OFFICIAL REPORT
AITHISG OIFIGEIL

Social Security Committee

Thursday 22 February 2018

Session 5

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SOCIAL SECURITY COMMITTEE
5th Meeting 2018, Session 5

CONVENER

*Clare Adamson (Motherwell and Wishaw) (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)

CLERK TO THE COMMITTEE

Simon Watkins

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Social Security Committee

Thursday 22 February 2018

[The Convener opened the meeting at 09:01]

Social Security (Scotland) Bill: Stage 2

The Convener (Clare Adamson): Good morning and welcome to the fifth meeting in 2018 of the Social Security Committee. I remind everyone to turn off their mobile phones, as they may interrupt the broadcasting. No apologies have been received for today's meeting.

There is only one item on the agenda: consideration of the Social Security (Scotland) Bill at stage 2. The deadline for lodging amendments has passed, so the marshalled list and groupings cover all the remaining amendments, and we will continue where we left off last week. There are 23 groups of amendments up to the end of the bill and we have until around 11.30 this morning, so we have the opportunity to complete stage 2 today if we get through them all. That is unlikely, but we will press on with those amendments today.

I welcome the Minister for Social Security and the officials who are accompanying her.

I draw members' attention to the fact that amendments 69 and 166 appear in the wrong order on the marshalled list. Amendment 69 should be disposed of before amendment 166. When we reach that point in the proceedings, I will call amendment 69 before moving to amendment 166; I will remind members again when we reach that point.

Schedule 2—Cold-spell heating assistance regulations

Amendment 22 moved—[Jeane Freeman].

Amendments 22A to 22C not moved.

Amendment 22 agreed to.

Amendment 23 moved—[Jeane Freeman]—and agreed to.

Schedule 2, as amended, agreed to.

Section 13 agreed to.

Schedule 3—Winter heating assistance regulations

Amendment 66 not moved.

The Convener: The first group is on means testing. Amendment 184, in the name of Mark Griffin, is grouped with amendments 185 to 187, 25A, 188, 27A, 190 and 30A.

Mark Griffin (Central Scotland) (Lab): Amendments 188, 190, 27A and 30A would ensure that disability and employment injuries benefits could not be means tested by the current Government or by future Governments. That would replicate the current policy for those benefits, which are not means tested. For disability assistance, it would enshrine in law the protection that was offered in the Scottish National Party and Labour manifestos for the most recent Holyrood election. The SNP stated:

"We will protect disability benefits and ensure that they remain non-means tested."

Labour said:

"Disability benefits will be rights-based not means tested".

In keeping with the Labour, SNP and Tory 2017 manifesto commitments, I am also seeking—through amendments 184 to 188 and 25A, all of which are supported by Citizens Advice Scotland—to ensure that winter fuel payments remain universal.

There is a risk that a reduction in the winter fuel payment or a restriction on who receives it could result in a loss of income for some consumers. A universal approach that covers the whole population is the most effective and efficient means of achieving what I think is the desired outcome of us all, which is maximising low incomes in vulnerable households by helping them with their heating costs during the winter months. My amendments would prevent the present and future Governments from means testing winter fuel payments, but they would not prevent the regulations from basing eligibility for such payments on eligibility for other means-tested benefits. That would allow the Government to continue to pay any additional premiums or top-ups to winter fuel payments using eligibility criteria that might be based on receipt of benefits such as pension credit, council tax reduction or housing benefit.

I ask members to support the amendments in my name in this group.

I move amendment 184.

The Minister for Social Security (Jeane Freeman): We have made a clear and consistent commitment that winter heating, disability and employment injury assistance will not be means tested, so I welcome our policy commitment being reflected in the bill and I support all the amendments in the group.

The Convener: I ask Mr Griffin to wind up.

Mark Griffin: I simply press amendment 184.

Amendment 184 agreed to.

Amendments 185 to 187 moved—[Mark Griffin]—and agreed to.

Amendment 24 moved—[Jeane Freeman].

Amendments 24A to 24C not moved.

Amendment 24 agreed to.

Amendment 25 moved—[Jeane Freeman].

Amendment 25A not moved.

Amendment 25 agreed to.

Schedule 3, as amended, agreed to.

Section 14—Disability assistance

Amendment 67 moved—[Jeremy Balfour].

The Convener: The question is, that amendment 67 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Balfour, Jeremy (Lothian) (Con)
Griffin, Mark (Central Scotland) (Lab)
Johnstone, Alison (Lothian) (Green)
McNeill, Pauline (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Motherwell and Wishaw) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 67 agreed to.

Section 14, as amended, agreed to.

Schedule 4—Disability assistance regulations

Amendment 68 moved—[Jeremy Balfour].

The Convener: The question is, that amendment 68 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Balfour, Jeremy (Lothian) (Con)
Griffin, Mark (Central Scotland) (Lab)
Johnstone, Alison (Lothian) (Green)
McNeill, Pauline (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Motherwell and Wishaw) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 68 agreed to.

The Convener: As explained earlier, we will dispose of amendment 69 before amendment 166.

Amendment 69 not moved.

The Convener: The next group is on equal consideration of different impairments. Amendment 166, in the name of Mark Griffin, is the only amendment in the group.

Mark Griffin: Amendment 166 ensures that secondary legislation on disability assistance requires equal consideration of different disabilities and impairments, irrespective of whether they are physical or mental.

The amendment addresses circumstances such as the recent changes to personal independence payments, which the United Kingdom Government has accepted are unlawful. The changes, which were made in March 2017, prevented people with mental health problems or psychological distress from being eligible for the enhanced mobility component of PIP. Last week, the minister confirmed that the Government would ensure that the regulations were never replicated in the new Scottish system. I welcome that commitment.

Amendment 166 seeks to make that a reality on the face of the bill. In practice, it would prevent the introduction of regulations that would create different or discriminatory eligibility criteria or levels of payment for people with mental health problems compared to people with physical health conditions.

I move amendment 166.

Jeane Freeman: I agree with the principle that underpins amendment 166, which is that individuals deserve to be awarded support based on their needs and the impact that their condition has on their day-to-day life.

As Mr Griffin said, this has been a key and persistent criticism of the current Department of Work and Pensions system. Particularly as a result of the amendments that this committee has agreed to, however, the idea that the system must promote the goals of equality and non-discrimination is already well rooted in the provisions of the bill.

Amendment 166 would achieve the opposite of the outcomes that Mr Griffin intends. It says:

"The regulations must not ... in any way"

differentiate

"between individuals on the basis of whether their impairment is physical or mental."

That would prevent the Scottish Government from responding to particular needs and reconciling our operational practice in a positive way for those who have mental health conditions.

09:15

The amendment also overlooks the fact that disability assistance will be given to people who have a terminal illness. Assistance will be provided rapidly to individuals who suffer from a progressive and life-limiting illness, although such an illness might not affect the person's ability to carry out normal day-to-day activities and although their needs will not be long term. A critical—although I am sure that it is unintended—consequence of the amendment is that it would prevent disability assistance from being given solely because a person was terminally ill.

I ask Mr Griffin not to press his amendment. The bill allows for specific eligibility criteria to be adequately and properly dealt with in regulations. Crucially, that will allow consultation with users to ensure that specific needs—whether they relate to physical or mental health—are considered and prepared for. Such regulations will be subject to scrutiny and the Parliament will have an opportunity to offer its views on our proposals.

Mark Griffin: I welcome the minister's comments and particularly her agreement with the amendment's policy intent. I take on board her concerns about the impact that the amendment could have on those who have a terminal illness. With the committee's permission, I seek to withdraw amendment 166.

Amendment 166, by agreement, withdrawn.

Amendment 70 not moved.

Amendment 188 moved—[Mark Griffin]—and agreed to.

Amendment 26 moved—[Jeane Freeman].

Amendments 26A to 26C not moved.

Amendment 26 agreed to.

Amendment 189 not moved.

Amendment 27 moved—[Jeane Freeman].

Amendment 27A moved—[Mark Griffin]—and agreed to.

Amendment 27, as amended, agreed to.

Schedule 4, as amended, agreed to.

Section 15 agreed to.

Schedule 5—Early years assistance regulations

Amendment 71 not moved.

Amendment 28 moved—[Jeane Freeman].

Amendments 28A to 28C not moved.

Amendment 28 agreed to.

Schedule 5, as amended, agreed to.

Section 16 agreed to.

Schedule 6—Employment-injury assistance regulations

Amendment 72 not moved.

Amendment 190 moved—[Mark Griffin]—and agreed to.

Amendment 29 moved—[Jeane Freeman].

Amendments 29A to 29C not moved.

