OFFICIAL REPORT
AITHISG OIFIGEIL

Social Security Committee

Thursday 2 November 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 2 November 2017

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SOCIAL SECURITY COMMITTEE
21st 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:

Jeane Freeman (Minister for Social Security)
Andy McClintock (Scottish Government)

CLERK TO THE COMMITTEE

Simon Watkins

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Social Security Committee

Thursday 2 November 2017

[The Convener opened the meeting at 09:00]

Social Security (Scotland) Bill: Stage 1

The Convener (Sandra White): Good morning and welcome to the 21st meeting in 2017 of the Social Security Committee. I remind everyone to turn off their mobile phones, as they interfere with the sound system. Apologies have been received from Mark Griffin, who, I believe, will be slightly late due to transport difficulties.

Agenda item 1 is consideration of the Social Security (Scotland) Bill at stage 1. We will take evidence from the Minister for Social Security, Jeane Freeman. I welcome her and her officials Colin Brown, James Wallace, Chris Boyland and Andy McClintock. Minister, I believe that you want to make an opening statement.

The Minister for Social Security (Jeane Freeman): Thank you very much, convener, and thank you, committee members. I am grateful for the opportunity to be here this morning. I place on record my sincere thanks to everyone who has given evidence to the committee so far either in person or in writing.

Our whole approach to building a new social security system for Scotland has been to make use of the knowledge and expertise of those with lived experience of the existing system under the Department for Work and Pensions. That includes, of course, the bill that we are discussing today, whose genesis lies in the consultation that took place over the summer of 2016. We received 521 detailed responses to the consultation, and we published all of them in February along with our findings and independent analysis. Since the consultation, I have attended more than 70 individual meetings with more than 50 separate individuals, groups and organisations ranging from Age Scotland to the Convention of Scottish Local Authorities and from the Multiple Sclerosis Society Scotland to Shelter. Alongside that, key stakeholders have kindly made many other contributions to our thinking.

The bill is the way it is because of our wide-ranging, detailed and on-going engagement work, the scope of which now goes well beyond our consultation to encompass our expert advisory group, the experience panels and the stakeholder groups covering both policy and delivery. Because of that engagement work, we saw before we introduced the bill the need to ensure an appropriate balance between primary and secondary legislation, and we built into the bill a mechanism to address that. Members will have read paragraph 12 of the delegated powers memorandum, which we published alongside the bill back in June. It says that

"the Scottish Government is live to concerns about the effect of this approach on the opportunity for the Parliament to control the detail around the different types of assistance during the Bill's passage. The schedules attached to ... sections 11 to 17 are a way of ensuring that ... members will be able to control what may ... be done using the power to make provision about a particular type of assistance. In this way, members will be able to exert just as much control ... as they would if ... the ... rules were set directly on the face of the Bill."

We have therefore addressed by design the need to strike the right balance between primary and secondary legislation.

We have also taken steps to address another key concern: the need to ensure that our secondary legislation receives the input and scrutiny that it requires. We are committed to producing illustrative versions of some of the regulations that we will make under the bill, and I was pleased that, last month, we were able to share with the committee the first illustrative drafts of our planned best start grant regulations. Those have also been shared with stakeholders, and, last Thursday, I took part in a discussion with our best start grant reference group. We have sought feedback on our illustrative regulations to ensure that we get things right.

I feel the same about the bill. For example, sections 11 to 17, in which the bill specifies that assistance may or may not be given in the form of money, do not say that the individual should always have a choice of whether or not to receive their assistance in any form other than cash. I believe that our policy memorandum makes it clear that we would wish the individual to have that choice. Indeed, our intention is that individuals should always have that choice, and I will make changes at stage 2 to make that clear.

Similarly, we heard a great deal during stage 1 evidence about independent advocacy. As Inclusion Scotland has put it, advocacy

"is vital to ensure that the rights of those who cannot properly communicate their needs are upheld"

and

"helps people to access advice and services that they would otherwise be unable to engage with due to communication needs".

I am grateful to Inclusion Scotland and others for their evidence on the matter—in particular, the clarification that advocacy does not mean

"mediation, giving advice ... or speaking up for someone when they are able to express themselves".

I am happy to say that we will take steps to address that issue at stage 2.

We have also responded to concerns about independent expert scrutiny, which we all accept is about more than just the scrutiny of legislation, important though that is.

Members are aware that the short-life working group that was made up from members of our disability and carers benefits expert advisory group has begun the work that I tasked it to do. I am grateful for the time that its members took on Tuesday of this week to update me on their thinking so far and for the discussion that we had then. They are working at pace. I know that they have had a discussion with the committee, and they will hold a workshop with a wider group of stakeholders later this month.

I hope that the committee found the session with the working group useful. You will appreciate that a number of interested parties—myself included—are keen to hear more about the committee's views on the issue, and I hope that we will be able to discuss it further this morning. It is an issue on which the Government, the Parliament and stakeholders need to work together to get it right. As I have said, stakeholder evidence and our continued engagement with the wide community of stakeholders who have an interest in the legislation is the foundation of the bill. That principle has guided us in the bill's development and drafting, leading us to make the legislation clear, accessible and flexible by putting the cardinal points into primary legislation and the detailed rules for the operation of our Scottish benefits into subordinate legislation.

We have continued that direct involvement since the bill was introduced, through the 2,400 volunteers on our experience panels, and we will go on doing so into the future. The experience panels have been established to run for at least four years, by which time the new Scottish social security system will be in place, our new agency will be up and running and we will be delivering benefits to the people of Scotland.

I am happy to take any questions that the committee may have.

The Convener: I will start with an overarching question. In your opening remarks, you mentioned primary legislation and subordinate legislation. We have heard from various stakeholders about what will be in the bill, about what will be in secondary legislation and about the super-affirmative procedure. I know that you mentioned this in your opening statement, but can you expand on the Scottish Government's proposals in those areas? In particular, can you expand on what will be in the bill? A number of stakeholders have asked the committee to explore that.

