OFFICIAL REPORT
AITHISG OIFIGEIL

Social Security Committee

Thursday 29 March 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 29 March 2018

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SOCIAL SECURITY COMMITTEE
8th 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:

Jessica Burns (Regional Tribunal Judge, Social Security and Child Support)
Paul Dumbleton (Disability Qualified Tribunal Member)
Andy Little (Midlothian Council)
Steven McAvoy (Enable Scotland)
Paul McCormack (Govanhill Housing Association)
Dr Patricia Moultrie (Medically Qualified Tribunal Member)
Professor Tom Mullen (Member, Former Scottish Tribunals and Administrative Justice Advisory Committee)
Jane Smith

CLERK TO THE COMMITTEE

Simon Watkins

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Social Security Committee

Thursday 29 March 2018

[The Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Convener (Clare Adamson): Good morning, and a very warm welcome to the eighth meeting in 2018 of the Social Security Committee. I remind everyone to turn mobile phones and other devices to silent, so that they do not disrupt the meeting or interfere with the broadcasting system.

Agenda item 1 is a decision on taking business in private. Are members content to take items 3 to 5 in private?

Members *indicated agreement.*

Social Security Tribunal

09:30

The Convener: Agenda item 2 is a panel session on the Scottish Government's proposals for a new Scottish social security tribunal. I welcome the members of the first panel, and thank them for their submissions. Andy Little is a welfare rights officer from Midlothian Council; Steven McAvoy is senior welfare rights adviser for Enable Scotland; Paul McCormack is a welfare rights officer for Govanhill Housing Association; and Jane Smith is a welfare reform officer and debt adviser, although she is here today in a personal capacity, rather than representing a council.

I have a general opening question. What difference do you think that having

"regard to the social security charter"

will make to how the tribunal might operate?

Jane Smith: In general terms, it is a really good idea. It is nice to see general principles being debated appropriately and coming through Parliament. I made a small comment in my written submission about rules 2 and 3—the bit about the overriding objectives. I would still like them to be enshrined in detail in law. However, that is not a comment on the Scottish social security charter, which I think is a good idea.

I am now stepping outwith my area of expertise, but it is quite nice to see this. Old Scots law had the idea that things should come from principle rather than from case law. The proposals kind of feel like a nod to that, which I think is really nice.

Paul McCormack (Govanhill Housing Association): I endorse much of what Jane Smith has said, certainly in relation to the general principles. There is very little to disagree with in that regard. I endorse her views.

Steven McAvoy (Enable Scotland): We support the principles in general. We are not convinced either way that the provisions of the charter need to fall under the proposed legislation on appeal tribunals. There is an argument that the overriding objective might cover the charter in practice in any case. I am therefore not entirely convinced either way that there is a need to enshrine it in the legislation.

Andy Little (Midlothian Council): I do not have anything to add to that.

Pauline McNeill (Glasgow) (Lab): Good morning. I thank Paul McCormack for his paper—indeed, I thank all the witnesses for their submissions. I have some questions for Paul, although they probably apply to everyone.

My first question relates to your concerns about redetermination. You will be aware from the evidence that the committee took from the minister that the new provisions set out that the Scottish ministers will not be adopting the Department for Work and Pensions model, and that a redetermination will be done by another member of staff in the new agency. The claim is to be looked at afresh, and the suggestion is that there would be a different outcome compared with what would happen under the DWP model.

I note that, as a result of your freedom of information request, you found that 80 per cent of redeterminations met with an unfavourable outcome. I can understand why you are concerned about that. I pursued the issue during our stage 2 consideration of the Social Security (Scotland) Bill, and proposed that there should perhaps be an automatic appeal.

Are you satisfied with the process? The Scottish ministers say that they are adopting a different model. What do you think?

Paul McCormack: Are you suggesting that there would be no requirement for a redetermination, and that an initial determination would carry a right of appeal?

Pauline McNeill: The Government has removed the word "mandatory", but my understanding is that, to all intents and purposes, the redetermination is mandatory. The key thing is that ministers are telling the committee that a different member of the agency's staff would look at the claim afresh, the implication being that the outcome would be different from what would happen under the DWP model.

Paul McCormack: The concept of a "mandatory reconsideration", to use the devolved language, was first introduced in 2013, when the intention was that it would reduce the number of cases proceeding to an appeal hearing.

We now know, because of the statistics that it has been possible to provide, that that has not happened. It would probably be overly cynical on my part to suggest that the mandatory reconsideration was used as a further deterrent to discourage people from exercising their right of appeal.

My colleagues may take a different view, but I thought that mandatory reconsideration was an unnecessary tier of adjudication that served no real purpose and often had the effect of making people believe that they would have no success if they took their case to the next stage of adjudication, which would be an independent appeal tribunal.

Another relevant point became clear to us when the provision was introduced. The purpose of a mandatory reconsideration, to use the old language again, was always that, if someone could provide additional evidence, that gave the new decision maker the opportunity to reconsider the case afresh. Our difficulty was that there was no way of obtaining additional evidence at that stage as legal aid was not available, because at that point the case was not the subject of an appeal. In relation to medical appeals, around the same time, most surgeries in the Glasgow area had signs up asking people not to ask them for any evidence or letters in relation to benefit matters.

Essentially, we went through a process in which there was very little chance of success—we went through the motions to get to the other end, so that the client could then exercise their right of appeal. At that point we could gather evidence, which would hopefully lead to an independent tribunal taking a different view.

The statistics certainly bear that out. The turnaround on appeal—the number of cases that had been refused at mandatory reconsideration but were successful on appeal—was stark. I have provided the response to my freedom of information request to evidence that fact.

I do not know whether I have answered your question.

Pauline McNeill: Would your preference be just to have a direct appeal?