Amendment 29 agreed to.

Amendment 30 moved—[Jeane Freeman].

Amendment 30A moved—[Mark Griffin]—and agreed to.

Amendment 30, as amended, agreed to.

Schedule 6, as amended, agreed to.

Section 17 agreed to.

Schedule 7—Funeral expense assistance regulations

Amendment 73 not moved.

Amendment 31 moved—[Jeane Freeman].

Amendments 31A to 31C not moved.

Amendment 31 agreed to.

Amendment 32 moved—[Jeane Freeman]—and agreed to.

Schedule 7, as amended, agreed to.

After section 17

The Convener: The next group of amendments is on housing assistance. Amendment 152, in the name of the minister, is grouped with amendments 153, 161 and 165.

Jeane Freeman: These amendments will allow us to deliver on our existing commitments to mitigate two areas of UK Government cuts to housing assistance: the bedroom tax and the removal of housing support costs for 18 to 21-year-olds.

In general, the abolition of the bedroom tax through universal credit can be mitigated using the universal credit flexibility under the Scotland Act

2016, but in order to ensure that the support that we provide to those to whom the tax applies is not limited by the operation of the UK Government's benefit cap, we need to create an additional payment to be made in circumstances in which the award would otherwise be reduced by the cap. The amendments create the power for ministers to introduce regulations to deliver such an additional payment, which will be delivered through universal credit as part of the technical solution to mitigate the bedroom tax in full.

Members will recall that the UK Government cut housing support for universal credit recipients aged 18 to 21. Despite the fact that some exemptions were created, a proportion of 18 to 21-year-olds will still be ineligible for support for housing costs. We took immediate steps to put in place an interim solution using the Scottish welfare fund, but it was always recognised that that would be a temporary measure. The amendments allow us to introduce housing assistance for that group to ensure that all 18 to 21-year-olds are able to get help with housing costs when they need it. I want to make it clear to the committee that we are not proposing to take a general and wide-ranging power without providing details of how we intend to use it. Instead, in creating a specific new type of housing assistance in primary legislation, we are setting out two detailed instances of how that type of assistance is to be used.

Amendments 161 and 165 enable ministers to introduce regulations to allow local authorities to deliver housing assistance. That will ensure that the support provided to 18 to 21-year-olds can continue to be delivered by councils as we move from the interim solution to this more permanent arrangement.

I move amendment 152.

Amendment 152 agreed to.

Amendment 153 moved—[Jeane Freeman].

Amendment 153A not moved.

Amendment 153 agreed to.

Section 18—Short-term assistance

The Convener: The next group is on short-term assistance. Amendment 154, in the name of the minister, is grouped with amendments 155, 155A and 155B.

Jeane Freeman: Amendments 154 and 155 respond to a request from stakeholders such as Carers Scotland and the Child Poverty Action Group for clarification. The amendments make clear our policy intent that short-term assistance will maintain payments at the original level until a redetermination or, after that, an appeal to the First-tier Tribunal has been determined.

Furthermore, people will also be eligible for short-term assistance when they seek permission to appeal. The bill allows a person an unrestricted 31-day period in which to appeal. After the 31-day deadline, the permission of the First-tier Tribunal must be sought. The amendments ensure the availability of short-term assistance for late appeals, both while the request for permission is being considered and, if permission is granted, until the First-tier Tribunal reaches its decision on the appeal itself.

Amendments 155A and 155B, in the name of Jeremy Balfour, reflect his wholly commendable commitment to ensuring that transitions between systems within the UK are as seamless as possible. We touched on that previously when discussing the residency amendments, and, as I indicated then, both the Scottish Government and the UK Government entirely share Mr Balfour's concern to get this right. Officials are working together to agree arrangements that will ensure that people transitioning between systems experience no gaps in payment or unnecessary administrative burdens. However, I am not convinced that using short-term assistance to plug those gaps is the right solution. If short-term assistance might usefully plug particular gaps, the enabling power in the bill would allow it to be used in that way in any case.

I recognise the issue that Mr Balfour raises and believe that we have the tools to address it. I hope that he will accept my assurance that officials in both Governments are working to address his legitimate concerns, which I know are genuinely felt, and that he will not move his amendments in this group.

I move amendment 154.

09:30

Jeremy Balfour (Lothian) (Con): I thank the minister for her remarks, which are very helpful.

All of us recognise that we have a new system coming in, and we all welcome it. Clearly, the system is not just for Christmas but for many years. Therefore, we have to make sure that we have a system that will work as we go forward and as regulations and Governments change. We do not want to end up with a situation in which an individual who lives in Scotland—or in England, Wales or Northern Ireland—does not move because they feel that they will have a short-term shortfall with regard to disability living allowance, PIP or other benefits that come forward.

I recognise that this is not a simple piece of work and that it will require both the Scottish Government and the Westminster Government to work together. I will not move amendments 155A and 155B today because I hope that the

Governments will work together and that we will end up with such a scheme.

I welcome amendment 154 from the minister, which plugs a gap and will be helpful for individuals, as it will give them an extra layer of protection. I also welcome what the minister has said about working with the Westminster Government.

The Convener: Does anyone else wish to contribute to the debate?

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I will be succinct, convener. I very much welcome amendments 154 and 155, which are extremely important and will make sure that people are covered and have the assistance that they need as their cases are considered by the First-tier Tribunal and until such time as it makes a determination.

I also warmly welcome Jeremy Balfour's decision not to move his amendments. While they certainly touch on important points and issues, their drafting gave me concerns about double claiming and definitions. A constructive approach in which the Governments work together and look at the issue later on is absolutely the right one, so I fully support his decision not to move his amendments.

The Convener: No one else wishes to contribute, so I invite the minister to wind up.

Jeane Freeman: I express my gratitude to Mr Balfour for raising an important issue, but also for accepting our concerns and not moving his amendments.

As has been said, amendments 154 and 155 are an important addition to our legislative framework and give a clear signal—from us, as a Government, and from the committee—that we positively support individuals who wish to challenge and appeal decisions made by our new social security agency. That is a very important signal to send, and I hope that the committee will take what is an important practical step this morning.

Amendment 154 agreed to.

Section 18, as amended, agreed to.

Amendment 155 moved—[Jeane Freeman].

Amendments 155A and 155B not moved.

Amendment 155 agreed to.

After section 18

Amendments 123 and 124 not moved.

Section 19—Duty to make determination

Amendments 125 and 126 not moved.

Section 19 agreed to.

Section 20—Application for assistance

The Convener: The next group is on the form of application. Amendment 204, in the name of Mark Griffin, is grouped with amendments 205 and 210.

Mark Griffin: Amendments 204, 205 and 210 have been sponsored by and submitted on the advice of the Child Poverty Action Group. The amendments aim to clarify the process for making an application for assistance in relation to whether an application is validly made. A determination that an application has been validly made should mean that the questions on the form or those that are asked in a phone call have been fully answered. That is what the regulations should say in relation to the manner in which an application must be made.

If an application is not validly made, it can be prevented from proceeding, and it should be clear that only evidence around basic details should prevent an application from being accepted, not evidence that it might take some time to obtain. Making that clear in the bill and the regulations will ensure that processes are fit for purpose and provide certainty. The amendments will not require the bill or the regulations to specify the exact types of information or evidence that are required, so they will not reduce the ability of the system to be flexible and responsive. I ask members to support the amendments in the group.

I move amendment 204.

The Convener: As no other members wish to comment on the amendments, I invite the minister to comment.

Jeane Freeman: I do not support Mr Griffin's amendments, which would require that the process for applying for assistance be set out in regulations.

The concern is about people's ability to prove that an application has been validly made according to the rules that were operating when the application was made. I understand that, but putting the rules into regulations is not necessary to address that issue.

Adam Tomkins (Glasgow) (Con): Would agreeing to Mr Griffin's amendments replicate the position that already pertains in social security regulations under United Kingdom law, or would it be different from what happens in the UK? Does the law at the moment prescribe in primary or secondary legislation what a valid application looks like?

Jeane Freeman: I do not know the answer to that question at the minute, Mr Tomkins.

Adam Tomkins: Perhaps when Mr Griffin winds up he could address that question, if he knows the answer to it.

Jeane Freeman: Indeed. What I do know is that courts and tribunals are able to look at evidence that does not take the form of regulations. Earlier in these sessions, we decided to ask them to look at the charter in determining cases, and the charter does not need to take the form of regulations for them to do that.