Jeane Freeman: Let me start with the consultation and everything that we have heard from people since then on one aspect of how the current system works.

It has been very clear that individuals and stakeholder organisations find the current United Kingdom system confusing, as it is difficult to identify what the situation may be in any instance. That is partly because there is a mix of cardinal points and regulations and rules in the primary and secondary legislation. We therefore set out to make our proposition clearer for people.

In primary legislation we will make the cardinal points about a social security system for Scotland, but in the regulations for each type of assistance we will tell the whole story about that type of assistance, congruent with those cardinal points, and we will make things such as eligibility and the type of assistance clear. We believe that that will allow individuals, as well as those who are working with and for them, to be very clear about what they can expect and to identify fairly straightforwardly any person's eligibility for a particular type of assistance, the requirements that would be placed on them to demonstrate that eligibility and the rules surrounding the assistance.

The critical part of all of that is, of course, how we introduce the regulations and what procedure we adopt. I am conscious that there is no perfect way of doing that—one of your colleagues said to me, "It is a difficult thing to get right. Good luck with that." We hope to adopt an affirmative approach in the majority of instances, adding elements that might be called super-affirmative—although I am conscious that there is more than one model of that—which will allow members to engage with and scrutinise draft regulations before they are laid. It should also ensure that stakeholder groups are consulted on draft regulations before they are laid.

As an example, the illustrative regulations that we have produced on the best start grant and the ones that we will produce on funeral assistance are not simply there to provide an illustration of what members should expect to see in the regulations; they also illustrate the approach that we would take in consulting on the drafts of those regulations prior to formally laying them before the Parliament.

I will also touch on the question of independent scrutiny, although I am sure that we will go into that in more detail. Whatever resolution we come to—collectively, I hope—on that, it is my firm view that, in addition to the Parliament's committees having an important scrutiny role, we will have an independent body that is charged with scrutiny as

part of its remit, which ministers should be required to consult in advance of making regulations or changing matters with respect to social security. That is very different from the current position of the Social Security Advisory Committee at the UK level, as there is no obligation or duty on ministers to engage in consultation with it prior to making their decisions.

I hope that all of that in the round—our having got the balance between primary and secondary legislation clear and the fact that we are building in, and remain open to propositions to build in more, aspects of the affirmative procedure that will take the procedure to our collective definition of the super-affirmative procedure—gives members the assurance that they will be able to look at the regulations in some detail as they come forward.

The Convener: Thank you very much, minister. That has clarified quite a bit. A number of members want to come in, and I may come back in later.

Ruth Maguire (Cunninghame South) (SNP): I want to ask about redeterminations and appeals. There is quite a bit of good faith and hope out there among folk who will be using the system, which has probably been helped by the consultation and the approach that has been taken. That said, people's views cannot help but be coloured by the experience that they have already had. Their concerns about redetermination have come across quite a bit in evidence, particularly at an Inclusion Scotland event that Pauline McNeill and I attended. How will that process be different from what happens under the current system, and why does there need to be a mandatory redetermination, not a reconsideration?

09:15

Jeane Freeman: I understand that the proposition that people experience in the current system is that, if they challenge a decision that has been made, that decision will be reconsidered but there is no particular timescale for that. Nevertheless, should the initial decision reduce the individual's benefit, that decision will be enacted straight away.

Our proposition is significantly different. If an individual challenges a decision that the Scottish social security agency has made, when the agency advises the individual of its decision they will be advised at the same time of their right to disagree, of the process that is clearly set out for what will happen if they disagree and of the timescale within which the agency must consider their challenge. The challenge will be considered with the whole application being looked at afresh—that is why we call it a redetermination.

If, for instance, I made a decision in the first instance on a claim that you had made and you challenged that decision, my colleague James Wallace, if he was then deciding, would not check what work I had done but would look at the application afresh and reach his own view. If he agreed with your challenge, that would be the decision. If he agreed with me, you would be advised of that and of your right to appeal. The matter would then proceed to an appeal in the normal course.

The final significant difference is that, in our system, should the decision that I made in the first instance, which you disagreed with, reduce the financial support that you received, that reduction would not be made until the whole process had been concluded. Therefore, you would retain your original level of financial support until we had concluded the process with James's decision or it was concluded at appeal.

Ruth Maguire: It has been argued that the mandatory element should be taken away. What are your reflections on why the mandatory element needs to be there?

Jeane Freeman: I understand what is in people's heads when they argue that. There is a widely held perception that the current system is designed to put people off challenging. Our system is not designed to do that, and I am finding it difficult to square a rights-based approach with one that would take away from an individual the right to decide whether they wanted to challenge. That is why it should always sit with the individual to choose what to do. If they disagree with a decision, it should be for them to choose whether they want to challenge it and not for the agency or Government to make that decision on their behalf.

It is also important to put into place a process whereby, if the agency has got a decision wrong, it can correct that quickly. That is why we have a timescale. Obviously, that is in the interests of the individual, too.

Ruth Maguire: On going straight to appeal rather than the agency having the opportunity to correct the decision, your position is that there is an opportunity to fix it more quickly if it goes to the agency.

Jeane Freeman: Yes.

Ruth Maguire: Thank you.

My next question is about the language that is used in the bill. It was put to me by—

The Convener: I am sorry to interrupt you, Ruth, but there are two supplementary questions on appeals. Is it all right with you if those questions are asked?

Ruth Maguire: Of course.

Pauline McNeill (Glasgow) (Lab): Good morning, minister. As Ruth Maguire has said, we have picked up that the message is clearly not getting through and that people are nervous about reconsideration. The approach that you describe is clearly different from people's experiences. Where will that approach be clearly set out, in the way that you have done this morning, so that we can point people to it?

