OFFICIAL REPORT
AITHISG OIFIGEIL

Social Security Committee

Thursday 25 February 2021

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 25 February 2021

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SOCIAL SECURITY COMMITTEE

5th Meeting 2021, Session 5

CONVENER

*Bob Doris (Glasgow Maryhill and Springburn) (SNP)

DEPUTY CONVENER

*Pauline McNeill (Glasgow) (Lab)

COMMITTEE MEMBERS

*Tom Arthur (Renfrewshire South) (SNP)
*Jeremy Balfour (Lothian) (Con)
*Keith Brown (Clackmannanshire and Dunblane) (SNP)
*Mark Griffin (Central Scotland) (Lab)
*Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con)
*Alison Johnstone (Lothian) (Green)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Anne Baldock (One Parent Families Scotland)
Ed Pybus (Child Poverty Action Group in Scotland)
Bill Scott (Inclusion Scotland)

CLERK TO THE COMMITTEE

Ann Peat

LOCATION

Virtual Meeting

Scottish Parliament

Social Security Committee

Thursday 25 February 2021

[The Deputy Convener opened the meeting at 09:01]

Decision on Taking Business in Private

The Deputy Convener (Pauline McNeill): Good morning. I welcome everyone to the fifth meeting in 2021 of the Social Security Committee. No apologies have been received.

My apologies for delay in starting the meeting. The technical hitch was that broadcasting was not aware that I will chair the meeting until the convener, Bob Doris, who is running late, is available.

Under agenda item 1, the committee is asked to agree to take item 3, which is consideration of today's evidence, in private, and to agree to consider our draft legacy report and annual report in private at future meetings. I will assume that all members agree unless someone indicates otherwise in the chat box.

As no member has indicated otherwise, the committee agrees to take those items in private.

Child Disability Payment

Draft Disability Assistance for Children and Young People (Scotland) Regulations 2021

09:02

The Deputy Convener: Agenda item 2 is to take evidence on the draft child disability payment regulations from members of the Scottish campaign on rights to social security. I welcome Bill Scott, the senior policy adviser at Inclusion Scotland, who is probably known to all members; Anne Baldock, the financial inclusion programme co-ordinator at One Parent Families Scotland; and Ed Pybus, the welfare rights officer at the Child Poverty Action Group in Scotland.

As usual, I ask members to keep their questions succinct. A number of members have already indicated that they want to ask questions on specific themes, but any member who would like to ask a question on a specific theme may indicate that in the chat box.

There is no indication in my notes that there will be an opening statement. Are we going straight to questions, or do you want to make an opening statement, Bill?

Bill Scott (Inclusion Scotland): No, thank you.

The Deputy Convener: In that case, we will start with theme 1.

Alison Johnstone (Lothian) (Green): How were the organisations represented by SCORSS involved in the development of the regulations?

Bill Scott: We have been involved in the development of the draft regulations in a number of ways. Ed Pybus and I, for example, are members of the disability and carers benefits expert advisory group, which gives advice to the Cabinet Secretary for Social Security and Older People. Our involvement is not as members of SCORSS but as individuals. The advisory group was involved at an early stage in the development of the regulations. SCORSS was also consulted directly by officials and the cabinet secretary on some of the proposals for the regulations. Furthermore, as individual organisations, we were able to respond to the Scottish Commission on Social Security's call to comment on the regulations.

In each of those instances, it would be fair to say that we got a good hearing, and changes have been made at every stage in line with some of the suggestions that were made by the various groups and organisations. We are pleased to see some of the amendments that were made to the regulations prior to their coming before the committee today.

Does Ed Pybus or Anne Baldock want to add anything?

Anne Baldock (One Parent Families Scotland): To confirm what Bill Scott said, OPFS definitely feels that it was involved quite heavily, and it was consulted on the regulations right from the start of and all the way through the process. Our organisation has also been involved with organising user groups. Some of our parents have taken part in one-to-one consultations with the Scottish Government and have been involved in the testing of the forms. We are pleased that organisations like ours have been so involved.

Alison Johnstone: I noticed that Bill Scott said that organisations and groups have had a good hearing, and that the Scottish Government says that it has been listening carefully to feedback. However, the SCORSS submission certainly notes that there are a few—a raft—of outstanding issues on which there is obviously a view that more needs to be done. Would Ed Pybus like to comment on that?

Ed Pybus (Child Poverty Action Group in Scotland): Yes. First, I echo Bill Scott's and Anne Baldock's comments that SCORSS and its members have been consulted throughout the process. We have seen a large number of our recommendations taken up as the regulations have been drafted.

There are a few outstanding issues. There are two aspects to that. One aspect is policy, on which we may diverge slightly with the Scottish Government's policy. The other aspect is that we feel that some of the technical elements of the regulations do not quite reflect what the policy is and the Scottish Government maybe has a slightly different view on that. I guess that we will touch on some of those issues later.