If the agency has told the public that an application can be made in a particular way, a court or tribunal should treat an application that has been made in that way as valid. As a no doubt unintended consequence of Mr Griffin's amendments, judges would be limited to looking at regulations when deciding whether an application has been validly made. If ministers wished to alter what was acceptable—for example, to address problems identified through performance reviews of the agency—changes would have to wait until the regulations were amended. Therefore, regulations would bring an inflexibility that would not be useful, and there is no gain from having them.

The committee has already agreed to amendments that emphasise the importance of inclusive communication that will help people to take up the assistance to which they are entitled. Requiring the rules for how people can apply to be set out in regulations would compete with that important aim. Regulations would bring a legalistic approach that would get in the way of telling people simply how to apply for assistance and of being able to adjust requirements where that would be beneficial. In addition, that approach would not really give Parliament more meaningful oversight of the rules for applying.

If the committee wants to know whether the Government is fulfilling its duties to communicate inclusively and to do what it can to promote take-up, it can look at what is actually happening on the ground as set out in the commitments in the charter, drawing on evidence from experts and, most important, listening to people with first-hand experience of applying for assistance.

I therefore ask Mark Griffin not to press amendment 204 and not to move the other amendments in the group.

Mark Griffin: As I am not aware of the legal situation across the UK, I am not able to respond to Mr Tomkins's question whether what I am proposing simply replicates what already exists. However, my instinct is that it does not.

I am still of the view that applicants should have a degree of certainty about what does and what does not constitute a valid application. It should be made clear that only evidence relating to the basic details should prevent an application from proceeding and that any evidence that it might take some time to obtain should not hold things up. As I have said, amendment 204 does not require either the bill or any regulations to specify the exact types of information or evidence that are required, so I do not feel that it will reduce the system's flexibility or responsiveness.

On that basis, I press amendment 204.

The Convener: The question is, that amendment 204 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Balfour, Jeremy (Lothian) (Con)
Griffin, Mark (Central Scotland) (Lab)
Johnstone, Alison (Lothian) (Green)
McNeill, Pauline (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Motherwell and Wishaw) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 204 agreed to.

Amendment 205 moved—[Mark Griffin].

The Convener: The question is, that amendment 205 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Balfour, Jeremy (Lothian) (Con)
Griffin, Mark (Central Scotland) (Lab)
Johnstone, Alison (Lothian) (Green)
McNeill, Pauline (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Motherwell and Wishaw) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 205 agreed to.

The Convener: The next group of amendments is on further application for assistance. Amendment 156, in the name of the minister, is grouped with amendment 160.

Jeane Freeman: Amendments 156 and 160 are technical amendments to correct an unintended effect of the restriction placed on repeat applications under section 20. The types of

assistance that they most concern are funeral expense assistance and early years assistance. Because both types of assistance have fairly long application windows, it is entirely possible that an individual might not be entitled to them when they first make an application, but circumstances might change and they might become eligible within the window.

For example, a woman might find out that she is pregnant and apply for the best start grant, but she might not have had confirmation of her eligibility for low-income benefits from the DWP. She might then receive confirmation of an award of universal credit later during the application window. These amendments require the agency, when determining that a claim is unsuccessful, to assess whether the applicant's eligibility could change later and to include that in the decision letter, to make the applicant aware that they can reapply. The agency will then be under a duty to consider a further application from the same person at a later date.

I move amendment 156.

Amendment 156 agreed to.

Section 20, as amended, agreed to.

Section 21 agreed to.

Section 22—Notice of determination

09:45

The Convener: The next group of amendments is on notification to applicant. Amendment 167, in the name of Mark Griffin, is grouped with amendments 81, 168 to 170, 83 and 86.

Mark Griffin: My amendments in the group, which would require ministers to provide a determination in writing, have been lodged on the advice of the Child Poverty Action Group. They seek simply to ensure that, as standard, a notification is made to an applicant in writing. Nothing in the amendments would preclude a decision being communicated in other inclusive communication formats, as set out in amendments in my and Ruth Maguire's names that were agreed to earlier in stage 2. They would not detract from the right to have that accessible information, nor would they prevent, say, a decision maker from notifying someone of a decision by phone.

Amendments 167 to 170 would give the applicant the right to a clear and thorough notification of why a determination had been made and how the agency had come to its decision. Indeed, that was a key call from Paul Gray in "The Second Independent Review of the Personal Independence Payment Assessment". In its response to that review, the UK Government claimed that it is not practical to provide such reports automatically to those who have been assessed, but disability charities have said that information in the reports would give those who have been knocked back for personal independence payments a better understanding of how the DWP had reached a decision, and are asking for the system to be applied to the Scottish social security agency.

Amendments in my name in the group would specifically require ministers to

"provide ... a copy of any assessment report"

as standard, and to list in its determination the rules that have not been satisfied. That approach would aid transparency and subsequent re-determination in appeals processes. We accept that the Scottish system will get more things right first time, so we feel that the burden would be limited, because applicants are unlikely to disagree with the original decision. I therefore ask members to support the amendments in the group.

I move amendment 167.

Jeane Freeman: I cannot support Mark Griffin's amendments, as drafted. However, I understand the motivation behind his amendments 81, 83 and 86, and am happy to work with him to look further at what they propose.

Amendments 81, 83 and 86 would change the existing requirements for an individual to be informed of something to a requirement that the person be informed "in writing". Although it seems likely that that would happen anyway, I realise that the committee has already agreed to amendments on inclusive communication standards. A duty to inform, coupled with the duty to communicate inclusively, would require ministers to think carefully about how information could best be communicated to an individual, but by saying that telling someone "in writing" is enough to meet the legal duty, the amendments could remove the onus on ministers, in that respect.

As I have said, I am happy to work with Mark Griffin to see whether an amendment can be lodged at stage 3 that gives us the best of both requirements.

I have concerns about amendments 167, 168 and 170, too. Section 22 already makes it clear that when the agency tells someone of its determination, it has to give reasons. There is case law on what is required under a statutory duty to give reasons, so any such amendment ought to take that into account. The amendments would require the agency to go beyond explaining the reasons for its decision in a particular case, and to provide a full assessment of the person's eligibility against every eligibility rule for the assistance type in question.

For example, when someone applies for early years assistance, the first thing that the agency will look at is whether the residence condition is met. If it finds that the condition is not met, that should be enough for the agency to decide that the individual does not qualify and to send the person a determination explaining that. However, an unintended consequence of amendments 167, 168 and 170 would be to require the agency to go on and assess the person against all the other eligibility criteria for early years assistance. If the person's original application did not provide enough information for that assessment to happen, the agency would have to seek the information either from the individual or from other public sector bodies. That would undoubtedly slow down the process of issuing decisions and would mean resources being used up in assessing individuals against all eligibility criteria, even when it is obvious that the outcome of an assessment would not alter the final determination.

Amendment 169 would also impose unnecessary requirements and might, in some cases, impose inappropriate requirements. It would compel ministers to provide every individual with a copy of an assessment report relating to a determination of their eligibility for assistance, whether they wish to have that report or not. It is possible, in some circumstances, that the information that the agency and ministers have used to reach a determination may include information that the individual is unaware of—in particular, in respect of health conditions. In my view, individuals should be able to choose whether or not to receive the assessment report.

In summary, I agree with Mark Griffin that there should be a duty on ministers to notify individuals of the outcome of their applications, of the rationale for reaching the determination and of any associated evidence that has been relied upon to do so, but there are a number of difficulties with the way in which he seeks to tie down the existing provision. I therefore urge him not to press his amendments today, and instead to work with us ahead of stage 3 to see how the concerns might be addressed.

Mark Griffin: I welcome the minister's comments and our agreement on the broad policy intention of the amendments. I would welcome the opportunity to work with the Government ahead of stage 3 to draft a set of amendments that we can all agree on and which will fulfil the policy aims that we share. I therefore seek the committee's permission to withdraw amendment 167.

Amendment 167, by agreement, withdrawn.

Amendments 81, 168, 169 and 170 not moved.

Section 22 agreed to.

Section 23—Right to request re-determination

The Convener: The next group of amendments is on re-determination and appeal. Amendment 33, in the name of the minister, is grouped with amendments 33A, 34 to 36, 82, 193, 84, 84A, 85, 194, 87, 87A, 88, 88A, 89 to 93, 37, 195, 38 and 52.

Jeane Freeman: I am pleased to be able to speak to a number of amendments that I have lodged to address issues that were raised during stage 1. Amendments 33 to 38 and 52 will allow a re-determination to be requested after the deadline if the person has a good reason for not meeting it. That will carry a right of appeal to the First-tier Tribunal, if refused by the agency.

