a problem with having a catch-all bill rather than individual pieces of legislation for each benefit. However, that could be addressed by saying that certain benefits will definitely be uprated annually. For example, at Westminster, all the disability benefits have that provision at the moment, and we would like carers allowance to be included in that. In general, we support annual uprating of all the benefits that are covered but, if proposals are made at some point to change the nature of the benefits, a change might be required in the primary legislation.

Adam Tomkins: There is no provision in the bill to enable Scottish ministers to exercise their power under the Scotland Act 2016 to create new benefits. Should there be such a provision in the bill?

Bill Scott: Yes. It should be on the face of the bill. It is an important power and I would like the Scottish ministers to take it up. There have been instances when people have been deprived of assistance that they should probably have received. I am thinking of kinship carers in particular. There could be another such instance in the future, and having the power in the bill would allow ministers to exercise it.

The Convener: Ben Macpherson has a supplementary question.

Ben Macpherson: It is not really a supplementary, but a separate question, convener. We have touched on the principles, which are set out in section 1. Paragraph 3.5 of Bill Scott's submission gives an interesting angle on the principle that is set out in section 1(c), which is on dignity and respect. Will you elaborate on that?

Bill Scott: Yes. At present, British law is based on the European convention on human rights, but when the convention was put together, social security was not uppermost in legislators' minds. The European court has proven itself to be reluctant to intervene when nation states have cut benefit entitlement. There is a need to provide adequate support, and dignity and respect flow from that. If someone does not get adequate support, they cannot maintain their dignity and respect. They are reduced to being beholden to others in order to eat, keep a roof over their head or heat their home. We would like provision on that to be strengthened in the bill.

The Convener: I thank the witnesses for attending and for the great information that they have given us.

Bill Scott: We submitted suggested amendments to the minister and the head of the bill team. Can we forward those to you, convener?

The Convener: Absolutely. That would be great. Thank you.

Steven, did you want to come in?

Steven McAvoy: I want to add something that we did not get a chance to raise. We would like the provision on mandatory reconsideration prior to the appeal stage to be removed from the bill. We would like to return to the previous system whereby, if the person disagreed with a decision, they could lodge an appeal, an internal reconsideration would be conducted and, if the decision was not changed, the person could then go to a tribunal.

The stats on mandatory reconsideration in the reserved system show that decision making did not improve; instead, the number of appeals reduced. Our concern is that that would also happen in the devolved system. Decision making will not improve; people who are not supported or who have other issues in their lives at the time will fall out of the system. The provision places quite a big administrative burden on clients and organisations such as ours that support clients, because we will need to keep track of when decisions were made and whether individuals have appealed, given the time limits that are involved. It will massively increase the workload of advice agencies as well as causing clients additional stress. We do not think that the provision is needed, because an internal review process could be conducted to the same standard without making that process mandatory.

Pauline McNeill: You raise a very important issue. Have you discussed it with ministers? If so, what response have you received?

Steven McAvoy: The response that we received is that, under the reserved system, mandatory reconsideration was introduced with perhaps a more cynical purpose, which was to reduce the number of appeals, and that the devolved system would be better. However, there was not really anything concrete behind that to show why that would be the case.

A recent policy paper gave the impression that the intention is to proceed with mandatory reconsideration. If the intention is to make decision making better in the first instance, I do not see the need for the review process to have a mandatory second stage. It just does not seem to have any practical purpose. The person can lodge the appeal and an internal review can be conducted in any case.

The Convener: Thank you very much. You got that issue in at the end. We will certainly consider it.

09:59

Meeting suspended.

10:01

On resuming—

The Convener: I welcome the second panel of witnesses: Craig Smith, policy officer with the Scottish Association for Mental Health; Peter Hastie, campaigns, policy and public affairs manager for Macmillan Cancer Support; and Hugh Robertson from the Industrial Injuries Advisory Council. Thank you for coming along.