Paul McCormack: Yes. That is how it always was prior to 2013.

Pauline McNeill: Rather than having a determination in between, there would be a direct appeal. Is that your position?

Paul McCormack: Yes. Prior to 2013, an unfavourable decision carried an automatic right of appeal without there being an obligation to request a mandatory reconsideration. The only benefit decisions to which that still applies today are housing benefit decisions, which carry an automatic right of appeal. All other benefits do not.

We viewed mandatory reconsideration as an unnecessary tier of adjudication, as an addition to our workload and as an additional stress for someone trying to exercise their right to challenge an unfavourable decision.

Pauline McNeill: I have another question, but I am happy to wait.

Ruth Maguire (Cunninghame South) (SNP): Good morning, panel. Thank you for coming.

This is difficult, because we are trying to do something new. You will obviously reflect on what happened under the old system, but the Government is telling us that it is proposing

something different. Everything will be lifted and looked at again.

The proposals do not involve requesting additional medical information. I hear what Paul McCormack said about mandatory reconsideration deterring people from appealing, and we do not want such deterrents, but I cannot help but feel that there should be an opportunity for the new agency to fix that. I am talking about getting money speedily to my constituents who need it. Could you reflect on that aspect?

Andy Little: Even under the old system there was always a possibility that the agency that made the decision could change it before the case got to appeal. That could happen already. I whole-heartedly agree with Paul McCormack that the system of mandatory reconsideration is not working. The statistics show that. To my mind, what is proposed now is simply a redesign of that system on the basis of changing the wording. It is a "redetermination" rather than a "reconsideration". I would support the idea of directly lodging appeals once the decision has been made.

I note the policy position paper on redetermination and appeals, which goes through the stages of the new system. It includes an "Independent re-run". It is a "Simple process" with "Clear procedures and timescales" that provides "Meaningful re-dress". The paper goes on to say at the end:

"We have considered this proposal but deemed it inappropriate as our system is built differently from Housing Benefit appeals and is not directly comparable. The automatic forwarding of appeals would place a significant administrative burden on the agency. It would also take away an individual's right to choose, as they would not have the option to decide how they want to proceed at the conclusion of the re-determination stage."

I would say that, once the person has set off on the journey to challenge the decision, they should be allowed to go to the end of the process. If they do not want to take the case further—to appeal—they may withdraw. Streamlining the process makes sense.

What you are considering doing in changing the culture and changing how decisions are considered is laudable, but we still have to consider the long-term process and the time that it takes. Simplifying the system to take out redetermination would make sense.

I have a point on section 29 of the Social Security (Scotland) Bill and what happens when a case gets to appeal. At the moment, the tribunal will only really consider the issue under appeal. The legislation suggests that the tribunal need not consider the matters that are not being appealed. There is a protection for the appellant once they reach the stage of appeal. What you are proposing represents a fundamental sea change, as far as I can see, because the whole decision will be on the table to be examined again. That will obviously have a big impact on whether people decide to take cases to appeal. If the change happens, that will stop people going to appeal, because they will have to think very carefully about whether they are going to come out of an appeal better off or worse off, given that something might be taken from them. That is my concern.

Alison Johnstone (Lothian) (Green): I want to be clear about this. I think that you are saying that the proposed arrangements could lead to a negative experience, and that people would be scared of finding themselves in a worse position than the one they started in. I want to be clear that you are not satisfied with the changes that have been proposed.

Andy Little: I think that you missed a big opportunity to radically change the system in favour of justice by removing mandatory reconsideration. Given how the proposed legislation stands now, you need to think very carefully about the outcomes that are open to the tribunal and what it can decide to do when a person appeals.

At the moment, as things stand, there would have to be something really strange in a decision to allow a tribunal to look into something again. What you are proposing means that the tribunal can reconsider the matter at large in any case that goes before it. The redetermination will be done afresh. At the moment, the tribunal technically just examines the bit that is under appeal.

Let us say that someone has a standard daily living allowance, but they are contesting mobility. In most such cases, the tribunal would consider mobility, but now it will be able to consider everything. That puts the onus on a representative to say clearly to the appellant that, if they go to the tribunal, it might consider what has already been awarded, reconsider that award and take it away.

Alison Johnstone: Thank you. That is clear.

09:45

Adam Tomkins (Glasgow) (Con): Good morning, everyone. I find this conversation really interesting and important. There are critical design issues under the Social Security (Scotland) Bill and the regulations that will flow from it. One is to have a system of public administration that gets things right first time as often as it possibly can for clients and citizens, many of whom are highly vulnerable. Another is to understand the appropriate relationship between the ability of the agency to correct inadvertent errors before a matter enters the tribunal system and having a tribunal system that is as open, transparent and easily accessible as possible.

In that context, I have two questions. First, is it not good administrative practice to have internal review within the agency before a case gets to the tribunal system? Is that not what mandatory reconsideration or mandatory redetermination is, in effect? Is it not about giving the agency the opportunity to correct inadvertent errors before a case leaves the agency and goes into the tribunal system? That seems to me to be good administrative practice and should, in principle, be welcomed and endorsed, rather than criticised. That is my first question.

Secondly, if we were to move away from a position of mandatory reconsideration or mandatory redetermination, with direct and immediate access to the tribunal system, how many additional cases would the tribunals have to hear? What is the additional burden on the tribunal system that such a policy proposal would entail, and how would you propose to pay for it?

Andy Little: If you get it right first time, that means that the agency has got it right first time. That should therefore reduce the number of cases going to appeal. Why does the agency need two bites at the cherry to get it right? Perhaps it should get it right first time.

Adam Tomkins: I am sure that the agency will try to get it right first time in every case, but everyone who has any experience of public administration in any domain in any jurisdiction knows that that does not always happen. Bureaucracies sometimes make mistakes.