Amendments 82, 84, 85 and 87 to 93 relate to the process for initiating an appeal to the First-tier Tribunal. I have listened to the concern of stakeholder groups, including Inclusion Scotland and Citizens Advice Scotland, that if the process for requesting a re-determination and then an appeal is too laborious, people may as a consequence drop out of the system and not get what they are entitled to. That is not a result that the Government wants. The question is how to make the process for challenging a determination as simple as possible, while honouring our commitment to having a rights-based system that requires individuals to retain control over the choices that they want to make.

My amendments would simplify the process by requiring the agency to provide to the individual an appeal form alongside the notice of redetermination. If the person wants to appeal to the First-tier Tribunal, they need only send back the completed form saying that they wish to do so. The agency will then be required to hand over to the tribunal all the materials that it used to make its determination. That will mark the start of the appeal process and, from that point on, the appeal will be in the hands of the tribunal and, rightly, no longer in the hands of the agency. I urge members to support my amendments.

I do not support Pauline McNeill's amendments in the group. I am sure that the motivation behind her amendments is much the same as the motivation behind mine—to simplify the process for appealing—but I believe that her amendments would complicate the process for asking for a redetermination. Rather than being able simply to ask the agency to look again at a determination, under her amendments, the individual would, at the same time, need to make a choice about whether, after the redetermination was made, it should be referred to the First-tier Tribunal on appeal. I find it difficult to understand how an individual could reasonably be expected to make an informed choice, which is critical in a rights-

based system, before they knew the outcome of the redetermination.

My amendments provide that the individual will be able to choose whether to appeal when they have the redetermination, and know what it contains. It will not be obvious to many people whether it would be in their interests to pre-emptively ask for a tribunal appeal—indeed, I do not believe that it would be obvious to me, for example.

I have another difficulty in principle with Pauline McNeill's amendments and approach, which is that they would take control away from the individual and give it to the agency. Under that approach, the agency would be required to submit an appeal on a person's behalf if that person had ticked the box when asking for a redetermination and the redetermination was not "more advantageous" to the person. There are many difficulties in defining what would be "more advantageous" from an individual's perspective. On the basis of the current system, there are at least 12 possible outcomes for care and mobility components, with decisions on differing lengths of awards adding further complexity.

If, for example, the original determination was based on a low care component and middle mobility component and would run for two years, but the redetermination was based on a low care component and low mobility component and would run for five years, which would be "more advantageous"? Under Pauline McNeill's approach, it would be for the agency, not the individual, to make that call.

There would also be significant impacts on the tribunal service, which we should consider. The amendments in Pauline McNeill's name would likely result in more cases being sent to the First-tier Tribunal—that is the intention—but if cases are to be sent to the tribunal with only limited involvement from the individual, it is reasonable to expect that a number of the appeals would not proceed. Having cases set down in the tribunal's schedule only for them not to be called would be much more than an administrative inconvenience. We should not underestimate the impact that that sort of churn in the tribunal's case load will have for the speed with which the tribunal can deal with appeals with which people genuinely want to proceed.

I urge members to support my amendments in the group, but not Pauline McNeill's amendments.

I move amendment 33.

Pauline McNeill (Glasgow) (Lab): I welcome the progress that has been made in this area, because the committee received significant evidence that the introduction of mandatory reconsideration had resulted in a dramatic drop in appeals and that applicants found the system onerous.

However, I think that it is about more than simplifying the procedure, as the minister said. Many claimants do not realise that there is a two-stage process, and there is evidence that many applicants might give up. That is why we must consider seriously what will be the best way to ensure that applicants realise that there is a two-stage process in which they have to make two decisions—one about whether to appeal against the original decision and one in relation to the appeal.

10:00

My primary concern is the dramatic reduction in the number of appeals following the introduction of mandatory reconsideration, although I realise that, under the bill, reconsideration will not be mandatory. The only statistics that we have show an 89 per cent drop-off between the mandatory reconsideration stage and the appeal stage. Reconsideration is the most significant feature of the system since its introduction, and it cannot be explained simply by adding an additional part to the process, as the Government proposes.

The purpose of mandatory reconsideration is to give the person an opportunity to present evidence against a decision for review without the need for a formal appeal process. I welcome the fact that, as we have previously discussed, the approach that the Scottish Government takes will, we hope, mean that people will benefit from more successful decisions being taken in the first instance and in the reconsideration process.

Judge Robert Martin, who is president of the social entitlement chamber of the First-tier Tribunal, said that mandatory reconsideration is based on a "false premise", because

"prior to its introduction, DWP already considered every decision that went to appeal."

It is significant that he said that the introduction of mandatory reconsideration was of "dubious advantage", because the claimant had to make two applications,

"whereas under the old system they only had to make one."

He went on to say that there was no real evidence to explain what has discouraged people from making an appeal.

Whatever happens with the amendments in the group, I urge the Government to think about whether it might be necessary to provide some further powers at stage 3, or to carry out further research, to make sure that the introduction of reconsideration does not lead to a drop-off in the number of people who appeal.

My amendments 33A, 193, 84, 194, 87A and 195 are designed to ensure that were a claimant to want to challenge a decision, they would be able to opt for an automatic appeal in the event that reconsideration was unsuccessful, thereby ensuring that it would be a one-stage process. I listened carefully to what the minister said at stage 1, and I agree that the system should be rights based, but my argument is that my proposals would mean that a person who was unsuccessful at reconsideration stage would have an automatic right to take that to appeal.

We must bear it in mind that many vulnerable claimants are put off by the brown envelope arriving through the door and do not know what to do. One of the features of my amendments is that the person would be notified that an appeal was pending, if they had opted for an automatic appeal, and should therefore seek representation. It is an important aspect of what the Government is proposing that the paperwork for the appeal will go automatically to the tribunal system. That represents significant progress.

It is a serious question whether the proposed process will ensure that more people will exercise the right of appeal. I might seek to withdraw amendment 33A and not move my other amendments; that will depend on what is said in the debate. However, I certainly ask the minister to ensure that the new support system will not prevent people from exercising their right to have an appeal on their case. At the moment, I am not satisfied that there is enough data to make that determination.

I move amendment 33A.

Jeremy Balfour: I welcome the amendments in the minister's name. They are helpful. The minister has listened to what we heard at stage 1 and to the subsequent emails and letters from different groups.

I have sympathy with Pauline McNeill's amendments. We have to strike a tricky balance between giving the individual control of his or her appeal and, as Pauline McNeill said, making that decision early in the process. That makes me slightly concerned. However, we want an individual to have the right to take the appeal to the appropriate tribunal.

We also do not want to clog up the system and leave the First-tier Tribunal with eight cases in a day when three or four people simply do not turn up because they do not want to pursue their case. That is a big concern because it will mean that those who do want to go through the whole process and have a right of appeal will be delayed because other people do not turn up for their appeal.

There is another issue that perhaps could be addressed through regulation later. Helpfully, the bill now contains the legal right to advice and assistance. As the bill goes forward, we must make sure that the papers that an individual gets will also go to their representative. At the moment, that does not always happen. That will give the individual greater protection, because the person from the citizens advice bureau—or whoever it is that is giving the advice—will be able to contact the claimant to ask whether they want to go on to appeal and tell them how to do it. Having a third party to help them with the process will give the individual greater protection.

I am happy to support the minister's amendment but, although I understand where Pauline McNeill is coming from and agree that we do not want a large drop-off, I am not sure that her amendments will prevent that, because of the way in which they are drafted.

Alison Johnstone (Lothian) (Green): This was an area of concern for many organisations. I note that Citizens Advice Scotland now supports the Government's amendment, which provides some comfort.

I also have a lot of sympathy for Pauline McNeill's amendments, because we are all concerned about that huge percentage drop. I will be interested to hear whether the minister can advise on how the Government intends to keep an eye on the situation and look at any consequences. What would be a satisfactory result in terms of future appeal numbers? If we get advocacy and advice right in the bill, that will have a big impact. Such support might make a positive difference.

Ruth Maguire (Cunninghame South) (SNP): I have two problems with Pauline McNeill's amendments. The first is around the person having to make a decision at the beginning of the process. Nevertheless, I understand the intention and I am sure that we all want the system and people's experience of going through it to be as easy as possible. We recognise the barriers that can be thrown up at different stages.

The second point to make is about cases clogging up the tribunal system, which is a really important issue. As Jeremy Balfour said, if there are eight cases sitting with a tribunal and only four people intend to turn up, that will have a knock-on effect on the people who do want to appeal.

Although I sympathise with where Pauline McNeill is coming from, my question for her and the minister is whether they have done any work to understand what claimants would like to see for appeals and what evidence there is of that. I know that a lot of the evidence that we have came from

the previous system, but what further evidence can we look at?