I will start with the first question, which is similar to the question that I asked the previous panel. We have heard lots about issues with the bill. What is your opinion? What are the greatest strengths, or weaknesses, of the bill in relation to the people whom you represent?

Craig Smith (Scottish Association for Mental Health): I would say something very similar to what the previous panel said. For us, the biggest strength is the inclusion in the bill of the principles and the charter, particularly the principle of social security as a human right. That is really welcome. The Government's rhetoric about the bill has been very welcome, too. That aligns with our greatest fear about the bill, which has been discussed a lot in previous evidence sessions, including in the session with the first panel today, and which relates to the balance between primary and secondary legislation.

Although the principles are very well worded, we would like there to be an extra principle around promoting wellbeing and health through the social security system. There are some big concerns about the balance between primary and secondary legislation when it comes to the principles and giving the charter practical force for individuals using the system.

Peter Hastie (Macmillan Cancer Support): Macmillan Cancer Support echoes many of those views. We were positive about the way in which the bill was developed and all the discussions around it. It started back in March 2016, when the Scottish Government released the cancer plan, which mentioned

"welfare based on treating people with dignity and respect".

That was in the actual plan. It also mentioned

"seeking to fast track ... those that qualify and are living with a terminal illness such as cancer."

We are delighted that the bill includes that.

One of the things that we want to get across is that we think that it is more than the job of just the bill to have a good social security system in Scotland; we think that it is up to the health service, private sector employers, third sector employers and state employers to support the bill, and to support cancer patients, for instance, staying in work. The cancer plan that was published in March 2016 used exactly the language that is in the bill, and we were delighted to see that.

Hugh Robertson (Industrial Injuries Advisory Council): As a UK-wide Government body, we do not think that it is appropriate for us to tell the Scottish Government what it should be doing. We are here mainly to answer questions about the UK system for employment injury assistance. I do not think that it would be appropriate for me to answer the question.

The Convener: We will have a special question for you, Mr Robertson.

Hugh Robertson: I am sure that you will.

Pauline McNeill: I would like to ask the witnesses about the rules that should apply under the bill regarding terminal illness. We have had evidence that it is not defined in the bill. As the witnesses will know, there is a separate eligibility route in the case of someone with a terminal illness.

The Welfare Reform Act 2012 refers to a person who

"suffers from a progressive disease and the person's death in consequence of that disease can reasonably be expected within 6 months".

The view of Marie Curie, which I met yesterday, is that that definition is far too prescriptive. What are the witnesses' views?

Peter Hastie: There are a range of views on the timescale. In terms of our knowledge of the cancer pathway, six months remains the suggestion. Broadly, the consultants and consultant nurse specialists know that the person is likely to be in their last six months and therefore eligible for benefits. We are still comfortable that the requirements of the cancer pathway are met by a six-month timescale. As more drugs come into the system, as we get better at palliative care and as we detect cancer earlier, that may change. However, for Macmillan, the timescale broadly serves the cancer pathway well. As the committee members know, it is not an exact six months—the consultant and CNS will give a rough approximation.

Representations that the committee has received show a different view in relation to other long-term conditions, where the illness is different and there is a different trajectory from that of cancer. The committee would need to take more views on those individual long-term conditions, particularly from the relevant representative bodies.

However, as I said, we know the trajectory for cancer at the moment and, although it is obviously not an exact science, we think that the timescale—the last six months of life—is appropriate. We hope that, with improved palliative care and by detecting cancer earlier, we will be able to provide a longer period of support. Six months broadly does the job for cancer patients, although it is still a very difficult situation.

Pauline McNeill: So are you content with the current definition as far as your interests are concerned?

Peter Hastie: Only for cancer, because the doctors can tell what the trajectory will be.

Pauline McNeill: But you acknowledge that there may be other conditions where a strict six-month rule might not be appropriate.

Peter Hastie: Yes—we see that with other conditions, but I am not an expert on those.