Jeane Freeman: The details that I have described, including what individuals will receive, will be set out in the agency's operational manual, which is part of what our experience panels are currently engaged in discussing with our officials. Our experience panels are looking at not just the design of individual benefits but delivery matters, and they are working with the agency on that.

On your point about the process being clearly understood, I can assure you that I have now spoken to, I think, every one of the key stakeholders on the matter in exactly the terms that I have just done. However, I understand that people look at what we are proposing through the lens of their experience of the UK system—I get that.

Pauline McNeill: Yes, but I think that there is an added concern. You say that the process will be in the operational manual but not in the bill. As a result, it will not come through the parliamentary scrutiny process, and we will not be able to see whether it is as you describe it. That is my concern.

Jeane Freeman: As my colleague Chris Boyland has just rightly pointed out to me, the other place where we would expect to see that is in the charter.

Pauline McNeill: I am sure that we will get to the question of the charter at some point. Obviously, we would need to be clear about its status and enforceability.

Jeremy Balfour (Lothian) (Con): For the record, I declare that I am in receipt of the higher rate of personal independence payment and that I am a former tribunal member.

One of the issues with reconsideration is the double ticking or filling in of forms. If somebody asks for a decision to be reconsidered and the decision that they then get back is negative, they have to fill out another form in order to get an appeal. A number of organisations have asked for a one-stage process. Internally, there could be two stages, but if the claimant is unsuccessful—to go back to your earlier example, if your colleague James agrees with you and the matter goes to appeal—the process could just happen automatically instead of the claimant having to fill in another form. Have you given any thought to taking that approach instead of having double administration for claimants?

Jeane Freeman: I understand that point, and I thank you for raising it. We are giving some thought to the issue. We are also having discussions with our colleagues in the Scottish Courts and Tribunals Service about what they require and are looking for so that we minimise the amount of effort that the individual needs to go to. I want the decision about what happens next to sit with the individual who has challenged a decision, but I do not want to overburden them with lots of form filling—in this instance or indeed in any instance—in a way that they feel precludes them from pursuing the issue. I want people to be really clear about what they need to do, what they should expect and the timeframe within which they should expect it.

As for appeals, we need to understand what our colleagues in the Scottish Courts and Tribunals Service require to do at their end of the process, and we are discussing that with them. The objective is to reduce the amount of paperwork and form filling that individuals have to do.

Alison Johnstone (Lothian) (Green): I welcome the fact that you are having a good look at that, because I think that my colleague Jeremy Balfour's suggestion that appeals should automatically proceed would help a lot of people. Currently, a lot of people think that the internal appeal is the final stage, and they do not push the matter any further. We need to strike a balance and ensure that people understand that the redetermination is not the final stage. It would be helpful if cases went forward to appeal automatically to a degree, and I am interested in hearing what comes out of that discussion that you are having.

Jeane Freeman: The matter will go forward automatically, provided that the individual wants it to go forward. The agency will not automatically forward the case to the appeal stage. If, after looking at the issue internally, the agency decides that it does not agree with the challenge, the individual will need to trigger the appeal. However, as Mr Balfour has rightly requested, they must be able to trigger it in the simplest way possible, without lots more form filling.

Alison Johnstone: Absolutely.

The Convener: In previous evidence sessions, a number of stakeholders have said that the charter should be available to people, either online or in paper form—perhaps in advice centres—so that they can see what is available to them. Will people be able to see exactly what is in the charter concerning appeals?

Jeane Freeman: Absolutely. The charter is where we take the principles of the bill and

transfer them into what an individual should expect and what their responsibilities are in their dealings with the agency. It is a document—a piece of paper—that we intend to write with our stakeholders and the input of our experience panels. I am sure that we will come to discuss the exact enforceability of the charter and how we make those rights and responsibilities real so that it is not just something on a bit of paper. I expect the charter to be widely displayed. I have also asked our officials who are leading on the implementation of the agency to consider whether people will simply be given the charter in their initial and subsequent communications with the agency—although, to be fair, that depends on the size of the charter.

The Convener: Thank you for clarifying that. That is certainly what stakeholders have asked for.

Ruth Maguire: I have a brief question about language. It has been pointed out to me that the term "physical or mental impairment" might not sit well with or might almost be a barrier to folk living with conditions that have stigma attached to them, specifically people living with HIV. Is that term fixed? The language feels slightly diminishing anyway, so why has it been used?

Jeane Freeman: Again, I understand the points that are being raised. The term is used because, in the Scotland Act 2016, the term "disability benefit" is defined as

"a benefit which is normally payable in respect of ... a significant need ... arising from impairment to a person's physical or mental condition".

There is a need, where we can, to retain consistency of language across different pieces of legislation, so that we are clear about what we are talking about. That is why we have taken that from the 2016 act.

Ruth Maguire: Okay. Thank you.

Adam Tomkins (Glasgow) (Con): Good morning, minister. It has been clear since you became minister in May last year that you want to regard yourself as being accountable to key stakeholders and to social security system users. That is to be welcomed and applauded, but you are also accountable to the Parliament. Over the half hour that you have been speaking to us, my concern has grown that, in your desire to be accountable to stakeholders and user groups, the Scottish Parliament is being cut out of various aspects of the process, which makes me uneasy as an MSP.

In your answer to Pauline McNeill's question, you talked about the new agency's operating manual, of which there will be no parliamentary scrutiny. Indeed, there is no parliamentary scrutiny of the creation of the agency at all, as it is not to be a statutory body. In section 3, there is a list of people who must be consulted by ministers in the creation of the first charter, but that list does not include the Scottish Parliament.