Jeane Freeman: I will make a number of points in response to the debate. I believe that Ms McNeill and I are trying to resolve the same matter and our aims have much in common. However, I need to make a couple of points about the differences between the system that we are designing, which the bill will underpin, and the current UK system.

First, mandatory reconsideration will not be a feature of the Scottish system. Redetermination is a very different exercise. The original decision is not looked at again to see whether the proper process was followed, but a different individual working in the agency looks at the case from scratch, so there is a very different starting point. I welcome Ms McNeill's acknowledgement that our intention is to operate our system in such a way that we get many more decisions right the first time because the right evidence is gathered in the first instance to support those decisions. However, redetermination is very different from mandatory reconsideration.

Secondly, the amendment on short-term assistance that we have just agreed to is included specifically to ensure that individuals are not prevented from pursuing a challenge to the agency's decision making or from appealing on the basis of a financial loss that they will have to bear while they wait for the process to be completed. That is an important indication of the Government's determination not to discourage people from challenging our decisions.

For me, a rights-based system requires the individual to be informed in order that they can exercise their rights. My central difficulty with Ms McNeill's amendments is that the individual is being asked to make a decision about whether they will wish to appeal before they have any information about the result of their first challenge—the redetermination. The decision about whether or not it is advantageous is out of the hands of the individual and in the hands of the agency. In a rights-based system—if we mean to embed that approach in every aspect of what we do—that is the wrong approach.

Pauline McNeill: I point out to the committee that, under my amendments, the individual's rights would not be undermined by whether or not they chose an automatic appeal, because they would still have the right to appeal at the end of the process if they chose not to have an automatic appeal. Their overall right to make an appeal would not be undermined—that is an important point to get across.

Jeane Freeman: I understand that, but, at the point when the person ticked the box to say that they wanted not only to challenge the agency's decision but to go to appeal, they would not have the information about the result of the challenge. We would have to go back to them and ask whether they wanted to continue to the appeal stage, which would be unnecessarily complicated.

Ms Maguire helpfully asked what evidence any of us might have. Obviously, we all have evidence from the stage 1 discussion and the debate, as well as the evidence that was submitted by individuals. We also have some limited evidence from our experience panels that indicates that people wish to exercise their rights in a staged manner—in other words, by making decisions about each step of the process as they proceed through it. Although the amendments lodged by Ms McNeill are trying to achieve the same end as my amendments, they would unnecessarily complicate matters by having individuals asked to make decisions in advance of their having the information that they would require in order to make them.

I have two further points to make. The first is about the tribunals and is a point that Mr Balfour made clearly. We should not see the additional burden that Ms McNeill's amendments would potentially put on the tribunal system simply as an administrative one; it could have an effect on the speed of the tribunal's decision making for those individuals who genuinely chose to pursue an appeal. That matters because we know that one of the difficulties that individuals face in the current system is the length of time that they have to wait before a tribunal can look at their case.

10:15

My final point is about the drop-off rate. The current drop-off rate relates to a system that is significantly different from the system that we are designing and that the committee is contributing to the legislation for. It is reasonable to say that more correct decisions will be made the first time round, that individuals will challenge those decisions, that the redetermination process will be so different from mandatory reconsideration that we would expect to see changed decisions in the redetermination process and that individuals could then still proceed to appeal.

It is not only ministers who will have oversight. The Parliament will have oversight of how well or otherwise the system is working in a number of ways, including through the annual report that ministers will bring to the Parliament on the agency's performance against a number of important indicators—and it is clear that the drop-off rate is one indicator. The Parliament will have oversight of how well the system that I propose is operating and will be able to require ministers to

take steps should we discover that the system requires further improvement.

Pauline McNeill: I am sure that we all agree that the right to appeal and to have an independent panel decide whether an application should be upheld is an important principle. One way or another, of course, there would still be a requirement to go to a reconsideration, albeit not a mandatory one.

I accept the minister's point that the only available figures that show a quite sharp drop-off are the figures that the DWP has for mandatory reconsideration, but we do not really have any information about whether my system or the Scottish Government's position is likely to prevent a sharper drop-off. I suppose that we can only guess that.

The point that Jeremy Balfour made about the papers is important. I acknowledge that it is a significant development that, as a result of the Government's amendments, the paperwork would go directly to the individuals. That is very helpful.

I have acknowledged that I agree with the minister that the approach is rights based, but I emphasise that my amendments would not preclude an individual's right to take an appeal should they not opt for an automatic appeal.

We do not know whether there would be delays and clogging up of the tribunal system.

Ruth Maguire: Will Pauline McNeill take an intervention?

Pauline McNeill: I will do so in a minute. I was just going to address your point.

Ruth Maguire: I am sorry to interrupt you, but it is about what you have just said.

For somebody to exercise their rights, they need to have all the information to enable them to make a decision. That is the point about your proposal maybe not being compatible with a rights-based approach. Of course, a person can opt for or against an automatic appeal and then change their mind, but, if they opt for it at the beginning of the process, before they have all the information, that is at odds with a rights-based approach.

Pauline McNeill: I accept that. However, at that stage, the applicant would be asked only whether, should their challenge be unsuccessful, they would want to appeal the decision automatically.

We want to strike a balance. I agree with the minister that we are both trying to address a significant problem under the old system, balancing all of that with the concern that appeals will drop off because people do not realise that there is a two-stage process. Could the proposals have an impact on the clogging up of the tribunal system? We do not know the answer to that question, but I concede that the system that the Scottish Government has outlined, with its approach to reconsideration, should ensure that there would be fewer appeals, as reconsideration would be a fresh look at the original decision.

I am not going to press amendment 33A and will seek to withdraw it, but I wanted to put on the record that that was my overall purpose. I will return to the issue at stage 3. I ask the Scottish Government to consider whether there should be a commitment to review and do some research if we find that the early stages of the operation of the new system result in a concerning drop in the number of people who choose to take up the right to appeal.

Amendment 33A, by agreement, withdrawn.

Amendment 33 agreed to.

Amendment 34 moved—[Jeane Freeman]—and agreed to.

Section 23, as amended, agreed to.

After section 23

Amendment 35 moved—[Jeane Freeman]—and agreed to.

Section 24—Duty to re-determine

Amendment 36 moved—[Jeane Freeman]—and agreed to.

Section 24, as amended, agreed to.

Section 25—Notice of re-determination

Amendment 82 moved—[Jeane Freeman]—and agreed to.

Amendment 83 not moved.

Amendment 193 not moved.

Amendment 84 moved—[Jeane Freeman].

Amendment 84A not moved.

Amendment 84 agreed to.

Section 25, as amended, agreed to.

Section 26—Notice where re-determination not made timeously

Amendment 85 moved—[Jeane Freeman]—and agreed to.

Amendment 86 not moved.

Amendment 194 not moved.

Amendment 87 moved—[Jeane Freeman].

Amendment 87A not moved.

Amendment 87 agreed to.

Section 26, as amended, agreed to.

Section 27 agreed to.

After section 27

Amendment 88 moved—[Jeane Freeman].

Amendment 88A not moved.

Amendment 88 agreed to.

The Convener: Before we move to the next group, I suspend the meeting for a comfort break.

10:24

Meeting suspended.

10:33

On resuming—

Section 28—Time for appeal

The Convener: Welcome back. I apologise; I did not stop just before a new group, as I said that I had. We still have some amendments on redetermination and appeal to consider.

Amendments 89 to 93 and 37 moved—[Jeane Freeman]—and agreed to.

Section 28, as amended, agreed to.

After section 28

Amendment 195 not moved.

Section 29—First-tier Tribunal's power to determine entitlement

The Convener: We move to a new group, which is on the First-tier Tribunal's power to determine entitlement. Amendment 206, in the name of Pauline McNeill, is the only amendment in the group.

Pauline McNeill: The amendment is designed to ensure that a tribunal need not consider any part of the claim with which the claimant is satisfied. The intention is to ensure that a tribunal could have the power to visit only the aspect of the claim with which the claimant is unsatisfied. I will probably be satisfied that the tribunal already has the power to do that, in which case I will seek to withdraw the amendment, but it would be helpful to get that on the record.

I move amendment 206.

The Convener: As no other committee member wishes to speak in the debate, I call the minister to respond.

Jeane Freeman: Thank you, convener. Tribunal procedural rules provide that, in looking at an appeal, the First-tier Tribunal may look at any issue and not just at points of dispute that are raised by the appellant. It is for the tribunal to decide, and it can look broadly or narrowly. Tribunals can make significantly different findings of fact from the original decision maker, and ministers cannot restrict a tribunal's authority or direct it in its deliberations, as tribunals are independent and judicially led.