Pauline McNeill: I had to ask you because Marie Curie was not able to give evidence and I want to make sure that all the organisations with a view have the chance to contribute.

Peter Hastie: Absolutely.

Adam Tomkins: I want to take up the point that Mr Smith mentioned in his opening remarks about the relationship in the bill between primary and secondary legislation. The committee has already heard that there are a number of concerns that the balance in the bill is not quite right.

Would you go into a bit more detail and give us chapter and verse on things that are not in the bill but should be, or, conversely, which are in the bill and should not be? We want to understand the issue in as much detail as possible.

Craig Smith: Most of my comments will be about disability benefits. Key concerns—some of these were raised by the first panel—are that the bill should include a key purpose for each of the individual benefits covered and a clear definition of disability. It is implicit in the bill and the policy memorandum that the Equality Act 2010 definition of disability is being used. We would like the bill to state that.

In our written evidence, we talked about principles of assessment. While there needs to be a balance with secondary legislation and an understanding that primary legislation is not the right place for huge screeds of detail about how individual assessments will be undertaken, we would like to see more principles on assessment in the primary legislation.

Assessment should be paper based; it should be face to face only when there is a real need for that. Assessment should be undertaken by people with a professional background or experience in the applicant’s primary condition. More detail on the eligibility criteria should also be in the bill.

Adam Tomkins: Is that also the view of the other witnesses?

Peter Hastie: We had a lot of trouble in trying to understand some of the motives behind the bill. Obviously, it is written in parliamentary language, which Macmillan does not necessarily have expertise in. We come to the bill with a lot of good faith, and we think that it allows the right judgments to be taken, whether through its provisions or through decisions by Government ministers that are then secured by Parliament. The issue is difficult for organisations such as ours. Even in Macmillan, we have varying views—perhaps I will come to that later. However, the bill does a lot and it shows an understanding of much of what we say in our submission—I refer in particular to the reality of the cancer patient’s journey through the benefits system, rather than the technical nature of the legislation. We think that much of the bill shows an understanding of real life in society and the experiences that people might have in working their way through a new benefits system.

Craig Smith: I agree with Peter Hastie. We are broadly happy with the general approach that the Government has taken to social security. I suppose that our key concern is about the things that are not in the primary legislation and the level of scrutiny that can be undertaken of secondary legislation. It is good that the affirmative and super-affirmative procedures are being put in place for the development of regulations and how they are approved, but the Parliament will still not be able to amend regulations that are scrutinised.

From what the Government has said, we are still not hugely clear about the level of scrutiny that will be open to the public on individual sets of regulations. I suppose that our concern stems from some of the experiences that we have had with the UK system. In November, the Upper Tribunal changed some of the conditions around PIP for people in psychological distress in relation to travel and reduced entitlement. The Westminster Government changed the regulations very quickly—it did that in February. We would not like to see something like that happen to the system here.

Although we are very positive about the approach that the Scottish Government is taking, we are concerned about future proofing, and that is why we would like to see a wee bit more in the primary legislation, including things such as timescales for awards. We welcome the fact that there is a timescale for redeterminations in the bill, but we think that that approach should be expanded to include other aspects of the system.

Adam Tomkins: Thank you. I have a final question. Would you like the bill to make express provision for the creation of new benefits?

Craig Smith: Yes. I can give you a huge example of what new benefits we would like to see right now, but—

Adam Tomkins: Yes, please. That would be helpful.

Craig Smith: I cannot give you a huge amount of detail on specific new benefits that we would like to see, but the fact that there is no such provision in the bill represents a big gap. I have more detail about the topping up of existing benefits. We would definitely like the Government to move to top up reserved benefits. With employment and support allowance for the work-related activity group, people have recently had a £30 cut, bringing ESA WRAG to the level of jobseekers allowance. We would like the Scottish Government to move to mitigate that and put in place a top-up, and to do the same around the changes to PIP that happened earlier this year.

In principle, however, the fact that the bill contains no provisions on the creation of new benefits represents a gap.