SCORSS accepted quite early on the broad policy decision to deliver a safe and secure transition, so we have all been working towards ensuring that the regulations for the Scottish child disability payment reflect the entitlement conditions for disability living allowance for children and we will look to make revisions to the rules later on, after we have had the safe and secure transition.

I do not know whether you want to go into some of the specifics of where we feel that the regulations do not quite match up at the moment or whether that aspect will come up in later questions.

The Deputy Convener: That will come up in later questions.

Alison Johnstone: Our briefing from the Scottish Parliament information centre notes that the safe and secure transition might limit the scope for change. Within the constraints, has the Scottish Government done all that it can to ensure that the child disability payment is an improvement on child DLA?

Ed Pybus: Many of the areas where we hope to see improvement are in the processes rather than in the regulations. There is a lot of policy intent to ensure that the assessment process is far easier for families with a disabled child, that decisions are made more quickly and that awards are made for a suitable length of time, as opposed to the shorter awards that we are starting to see with DLA. The intention is for there to be a lot of improvement in the processes, which are not covered by the regulations as such. It will be a case of waiting to see whether that happens when the processes are rolled out.

Alison Johnstone: My final question is for Bill Scott. Do you believe that there are any lessons from the policy development for the child disability payment that should be applied to the development of future payments, especially the adult disability payment?

Bill Scott: Yes, very definitely. As I said, the Scottish Government has done a lot to seek the views of practitioners. Ed Pybus is more of a practitioner than I am, as is Anne Baldock—they provide advice directly to people or provide advice to advisers. The views of people like me, at the policy level, have also been sought. Sometimes, that has involved one-to-one conversations with officials, who, initially, were just setting out their thoughts and seeking views. Before you put things down on paper, a good starting point is to run things by people and say, "We are thinking of this. What do you think?" It is about adopting an approach in which, right from the outset, you are trying to ensure that what you are planning to do is in line with the needs of the users of the system.

My views are set by our members. We consulted with them throughout the process as well. People feel that they have been heard, and that is important for dignity and respect. It is important that people feel that they have had an opportunity to air their views and genuinely be heard by the person listening, rather than that person telling them what will happen.

We have not got everything that we asked for and we will seek a few more changes, but a number of significant changes have been made that I think will improve things for families and parents in particular. Currently, for example, if a child is put into detention, under the child DLA rules down south, the parents could lose the mobility part of the payment and consequently their ability to visit the child in detention. Keeping that entitlement is an important change. The issue affects a minority of families, but it is important for those families.

Anne Baldock: Parents, service users and others have been consulted. The parents we work with said that they felt that they were contributing to how the benefit was developed and it gave them a better insight into how benefits work. There is a lot that can be learned from that, and the approach should be carried forward into the work on the adult disability payment, because of the effect that it has on people who will be applying for the benefit. It makes them feel like they are part of the whole system.

09:15

Jeremy Balfour (Lothian) (Con): I will ask a question that came up just over a year ago at the cross-party group on disability—you may have seen the letter on that. The fear for children who have a disability and who are on benefit is that, if they get slightly better, they will lose that benefit. There is a catch-22 situation that relates to ensuring that people have the right benefit and at the same time, with certain conditions, hoping that the child will improve. This may not be directly about the regulations, but do you have any comment on how we deal with that as we go forward to the adult disability payment and trial the child benefit? Is there any way that we can devise a system that does not discourage children from getting better because they are on that benefit?

Bill Scott: I do not think that any parent of a child with an impairment or health condition would seek to limit an improvement in their condition or impairment just for the sake of benefits. For many children, their impairment acts as a barrier to their social life, family life and education. When improvements are made, whether by aids or adaptations or an actual improvement in the condition, most families greet that with absolute joy rather than thinking about the benefits that they might lose.

Anne Baldock and Ed Pybus have direct contact with families in that situation, so they might want to provide views on that.

Anne Baldock: I definitely agree with Bill Scott. If parents see an improvement in their child's health, the last thing that they think about is how it will affect their benefits. I do not think that that would affect the way that the system works.

Jeremy Balfour: I will put it another way. There is a danger that, once a child starts to get better, they lose everything—the family can lose the car or whatever. Should there be more of a tiered system so that the benefit does not just simply disappear quickly? Perhaps the amount of money that people get should go down over a period of time so that a family does not suffer financially. I suppose that I am looking at it more from a family perspective. If a child suddenly improves, the family might financially be quite a lot worse off. Could there be some kind of tiered system so that people do not just fall off a cliff edge and lose everything, but it is done over a period?

Anne Baldock: That would be a much better way of dealing with it. It would also allow for the establishment of how much the child's improvement has impacted on their need for care. When something improves, it is difficult to say whether that can be sustained or how it will affect a child over a longer period. If there was a stepped move, that would be a much better way of dealing with improvements in conditions.