Amendment 206 could appear to tie the tribunal's hands in relation to calculating what an individual is entitled to. An appellant—particularly one who is without the support of a welfare rights officer—may not have specified all the potential grounds for appeal, and the tribunal might identify things that the individual has missed. Conversely, it may consider that part of a determination is plainly wrong even though the appellant is not disputing it. Clearly, the tribunal will want to make what it considers to be the right decision. Those are matters for the tribunals to decide and not matters for the bill, so I urge Ms McNeill not to press her amendment 206.

The Convener: I ask Pauline McNeill to wind up and to press or withdraw amendment 206.

Pauline McNeill: I am satisfied with that response, so I will seek to withdraw the amendment.

Amendment 206, by agreement, withdrawn.

Section 29 agreed to.

After section 29

Amendment 38 moved—[Jeane Freeman]—and agreed to.

The Convener: We move to a new group, on the ordinary members of a First-tier Tribunal. Amendment 127, in the name of Pauline McNeill, is the only amendment in the group.

Pauline McNeill: I lodged amendment 127 after discussion with the Scottish Association for Mental Health, which has some experience of the tribunal system. The primary role of the tribunal is to consider and determine applications and, in the case of compulsory treatment orders under the Mental Health (Care and Treatment) (Scotland) Act 2003, to consider appeals against compulsory measures. A key feature of the mental health tribunal is that it comprises three members—a legal member who acts as convener, a medical member and a general member who has lived experience of a mental health disorder.

Amendment 127 seeks to ensure that one of the members of the tribunal has lived experience, as I think that that is good practice. I am not clear about whether there will be a three-member tribunal in every case, but I presume that that is the intention.

It seems to me that what I propose in the amendment would strike a good balance in the devolved system.

I move amendment 127.

Jeremy Balfour: I will make a couple of points. First, I am not sure that the bill is the right place for the proposed provision. We have seen the draft regulations with regard to how the tribunals will be run—I think that they are going to the Justice Committee, but they may well be looked at by us at a later stage. If what is proposed is to happen, it should appear in those regulations rather than in the bill.

Secondly, I think that the wording of the amendment would exclude from sitting on the tribunal a number of people who come with a lot of experience—I remind the committee that I was an ordinary member of a tribunal. There is a danger that we would lose the experience of people who have physical or mental illnesses as ordinary members. I am sure that that is just due to unfortunate drafting, which could probably be tidied up at stage 3, but my view is that it would not be helpful to have the provision in the bill. We should consider the matter when the Justice Committee looks at how the tribunals will work. That seems a more appropriate place to have the debate.

Jeane Freeman: I have no difficulty with the principle of what Ms McNeill's amendment 127 aims to achieve—that ordinary members of the tribunal should have a range of experience—but Mr Balfour is correct in saying that the bill is not the right mechanism to use to achieve that. The tribunal regulations under the Tribunals (Scotland) Act 2014 are the right mechanism to use.

As the committee has been reminded by Mr Balfour, a public consultation that we launched on 22 January is under way on the full suite of regulations that are needed to create a new chamber in Scottish tribunals to hear social security appeals. The draft eligibility for appointment regulations provide for the appointment of ordinary members with two types of specialism: medical and disability. The disability criteria have been expanded so that they align with the definition of disability that is provided in section 6 of the Equality Act 2010. That will ensure that the meaning of disability covers not just physical disability but mental impairment. Such members would be involved in situations in which medical issues in connection with entitlement to disability assistance or employment injury assistance fell to be determined. The consultation on the draft regulations proposes that all other cases would be dealt with by the legal member sitting alone. However, the point of the consultation is to seek views.

The consultation will close on 16 April, and I assure Ms McNeill and the committee that care will be taken in considering and balancing any views that are expressed on eligibility for appointment and on which members should sit on different tribunals.

I ask Ms McNeill not to press amendment 127. Instead, I urge her and other members of the committee to respond to the current consultation, after the completion of which we will take matters forward in the appropriate manner.

The Convener: I invite Ms McNeill to wind up.

Pauline McNeill: I intend to seek to withdraw amendment 127. I am persuaded by Jeremy Balfour and the minister that the bill might not be the right place to address the issue, although I stand by the substantive point that I make in my amendment.

I would like to discuss the matter with the committee at a later stage, because I think that the committee should have a close interest in the operation of the tribunal system and the on-going consultation. There is a close relationship between the work that we do and the operation of the tribunal system. Perhaps we should be a secondary committee—I would like to have that discussion, but I agree that now is not the appropriate time to have it. Therefore, I seek to withdraw amendment 127.

Amendment 127, by agreement, withdrawn.

Section 30—Obligation to provide information on request

The Convener: We move to the next group, which is on the obligation to provide information. Amendment 196, in the name of Mark Griffin, is the only amendment in the group.

Mark Griffin: Amendment 196 has the support of the Child Poverty Action Group. It seeks to remove the possibility that someone could automatically be refused their entitlement if they were asked to provide information in the form of, for example, a pay slip or a medical test and they simply could not.

Although I recognise that that is not the policy intention and that the provision in section 30 is intended not to be negative, the bill should not make possible such a practice. As it is drafted, the provision goes beyond the general practice under the current UK benefits system. A fairer provision would be that the agency could go ahead and decide an award on the basis of the evidence that was available.

I will be interested to hear the Government's thoughts on the matter.

I move amendment 196.

Ben Macpherson: In my view, section 30 is useful and important in that it will make sure that decisions are made and that there are no outstanding collections of data lying with the agency. I wonder whether data protection is an issue that we need to be mindful of in this context. I put that to Mr Griffin and the minister.

10:45

Jeane Freeman: I cannot support Mark Griffin's amendment 196, as section 30(2) is a technically important provision that cannot be left out.

Section 30 deals with the situation in which the agency does not have the information that it needs to make a determination about someone's eligibility. Section 30(1) lets the agency request that information from the individual. I emphasise that it allows information to be requested only if the information is necessary for a determination to be fully made. If the agency has asked someone for information and has allowed a reasonable period for a reply but has not received it, the agency needs to be able to determine the application at some point. That is what section 30(2) is for—it is to allow ministers to fulfil the duty that section 19 places on them to make a determination of a person's entitlement.

Because we are talking about a situation in which the agency lacks information that it needs to decide what the individual is entitled to, there must be some legal basis for the agency to make a determination in the absence of that information—otherwise, as Mr Macpherson hinted, the agency would have to keep the application open and would have to hold the personal information of the individual in question in perpetuity. That would be at odds with the data protection principle that information should be held only for the purposes for which it is needed.

I stress that section 30(2) does not say that, without the information, an application will inevitably fail. There may be cases in which information is sought to decide whether a person qualifies for a higher rate of an award or in which information that is already held justifies an award at a lower rate. My issue with amendment 196 is that it would leave an application hanging when an individual had applied but had failed to provide what was sought from them, which would be neither appropriate nor helpful. For those reasons, I invite Mr Griffin not to press his amendment.

The Convener: I ask Mr Griffin to wind up and say whether he wishes to press or withdraw his amendment.

Mark Griffin: On the basis of the information from the Government, I seek the committee's permission to withdraw the amendment.

Amendment 196, by agreement, withdrawn.

Section 30 agreed to.

After section 30

The Convener: The next group is on medical assessments. Amendment 207, in the name of Alison Johnstone, is grouped with amendments 208, 171 and 172.

Alison Johnstone: I stood for election on a manifesto commitment to reduce the number of assessments that are used to assess eligibility for devolved benefits, and I believe that SNP members of the committee campaigned on a similar commitment. The SNP's 2016 manifesto stated that it would

"stop the revolving door of assessments and related stress and anxiety for those with long-term illnesses, disabilities or conditions",

and amendments 207 and 208 would do just that.

The principle that is established in amendment 207 is that pre-existing evidence should be fully considered before an assessment is insisted on. Where existing evidence is sufficient to corroborate what the applicant has claimed on their application, we really should not ask them to undergo unnecessary assessments, which for some people can be highly stressful experiences that exacerbate conditions and illness. I have not been prescriptive on how that should be done, so it would be a matter for the Scottish ministers to decide what pre-existing evidence would be sufficient. However, the principle that we should not put people through unnecessary assessments is an important one that we should establish in law. It is also a matter of practicality and efficiency, because current PIP assessments can cost up to £200.

Under amendment 208, when an assessment is required, the Scottish ministers will have to consider a range of options and forms of assessment that may be less taxing and stressful than face-to-face assessment. Where face-to-face assessment is absolutely essential, ministers will have to consider the distance from home that the person has to travel to the centre and any adverse effects that that travel might have. The amendment also specifically highlights the possibility of assessing applicants in their own homes.