Peter Hastie: If the committee thought that including such provisions was the only way to do it, we would absolutely want the committee to include them. If the committee and the Parliament come to a judgment that things can be done—for instance, on ESA WRAG—through other mechanisms, we will trust them. We put into your hands the need to top up, reinstate, recover or whatever in order to support the cancer patients who have just lost £30 a week, and we trust the committee and the Parliament to do the right thing for them.

As I said, we are not experts on legislation. We believe that, if a provision on the creation of new benefits is the only mechanism, it should be included in the bill, but we also think that the Parliament and the Government can support cancer patients using the top-up tool. Therefore, we leave it in your hands.

Adam Tomkins: I think that, for the record, it is important to note that there is a difference between the power to top up benefits and a power to create new benefits. There is a provision in the bill about the power to top up benefits, but there is no provision in the bill about the power to create new ones. It is important to bear that distinction in mind. Thank you for your help.

10:15

Jeremy Balfour: I have a couple of questions. Maybe Craig Smith and Peter Hastie can answer the first one, and we can bring in Hugh Robertson for the second one.

My experience is that people with mental health conditions who applied for DLA and those who now apply for PIP are often the people who find it most difficult. We had a discussion with the first panel about advocacy and representation. I am interested in your views on advocacy, particularly in relation to the people whom you represent. Should there be an advocacy provision in the bill? If advocacy is to be provided for in the bill, or, as is more likely, in regulations—this gets into the nitty-gritty of how the bill will work—should we have a separate category for those who have mental health issues, rather than try to fit those people into categories that are predominately based on physical disability?

My second question is on residency. Perhaps Peter Hastie can come in on this one. At the moment, residency—where someone lives—is not defined in the bill. Someone with a cancer diagnosis may, for family reasons or whatever, move north or south of the border. For example, someone in Aberdeen who has a terminal illness may move to be with family in Carlisle. Does the bill need to cover such situations?

Craig Smith: We are very clear that we would like to see in the bill a right to independent advocacy for all individuals who engage with the social security system. There is really good precedent for that in the Mental Health (Care and Treatment) (Scotland) Act 2003, which provides a right to advocacy for everyone who has a mental health disorder, irrespective of whether they are being treated. We would like to see a similar provision in the bill.

If we are really going to embed a human rights approach, advocacy is key. There is a very good evidence base around the important impact of advocacy in social security, which you heard about earlier. We know that the Scottish Government funded a welfare advocacy pilot a few years ago, in which local advocacy projects delivered specialist welfare advice advocacy for individuals who were undertaking ESA and PIP applications and assessments. Its impact on individuals' confidence and the quality of decision making was quite stark. There is a clear role for advocacy, and a right to advocacy should be in the bill. That is one aspect that could help embed a human rights approach to the system.

Your question on whether there should be a separate category for mental health is an interesting one that we have discussed a lot internally. In some ways, it would be a good approach to have a dedicated mental health stream that people would go through if their primary condition was a mental health condition. What is most important—and it would probably alleviate the need for such an approach—is that the quality of assessments and information gathering is good. There is a fairly wide consensus across disability groups on the need to move away from having a face-to-face assessment by default to an approach that is much more paper based and focused on the individual and the impact that their disability or mental health problem is having on their life. We would like a system in which such an approach is key.

We have heard good things from Government on that, but one of our slight concerns is on where liability for the collection of evidence lies. In the current system, where some people are charged for additional evidence and some people struggle to gather evidence because of their condition, we know that there can be big problems and gaps in evidence, which is leading to people having to go to appeal and tribunals. We would like the agency to have a much stronger role in gathering evidence on behalf of the individual, once the individual has given their consent and possibly identified key evidence sources. Quality evidence that is gathered from community psychiatric nurses, psychiatrists and family and friends—people who really know the individual—and evidence that is gathered from the individual themselves about their understanding of the impact of their health complaint could make a big difference to decision making. When face-to-face assessments have to happen, they should be undertaken by someone with a mental health background if the applicant's primary condition is a mental health condition. Those things would go a long way towards improving the quality of assessments and the experience of those who undergo them. We know that undergoing an assessment can be a very damaging experience.