Ed Pybus: That has been explored a bit by DACBEAG, and I know that CPAG has been thinking about it as well. We have suggested the idea of a run-on period of benefit so that, if a decision is made that someone is no longer entitled, their benefit would continue for a period, which would give them time to adjust their finances and to be signposted to additional support that they might need.

I think that DACBEAG included that as a potential recommendation for future changes. Something certainly could be done on that for a relatively small cost, to provide help for families in that situation. Jeremy Balfour is right that, if a child is no longer entitled to a disability benefit, that can have a massive impact on a household's income, which obviously needs addressing in some way.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): I will cover the subject of the transfer from DLA. Do you believe that there will be any scope for change or improvement to be made following the implementation of the CDP pilots in Perth and Kinross, Dundee city and the Western Isles, when those pilot examples are then used in other local authorities after November 2021?

Bill Scott: I do not know whether there is scope for improvement, but I hope that the social security agency learns lessons from the pilots and uses them to improve the service that it offers to parents and children. Fundamentally, a safe and secure transfer is something that we care very strongly about for our members, some of whom are parents of disabled children.

It is a difficult one. We obviously want improvements in any benefit that is being devolved to try to iron out any difficulties and make the claiming process as simple as possible, and to introduce things such as run-ons if a condition changes, which Ed Pybus mentioned. If there is a temporary or permanent improvement, the benefits could be run on for a wee while longer so that the family can make an adjustment.

However, the difficulty with making any large-scale change to the regulations is that children would have to be reassessed, which could be quite stressful for the families, because they would not know whether they will get an increase or a decrease in benefits, or lose them altogether. That is why the families are in favour of not having a huge amount of change in the transfer.

I hope that lessons are learned in the roll-out of new claims and the transfer of existing claims to make sure that nobody loses out, but there is a limit on what can be done.

Rachael Hamilton: To add to that and to bulk out the question, do the other witnesses believe that there are sufficient safeguards against any mistakes that are made in the transfer process?

Anne Baldock: I think that as many safeguards as possible have been put in. I do not think that we will ever get it to absolutely 100 per cent. The pilot could be used as a test of change, with a report produced on all the outcomes, based on not just figures but the effects that the system has had on families. Everything should be as transparent as possible, and it should involve consulting advisers and parents on how things have worked and what can be used in the roll-out. Anything that can safeguard against the need for redeterminations has to be considered as part of the approach.

Rachael Hamilton: To again build the questioning on that issue, has there been any discussion about reducing the 13-week eligibility decision time? Perhaps Ed Pybus will want to come in on that.

Ed Pybus: I am not aware of discussion on that specific question. As you have talked about, the processes for the child disability payment are important. It is key that, as Anne Baldock said, Social Security Scotland takes feedback from families on the process in the pilot areas. For example, that could be about whether, when the letters went out, they explained sufficiently what was happening, whether support is available for people and how the new claims process is working. I understand that the programme is building processes that are adaptable, agile and can be changed. It is important that those processes are used during the pilot to improve the system for the roll-out in the rest of Scotland.

One concern that we flagged up in the submission that we made on the transfer relates to the fact that it appears that Social Security Scotland is relying on data from the Department for Work and Pensions as to who will be transferred to the Scottish system. The problem comes if there are people who are borderline cases. For example, if a child's parent lives in England but the child lives in Scotland, will that be picked up in the DWP sweep of addresses? If there is a lack of clarity on where someone is resident, how will someone in that position get into the transfer process if they are not picked up by the DWP data sweep? That question needs to be explored slightly. It might not be picked up in the pilot, but it might be picked up during the roll-out across Scotland by the end of the year.

Rachael Hamilton: Do the witnesses have an opinion on whether people should be able to choose to transfer to CDP and how they should be prioritised for that transfer?

Bill Scott: It should be a phased transfer because, otherwise, the system could be overwhelmed. If everybody chose to transfer at once to CDP, that would overwhelm Social Security Scotland staff. To an extent, there is no huge benefit in transferring at the moment, because there is very little difference between the regulations for child DLA and those for the Scottish child disability payment. I am not sure that anybody would be extremely keen to transfer because they think that there would be a big improvement in the amount of benefit that they receive, but I suppose that there could be individuals who want to do it.

A phased transfer is probably preferable, because Social Security Scotland can plan for that and ensure that the last payment from the DWP is followed by one from the Scottish social security system. The last thing that people want is an interruption in the payments or for a file to go missing somewhere due to an anomaly in the system because they have transferred before everybody else whose surname has the same initial or whatever. It might throw things out a bit.

Rachael Hamilton: Do the other witnesses want to come in on that?

Anne Baldock: A phased transfer would be preferable. As Bill Scott said, if you try to transfer everybody right away, it would be overwhelming. A phased transfer also gives the opportunity to adapt as problems come up so that the next tranche does not have the same problems.