I make clear that the intention is not to stop assessments that are necessary to determine entitlement. I know that the minister shares those aims; she outlined a similar process in January to the House of Commons Work and Pensions Select Committee and she has made comments to that effect in the chamber.

I am pleased to note the support for the amendment from Inclusion Scotland, Citizens Advice Scotland and the Child Poverty Action Group. If we are to found the new system on the principles of dignity and respect, as the Scottish Government rightly intends to do, protecting applicants from unnecessary assessments that could unintentionally cause distress is one way to create such a system.

I move amendment 207.

The Convener: I invite Mark Griffin to speak to amendment 171 and the other amendments in the group.

Mark Griffin: Amendments 171 and 172 are sponsored by SAMH, and the intention behind them is that, if the person who is being assessed has a mental health condition, the person who conducts any face-to-face assessment for disability should have professional experience of mental health. SAMH research has highlighted significant problems with how face-to-face assessments for PIP work for people with mental health conditions, including a lack of understanding by assessors of the impact of mental health; the inability of face-to-face assessments to accurately assess the impact of fluctuating conditions; and stigmatising attitudes and behaviours by some assessors. The cumulative impact of those failings has been a loss of trust in the PIP assessment process and, in some cases, a deterioration of applicants' mental health. SAMH's sister charity in England, Mind, surveyed 800 people with mental health problems on their experiences of PIP, and only 8 per cent felt that their assessor understood the impact that their mental health problem had on them as individuals.

We welcome the Government's intention to reduce face-to-face assessments for disability benefits but feel that this amendment provides a safeguard for those applicants who would still require such an assessment. A reduction in assessments should make it easier to provide condition-specific assessors, because demand for assessment should be lower. That would contribute to building trust between applicants and the new Scottish social security system, which is essential for its long-term effectiveness. I ask members to support the amendments in my name in this group.

Jeremy Balfour: I support the way in which Mark Griffin has gone about amendment 171, and it is the right way forward. My slight concern is about the wording, which refers to

"assessment of the individual's mental health".

My understanding is that that is not what the assessment is about, which is how an individual's mental health impacts their needs for day-to-day life. I am not sure that the wording is absolutely right, so I wonder whether Mark Griffin will consider not moving the amendment and bringing a fresh one at stage 3. Maybe the minister could comment on whether the wording covers what is intended to happen in an assessment. I am very sympathetic to what the amendment is intended to do, but I am not sure that the wording is right.

Another issue for us to be wary of—it will be an issue for the Government in the future—is whether there are enough people with the experience to do the assessments. That does not make the amendment wrong; we just need to make that there are the right people.

I do not support Alison Johnstone's two amendments. I do not want to provoke my colleagues across the table into having another go at assessments, but I am one of the few people here who has been for an assessment, and it was very positive. I appreciate that a lot of people have not had that experience. I am sure that I have woken up at least a couple of members. We had assessments even back in the 1980s; when I went for DLA for the first time, I was assessed. We need to be careful, as face-to-face assessments will help some people to get the benefits that they require. Information can be obtained from face-to-face assessments that could never be obtained from reading a bit of paper.

The agency will have to collect as much information as it can on someone, but there is a danger that some information will just not be available or will be very hard to get. The quickest way for an individual to be dealt with is for them to go through the right form of assessment with the right support. I am slightly concerned that we might end up making claimants' lives harder as a result of their not getting an appropriate assessment at the appropriate time.

There is an argument for some assessments to be done at home. That used to happen on a number of occasions. It used to be the case that the First-tier Tribunal would hear a case first, and a face-to-face assessment would be carried out that it would arrange. We might want to consider providing for such an arrangement in regulations.

I am concerned that, as Alison Johnstone's amendments are written, we might make life more difficult for people. I accept that, in some situations, assessments are not done that well, but that does not mean that assessments are not a good way of obtaining information. It is possible to assess someone quickly. Tribunals often make very different decisions because they see a person; it is not just a paper exercise.

Adam Tomkins: I cannot support the amendments in this group, because they demonstrate a failure to understand what is being

assessed. We are not talking about assessments of people's medical condition or treatment. We are talking about assessments of the needs that people have that arise from their disability or health condition. Alison Johnstone's amendments 207 and 208 fail to recognise that, as does the wording of Mark Griffin's amendment 171 on mental health, which I would otherwise welcome.

We will not support any of the amendments in the group. We will not vote against Mark Griffin's amendments, because the principle is the right one, but amendment 171 would need to be amended before we could support it, because it uses the phrase,

"an assessment of the individual's mental health".

That is not what is assessed in an assessment—it is an assessment of the needs that an individual has as a result of their mental health condition, which is a very different thing.

Jeane Freeman: I will start by addressing Mr Griffin's amendments 171 and 172. I agree with the principle behind them, which is that individuals should be assessed by professionals who understand their specific conditions and the impact of those conditions. Our arrangements should provide for the needs of people with mental health conditions to be met.

The Scottish Government has put a clear emphasis on getting assessment decisions right first time, every time, and the use of appropriately trained or—as I have previously referred to them as—condition-specific assessors would help us to achieve that. I agree with Mr Griffin that, in many cases, mental health assessments would be best dealt with by people with professional experience of mental health.

Unfortunately, if I were to commit to implementing amendments 171 and 172 as they are drafted, that would mean that we would inadvertently increase the risk that individuals with mental ill health might not be effectively assessed for any other conditions or disabilities that they might have, particularly when the mental health condition is not the primary condition. People frequently present with multiple conditions. Insisting that everyone who has any kind of mental health condition, to any degree, should be assessed only by a mental health professional might result in some people not getting the right assessor or assessment for them, particularly if their primary condition is physical.

The Scottish Government has consistently argued for condition-specific assessors to be used—I am on record as saying so, as has been noted—and we are working with our stakeholders and experience panels to see how best we can implement that. I know that Mr Griffin, as I do, wants individuals with mental health conditions to get the best possible assessment outcomes, and I urge him to consider not moving his amendments so that we can work together to improve the wording before stage 3. If he wishes to move them, we will support them, but we will want to revisit them at stage 3 to make some improvements to them.

I whole-heartedly agree with the principles behind Ms Johnstone's amendments, which are that face-to-face assessments should be conducted only when completely necessary and that, when they are required, they meet the needs of the individual. We remain committed to reducing the number of face-to-face assessments that are required. To do that, we focus on the initial stage of the process, which others have commented on.

11:00

However, assessments are undertaken to determine the impact of the individual's disability or ill-health condition, as Mr Tomkins has outlined. Therefore, the assessments are not medical assessments but assessments of impact, because that is the purpose of the benefit. Ms Johnstone and I share the same intent for assessments and for determining when assessments are required and when they are unnecessary. Indeed, we share much of the same intent with regard to the process that should be gone through by the agency in reaching that view, which includes ensuring that assessments are made as close to the individual as possible and at home where that is desirable. However, I urge her not to press the amendments on the basis that I am open to continuing to work together to ensure that assessments are undertaken only when necessary; if required, we can come back to the issue at stage 3.

The Convener: I invite Ms Johnstone to wind up, and to press or withdraw her amendment.

Alison Johnstone: I begin by addressing Mr Balfour's comments. He frequently shares his experience with members; I feel that it is important that we do not assume that our personal experience is universally shared. Citizens Advice Scotland's briefing for today's proceedings says:

"From consultation with several hundred CAB clients and advisers, the highest priority for the Scottish social security system was that the number of unnecessary medical assessments for disability benefits is substantially reduced by making the best use of existing evidence."

Its submission supports the fact that, for a lot of people, the process is stressful and unnecessary and they are

"not ... treated with dignity and respect"

on every occasion. The submission speaks about

"poor quality of decision-making; charges for medical evidence; and people on DLA losing their award on reassessment."

It is clear that there is a lot to be improved in this area.

I am aware that Mr Tomkins and the minister have concerns about the word “medical”. I warmly welcome the minister’s support for the principle of my amendments and I certainly would not want any evidence left out of the process that might help an individual to access entitlement. If a rewording of the amendments means that fewer people have to be assessed unnecessarily, I am prepared to work on the wording of my amendments with the Government to bring them back at stage 3. Clearly, we share the same intent, as this is a very important issue that we should all seek to get right.

Therefore, with the approval of the committee, I will withdraw amendment 207.

Amendment 207, by agreement, withdrawn.

Amendment 208 not moved.

Section 31—Duty to notify change of circumstances

The Convener: The next group is about appointees. Amendment 157, in the name of Jeane Freeman, is grouped with amendments 158 and 159.