The Convener: I will bring in Hugh Robertson at this point. SAMH said in its written submission that post-traumatic stress disorder should be looked at, but the Scottish Government's position paper notes that the IIAC has considered the issue and has "not found sufficient evidence" to recommend changing the criteria. In addition, the Scotland Act 2016 prevents the IIAC from providing advice to Scottish ministers.

I have a two-pronged question. First, do you have any comments on what SAMH has said? Secondly, do you have a view on how the IIAC could provide functions in Scotland under the bill?

Hugh Robertson: That requires quite a long answer. I will start with mental health issues, if that is okay. We have looked at that area. The problem is that the scheme is not a sick pay scheme, but a benefit payment scheme for disabilities that are caused by work. Roughly a third of mental health disorders involve a work component, but it is very difficult to say that someone's mental health problems have been caused purely by work.

Last month, we published a report on teachers and healthcare workers. We felt that there must be good evidence in that area—we have all heard anecdotes and stories. However, because stress and anxiety are so common among the general population, we could not ascertain that people in that group are more than twice as likely to experience such problems. If we wanted to say that it is more likely than not that such disorders are caused by work, we would need to see that kind of doubling, and unfortunately it is not there.

One issue is that mental disorders that are caused primarily by work are treatable and people can recover from them. We do not want such disorders to be seen as a disability, because that medicalises the issue and institutionalises people. We want to empower people to feel that they want to get back to work and get well rather than see themselves as victims.

Another issue is that such disorders are preventable, but there is no link between the current industrial diseases system and the workplace and the employer, which means that there is no real incentive. The Scottish Government could end up paying large sums of money in benefit to those people, but what would it do to prevent the problem? The scheme does not really do that.

We looked at PTSD and said, "Yes, it is different." It can arise from a one-off traumatic event and can be very disabling, which is why we said that although the occupational diseases scheme does not apply to it, the accident provision may apply. If someone experiences PTSD as a one-off event, they can claim benefit under the accident provision. That is probably a reasonable approach to the issue, because it is a different state in the context of mental health issues.

With regard to what kind of model we should have, there is a fantastic amount of occupational medical experience and skills in Scotland. Just down the road there is the Institute of Occupational Medicine; one of the fathers of occupational medicine, Professor Ewan Macdonald, set up the healthy working lives group in Scotland; and there are professors of occupational medicine and so on in Glasgow and Aberdeen.

The point about setting up a committee to deal with the issue is that it is not primarily a medical approach that is needed. We need the epidemiologists: the people who can look at the evidence around the world and say whether it shows that it is more likely than not that people in certain occupations have developed this particular disease because of their work.

The difficulty is that, if you use the same criteria in Scotland as will be used in England and Wales and as apply in Northern Ireland, two committees will be looking at exactly the same diseases on a scientific basis and coming up with different decisions, which will cause problems. In the long term, are you going to use a 71-year-old system, which is what we have in England and Wales—which was set up for a completely different purpose, to deal with a completely different workforce, at a time before our current occupational health priorities were developed—or will you have your own system?

The initial issue is having two parallel committees looking at exactly the same issues. In the long term, it is a question of the Scottish Government deciding what kind of system it wants to evolve for the modern Scottish workplace and having a group that is appropriate to that.

We have found that having a mixture of academics, a lawyer and people who know the world of work—representatives of both employers and employees—has worked fantastically well, and we very rarely have disputes within the IIAC. I have been on the council since 1999 and we do not normally disagree, because we go where the evidence takes us, whether we like it or not. I do not like the decision that we made on stress in teachers and healthcare workers, but we made it because of what the evidence shows us. The evidence will not be different, whether it is being looked at in Scotland or in London, and that is where we have a problem.