09:30

The transfer from DLA to personal independence payment caused problems, and that is a good example of how a transfer has to be carefully managed and explained to claimants. When people changed from DLA to PIP, they were invited to apply for PIP but, if they did not reapply, the benefit was stopped. We do not want something like that to happen with the child disability payment. It has to be carefully managed with a phased transfer. It also has to be well promoted with claimants so that they know exactly what is happening. It would be better if it is staged rather than having a national transfer at the one time.

Rachael Hamilton: On that—

The Deputy Convener: Can you make this your last question, please?

Rachael Hamilton: Yes. I think that Ed Pybus wants to come in. Anne Baldock made some points that have been highlighted in the committee. For example, there have been issues in relation to the child winter heating assistance on the transfer from DLA to PIP. I presume that those are the types of things that you would not want to be repeated.

Anne Baldock: Yes—very much so.

Rachael Hamilton: Ed Pybus wanted to come in, convener, although I do not know if we have time.

The Deputy Convener: I was going to come to Ed Pybus, but I want to say that I will not take every speaker on every question. If the witnesses want to say something that has not been covered, they should just put an R in the chat box; otherwise, we will be quite slow.

If Ed Pybus wants to finish off anything that has not been covered on that issue, that would be great.

Ed Pybus: Anne Baldock and Bill Scott have mostly covered the issues. On priority, it seems that the groups that are being targeted are those where there are different rules for CDP, such as children turning 16 and those with terminal illness. That seems to be the right approach to take.

The Deputy Convener: We move on to theme 3, which is incorporation of case law. I might ask a few questions, but I will start with Jeremy Balfour.

Jeremy Balfour: I suppose that the obvious question is to ask whether you think that the regulations give enough protection to case law that has developed over the past 20 years, particularly in relation to definition of night-time care. I know that there has been concern that there might be confusion about what case law applies.

Bill Scott: Ed Pybus is the technical expert, but I think there is a problem in relation to night-time care. The wording has been changed, which means that a court or tribunal could interpret the new wording differently from interpretation of the existing wording in child DLA regulations. That might create a barrier to families receiving the higher rate for night-time care.

There is still a worry. Case law is, I think, not written into the regulations. Obviously, if guidance to decision makers in the agency who make determinations says that they should follow existing case law for child DLA, that should mean a huge number of cases not going to appeal. At the end of the day, individuals differ, and there will always be a few cases that get through. A difference in wording could mean that a tribunal in Edinburgh might make a decision based on the new wording while a tribunal in Glasgow would make a different decision, with neither following existing case law for child DLA. That would create a problem in the system; whether people get the night-time care element added could become a postcode lottery, which we want to avoid, as far as possible. I wonder why the wording has been changed; I am not sure of the reasoning.

The Deputy Convener: Ed Pybus is the expert. Would you like to come in?

Ed Pybus: Yes. SCORSS members have raised that concern throughout the process. The real test will be what happens once the provision has been rolled out. Quite a careful balance has been struck between including case law where it can be put succinctly in definitions and, where it has not been possible to do that, mirroring the language that is used in the DLA regulations. That certainly suggests that the tribunals should follow the Scottish case law on DLA. We do not know how tribunals will view that, but it seems that points about case law have been taken on board and a balance has been struck. Whether the balance is right, only time will tell. However, it seems to be.

I echo Bill Scott's point about the change in the language that has been used in the legislation. That the language has not been changed throughout suggests that there might be differences. If that is not intended, the question is this: why use different language? There are places where the language has been deliberately changed—for example, in relation to severe behavioural difficulties. The language that was used for DLA was somewhat regressive, so it has been reworded. We hope that it is an improvement, but there is a concern about the definition of "frequent attention" during the night, which uses different language. That could be problematic.

As Bill Scott said, it is important that it is made clear in guidance that decision makers are expected to follow the rules for DLA. If the guidance is clear to decision makers and they stick to it, there will not, we hope, be the amount of appeals that we have seen in the PIP and DLA systems.

Jeremy Balfour: That is helpful. Thank you.

The Deputy Convener: Potential variation in how the regulations are interpreted is cause for concern. Do you think that there is a need for guidance for tribunals? I have expressed concern in other committees that a refresh of administration of the judiciary might be helpful when it comes to social security matters. What do you think about that?

Ed Pybus: Obviously, the Scottish Courts and Tribunals Service is independent of the Government and Social Security Scotland; that is how it must be. It will be up to tribunals—ultimately, the Upper Tribunal or even the High Court—to decide whether the case law that has been built up around reserved benefits applies to devolved benefits or not.