Andy Little: Sure.

Adam Tomkins: They make honest mistakes and other sorts of mistakes. Giving the agency two opportunities to get it right rather than just one will presumably double the number of times that it gets things right before matters leave the agency and go into the tribunal system.

Andy Little: You are keen to change the culture, and you are focused on getting things first time, so I will not belabour the point, but if the case goes directly to appeal, it is dealt with quicker, and the person gets justice quicker. The big problem with mandatory reconsideration is that it puts people off and delays things. That is the issue that I have with it.

The Convener: A number of members wish to come in on this, but I will allow Mr McAvoy, Ms Smith and Mr McCormack to comment before I bring members back in.

Steven McAvoy: On the point about giving the agency a second chance to correct any errors, prior to the introduction of mandatory reconsideration, if the person concerned got a decision that they disagreed with and they lodged an appeal, a decision maker would then have to produce a bundle of papers to be sent to the tribunal. That bundle of papers would need to clarify the date of the decision, and what the issues and the evidence were.

That opportunity was already built into the system anyway. Prior to the appeal being heard—or even when the bundle of papers was being produced—there were always options for the decision-making body to acknowledge that it had made a wrong decision and to revise it at that point. Even if you allowed people to lodge an appeal directly, that opportunity to get the decision right prior to any appeal being heard would still exist. The decision could be changed even at the point of producing the bundle of papers to send to the appeal tribunal.

The Convener: I wish to clarify that process. We are talking about having an automatic appeal for any decision. In that process, the person would still decide whether or not to appeal.

Steven McAvoy: Yes. The person would get a decision, decide that they disagreed with it and lodge an appeal. The decision-making body would get notice of that. The body would need to produce a bundle of papers to show how it arrived at that decision.

To me, that point in the process marks a clear opportunity for people to consider the decision afresh, to prepare a case and to ensure that they are happy with the decision. If they are happy with it, they send the case to tribunal. If they are not, they have the opportunity to revise the decision before the case gets to the tribunal.

Jane Smith: I will try not to repeat what has just been said. I completely agree that good administrative practice entails reviews of decisions. The process should not be made unnecessarily formal, and errors should be corrected at the first possible stage.

Going straight to appeal does not preclude that. As has been said, under the previous system—the very old system—at the point at which the claimant went straight to appeal, the matter was reviewed in house anyway. That cut out the fairly long process of the claimant having to set out arguments twice, with the matter automatically being reviewed at some length, in accordance with long processes in the agency. The business of going straight to appeal, with the matter looked at again in house anyway—it had to be, and it was—is probably cheaper, I suspect. It is certainly easier, simpler and clearer for claimants, who habitually say “I want to appeal” with reference to what we would call mandatory reconsideration.

However, that approach does not preclude things being sorted out in house. If anything, it makes that quicker, because there is a time limit. People decide fairly quickly whether the matter is

worth examining in detail and changing in house so that it does not go to appeal. Alternatively, it goes to appeal, rather than there being a long backlog of reconsideration cases in the agency.

It is perhaps worth mentioning that, at least for some cases, there was a process at the end of the 1980s, I think—I am very old—in which people asked for a review and then went to appeal. That was got rid of because of the amount of time that the agency spent on reviews when cases were going to appeal anyway.

So many cases fail at mandatory reconsideration. It is a very expensive way of doing things—it is an expensive additional step. I would agree with what has been said.

Paul McCormack: I endorse that, and I stress our concerns about the introduction of mandatory reconsideration in 2013 for the United Kingdom benefits system. Our first question was why we needed to introduce a further tier of review. If a claimant submitted an application for appeal, an automatic review was carried out by the agency anyway. If it decided not to change its mind, the case sailed on to appeal. It was the idea of introducing a further tier of adjudication that prompted our concerns.

Our concerns have been borne out. On the statistics—I go back to a point that was made earlier—the percentage of cases in which there was no decision change following mandatory reconsideration was running at about 86 per cent. Most of those cases would have gone on to appeal. The success rate for employment support allowance decisions being overturned on appeal was 69 per cent; for personal independence payment cases, the success rate was 61 per cent. That called into question the entire process of the middle tier of adjudication that was introduced. When tribunals considered cases, they did not agree with the view of the second decision maker who carried out the mandatory reconsideration.

If you are trying to encourage people to exercise their right of appeal, it puts an additional strain on them if you tell them that they can go to appeal but that they need to go through a process to get to the second stage. That is not always easy for people who are vulnerable and feel unsure about exercising their right of appeal. Getting a case straight to appeal cut out the middle tier and made things much easier for us.

Jeremy Balfour (Lothian) (Con): I should say at the outset that I am a former member of the tribunal service. I think that all four individuals on the panel appeared before me at some point. It is nice to see you all again—welcome to the committee.

Mr Little made a point regarding people being put off making an appeal because the whole case could be opened up. Given that that is already happening at the moment, how will it be different under the new system? The tribunal can consider any component and any award that a person has. How will that change under the new regulations?

Andy Little: The proposals clearly state that there is no fetter on what the tribunal will consider. However, the current case law suggests that there are limits to what the tribunal can do—the tribunal need not consider what is not brought before it on appeal. As I stressed earlier, that will be based on the case law, which protects the appellant in that area. That is why it could be different. You are moving away from saying that the tribunal need not consider things to simply saying that the whole award may be considered again.

At the moment, tribunals often decide to consider the unappealed component, but there has to be a really good reason for that. As the proposals stand, you are not proposing any reasoning at all. That is how I see it. That is why it would be different.

Jeremy Balfour: Can I ask my other questions now?

The Convener: Not if they are on a different area. Mr Adam wants to come in.