That lies at the core of the concern that the Delegated Powers and Law Reform Committee set out in the report that it published yesterday about the balance between primary and secondary legislation, which is the issue that you have discussed with the convener. That committee concluded that the bill could strike a better balance between accessibility and parliamentary scrutiny. In paragraph 31 of its report, it calls for

"a 'reasonable level of detail' to be set out on the face of the Bill on eligibility criteria and the assistance to be given."

I find its conclusions and recommendations compelling.

09:30

In the light of what I have just put to you, what can you say to reassure us as MSPs that, notwithstanding the values of co-production that you have been working so hard to engineer over the past year and a half and which we welcome and support, the Scottish Parliament will be front and centre in the design and delivery of devolved social security in Scotland?

Jeane Freeman: I absolutely consider myself to be accountable to the Parliament. As a Government, we have said that the social security delivery body will be an agency precisely because agencies are accountable to ministers and ministers are accountable to the Parliament. Therefore, the agency will be accountable to the Parliament for its operation through the minister.

It is not my intention to cut parliamentary scrutiny and involvement out of the process of constructing a social security service and delivery agency for Scotland. At the outset, I acknowledged that there is no perfect balance that can be struck, and there might be areas where we need to reconsider what should be included in primary as opposed to secondary legislation. However, I ask members to hold in their heads the fact that it is not simply the important role of the Parliament that we must consider; we must also take account of the delivery experience of people in Scotland, who will look to the social security system for the support that they are entitled to.

I am reluctant to set out eligibility criteria in the bill because I believe that that might create difficulties for people. If I were to set out in the bill a list of things that an individual had to produce to demonstrate that they were eligible for a particular form of assistance, it might mean that if an individual could not produce every one of those, the agency could not exercise discretion in order to deliver the benefit. Such matters need to be borne in mind as we seek to get what we consider

to be the right balance between primary and secondary legislation.

I am mindful of Ms McNeill's question about where the process for redetermination and appeals will be set out. In that area, as in others, I am open-minded about where we might make improvements to the bill. In my opening statement, I gave a couple of examples of how we have already demonstrated our open-mindedness with regard to stage 2 amendments.

Therefore, I am not saying, "This is what'll be in primary legislation, that's what'll be in secondary legislation and I'm no willing to move." I am simply asking members to consider—as I have to—the practical implications of putting some aspects into primary legislation when witnesses to the committee have suggested that, in practice, doing so would undercut the approach that we are attempting to take in delivering social security in Scotland.

Adam Tomkins: That is helpful. Thank you. You mentioned in your opening statement—or perhaps it was in response to the convener's first question—that you recognise the need for an independent advisory body, perhaps along the lines of the SSAC but with more powers. You also said that you were attracted by the idea of there being a requirement on ministers to consult that body. Do you intend for the independent advisory body to be a statutory body and created by the bill? Should the requirement on ministers to consult it be a legal requirement also under the bill? If so, are you minded to lodge amendments along those lines at stage 2?

Jeane Freeman: My view is that we should have an independent scrutiny body. I am not settled on whether its role should be solely scrutiny or whether it may have additional areas in its remit. I look to the committee—I have raised it before here—and the expert group to express their views. There should be a duty on ministers to consult that independent body before they introduce draft regulations or changes to primary legislation relating to social security. I am open to the proposition that the body should have a statutory footing.

Adam Tomkins: The power to create new benefits is an important part of the Smith commission package and the Scotland Act 2016. Some social security powers are devolved in full, we have the top-up power and we have the power to create new benefits. There are provisions in the bill that deal with the streams of social security that are devolved in full and provisions in it that deal with the top-up power—section 45 in particular—but there is no provision in the bill that enables the Scottish ministers to create new benefits. I have asked you about that in the chamber and you have said that that is because you already have the power and do not need such a provision. Will you walk me through that? I still struggle to understand why you need a bespoke power to top up benefits in section 45 but you do not need a companion bespoke power in the bill to create new benefits.

Jeane Freeman: As you know, Mr Tomkins, and as I said, the Scotland Act 2016 gives us the power to create new benefits. It is not wise—in fact, it is contradictory—to worry about the degree to which Parliament and the committee have scrutiny over what we do, which is fair on many points, but also to want us to put into primary legislation a simple provision that gives us the power to create new benefits without specifying what those new benefits might be. That would simply allow the Government to create a new benefit and produce secondary legislation without the primary point of the new benefit coming to the Parliament for scrutiny at the committee. That is not a consistent approach.

That is why we have not put into primary legislation a blanket power to create new benefits. Should the current Government or a future Government propose the creation of a new benefit, it would need to amend primary legislation to do that. Indeed, at stage 2, we will come with just such a proposition to overcome the difficulty that we have encountered with respect to housing benefit for 18 to 21-year-olds. Members will recall that we currently have an interim solution. That is fine for now but it is not a sustainable approach. The alternative to it is to amend the bill specifically with a new benefit for that purpose. We will lodge such an amendment. That is how it is appropriate to use the powers of the 2016 act to introduce new benefits. That is why we have not done that in this bill.

Top-up is, of course, a separate proposition and the primary legislation allows us to make the additional payment to carers allowance, which we intend to introduce as soon as the bill receives royal assent.

Pauline McNeill: Obviously this is an important area to examine at this point. I agree with the minister that it is important to get the balance right. There is a good case for saying that not everything should be in the bill. However, as you know, there are different understandings of that among witnesses.

You have talked about the super-affirmative procedure, and that is one way in which regulations would have a higher degree of scrutiny. The first set of regulations on the best start grant, for example, would come before the committee and there would be a consultation on them. I am trying to think of a scenario. Let us say that there was something in the regulations that the committee felt went against the principles of

primary legislation but, by and large, most of the instrument was okay. We cannot take out the bit that we do not like, and that is the problem.