It is important that the agency's staff receive clear guidance about how they are expected to make decisions. Case law is often subtle, so it is hard to put in legislation. Where exactly the same language is used, tribunals will presume that the case law that previously applied across the United Kingdom would continue to apply in Scotland. However, that will be up to the tribunals to decide. I do not think that the Scottish Government or the agency would be in a position to tell the tribunals how they should interpret the law.

The Deputy Convener: If a High Court decision were to be made, would a tribunal be required to implement that decision?

Ed Pybus: Absolutely, yes.

The Deputy Convener: Theme 4 is the past presence rules. An earlier draft of the regulations replicated the DLA rule that a person over the age of three must have been present in Great Britain for two of the previous three years, for eligibility. In your submission on the draft regulations, you note that that has been altered to reflect a recent court decision. The final draft of the CDP regulations provides for the presence conditions being 26 weeks for children aged six months or over and 13 weeks for children under the age of six months. We will start with Ed Pybus. Do you have concerns about the past presence rules that you want to share with the committee, or are you content?

Ed Pybus: We brought a court case against the UK Government and DWP about the 104 weeks rule and won it just before Christmas. It is great that the Scottish Government has reflected that, although I think that it had no choice because cases could have been brought against it, had it not.

SCORSS has been considering the past presence test for disability benefits. There is certainly an argument to be made that the test is somewhat unjust. Disability living allowance and child disability payment exist because an additional cost is imposed on disabled people by society; that additional cost is imposed regardless of one's immigration status or their time in the UK.

Is it feasible to reduce that test further and, more broadly, to look at people who are subject to immigration control? I do not think that we have a fully established position on that yet. It would be good from an access-to-benefits point of view if the 26-weeks requirement was shortened, but that has to be weighed against other considerations. We hope that the matter can be explored more fully once a there has been a safe and secure transition and we can start to look at where rules for the child disability payment can be revised.

The Deputy Convener: What would be the case for reducing the 26-weeks requirement? I take the point that you want to wait until we embed the provision.

Ed Pybus: I will give the example of a family with a disabled child, in which a parent's job has been outside the UK. When that job ends, if they were to come back to the UK and start working here, they would not be able to get that help for six months. They would have to wait that long, even though they have fully moved back to the UK and have no intention of leaving. Regardless of whether people are UK nationals or another nationality, there is an argument to say that they should get that help as soon as they are here, because they will need it from that point. They will not be getting help from anywhere else.

The Deputy Convener: There are no other questions on that. Our convener, Bob Doris, is back. We will move on to theme 5. I hand the chair back. Welcome, Bob.

The Convener (Bob Doris): Thank you for convening, Pauline. I apologise to the witnesses; I was fighting first with ScotRail and then with technology in order to log on, so I have missed the bulk of the evidence.

I see that we are moving on to theme 5. I am not aware of question bids for theme 5, other than what is in the chat box right now, so I apologise if I do not call colleagues in the correct order. We will open up on theme 5 with Shona Robison.

Shona Robison (Dundee City East) (SNP): Do the regulations provide adequate rights for someone to challenge decisions about their award or to get their on-going award reviewed?

Bill Scott: That is a difficulty. We have talked about instances where a child's condition or impairment improves, but if it deteriorates there should be a right to seek a review of the earlier determination. If you have a child whose mobility issue gets worse, you should be able to go to the agency and say that the child's walking ability has deteriorated and you want the agency to look again at the determination in order to get the child on to the higher mobility rate.

At the moment, the regulations say that the Scottish ministers can look at the possibility of whether an increase in award would result from a review, and that introduces an element of discretion as to whether a review will take place. I think that all of us think that a review should take place if it is requested, except in exceptional circumstances where there has quite obviously been no change. If you just say, "I want a review because I do not agree with how you came to an earlier determination," that is an appeal rather than a review. If it is well outside the time limit, it should not go ahead, but if there has been a genuine change in the condition and that is notified to the agency, a redetermination should occur.

Ed Pybus and Anne Baldock, do you have anything to add on that?

09:45

Anne Baldock: As Bill Scott was saying, there needs to be the ability to ask for a redetermination due to a change of circumstances, because deterioration happens quite frequently. Sometimes a redetermination is needed because, as children develop and get older, their conditions can change and the assessment of those conditions can change quite a lot as an award goes through. It is necessary that somebody is allowed to request a redetermination.

If we established possible situations in which something might change, that could be challenged, so someone could go through the appeal system to get a tribunal decision on whether they could apply to get a change of circumstances—which could then be appealed. It lengthens the whole process. It is vital that the process is set out in the regulations and is very clear. When you have a lot of different people making different decisions, you could end up with an awful lot more challenges regarding whether somebody can ask for a redetermination.

Ed Pybus: Anne Baldock and Bill Scott have made the point that it is not a clear and unambiguous right to request a review, which is what we called for. What we need is very clear guidance to decision makers. If anyone says there has been a change in their circumstances, that should be accepted and a review should take place. It does not mean that the award will change. The decision may be that the award is correct, but there should certainly be that process.