George Adam (Paisley) (SNP): Good morning. I understand where you are coming from. Like us, as constituency MSPs, you deal with cases and have people coming to your door day in, day out. However, are you not taking a very closed view? The minister has said on numerous occasions that the whole point of the new system is that it will be different. As Adam Tomkins rightly said, it will give the agency the opportunity to get some issues corrected and to get things sorted.

Andy Little referred to the culture change that the Government is trying to bring about. Is that not the whole point? Is there not scope to consider ways in which this could work in a more positive manner?

Andy Little: The culture change is positive. It should work and I hope that it will. However, that does not mean that you cannot do other things, too. I am not criticising your saying that things have to change. We are saying that, as it stands, the system of mandatory reconsideration does not work. Our preference would be for a direct process to appeal—

George Adam: I am sorry to interrupt you, but the minister has said on numerous occasions that the proposal is not for mandatory reconsideration. I understand where you are coming from. I know that you would have a certain amount of cynicism if you saw something that you believed to be similar to that, but the minister has said that it is not. Someone new would be looking at the

matter—a fresh set of eyes—giving the agency the opportunity to make a difference without putting people under other undue pressure.

Andy Little: There is some ambiguity with the wording. You are proposing a series of things that will change the wording and how things are looked at but will not change the system. I would prefer it if you changed both the wording and the system to allow for a direct appeal. That is where I disagree with where you are coming from.

I do not think that I have blinkers on. Given that we work with people on a daily basis, we see the effects of how the system works just now. I do not oppose the proposed changes; I just think that something tougher might be needed to make the system much better. That would mean taking the best parts of both: taking up the new proposal to change how things are looked at while also dealing with the route to appeal.

If you get more cases right first time, that should in theory reduce the number of appeals in the system.

George Adam: That is what we are planning.

Andy Little: I understand that that is the overriding aim.

George Adam: I do not mean to be disrespectful, but the minister has been adamant on the point that her idea is for the second look to involve a fresh set of eyes and an opportunity for the agency to make changes. There is no ambiguity in what the minister wants from the proposals.

Andy Little: I do not think that it is ambiguous, and the change should be welcomed. However, that does not necessarily mean that you should not consider other things. I cannot say any more than that. I believe that you can make the system even better by doing both.

Steven McAvoy: We have consistently said that the process is difficult, particularly with regard to disability benefits. You are attempting to take the massive range of disabilities and essentially calibrate them to a points-based test, or whatever test you choose to design, and then attach a financial figure to that.

There will always be scope for disagreement: one person would make an award and another person would not. You will never get the system 100 per cent perfect. If you accept that there will be an element of disagreement, to whatever degree, and that some people will get an incorrect decision, you also need to accept that the process of challenging an incorrect decision should be made as easy as possible.

I recently had a case involving a parent of a young person with a disability, who had been refused a personal independence payment. Reconsideration was refused. At that point, the person did not want to proceed any further; they just wanted to let the matter go. I encouraged them to proceed by telling them that there was a case. They eventually changed their mind, the matter went to tribunal and they were successful.

Imagine if such a person did not have support. Even in a system in which everything was reviewed, with the best will in the world, and in which only a small percentage of decisions were wrong, if they did not have support and did not appeal, they could lose out on a significant amount of money.

You are doing something about which there will be an element of subjective opinion. If you accept that you will never get things 100 per cent right, it is good to make the system of challenging decisions as easy as possible. You can still strive to get as close to 100 per cent as possible—there is nothing to stop that—but, for cases where there is disagreement, particularly when you are dealing with potentially vulnerable groups, you need to make the process of challenging decisions as easy as possible, so that people do not fall outside the system.

The Convener: I understand exactly where you are coming from. As George Adam said, we are faced with navigating the process as constituency MSPs almost on a daily basis. As I understand it, in the proposed system, the consideration will be different because the onus will be on the person making the decision to look for the information that they need to make it, unlike what happens at the moment. The reconsideration process does that all again. It is not a reconsideration of the evidence that is there; it is a reconsideration of the case. If the person decides that they need more information before making a decision, they can seek it.

10:00

The statistics that have been quoted—however worrying they are—are from the existing system. The review and the reporting are parts of the process. Would you be content if, in a year's time, the figures showed that the secondary consideration was making a significant difference in that fewer cases were going to appeal but more people were getting a result? Would that give you some comfort that the new system was embedded in the way that the minister envisages?

Steven McAvoy: We would certainly be happy to see things improve. We would be happy to see more accurate decisions being made the first time—while accepting that we will never get things 100 per cent right. The process still needs to be as easy as possible for people challenging decisions.

We would welcome anything that makes the reconsideration process more thorough and the decision-making body more open to reconsidering decisions, but I do not necessarily see how it would make things better to make that process mandatory.

Paul McCormack: There is a precedent as regards the point about having a fresh pair of eyes look at a case. When the disability living allowance was introduced in 1992 it was written into the legislation that, if a case was refused and a review was sought, a different decision maker—a fresh pair of eyes, for want of a better expression—would look at the case. I do not have any statistics to show what the turnaround rate was, but I know that there were an exceptionally high number of appeals in disability living allowance cases back then. There is a precedent for such a process operating.

The Convener: But that was the Westminster DWP system.

Paul McCormack: Absolutely.

The Convener: It was not the Scottish system that is being proposed.

Jeremy Balfour: Perhaps you could take us back to the actual regulations, which we are here to talk about today. I have three questions in that regard. First, do you have any views on the awarding of expenses? Do you see the provisions on that making a change to what happens at the moment? Have you considered that area?

Steven McAvoy: If there is a suggestion that expenses could be awarded against an appellant, they would have to be advised of that. There might be a risk that an appellant who is unrepresented could read that and be concerned by it, which might stop them exercising their right to appeal.