What is your view? What would you do in that case? Do you have any power to withdraw the regulations if the committee feels that they do not comply with the principles of the primary legislation?

Jeane Freeman: Let me stick with the best start grant because it is around just now and there are draft illustrative regulations. They are in the process of being written by my officials in consultation with the key stakeholders through the stakeholder reference group. They are now before this committee and with the Delegated Powers and Law Reform Committee, and I understand that, yesterday, they were circulated to about 100 different individuals and organisations drawn from our consultation exercise for their comments and views. All of that, including any views that the committee might have, will come to me when we get to the stage of turning those illustrative regulations into draft regulations.

In my opinion, it would be a remarkably foolish Government that, despite knowing that either stakeholders or a committee of the Parliament responding to stakeholders had a serious disagreement with what was in draft regulations and thought that they contradicted some of the key cardinal points in primary legislation, nonetheless ploughed ahead with an affirmative process that risked Parliament voting those regulations down. That would mean that we would not have the regulations for that form of assistance and we could not then go ahead and deliver it.

This Government, and any future Government, would have two options. One would be to alter the regulations between the draft and what is then laid in order to respond to the concerns that have been expressed, and the other would be to lay the regulations and then withdraw them—of course, there is a third option, which is to fire ahead and risk losing the vote in Parliament.

Pauline McNeill: The dilemma for Parliament comes if 75 per cent of the instrument is okay and the other 25 per cent is not. The problem is that we cannot amend regulations.

If an individual claimant or organisation felt that the regulations were not compatible with the principles of the bill, what redress would they have?

Jeane Freeman: Initial redress is through the charter, which will make it clear what people's rights are. They would raise their objection initially with the agency, if it was a particular matter that the agency could resolve, or directly with the Government. All ministers are obliged to comply with the European convention on human rights and human rights legislation in what we do, so the final recourse is the judicial one that is always available in relation to this Parliament's legislation.

09:45

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I want to move the questioning on to an area that has produced a lot of evidence, both in writing and orally here at committee—the principles of the bill in section 1.

In your opening remarks, you made reference to the evidence received on advocacy and I welcome what you stated on that point. There have been a number of other suggestions, both on amending the principles as drafted and for some new principles, particularly on accessibility. As a very broad question, do you have any comments on the suggestions that have been made? I will then follow up with a question about a particular principle as drafted.

Jeane Freeman: One of the suggestions that I understand have been made is on equality—ensuring that there is equality of access and treatment. I understand that principle and why people might want that and am open to it being included. I can see no reason why we would not want to do that.

There have been other suggestions about ensuring that we tie the principles and the rights-based approach to international conventions—that may not be the right word, but you will know what I mean.

I make the point that, as I have just touched on, the Scotland Act 1998 requires Parliament's legislation to be compatible with the ECHR. The Human Rights Act 1998 makes it unlawful for public authorities in Scotland to act incompatibly with the convention rights. Everything that we do is set in that context. It may be that we need to remind people of that and make it clearer. In addition, all Scottish ministers now and in the future are required to comply with our code, which includes an overarching duty to comply with the law, including international law.

Our bill and our principles sit very firmly in that landscape. It may be that there is a case for making that clearer. I am not sure that we need to do more than make that clear, although people may come forward with propositions to suggest otherwise.

I am also mindful—and this has arisen in a number of discussions that I have had with organisations that want us to do certain things—that, although I am intending to create a legislative framework for social security in Scotland, in the first instance it is for 11 benefits, or 15 per cent of the total. I cannot have this Government or a

future Government required to meet obligations that 11 benefits are not sufficient to allow it to meet. We need to get that balance right as well.

Ben Macpherson: Indeed, and that complexity and how difficult it is to navigate came through in some of the evidence we received.

The your say workshop powerfully said that, as a group, it warmly welcomed the principles and particularly supported the objective that respect and dignity should be at the heart of the Scottish social security system, as do I. However, some concerns have been raised with me, particularly by Advocard, a local advocacy agency in my constituency, that dignity and respect are subjective terms. Would you be open to tightening that aspect of the principle in order to make sure that we are as clear as possible about what those terms mean in the legislation?

Also, several pieces of evidence have referred to the principle in section 1(d), which says:

"the Scottish Ministers have a role in ensuring that individuals are given what they are eligible to".

Some representations have said that that should be a duty, rather than a role.

Jeane Freeman: Let me start with the last point. I am open to lodging an amendment to make that change. I understand why people want it. For me, the important part of that principle is the phrase

"eligible to be given under the Scottish social security system,"

because that makes clear what we would be responsible for. I think that that is fair enough.

The point about dignity and respect is a fair one. Last night I read again the report that the Equality and Human Rights Commission commissioned from Ulster University, which talks in some helpful ways about dignity and respect and how that set of words or concept is difficult to enforce judicially because it is largely subjective. We should look to make the meaning of those words more tangible in our charter. I do not know how they could be tightened in the primary legislation to address the issue that you have raised and to make them enforceable, while still retaining their meaning. What Ulster University's report says is very helpful in that regard. It points us towards the charter and I think that that is the right direction for us to take.

Ben Macpherson: Thank you.

George Adam (Paisley) (SNP): I asked this question previously when we discussed various things. It is about the information technology systems. We can all have great principles and ideals about how we want to treat people, but the practicality is that, come the day of delivery, we could have a problem. Traditionally, Governments are not great when it comes to IT.

We know that Audit Scotland said that you were in a good place when it had a look at everything earlier on, but where are we now? What is the update? I believe that that is important because, at the end of the day, all that the claimants care about is that the money is in their bank account. We can talk about everything else, but to me that is probably one of the most important issues.

Jeane Freeman: Thank you very much, Mr Adam. I think that you are absolutely right that what people will care about at the end of the day is that the money has arrived—the right amount, in the right bank account, on the right day. I also think that they care about how they are treated, but we have dealt with that.