Another area where we feel that there is perhaps not an adequate right of challenge is the amount of time that someone has to ask for a redetermination after the first decision is made. That has been increased from 31 days to 42 days, but we feel that that is still far less of a right than people have within the UK system, where someone can ask for their award to be looked at again at any point in the year after the decision has been issued. In the Scottish system, people will have to show good reason.

Anne Baldock gave another example. If someone asks for a review and the agency decides that they do not have good reason, that person will to have appeal about their reason. It puts another decision-making process in place. Again, we would call for clear guidance to case managers that all but the most unfounded cases are to be allowed. There is no point in refusing them, because they will end up in the cycle of appeals if case managers are not careful.

Something else that we flagged up in our submission is the case of missing information. If a decision is made based on ignorance or a mistake about a material fact, in the UK system the client is allowed to challenge that further down the line. A typical example would be where a child has multiple conditions but the agency has been notified of only one condition at the point of claim, and three years later, the carer takes some advice and realises that they should have told the agency about the other condition. Under DLA, a client is allowed to get a new decision on that basis. It applies only from the date that the agency is told, but it is a new decision.

There is no unambiguous right to do that in the Scottish system. It is not a change of circumstances, because the child has always had the second condition, so the process relies on the official error provisions and the fact that somehow it was an error that the agency had not been told about the other condition.

That might apply or it might not. We would have preferred to have seen an unambiguous right in the regulations that allowed a claim process to look at a decision later on if a bit of information had been missing. That has not been put in the regulations. The guidance for decision makers needs to be very clear about what they should do if such circumstances arise and what should happen.

As we have said throughout the process, it is always preferable to have such rights in the regulations rather than in guidance, but if they are not in the regulations, they have to at least be very clear in the guidance. In all the process issues with CDP, it is important that information on how it is working is gathered and reviewed and that changes are made if there appears to be a problem. If a lot of late requests for redeterminations are being refused or if people are requesting changes of circumstances and their new decisions are not being made, that information needs to be collected and acted upon. Hopefully there will not be any of those cases, but the agency should at least be looking to collect that information.

We will certainly be speaking to our advisers and collecting information, as I am sure will Bill Scott and Anne Baldock and other members of SCORSS, but it would be good if the agency collected information centrally so that we could have evidence-based discussions about what improvements need to be made. I know that the Scottish Government and officials want to make a system that works, and we are all supporting that. There are obviously slight differences of opinion on how that can be achieved, so it is important to be able to review matters further down the line to see where things have worked and where things have not worked so well.

The Convener: Shona Robison, do you want to come back in?

Shona Robison: No. I think that that is clear, convener. I thank the panel for highlighting those issues.

The Convener: Thank you. Pauline McNeill wanted to come in on this theme.

Pauline McNeill (Glasgow) (Lab): I am trying to get my head around this. On the right of appeal, our briefing paper says the following:

> "There is no right of appeal if ministers decide not to make a new determination, although ministers must do so if it is *possible* that the award would change."

That is the bit I would like the witnesses to help me with. The briefing continues:

> "If a new determination is made, then the claimant can request a redetermination if they disagree with the result."

This is my concern. How can ministers assess whether it is "possible" that the award would change? Can Ed Pybus help me to understand that?

Ed Pybus: That is the crux of the issue. A decision maker will be making a decision about whether the change that has been reported could possibly change the award. If they decide that the change that has been reported could not possibly change the award, there is no new determination and, therefore, no right of appeal.

We see that general approach in the DWP system. If you ask the DWP to look at something again, a decision will be made and even if the decision is to do nothing, you can appeal that decision in almost all cases. However, in the DWP system, that does not apply if you have been refused employment and support allowance—which is a totally different benefit—and then say that your condition has deteriorated so you want another review. There is no way to make the Secretary of State for Work and Pensions carry out that further review. We know that causes problems in the DWP system.

The danger is that you have exactly the same problem with the child disability payment. The carer or parent of the child reports that their condition has deteriorated, a decision maker looks at that and says, "I do not think that that is a deterioration in their condition. There is no possible way that that could affect the award. We are not going to make a new decision and, therefore, there is no right of appeal", so nothing happens. There is no way for the parent or carer to pursue that further, apart from through judicial review or a complaint.

There should be very clear guidance for decision makers that any request for a determination without application on the grounds of change of circumstances is accepted unless it is absolutely without foundation. As Bill Scott says, if someone writes in and says, "My condition has not become worse; I just think that the decision that you made two years ago was wrong", that is clearly without foundation. There is no change and you cannot have a new appeal right for a decision in relation to which you have already exhausted the process.

There are very such few cases, and in practice it does not happen. As Bill Scott and Anne Baldock know, families do not want to keep challenging the same decision after it has already been made; it is more likely that there has been a deterioration in the condition.