Jane Smith: I wondered what mischief the provisions were designed to address, as it were, particularly regarding First-tier Tribunals. If you are saying that expenses can be awarded against somebody, I assume that there is a reason for suggesting that, and I wonder what it is.

In general terms, claimants have no or very few financial resources—although that is not always the case—so the outcome could be very harsh on them. That could put people off.

The respondent is paid out of public funds. It feels a bit unwieldy to award expenses against the social security agency, because that is just one body awarding expenses against another.

I could not quite see what issue the measures were designed to address. I share my colleagues' concerns, and I was hoping that somebody could tell me the reason for the measures.

The Convener: I am not sure that the committee is in a position to do that, but one of the reasons for today's evidence session is to raise such questions.

Jeremy Balfour: My second question relates to the make-up of the tribunals. Tribunals concerning DLA, PIP and attendance allowance, which we will probably be examining most, are currently three-member tribunals. One of the members is someone with a disability or with experience of having a disability or someone working with disabilities. Should three-person tribunals continue, or is that too unwieldy when it comes to making decisions?

Jane Smith: The general point is that the non-legally qualified member, who is not a doctor, is really important, given the insight that they bring to decision making in relation to the nature of disability and practical concerns. I am aware that this is difficult for the tribunal service, but it would be nice if there could be more detailed regard to their particular expertise. There has been a lot of publicity about problems to do with a lack of understanding of people with mental health issues at the assessment stage—which is not to do with tribunals. An occupational therapist who deals with physical disabilities would not necessarily have a great insight into an autism spectrum disorder, for instance. It would be nice if the tribunal service could target things a bit. I am conscious that we have to avoid unnecessary expense, and that people have broader expertise, but such arrangements would be good.

Andy Little: I agree with that. That is a salient point. It would be useful to have sub-pools of members with regard to the type of disability and tribunal.

Steven McAvoy: We are broadly happy with the composition of tribunals, with the three panel members. One of the issues that we raised was that, if someone has a PIP claim that is refused for a procedural reason, for instance, and they appeal that decision, the appeal could be heard by a one-member panel. If the appeal is successful, that could mean that the decision simply gets remitted back to the decision-making body. It might be worth considering the use of a three-member panel in such cases.

If there was evidence available at that point that would allow the tribunal to make a decision on entitlement on the day, that might result in a better outcome, rather than using the process of remitting the case back for the decision maker to make a decision. If the tribunal feels that it cannot do that, because it has been dealing purely with the procedural reason, it could still remit the matter back in any case.

Jeremy Balfour: Thank you for that.

Finally, outwith what we have already talked about, do you have any other major concerns about the new regulations, as drafted, that you wish to highlight to the committee this morning?

Andy Little: I will make a point about representatives and supporters. The issue of drafting has been raised because the coverage is wide across all the other First-tier Tribunals. Let us consider the drafting on what a supporter may assist the tribunal to do. They can provide "moral support". However, the regulations also state that they may advise on

"points of law and procedure; and issues which the party might wish to raise with the tribunal".

That seems to fit rather badly with the role of the representative. In most cases, the tribunal has the discretion to allow people in to provide moral support or indeed to hear evidence as witnesses, but the representative's role is different from that. My concern is that supporters cannot really be in a position to advise on points of law or procedure without stepping into the role of the representative. Those are my only thoughts on that.

The Convener: Mr Macpherson has a supplementary question.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): It is a separate question, in fact.

The Convener: I am sorry—we need a signal for supplementaries.

Steven McAvoy: I have considered the same point that Andy Little has just made. I started to think about a situation where there was a family member who was otherwise qualified as a representative or as a solicitor or something, and who was able to play a dual role. If it was specified that a supporter was not able to advise on points of law, there might be a situation in which there was a person in the room who was a family member and was giving evidence, and who was able to guide the tribunal on a point of law. It would not seem to make sense to exclude that. Those might be fairly unusual circumstances, but that situation could arise.

Under the draft regulations, supporters seem to be given the option of advising on points of law, whereas that is not specifically given to representatives. It seems to be a strange gap that representatives do not have that option.

Your next panel might discuss related issues on whether appointees at tribunals are sometimes appointed inappropriately. That is a big issue for us in supporting people with learning disabilities. A huge amount of the people we support at tribunal will have a representative. We would question whether a social security tribunal was the correct venue for raising issues about whether or not somebody should have an appointee.

I know that legislation about adults with incapacity is currently going through, and I think that something in that regard would be more appropriate, rather than opening the door for tribunals to make referrals back to the decision-making body if they feel that an appointee is not appropriate for a person.

Paul McCormack: The concept of supporters is an excellent idea, and I do not have any issue of principle with it. There is no problem there at all.

Following on from what Andy Little has said, my difficulty comes with the practicalities. If a family member comes to an appeal tribunal with the appellant, and the intention is for them to assist or possibly even give some evidence, they would not be going into the room at the time when the proceeding starts; they would be called later, as a witness. The decision would then have to be made whether that person is coming in as a supporter, to sit and observe, or whether the purpose of their being there is to give additional evidence in support of the appellant's case. That would cause some practical problems for the tribunal, which would have to determine the procedure for a person who has been in the room, who has heard what the appellant has said and who will possibly be giving evidence based on what they have heard, or who may be there to provide moral support.

Having represented many people, like my colleagues, I would say that I am often loth to bring in a family member, simply because it can restrict the evidence that the appellant wishes to give. It can almost act as a deterrent, because the appellant might not want to tell the tribunal exactly everything that has been going on in front of the family member accompanying them.

There is a judgment call to be made, certainly from the representative's point of view. It needs to be clarified exactly what the person is doing and why they are in the room with the appellant. That is not to be negative, however—going back to my original point.