The Convener: Thank you, Mr Robertson. I did say that we would have a question specifically for you. That was very interesting. Obviously, we cannot make assumptions, but if you have looked at evidence and you have advice, perhaps you could work together with the new social security agency so that it can receive that advice.

Are you saying that it would be better to keep things separate, or are you saying that you would give that advice if you were asked? We have talked about PTSD, which is recognised now, so if that was considered to be a disability a person would get a social security benefit for that. Would the evidence for that need to be provided by the committee?

Hugh Robertson: We have been told that we cannot give such advice to Scotland. We cannot really comment on that—that is what we have been told. Once Scotland takes over devolved responsibility for industrial injuries benefit—you are calling it "employee injury assistance", which I welcome—then we will no longer be able to give advice.

The reality is that occupational diseases in Scotland will not be different from those in England. In the initial period, when Scotland will be mirroring the scheme in England and Wales, reports on issues will be coming from the IIAC in England and Wales. We cannot really advise you on whether Scotland should just accept those reports and put them into Scottish regulation, or whether it should set up its own specialist committee, either as a sub-committee of the Social Security Committee or as a separate one.

However, we can say that, because those reports are meant to be evidence-based academic ones, problems would arise if the two committees looked at the same things and reached totally different conclusions. That should not happen. Is it a useful use of Scotland's resources to duplicate the committee's work? That is your decision, I am afraid.

The Convener: I am sure that the committee will reflect on that.

Jeremy Balfour: Can I say for the record that I forgot to declare that I sat on PIP and DLA tribunals and I am in receipt of PIP? My apologies for that.

The Convener: Not at all. Thank you, Mr Balfour.

Alison Johnstone: Earlier, Peter Hastie commented on the fact that the Social Security (Scotland) Bill has a hugely important role to play, but that society at large can also contribute to a good system. In his submission, he said:

> "Recent work at the Spinal Unit based at the Queen Elizabeth Hospital in Glasgow showed that here is a real opportunity to change how decisions are made for people with longterm conditions working closely with nurses, physios and consultants",

which could have a real impact on the way that we assess those conditions in the first place. Can he give us more information on how that worked?

Peter Hastie: Absolutely. I do not want to make up a new phrase but I think that we could be interested in something about pre-advocacy. In our submission we talked a lot—sometimes defensively and sometimes positively—about the work that we have done with the UK Government on changing the nature of cancer patients' claims. A Macmillan Cancer Support phone line is now credited by the DWP to fast-track those payments.

10:30

The Scottish Government is the only Administration in the UK that has helped fund Macmillan Cancer Support benefit advisers, which it did for the five cancer centres across Scotland in 2008. It is about changing the nature of somebody's benefits journey. If members want to, they can visit the Western general, for example, and see the benefits staff going round the chemotherapy ward to get the patients to fill in the forms. We know that somebody going through chemo could not go to the advice centre on the high street and so on.

The Queen Elizabeth practice follows Macmillan's benefits model, which takes the advice into the hospital, fast-tracks the form and avoids all the face-to-face assessments, because the judgment of the consultant and the CNS that the person going through chemotherapy is not able to work can be trusted. The Queen Elizabeth has built on that model, which surrounds the patient. Macmillan normally deals with those who have cancer, and the Queen Elizabeth deals with those with long-term conditions. We can support them through that journey.

I am passionate about addressing the changes regarding people going back to work. As the state retirement age rises to 68, cancer is going to be more and more of a working-age illness. Back in the day, if someone got cancer when they were 60, they were just about at retirement age and could get their pension. However, that is not the case anymore. We now need to get people back to work, which chimes nicely with the fact that survival rates are growing massively. The next Scottish cancer survival rate figures will be issued around January and they will show increased survival rates, with one, two, five and 10 years' survival. We would like those rates to be higher, but that is an issue for another committee.