Andy McClintock, our chief digital officer, is here this morning and will happily provide you with some detail about exactly where we are. Before I ask him to do that, I remind everyone, including me, that the approach that we are taking is absolutely compliant with Audit Scotland's key lessons learned from previous IT projects, both those that worked and those that have encountered difficulties.

Those lessons include not going for the big bang but doing things in manageable chunks. That approach sits perfectly with the way in which we are building the agency and taking over responsibility for the individual benefits on an incremental basis. It also allows us to make best use of our expert group, stakeholder groups and experience panels in the design, test and build stages.

That is the overall approach across the piece to the individual benefits, the build of the agency and the IT. Our approach is that the IT is the infrastructure that supports the overall objective of what we are delivering. We have adopted that approach from the outset in the Scottish Government's social security directorate. It has been adopted by the officials who work with and for me. All our teams are integrated, so we do not have a team of officials in one corner working on policy without delivery folk sitting right beside them advising on whether the policy is deliverable. Equally, we do not have delivery folks on one side working out a good system only to have policy people telling them that it might be a good system but it will not deliver the policy intent, or finance people sitting somewhere else altogether. Those integrated teams exemplify our intent to ensure that everything works together.

I am sure that Mr McClintock can give members more details on where we are on the IT build.

Andy McClintock (Scottish Government): Thank you, minister. I will give members an update on where we are.

The minister has already explained that we are taking an incremental approach to the delivery of IT solutions. It is important to say that the programme is an IT-enabled programme for delivery; it is not an IT-led approach. We are very much picking up on the lessons that others have learned before us, and the Audit Scotland report has shaped our thinking and will continue to do so. The contract that was awarded some 10 days ago was the first step on a long journey that is about building an incremental approach to the delivery of social security in Scotland. It is a contract for £8.3 million, which was well publicised in the media last week. That approach and the award of that contract have an element of the reuse of software that has previously been used across the world. In addition, we are looking at the reuse of systems from across the UK public sector. We are not trying to build everything ourselves or to do everything in one large release. The approach is very much incremental.

Members will have heard the term "agile delivery". That brings a different methodology to the way in which projects are structured and the way in which technology is delivered. As the minister has outlined, it sets out a journey in which we have policy colleagues, legislation colleagues and delivery colleagues embedded in all the teams to ensure that users' needs and respect for users are at the forefront of everything that we do and that citizens and users are engaged along that journey so that what we are building is fit for purpose and highly useable.

It will be a three or four-year journey of technology delivery that will support multiple benefits. The first wave of those benefits will arrive next year. The technology journey has only just begun, and the early indications are that we are on the right track and are learning lessons from those before us. We are absolutely taking into our thinking all the digital principles and standards that are right to follow. Our incremental approach to procurement and investment is proportionate and timely so that we can take things in small, bite-size chunks to ensure that what we produce and deliver is fit for purpose and will work for now and for the benefits of the future.

George Adam: I do not know whether my next question is for the minister or for Mr McClintock. I remember it being mentioned that the current benefits are spread over various data streams and that there are manual systems in some cases. Is there work to try to embed our system with other UK systems? Where are we with that? That seems to be quite complicated.

Andy McClintock: We are aware that the current UK benefits platforms are predominantly technology driven, but there are some off-table solutions and manual approaches. As part of our journey in understanding how we intend to deliver and implement benefits in Scotland, we will look to automate as much as possible and ensure that the end-to-end process is efficient, has the citizen in mind and ensures that as little as possible is not automated. We need to learn lessons from systems that were developed decades ago and that have not been able to keep pace with the modern requirements of citizens and legislation, ensure that we implement the new technologies with the citizen at the forefront of what we do, and ensure that those technologies are adaptable to the changing landscape.

George Adam: The system will be more open and flexible to any changes in future.

Andy McClintock: That is the plan. The whole approach that we are taking here is that we are not building a system, locking it down and saying, "That's what it has to be", and then having to bend benefits, rules and regulations to fit it. We are creating an architecture that is loosely designed and can accommodate changes in not only legislation and benefit powers, but technology, which will continue to change over the lifetime of the programme and beyond.

10:00

Jeane Freeman: I think that part of your question, Mr Adam, was about data transfer and data exchange. Colleagues may have met Lisa Baron-Broadhurst, who is another of our depute directors and is leading the programme delivery work on systems and processes, alongside Mr McClintock and the IT side. There is, I suspect, daily contact between our officials and DWP officials to work out the process for data transfer, so that we are assured that the information that we are receiving on those who are currently in receipt of the benefits that we will take responsibility for is as robust and accurate as possible. That work sits alongside the work that Mr McClintock has described.

George Adam: COSLA has raised the issue that there are people who, because they are asylum seekers or on account of their immigration status, cannot get access to benefits and have no recourse to public funds. What is your understanding of that situation, minister?

Jeane Freeman: That is correct. If, as a consequence of an individual's asylum or immigration status, they have no recourse to public funds, they have no recourse to public funds. There is nothing that we, as the Scottish Government, can do to alter that, because it is a consequence of immigration and asylum policy, which sits with the UK Government, and we are obliged to comply with that.

However, there are other areas of support, primarily for children, where a proxy for eligibility is used for benefits that an individual may be receiving. I am thinking about local authorities and access to free school meals, school uniform support and so on. In those instances, the authorities are perfectly free to find another means of determining eligibility for those individuals, other than receipt of benefits. In fact, I have had correspondence with Ben Macpherson on that very matter.

The condition of no recourse to public funds that comes as a consequence of a pending decision on immigration or asylum status sits with the UK Government. It is a reserved area and not one that we can alter at this point.