Jane Smith: It is worth adding that the overriding objective in that regard seems to work really well at the present time. It is not often that representatives go about being positive, but I will be on this point. The arrangements seem to work very well. In a situation where a supporter is present, tribunals can ask for evidence from that supporter where appropriate. Things seem to work quite nicely without any greater formality than there is.

I am not sure—somebody else might disagree—but I think that the flexibility is already there without the new provisions. I agree about the confusions.

Pauline McNeill: What are your experiences of appeal decisions and the time that it takes to get a decision? Do you have any concerns about timescales, or are you perfectly happy with that, given your experiences to date?

Paul McCormack: It works okay—I think.

Jane Smith: I agree.

Ben Macpherson: Good morning. As well as sitting on this committee, I sit on the Justice Committee, which has been conducting an inquiry into the increased use of alternative dispute resolution. You will note that rule 3 in the draft First-tier Tribunal regulations refers to the use of mediation. Given your experience, can you envisage circumstances where mediation or other alternative dispute resolution might be helpful?

Steven McAvoy: I could not really envisage situations where that would fit. I think that the current process works well, apart from the mandatory reconsideration. When the person lodges an appeal, it is always open to the decision maker to make a change at any point, if any additional evidence is submitted. I have tried to conceive of situations where that might help in social security, but I have struggled.

10:15

Jane Smith: I would have a principled concern. We are talking about people asserting their rights, as opposed to people trying to reach a reasoned conclusion. Normally, with mediation or any such things, we would tend to go in with the premise at the back of our minds that we might concede some things, because it is better for everybody to get an agreement overall. The rights-based nature of things potentially disappears in mediation. That would really concern me.

Another point is the issue of equality of arms. The claimant simply does not have the back-up that an agency might have, however well intentioned it may be. I agree with what has been said.

The Convener: Is there anything that you want to get on record that has not been covered in the questioning or in your submissions? Do you have any final thoughts?

Jane Smith: Yes. There is a reference in the draft regulations to representatives and supporters potentially being barred from proceedings. This is not a question for the committee, but something occurred to me. We can try to imagine a situation where that could arise, and we might then think about what to do when things go wrong. That would be a very cumbersome process.

I note how the draft regulations are written. Such situations are difficult to imagine at present because, generally speaking, tribunals are very good, very reasonable, very supportive of claimants and representatives and so on. However, if something goes wrong, it becomes difficult to make a challenge. The grounds for barring somebody are broad. I would be concerned about that—for both representatives and supporters.

I would have thought that the sort of situation where somebody ought to be barred, because they were disruptive or were acting against the interests of the claimant, could be dealt with otherwise, under the procedure rules.

The Convener: I thank all the witnesses on the panel for their attendance at committee this morning.

10:17

Meeting suspended.

10:18

On resuming—

The Convener: I welcome our second panel to the committee. Jessica Burns is a regional tribunal judge for social security and child support; Paul Dumbleton is a disability qualified tribunal member; Dr Patricia Moultrie is a medically qualified tribunal member; and Professor Tom Mullen was a member of the former Scottish tribunals and administrative justice advisory committee. I thank you all for the submissions that you have given to the committee prior to the meeting.

As a general opening question, do you have any concerns or comments on where we are at the moment regarding the proposals?

Jessica Burns (Regional Tribunal Judge, Social Security and Child Support): That is quite an open-ended question but, as a starting point, my understanding was that the rules would follow as closely as possible the rules that apply at the moment. I can understand why the Scottish Government would want to depart from those rules if it was shown that they were not fit for purpose or that they were causing difficulties, but my understanding is that they are not. I think that the evidence that you have already heard from the representatives supports that.

My overall concern is that, in a desire to try and make things better in some unspecified way, the proposed rules are more prescriptive than they need to be. Overall, they might lead to confusion, particularly as we anticipate that, at some time in the future, the same tribunal will hear appeals regarding both devolved and reserved aspects of social security law. You would then have rules that

were different, or you would have rules that had to be amended to take account of the changes. To me, that seems disproportionate, confusing and perhaps not in the interests of the users of any appeal system.

Adam Tomkins: I remind the committee of my entry in the register of members' interests, in that, like Professor Mullen, I am a member of the University of Glasgow's school of law.

I wish to ask the panel about what the draft regulations and the Social Security (Scotland) Bill say about the role that will be played in litigation before tribunals by the principles and by the charter. A number of you gave oral or written evidence to the committee when we were considering the bill at stage 2. You will have seen that the bill has been amended to seek to clarify the legal role of the principles and the charter, which means that courts and tribunals can take them into account in relevant cases, although they create no new cause of action in and of themselves.

The draft regulations mention "overriding" interests and the charter. Do you have any concerns about unintended consequences stemming from the amendments that have been made or from the provisions, or do you think that the situation is now reasonably clear and that we can be confident that the establishment of the principles and the charter, which we all support across the political spectrum, will not lead to unnecessary future litigation challenging their legal status, effects or consequences?

Professor Tom Mullen (Member, Former Scottish Tribunals and Administrative Justice Advisory Committee): The amendments have made the status of both the principles and the charter clearer, in that they can be taken into account by a court or tribunal. They still leave considerable scope for how that will work out in practice. We know now that a tribunal is not obliged to decide in accordance with the perceived human rights of the claimant, just because human rights is a principle and is mentioned in the charter, but it can take some account of the notion of human rights when making decisions. That seems to be what the provisions say.

I wonder whether that might raise expectations that people can use human rights arguments as additional arguments when they do not think that an argument that is based squarely on the entitlement regulations will give the claimant the benefit that they seek. Tribunal members are better qualified to say than I am, but I doubt whether tribunals would be comfortable using human rights-type arguments in the context of benefits, which are essentially defined by precise regulations. I think that the default position of tribunals will be, "This is what it says in the regulations," and that they will make decisions accordingly. If that conflicts with some conception of an individual's human rights, they would give preference to the regulations, because that is where the entitlement is.