We have to remember that the DLA components cover a wide range of conditions. Someone's condition may well have deteriorated, but that would not mean they would be entitled to a different rate of benefit. However, there still has to be a determination to tell them that, which they can either accept or not. If they do not accept it, they have the right of appeal. The important thing is that a determination has to be done. The way in which the legislation is set up at the moment means that the person who decides whether a new determination is needed is the same person who makes that determination—that is, the decision maker or case manager at Social Security Scotland.

Does that answer your question?

Pauline McNeill: It does, but I want very quickly just to emphasise the words "must" and "possible" from the paragraph that I quoted from our briefing:

> "although ministers must make a determination if it is possible that the award would change."

If the word "possible" is used, is it arguable that every single case would be affected?

Ed Pybus: That is another view. Ministers are trying to balance two things. They are trying to balance the rights of individuals to have awards looked at again against the situation that we do not want, which is that case managers can review a case at any point. People need to know that, once a decision has been made, it has been made and will last.

However, I agree that the wording—any change that could possibly result—could be interpreted far too widely and that anything that is done could result in a review. Let me give an example, which may be more applicable to adults, but it certainly applies to children as they get older if they start a part-time job. The Scottish Government's policy is very clear that taking work will not affect your entitlement, but obviously taking a job could possibly be a change that affects your entitlement. Would that then be pulled in under the regulations? If that is what the law says, there has to be very clear guidance for decision makers. If an individual reports a change and wants a review, the review happens, but the agency should not use that as a spurious reason to constantly review people's cases when it wants to. It is a question of getting the balance right, and that will have to be covered in the guidance to make sure that the position is clear.

Keith Brown (Clackmannanshire and Dunblane) (SNP): I have a couple of questions about information sharing and the tension between the desire to get as much information about individual applicants as possible and to use that to maximum effect to maximise benefits that might be payable, while, at the same time, respecting their privacy.

The Information Commissioner's Office has said that it is content with the regulations; it draws attention to the importance of transparency and making clients aware of how their data might be shared. Do the witnesses have any comments on the information-sharing provisions? In particular, do they have any concerns about applicants' privacy rights? I will start with Anne Baldock.

Anne Baldock: We certainly have concerns about the prospect of information sharing with local government. We can see the point of wanting to share information to increase the chances of follow-on benefits being awarded, but when it comes to the Scottish welfare fund or discretionary housing payments, for example, we are a wee bit concerned because those payments are individually assessed.

We do not want to see the use of information that is being shared to not award rather than to award, if that makes sense. For example, somebody might apply for a discretionary housing payment and say that they have a disability that affects how they do stuff, but because they do not have an award of child disability premium, they are refused things such as a payment for an extra bedroom.

10:00

It is also crucial to make sure that, when people are applying for a benefit, they are given the opportunity to opt out. We would prefer a system where people opt in, perhaps so that they could choose to share information for council tax benefit purposes, but not for the Scottish welfare fund or for DHP, which are more open to interpretation.

When people apply for the child disability premium—and this is even more the case for those who apply for the adult disability payment—they look at the guidance, but they are more concerned with applying for the benefit than they are with how it will affect them afterwards. I think that the implications need to be made very clear in the guidance, so that we do not get cases in which people do not want their information passed on but feel that they cannot say anything to avoid that happening.

Keith Brown: Thank you. Do Bill Scott or Ed Pybus have any comments?

Bill Scott: There is a willingness among disabled people to share relevant information. As Anne Baldock says, it should be about opting in rather than opting out, so that people are clear about the fact that they want to share information. For example, when it comes to medical records, at the moment general practitioners can charge quite significant sums of money—£120 and upwards—for a letter confirming that somebody—[*Interruption*.] Can you still hear me?

Keith Brown: Your connection is cutting in and out.

Bill Scott: Sorry—my screen went blank for a minute there.

GPs can charge for information at the moment, and it is obviously far better if the person can give the GP permission to share that information without being charged an exorbitant amount of money for that, given that they have very little money to start with.

I think that that side of things is fine; the issue is with relevant information. People sometimes have information in their medical records that they do not want shared. I know that information is shared confidentially, but people do not want things that are irrelevant to their claim for a disability benefit to be passed on. Only relevant information to confirm a diagnosis or the fact that somebody is missing limbs or whatever should be shared, rather than that they were sexually assaulted at some point and sought counselling after that. That is not the sort of information that needs to be shared with the social security agency, unless it is relevant to the claim.

Ed Pybus: I echo what Bill Scott and Anne Baldock have said. The key is the note in the data protection impact assessment, which says that the information-sharing powers

> “are not intended to create ‘big government’ or to extend beyond what is necessary for the delivery of social security in Scotland.”