Jeremy Balfour: I have two specific questions and one general question. First, from my reading of the bill—I am happy to be corrected on this—there is no clear definition of "residence" in relation to who gets an award, how long they would have had to live in Scotland and so on. Have I missed that in the bill? If it is not there, are you minded to amend the bill and, if so, what kind of residence requirement would you be looking for?

Related to that is the issue of people moving between jurisdictions. If I live in Aberdeen and get carers allowance and because of some change have to move to Newcastle, do I take my award with me or do I have to reapply in England? Have there been any discussions between Governments on how long awards last if people move from the area of residence in which they made a claim?

Jeane Freeman: We are still looking at that, but we are minded to follow the existing DWP approach, which is to operate on the basis of what is called "habitually resident", a widely recognised term in the common travel area and the European Union. That would be the approach that we are most likely to take. That would be set out in the regulations for each of the benefits.

In terms of moving between different jurisdictions, we are in discussions with our colleagues in the DWP to resolve that so that it can be as simple and straightforward as possible. It is not new—we need to look at how it operates in other subject areas and whether that method is agreeable to the Scottish Government as well as to the DWP and the UK Government in the case of social security. As we resolve that, we will make sure that the committee is aware.

Jeremy Balfour: To clarify, once you come to a view on residence, will that be in the bill or in regulations? I think you said that it would be in regulations.

Jeane Freeman: It will be outlined in regulations. It is also in part 1 of schedule 1 to the bill.

Jeremy Balfour: My second question is to seek clarification on those who have a terminal illness. At the moment, under UK legislation, there is a six-month rule. I have had correspondence from charities and from doctors who say that, while for some conditions such as cancers it is very easy to say that, sadly, the person has six months or less to live, for some conditions that is less clear. It may be six months, or nine months or two years. Some conditions will have terminal consequences, but in longer than six months.

Would you be open to extending the six-month figure to two years? That would not be an open definition of terminal illness, but it would extend it from six months to perhaps 18 months or two years.

Jeane Freeman: That issue has been raised with me and I am alert to the views of various organisations. My understanding is that there are disagreements between some of our stakeholder groups, and quite strongly held disagreements at that. I am not minded to take sides on the matter.

As I understand it so far, although I am open to other interpretations, the current six months also accommodates those who may, happily, live longer. A number of our clinicians are more likely to give a band between two figures rather than an absolute number, because, as we all do, they understand that aspects of clinical judgment are less binary than we might sometimes like them to be.

At this point, I am not minded to move beyond what we currently have, but I am open to other representations. The reason why I am not minded to move is that there is significant disagreement among stakeholder groups and in our clinical community on the matter.

Jeremy Balfour: My general point picks up on Pauline McNeill's and Adam Tomkins's points.

I appreciate that you want to listen to stakeholders and be as open as possible. At some stage, however, we have to make either primary legislation or regulations on who does or does not qualify. Those will be decisions that you will have to bring forward and with which we as a committee will have to agree or disagree.

The example that many people have raised with us is the higher-rate mobility component. Under the disability living allowance, there was a certain distance that people had to be able to walk and that was lowered under PIP. I presume that, at some point, the Government will come to a view on that and that that will be in regulations. When will the regulations be available?

People are concerned. They genuinely accept and appreciate your openness but, at some point, we have to make some hard decisions. If the

measure is not in the bill, then, as Pauline McNeill said, it might be that the regulations will come to the committee and we will love 99 per cent of them but—to take a ridiculous example—they will say that people who can walk a tiny bit do not get the benefit so, although we like everything else, we have to throw out the regulations as a whole on that one thing. It is difficult for the committee to make it work. Is there any possibility that the regulations will be available for consultation before we get to stage 3?

Jeane Freeman: No, not on every area of assistance. That is not possible. We will have the draft regulations on what we have described as the first wave of benefits that we will deliver. The carers supplement is covered, so it will be the best start grant and funeral assistance. At this point, we are bottoming out the next set of benefits of which we will take delivery after those first three.

We are mindful that we have made a clear commitment to deliver all 11 benefits by the end of this parliamentary session. A significant amount of work is going on at pace because I am conscious of two things, as you might expect me to be. The first is that it is not that long until the end of this parliamentary session and the second is that I have to make hard decisions, for which I am accountable.

There will be significant consultation on the regulations for the disability assistance benefits. That will take place in the drafting of the regulations and the discussions around their drafting. Those benefits will be in regulations and, as I hope that members are clear, I have already accepted the difficulties in striking the right balance between primary and secondary legislation. I have also accepted the positives and negatives of where we might set that balance.

I repeat that it would be a remarkably foolish Government that introduced regulations under the affirmative procedure if it knew that there was significant disagreement on an aspect of them. If we did that, we would risk those regulations being voted down—particularly because we are a minority Government—and, therefore, not being able to fulfil the commitment that we have made to deliver those benefits in this session of the Parliament. There would be clear consequences of that not only for the Government but, more importantly, for the individuals whom we would not be assisting until those regulations found approval across the board. We would be exceptionally foolish to get ourselves into that position.

Alison Johnstone: I was heartened to hear the minister say in her response to Mr Macpherson that she was open to lodging an amendment at stage 2 to change the Government's role in maximising recipients' incomes into a duty, because that is what the cabinet secretary has previously said to us. She said in the Parliament:

> "It is important for the Scottish Government to help people to navigate their way through that complexity. That includes ensuring that our new social security agency has a duty to maximise incomes."—[*Official Report*, 17 May 2017; c 19.]

Will the minister expand on how the Government would fulfil such a duty? Could it be, for example, that the new agency, having assessed someone for entitlement to one benefit, might automatically consider what other benefits they are entitled to without that person having to fill in various forms?