There is a risk that a perception will be created of an ability to use broad legal human rights arguments to a significant extent whereas, in practice, it will not be possible for people to get results by doing that.

Jessica Burns: For practical purposes, if there was an argument on that basis, the First-tier Tribunal would not currently have jurisdiction over that. It would have to remit the matter to the Upper Tribunal to address, and that would not arise commonly.

I can understand why you would want the principles and the charter to underpin everything to do with any new social security system; I think that that is right, but it is difficult for me to envisage how that would impact on the tribunal's decision making regarding the more detailed entitlement provisions.

Adam Tomkins: I thank you both for those helpful answers. I very much share the concern that Professor Mullen articulated: we do not wish unreasonably to raise expectations. We want to raise expectations that the new agency will get as much right first time as it possibly can, but we then need to deliver on those expectations, rather than frustrating them. There is no point in raising expectations that people in Scotland will be able to make high-falutin', broad-brush or impressive arguments based on international human rights principles if the reality is that those expectations will only be frustrated when tribunals hear cases and decide them in accordance with very detailed, prescriptive regulations, rather than general principles of international human rights. All that that will do is upset people, and there is no need to do that.

Are any further amendments required, either to the bill—we have one more chance to amend it—or to the draft regulations that are before us today, to ensure that there is no unnecessary raising of expectations that will inevitably be frustrated? Would you leave the drafting as it is?

Jessica Burns: I do not envisage any changes. On the broad aspect of expectation, we could go back to the mandatory reconsideration argument that has already been aired this morning because the issue is one of access. There are human rights issues about that and about discouraging appellants who may feel that any additional steps and processes are a discouragement to a remedy.

Professor Mullen: I would not particularly suggest making amendments. You could clarify the provisions in the direction of human rights or

other general things being more strictly enforceable—I do not think that you want to do that—or you could go in the direction of their having no effect at all; I do not think that the committee wants to do that either. I think that it will be okay to leave the provisions as they are and just to be aware of the danger of expectations being unduly raised.

Adam Tomkins: That is very helpful. Thank you.

Jeremy Balfour: Good morning, and thank you for coming. I have three questions. First, I return to the question that I raised with the first panel about the awarding of expenses. Do you see that happening in reality? Would the First-tier Tribunal welcome having that power?

Jessica Burns: I have not seen the arguments about including that power. I do not know where the proposal came from. There is absolutely no demand for such powers from a tribunal perspective, and I am not sure where their place would be in a tribunal. I cannot really say more than that. For me, the starting point is where we are with the rules at present, because they are the ones that I know. The fact that those rules do not confer the power to award any costs or expenses has never been an issue.

Professor Mullen: Historically, in most tribunals and across different subject matters, there has not been a power to award expenses nor a demand from those tribunals to be able to award them. That seems to go against the idea that tribunals are meant to be more accessible than courts. As we all know, one of the barriers to people going to court is their fear of having expenses awarded against them.

Jeremy Balfour: One of the issues that frustrates all tribunals is the number of adjournments that can happen in cases, for lots of different reasons. I wonder whether you have any suggestions regarding the draft provisions. Could anything be done at an earlier stage that we could include in the regulations to reduce the number of adjournments? Is there anything that could happen procedurally to reduce the number of adjournments, or are they just part of the process that we have to live with?

10:30

Dr Patricia Moultrie (Medically Qualified Tribunal Member): I will comment about medical evidence in appeals. Quite a common reason to adjourn is that we are concerned about a lack of medical evidence.

Quite a common reason why an appeal succeeds, in my opinion, is that we receive further medical evidence prior to the appeal that was not available to the original decision maker.

From my perspective as a medical member of tribunals, I would really like to see a move towards some medical evidence being available at the original decision making. There has been much discussion today about getting things right first time. In my view, it would be good if it was possible for an agreed data extraction from a general practitioner's records to be made available to the original decision maker, which would then be available for any further reconsideration and would be available to the appeal service. That would help with the evidence base underpinning the original decision making.

I know that there have been difficulties. Reference was made earlier to general practices struggling with workload and to their ability to provide reports on request, but producing a computerised extract from the medical records is not difficult. We have agreed data extractions for other purposes. That is slightly off the topic of appeals, but I think that it is relevant to appeals and to adjournments. I hope that consideration will be given to agreeing a data extraction from GP records, which would be available to the original decision maker.

Paul Dumbleton (Disability Qualified Tribunal Member): Medical evidence is really useful, but other professional evidence sometimes does not get as much emphasis as medical evidence, particularly if people are in receipt of community care support, for example. Evidence such as the care plan that was put together in order for a person to get support from their local council is very useful, and problems with that can lead to the same sort of delays as those that we have been speaking about. The issue concerns both medical and other relevant professional evidence.

Jeremy Balfour: That leads me to my next question. From your experience of sitting on tribunals over a number of years, why do you think that such a high percentage of tribunals are successful compared with decisions regarding DLA? Is there something fairer about tribunals? What lessons can the new agency learn from tribunals so that fewer appeals come forward?

Dr Moultrie: I am focused on the medical aspects. In my experience, one of the many things that happen at tribunals is that the level of disability arising from people's medical conditions is explored in some detail. We start from an understanding of the likely disabilities arising from somebody's medical conditions, and we ask a lot of questions. The disability member is extremely helpful in asking the appropriate questions.

Although the current medical assessment process has attracted a lot of negative attention in

some ways, such assessments are extremely difficult to undertake. It strikes me that some medical assessments are undertaken in a routine, formulaic way, whereby a process is applied to somebody no matter what medical conditions or disabilities they have. The medical assessment process could be improved by strengthening the starting point and by making assessments more bespoke to the person's medical condition.