If we can surround the cancer patient or the person with the long-term condition with physiotherapy and vocational rehabilitation and all that that brings within the health service and their workplace, we will not necessarily take them out of the benefits system, but we can keep them away from it as long as possible. There are so many roles for so many professionals in our society to support the person with the illness to not always need the support of the benefits system.

Alison Johnstone: I address this question to Craig Smith. At the start of the evidence session, you were asked about the strengths of the bill and I think that you mentioned the charter. Does the bill provide a framework of rights and a mechanism of redress that a benefit applicant could rely on if they felt that their rights were not being fully respected?

Craig Smith: No, not at the moment. I very much welcome the fact that the bill stipulates that there will be a charter. We would like to see it co-produced with the experience panels, but with a wider audience of stakeholders. We stated in our submission that we want that to reflect the fact that over 30 per cent of people receiving PIP have mental health problems as their main condition, so the mental health population needs to be reflected.

Redress is one of our concerns. We very much welcome the bill's principles and the legislative promise that a charter will be developed. What is currently missing, though, is avenues for redress. If we want a system that is based on human rights, we need it to have accountability, scrutiny and redress. There needs to be a wee bit of clarity around whether the principles are systemic or are for the individual and whether the charter will be for enshrining the rights and principles for the individual. If that is the case—it should be—there must be an avenue for individuals to complain or seek legal redress if they feel that their rights under the principles and, subsequently, the charter are not being adhered to by the state or social security agency.

We hope that that can be developed and we would like further clarity from the Government on it. The concern has been raised not just by us but quite widely across the disability third sector that there are some gaps regarding the issue of redress. That is crucial, because people need to be able to get redress when they feel that their rights have been breached.

The Convener: Ruth Maguire has a supplementary question.

Ruth Maguire: It follows on from what Craig Smith has just said. If the charter was to be legally enforceable, it would have to be drafted as a legal document. I believe that that would be a disadvantage, because it would detract from the charter's purpose of being accessible, easy to read and not legalistic, and it would affect its ability to be co-produced, as Craig Smith said that he wanted it to be. What are your reflections on that?

Craig Smith: That is a big challenge. A balance needs to be struck, but I do not have the answer. We believe that the charter must have some form of mechanism of redress, but the charter needs to be accessible for everyone who uses the system and it should be co-produced.

Ruth Maguire's question is a really good one, and it is a difficult one to answer. We would not like the charter to become window dressing for the system. I am certainly not suggesting that that is the intention or that that is what will happen, but charters under other legislation perhaps have not had the impact that they could have had. We need to get a balance, but an individual's right to redress is a key issue.

Ben Macpherson: I am interested in Peter Hastie's thoughts on this question. Macmillan's written evidence mentioned the fast-tracking element for those who qualify for assistance and who are living with terminal illnesses such as cancer. Other organisations, such as Marie Curie, have suggested that the fast-tracking element should be mentioned in the primary legislation. Do you have a view about where a right to fast tracking, or a statement about it, should be included?

Peter Hastie: I have been thinking about that, and I cannot remember ever coming across a situation in which people did not just accept that terminal illnesses are different from other issues. We push the UK Government all the time to speed up payments, but we have most success when we are talking about terminal illness. Most people would normally accept that the system should have different criteria in that regard. Despite the brilliant work of the detect cancer early programme, many Scots are diagnosed very close to the end of their lives. Most people accept that the system should have built into it a shorter timeframe for those with a terminal diagnosis of six months or less—it is often a lot less—than the timeframe that it has for those who have a normal diagnosis. I should perhaps not say “normal”, but you get my point.

I am not clear that that has to be in the bill. As Pauline McNeill alluded to, the nature of terminal illnesses will change over time, so you would not want to tie your hands too tightly. However, the committee and the Parliament can send a very strong message. Every system that there has ever been accepts that those with terminal illnesses have to be fast tracked ahead of others, although we would love all benefits to be processed within 24 hours.