10:15

Jeane Freeman: I, too, am mindful of what the cabinet secretary has said. There are a number of ways in which the Government should be expected to do that. The first is through the way in which our agency will operate. We have been very clear that, in addition to the staff who are employed at the headquarter site in Dundee and at the large site in Glasgow, there will be at least 400 staff who are spread across all local authority areas in Scotland, including the islands, with the job of providing pre-claims advice and support. Of course, their primary role will be on the benefits that we are responsible for, and that is why people will come to them in the first instance, but we have also been clear that their job is to help people to secure what they are entitled to, regardless of whether a benefit is delivered by the UK or the Scottish Government. Those staff will have a key role in that regard.

My officials are conducting a series of meetings with local authorities and other key agencies in each local authority area and, as we have said, my expectation is that the model of operation will differ from one local authority to another. For example, some local authorities have reconfigured their housing, welfare advice and council tax reduction services to ensure a streamlined approach for individuals. A person might come to the council for help and advice on one area, but that will trigger support from the authority in another area. Where local authorities have done that, I expect local social security agency staff to be working there and complementing that, and therefore to be part of that triggering approach. The overall objective is that people should receive what they are entitled to with the minimum of fuss and burden on them, in a way that is congruent with the good use of public funds.

However, not every local authority is like that. Some remain disparate in their approach, so we need to adapt to that and find a way to complement it. Also, where we can, we need to act as a trigger to the realignment and

reconfiguration of services, so that the individual can receive a more streamlined service.

If I may say so, the way in which we will deliver through the local social security staff is a bit of a big deal. They will not make decisions on individual applications—those will rightly be taken elsewhere in the agency—but they will have the role that I have described. If we look to some of the work in and lessons from Northern Ireland, we see that the comparable approach there has had a significant impact in increasing benefit uptake, for example.

Of course, there is the complementary work that we are doing on benefit uptake. I am delighted that we are working closely with COSLA and local authorities to ensure that our uptake campaign work, which will continue throughout this session of Parliament, is operating at national and local level.

Alison Johnstone: Is the minister striving for 100 per cent take-up? Will there be annual targets so that we can assess the gap between entitlement and what people receive?

Jeane Freeman: We have not yet looked at that in any detail or set a target for ourselves. Along with COSLA, we operate two types of campaign. One is a general, broad-brush, trigger campaign asking people whether they have thought about what they might be entitled to. That is aimed at people who are in work who may think that they are not entitled to support, although they may be entitled to tax credits and other things because of their low income. The second type of campaign targets areas in which we know that there is low uptake.

The difficulty is that we do not hold the data on the uptake across all the benefits. That data is either held elsewhere or not held at all. Given those circumstances, it is more difficult to set a target because we do not have a baseline. However, we know that there is low uptake in some areas, such as among carers and young carers in particular. We are targeting that group.

We have just completed the campaign that was targeted at over-65s. We will now sit down with our local authority colleagues and review how that has worked. We will look at the response rate that we can measure and the feedback that we have had from the citizens advice bureaux and others about people pursuing applications for support. We will review what we might do next. It is an evolving piece of work.

Alison Johnstone: Mr Macpherson brought up the issue of dignity and respect. I really appreciate the focus that the Government is putting on ensuring that the system delivers that. However, in order for that to be achieved, people must have an adequate income. We can treat people with the utmost dignity and respect, but if the benefits are simply inadequate because they keep decreasing as a result of inflation, it will be very hard to deliver.

We have heard from many organisations that there should be an annual uprating mechanism in the bill. NHS Lothian said:

"Annual uprating of benefits should not be discretionary."

Is the Government considering that?

Jeane Freeman: I have read that evidence. We will continue to consider what we might do on that. We have made the commitment on uprating disability assistance. We will consider the other areas and what we might do in that respect.

Mark Griffin (Central Scotland) (Lab): I apologise for arriving late.

I would like to go back to the balance between primary and secondary legislation and the detail of the calls made by some organisations. I do not envy the task of the minister and her officials in getting the balance right—it is not an easy job. We have touched on some areas, such as a duty to ensure that entitlement is met, income maximisation and annual uprating and whether it would be appropriate to put that into primary legislation to give people an up-front assurance that their benefits will increase in line with inflation.

The other thing that I wanted to touch on is something that we have spoken about before: disability assessments. The minister has said that a legislative ban would be the wrong way to go because

"it brings significant potential for other difficulties and unintended consequences to occur."—[*Official Report*, 7 September 2017; c 2.]

Can you set out those difficulties and unintended consequences?

Jeane Freeman: I am very mindful that when we put something in primary legislation, our language—notwithstanding the points that we have discussed on dignity and respect—needs to be very clear and careful. We have said very clearly that we will not use the private sector for one-to-one health assessments for disability benefits. I do not want us to get into the situation where putting something like that in the bill means that we are constrained from accepting, for example, supporting evidence for an application that comes from a private sector organisation. Such evidence to support an individual's application may come from any of the private healthcare providers. I do not want us to be in a situation where we exclude the private sector from information technology contracts and so on.

I am looking at devising a model that makes it clear that assessment will not be provided by the

private sector because of the nature of that model. Devising what the assessment model will look like is work that the expert group is undertaking and which we are doing with parts of our experience panels. I hope that that will then be described in regulations around disability assessments.

Mark Griffin: We have spoken about the fact that many people view the new social security system through the prism of the current system. Making it clear in the bill that the use of the private sector is banned solely from the medical assessments, and that such assessments will be carried out entirely by the public sector, would be a bold statement. However, I take on board the minister's points.

Can you expand on the issue of annual uprating and where your officials see any difficulty in putting that in the bill?

Jeane Freeman: No. As I said to Alison Johnstone, we are looking at that and several other areas to see whether it would be appropriate to include them in the bill. We will return to that at stage 2 when we have the benefit of the committee's report.

The Convener: Thank you for answering so honestly, minister. I thank you and your officials for coming to the committee.

10:26

Meeting continued in private until 11:47.

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