When people come to the tribunals, we have a pre-hearing discussion on the disabilities and impairments that the person is likely to have. We construct our questions in detail to address those matters. We come at the disability from the perspective of a biopsychosocial model, rather than that of a truly medical assessment.

I agree completely with what has been said by my colleague. Although I am talking about medicine, I am probably using that term narrowly. We very much understand that disability is more complex than being purely to do with medicine.

We explore things in detail. We ask a lot of questions of the person, and we do not simply accept the first answer. We will ensure that we really understand the level of disability and difficulty that the person has.

Paul Dumbleton: Tribunals often have more evidence than the decision maker. People can gather more evidence during the intervening period, often supported by the agencies whose representatives gave you evidence earlier this morning. Often, there is evidence before us that the decision maker did not even see, and that makes a big difference.

Pauline McNeill: I have a few questions on slightly different areas. I raised this first question at stage 2 on behalf of the Scottish Association for Mental Health, on the matter of ordinary members with lived experience being on the tribunal. SAMH is concerned that we are not using the model that was used by the Mental Health Tribunal for Scotland. Certain panels will have an ordinary member with lived experience. Do you have any views on that to share with the committee?

Jessica Burns: You will be aware that all the judges, medical members and disability-qualified panel members are appointed by the Judicial Appointments Board for Scotland under the terms of the criteria that have been set out. It is not a matter for the tribunal organisation to have an overview of people's backgrounds. Once they are appointed, they are appointed. They are generally appointed up to the age of 70. On the issue of appointing someone who has lived experience, that might apply at the time, but their expertise or experience might not see them through the whole term of their appointment.

It is perfectly true that a number of our disability-qualified panel members are in receipt of benefits and are sitting on determinations or decisions relating to benefits that they might be receiving, but it is not within the culture of sitting on a tribunal that people try to apply their own personal experience, because we know the limits of doing that. We have to open up a generality.

My fear is that, if somebody is appointed specifically for one purpose, their focus, in considering a wide range of cases, will not be as effective. One thing that we have achieved with a wide spread of people from diverse backgrounds sitting as our disability-qualified members is that, over time, a real sense has been created of people building up expertise across a much wider area than the area that they might have known about at the time of their appointment.

We have targeted training on identified areas of weakness. For instance, we recently had training on autism and mental health issues, particularly in relation to children. It is through that process that we try to create a flexible number of disability members.

I expect that Paul Dumbleton will wish to make some comments on that.

Paul Dumbleton: Yes. I was interested to see what SAMH had proposed. I have lived experience of being the carer and father of a daughter with a learning disability who is in receipt of DLA, so I meet that criterion. However, I am not convinced that that should be set as an essential criterion for people in the role. There are a couple of reasons for that. It is not to do with not valuing people's lived experience. In the process that you are in now, in devising a new benefits system, people's lived experience should be heard very loudly. However, I am not sure that lived experience is as important with regard to what goes on in a tribunal, where people are making a decision about someone's entitlement against a particular set of criteria. That is one aspect of it.

Turning to another aspect, I noted that SAMH went on to say that the proposals might address people's concerns about not feeling that they were respected or treated with dignity in tribunals. With my long experience of working in the field of disability, I am not sure that we can necessarily expect people with disabilities to be more or less respectful of other people just because they have a disability. I could not see the logic in what those at SAMH were arguing. It is perfectly possible to have a disability yourself or to have a relative with a disability and still to be disrespectful. The opposite can be the case, too. I find myself surprised not to support what SAMH was suggesting, but I do not actually support it.

Pauline McNeill: I want to ask you about a separate issue. To your knowledge, will there be an appointment of new tribunal judges under the devolved system? Can you give the committee any information about any training that might take place?

I will tag something else on to the end of that. Do you have a view on whether, in the interests of transparency, the outcomes of tribunals—not the texts of judgments—should be published for the public to see how many decisions have been upheld and not upheld?

Jessica Burns: I am a supporter of tribunals being as transparent as possible. It comes as a surprise to some people to know that they are public hearings. Our hearings are public unless there is an order and a good reason for them to be held in private. That is very rarely exercised, simply because it is very rare that a member of the public turns up just to sit in and to see what goes on.

In order to create a sense of transparency, it would be helpful for people at least to see what a tribunal decision looks like—it is difficult for people to access something like that when they go online—and to see what a statement of reasons looks like. If somebody wants to challenge a tribunal decision, they must ask for a statement of reasons. It is very difficult to find out what those look like unless you are working in the field.

That would also provide a sense of what the outcomes are. In a court situation it would be bizarre not to be able to access that sort of information. Given that we are a public hearing, I think that there should be a higher element of transparency. That might take away some of the mystique from what happens at tribunals.

You asked the representatives whether there was any concern about delays in tribunals issuing decisions. The current practice is that tribunals are supported by a clerk. In 95 per cent of cases, I would say, tribunals issue the decision to the people concerned on the day. They wait, and they get a typed copy of the decision in their hand to go away with, and a note of what they can do if they wish to challenge the decision in the event of the appeal not being successful. They know that, at the point when they get to the tribunal, that will be the day—virtually always—when they will get the decision. There is not a sense of not knowing when they will find out what has happened.

That goes a long way toward allaying people's anxieties about the process. It also means that, when they get the decision, most appellants in Scotland are supported by representatives, who can talk it through with them.

The Convener: We have no further questions for you. Is there anything that you would like to say to the committee that has not been covered by today's questioning? If not, I assume that everybody is content that they have voiced everything that they wanted to raise. Thank you very much for your attendance and for your submissions to the committee.

We are about to move into private session but, just before we do so, I will mention that Laura Cockram, who has been on secondment to the committee, is going back to her role at the University of Edinburgh. I thank Laura for her contribution and for her support to the committee.

10:44

Meeting continued in private until 11:08.

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