It is pretty clear that the seven-day targets that have been set by Westminster are being met, and we would not want the bill to do away with those hard-won targets. My colleagues Emma Cross and Grace Brownfield fought hard at Westminster for years to have those targets put in place. However, we do not perceive for a moment that the Scottish Government would do anything other than continue with those targets and keep publishing the statistics so that the committee can hold ministers' feet to the fire when the quarterly statistics are published, just as we currently do at Westminster.

The Convener: Ruth Maguire, do you wish to come in on advocacy?

Ruth Maguire: I could do.

The Convener: Sorry—I had your name down for a question on advocacy.

Ruth Maguire: That was for the first panel. To be honest, the panel have already reflected on advocacy and advice, but thank you for the offer.

The Convener: That was remiss of me.

Questions have been asked on numerous occasions about the issue of primary and secondary legislation. We have had evidence from many groups, most of which say that they would like some particular measure to be included in the bill. Why is it so important to have measures in primary legislation rather than secondary legislation, when the latter is easier to change because we do not have to go through the full parliamentary process? Could you explain that to us in simple terms?

Craig Smith: Although regulations certainly are easier and quicker to change, we are concerned about the scrutiny aspect. That is key for us. Changing primary legislation requires a much longer process, but that is not necessarily a bad thing, as it allows proper public consultation and Parliament can amend proposals rather than just pass or reject them. We fully understand that, in a complex social security system, we cannot have every single detail in the primary legislation, as that would become unmanageable but, for us, it is important that we have the key eligibility and assessment criteria as well as timescales—the key principles—to provide a framework for further regulation. Scrutiny is a real concern for us.

The experience of the changes to PIP that were made through regulation, which we felt were very damaging and were made without any public scrutiny, is a warning for us that we need to future proof the bill. Although we welcome the Government's tone in the debate on social security—actually, it has been a fairly cross-party tone across Scotland since before the bill was produced—we do not know whether that level of discourse will always be there. It is important that safeguards are put in place, which is why we feel that the balance between primary and secondary legislation is still not quite right.

The Convener: So scrutiny is really important—

Craig Smith: Scrutiny is really important for us.

The Convener: —and you believe that, if measures are in the bill, scrutiny will come along. You do not think that having an independent scrutiny body would be enough.

Craig Smith: We definitely agree that there should be an independent scrutiny body, but it is important to have that public scrutiny, too.

Peter Hastie: I certainly do not want to contradict Craig Smith, but we have not asked for that. Maybe it is just because I am so long in the tooth now, but I am fairly sure that more social security bills will come in front of the committee as the years go on. Macmillan will scrutinise those for cancer patients through the committee and the Parliament and outside the Parliament. The reason why we have not called for measures to be put in the bill is that, because the nature of cancer is changing so much—in a good way—if we tried to pin down every single one of our beliefs in the bill, we would be concerned that we would have to come back to you in six months to say, "We've got a new one."

I am not an expert on putting things in bills and I am not speaking against that, but we strongly believe that the changes to the welfare system for cancer patients are non-stop. The survival rates are incredible. I could not have told you that five years ago.

The Convener: Something might even change that concerns Mr Robertson's council—you never know. I am bringing Mr Robertson back into the discussion, as we talked earlier about post-traumatic stress disorder and that type of thing. I have heard from a number of people that things are changing all the time in the welfare system and that it would take a long time to deal with that if everything was in the bill. However, it is for the committee to make up its mind on that when proposals are made.

Ben Macpherson: Some of the panel were in the public gallery listening to the first panel, with which we discussed a commitment from the minister to use the super-affirmative procedure for secondary legislation. Does that reassure you, Mr Smith?

Craig Smith: It is definitely very welcome, as it would provide a greater level of debate on regulations. However, I would need to reflect on that a bit more. There are still certain areas that we would like to be covered in the bill, but it is a very welcome step if the minister is going down the super-affirmative route.

The Convener: I thank the panel very much for their evidence. We now go into private session.

10:43

Meeting continued in private until 11:25.

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