Jeane Freeman: The amendments are technical adjustments to provide the new agency with the power to appoint individuals or organisations to act on behalf of a person who appears to be eligible for assistance but who is unable to act for themselves and has nobody authorised to act on their behalf. The effect of the amendments will be to ensure that individuals who do not have the mental or physical capacity to act themselves are able to access and receive all the assistance that they are entitled to under the new Scottish system. The amendments will also allow an appointee to be appointed when someone has died and there is no executor of their estate. Where an appointee is appointed, they will take on the rights and responsibilities for the person who is eligible for Scottish social security.

I move amendment 157.

Amendment 157 agreed to.

Amendment 158 moved—[Jeane Freeman]—and agreed to.

Section 31, as amended, agreed to.

Section 32 agreed to.

After section 32

Amendments 159 and 39 moved—[Jeane Freeman]—and agreed to.

The Convener: Amendment 171, in the name of Mark Griffin, has already been debated with amendment 207. I ask Mr Griffin whether he wishes to move amendment 171.

Mark Griffin: If the convener can give me a bit of leeway, I say that I welcome the comments of committee members and the unanimous support for the principle behind amendment 171 and will look to work with the Government and committee members towards agreed wording that fulfils the policy that we all want. On that basis, I will not move the amendment.

Amendment 171 not moved.

Section 33—Decisions comprising determination

Amendment 160 moved—[Jeane Freeman]—and agreed to.

Section 33, as amended, agreed to.

Section 34 agreed to.

After section 34

Amendments 128 and 129 not moved.

Section 35 agreed to.

After section 35

Amendment 191 not moved.

The Convener: The next group is on assistance no longer required. Amendment 197, in the name of Mark Griffin, is the only amendment in the group.

Mark Griffin: I appreciate that the motives behind amendment 197 are not immediately obvious, but I hope that I will be able to explain them.

The amendment seeks to give people a right to cease receipt of assistance at any point and to say, in effect, that they no longer wish to receive that assistance.

The Child Poverty Action Group highlighted that, as is currently allowed under United Kingdom law, it is important that people are able to withdraw their application once they have an award. There are circumstances in which a person might want to stop getting a particular benefit even though they are still entitled to it—for example, that might happen when a couple has a choice between two benefits or a choice about who will make the application and receive the assistance. The Child Poverty Action Group highlighted the example of a couple who care for their disabled child, one of whom gets carers assistance for their child but has their own health condition and gets universal credit. With universal credit, there are extra amounts for someone who gets a carers benefit

and for someone who has a health condition, but not for both, unless they are different people. If that partner could not withdraw their claim to allow the other partner to claim, they could be more than £150 a month worse off because their universal credit will not include a carers element.

I am happy to listen to what members of the committee and the Government have to say about the amendment and how it is worded.

I move amendment 197.

Jeane Freeman: I am happy to support the principle behind amendment 197, but I ask Mr Griffin not to press it, for technical reasons. There can be situations in the benefits system in which it would be sensible for someone to choose to stop receiving assistance, because that might allow the person, or related persons, to claim other assistance instead.

The committee has agreed to amendments on the Scottish ministers' duty to promote take-up and income maximisation, so it might be beneficial to include in the bill an express statement that a person can decline assistance, given that there is an apparent contradiction between such an approach and that duty. It might be clearer to make such a statement earlier in the bill.

It seems unnecessary to require a person to state their choice in particular ways and to have to publicise what those ways are. Ministers would undoubtedly try to ensure that a person was making an informed choice, but it seems to me that that would best be left to good practice in the unusual situations in which the issue will arise.

The wording and location of the amendment give rise to concerns that suggest to me that it would be better to consider the issue in the light of other amendments and to lodge another amendment at stage 3. I am happy to work with Mr Griffin on that, and on that basis I ask him not to press amendment 197.

Mark Griffin: I welcome the Government's comments. Aside from the duty to maximise the income of an individual, we should look holistically at the wider picture. We should look to maximise the income of a household as well as the income of an individual, and the two might well be in conflict. We can consider the issue in advance of stage 3, and I look forward to working with the Government. On that basis, I am happy to seek leave to withdraw amendment 197.

Amendment 197, by agreement, withdrawn.

Section 36—Liability

The Convener: The next group is on recovery of assistance. Amendment 40, in the name of the minister, is grouped with amendments 41 to 45.

Jeane Freeman: The Scottish Government has always made it clear that overpayments that are made as a result of official error will not normally be recovered unless there are exceptional circumstances. The committee acknowledged that in its stage 1 report and, reflecting the concerns of stakeholders such as Inclusion Scotland and Citizens Advice Scotland, asked the Government to make the position clear in the bill. That is what amendments 40 to 44 will do.

Through amendment 40, we will widen the scope of overpayment liability to encompass all types of error. Under amendment 43, we set out a qualification for when that liability exists. Those amendments mean that an individual will be liable for an overpayment only when the mistake was their fault or it was reasonable for them to have noticed that an overpayment had occurred.

The amendments will also bring all types of error that result in an overpayment under the statutory framework, which means that the Government will not be able to rely on the common-law rules of unjustified enrichment to recover overpayments. That will further increase transparency on an important issue. I hope that members will welcome amendments 40 to 44.

Amendment 45 is a technical amendment. When a person dies, the cost of their funeral is a priority debt, which takes precedence over most other debts, when there is money in the deceased person's estate. Amendment 45 confirms that that normal legal rule applies when funeral expense assistance has been given to someone. That means, for example, that if a person leaves assets that can be used to meet the costs of their funeral, but someone needs assistance to meet those costs up front, assistance can be given and the cost can be recovered from the estate in the usual way.

The committee will note that amendment 45 enables recovery of cost from the deceased person's estate but not from the person who is assisted. That is in line with the usual approach to such matters.

I move amendment 40.

Mark Griffin: We support the amendments in this group and we will seek to work with the Government and the minister ahead of stage 3 on areas that we think can be improved.

If the bill is not amended, people will be liable to repay an overpayment that is caused by an official error, and there will be no right of appeal against recovery of an overpayment. If the Scottish Government's amendments 40 to 44 are agreed to, people will be liable to repay overpayments that have been caused by official error if it is deemed that a reasonable person should have noticed the error.

People will not be liable to repay an overpayment if it was not their fault and they cannot be expected to have noticed the error, but there will still be no right of appeal against recovery of an overpayment. The minister's amendments are a considerable improvement—

11:15

Jeremy Balfour: Does the member not agree that, under the present system, the individual has a right of appeal to the First-tier Tribunal and that such a safeguard could be looked at for stage 3?

Mark Griffin: I thank Mr Balfour for that intervention, because I was just about to come on to that point. As it stands, people need to go to court if they want to appeal, which results in unnecessary calls on the legal aid budget and court time and presents a fairly substantial barrier to justice for people. As Mr Balfour has pointed out, the current UK system gives a right of appeal to the First-tier Tribunal.

I feel that the test of liability to repay is too strict—indeed, it is stricter than it is for almost all current DWP benefits—and that the bill should provide for regulations setting out the methods of recovery. Evidence has shown that deductions from benefits cause hardship, and putting into law a limit on the level of such deductions would protect vulnerable people, many of whom would struggle if there were no protection with regard to the amount that could be deducted either weekly or monthly.

As I have said, we support these amendments, which represent a considerable improvement, but I will look to work with the Government ahead of stage 3 on some of the issues that I have flagged up.

Jeane Freeman: I will wind up by concentrating as best I can on Mr Griffin's comments. I am grateful for his support and I am happy to continue discussions in advance of stage 3 on whether further improvements can be made. However, I should make it clear that it is possible to appeal any recovery deductions through the First-tier Tribunal and that the DWP makes free-standing recovery deductions, which we are not proposing. Nonetheless, I am grateful for the member's support and I am happy to continue the discussion with him and other committee members, if they wish, in advance of stage 3 to find out whether any further improvements can be made that the Government can agree to.

Amendment 40 agreed to.

Amendments 41 and 42 moved—[Jeane Freeman]—and agreed to.

Section 36, as amended, agreed to.

After section 36

Amendment 43 moved—[Jeane Freeman]—and agreed to.

Sections 37 and 38 agreed to.

After section 38

Amendments 44 and 45 moved—[Jeane Freeman]—and agreed to.

The Convener: I am very conscious of the fact that it is 20 past 11 and that we must stop at half past. Given the significance of the next group of amendments, I will stop stage 2 proceedings there for today and continue them next week. A new marshalled list and groupings will be issued to the committee.

I thank everyone for their attendance this morning.

Meeting closed at 11:19.

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