The problem is with who decides which information in, for example, the medical records is necessary for the delivery of social security in Scotland. If it is the GP, going through a medical record to decide what is and is not relevant to a claim will create a huge amount of work for them. If the agency itself gets the information, it could include information that is not needed, as Bill Scott said.

Our work on appeals and disability benefits claims shows that often the GP or the medical staff are not the best people to provide information about someone’s care and mobility needs. It is important to remember that. As Bill Scott said, information from medical records might be very useful in relation to a diagnosis. However, the person who is best able to talk about someone’s care or mobility needs is their carer or perhaps a third sector organisation that provides respite, and they will not be covered by the data-sharing agreement. The danger is that the data-sharing agreement becomes the de facto default when it comes to gathering information, rather than the decision makers looking further afield to other information that might be slightly harder for them to gather because it is not covered by information-sharing agreements, but which is more useful for making decisions.

I know that I keep mentioning guidance, but this is again about making it very clear to case managers what information they can get from that type of data sharing and what information they might not be able to get from it—and where else they might have to go to get that information.

We are all quite supportive of the idea that having joined-up information sharing is useful, and that, if the claimant wants it to, the agency will go out and gather that information. However, we also know that, in many cases, it will be much easier for the claimant themselves to speak to their carer or their support provider to get the information and send in it. That has to be given equal consideration and treated as being as valid as information that is gathered through data sharing. The danger is that decision makers will get two tiers of information and that they will give more weight to evidence gathered through the data sharing than they give to information that is gathered in more informal ways. We need to make sure that that is avoided. Unfortunately, that is what can happen in DLA and PIP decisions, even though it should not. We need to make sure that that is clear to case managers so that it does not happen with Scottish benefits.

Privacy is not our area of expertise. There may well be concerns, but I am not best placed to respond to those.

Keith Brown: If the concerns around privacy and confidentiality were satisfied—and the Information Commissioner’s Office seems relatively satisfied about that—is there another concern? Are any of the witnesses concerned that insufficient sharing of data and information might lead to the potential loss of benefits that would otherwise be payable? Do not feel you all have to answer, but do any of you have a concern about that?

Bill Scott: That would definitely be a concern. Where information that is relevant to the making of a positive determination can be shared, we want it to be shared. We definitely do not want people losing out.

I go back to my earlier point: disabled people get very upset when GPs charge them for information that they think should be supplied to the DWP for free. The proposal gets around that problem by making the agency responsible for gathering that information, rather than the claimant. That is definitely a step forward for a lot of claimants.

Keith Brown: That is fine. Thanks very much.

The Convener: Thanks. I have a note saying that Shona Robison might want to come in on this point.

Shona Robison: I have a slightly different point under this theme, to do with the consequential regulations. Are other changes to devolved legislation needed in order to take account of the child disability payment? Maybe Bill Scott can answer that question first.

Bill Scott: I will be honest: I do not know.

Shona Robison: That is fair enough.

Bill Scott: Thinking about all the areas is quite a big task. The list looks comprehensive to me, but people are paid a lot of money to dig through the various pieces of legislation to find out where that legislation might be applicable and where it might not apply. The issue relates, in general, to passported benefits and so on, but a lot of them are reserved so it is probably okay. There might be things missing that we will pick up later. That will be a great pity, but it is very difficult, even for people who are experts in this area of law, to pick up all the changes that might be required.

Shona Robison: That is a very honest answer. Thank you.

The Convener: Our deputy convener, Pauline McNeill, has an interest in the next theme. Do you want to open up with some questions on theme 7, Pauline? [*Interruption*.] Perhaps not at the moment—I did not spot that she is not there.

I see that Ed Pybus has raised his hand and wants to come in. I do not know whether this is an attempt to filibuster on behalf of our deputy convener.

Ed Pybus: I will make a brief point on the previous question, given that we are waiting for Pauline McNeill.

CPAC has been in discussions with officials at the Scottish Government to pick up some issues, but we think that, broadly, those have been covered. We have not gone through the consequential amendment regulations with a fine-tooth comb yet, but we will do that when we prepare our new handbook, which obviously relies on the rules. I will be happy to report back to the committee if, over the next couple of weeks, we spot anything that appears to have been missed.

The Convener: Thank you. I will lead off on theme 7 more generally. It is a good catch-all question. I apologise if this was covered earlier. I suspect that next week, when we have the Cabinet Secretary for Social Security and Older People at the committee, we will look at the draft regulations again. This is a good thing that has happened. We are talking about making the regulations as robust and complete as possible. I have not heard all the evidence this morning; I apologise that I was not able to do that.

What would the witnesses' priorities be for policy changes once CDP is safely established? This is a good and progressive thing that the Scottish Government is doing. SCORSS is looking at ways of making it better and more robust, so what changes would you like to see once this is embedded?

Bill Scott: I cannot speak for SCORSS as a whole on this one; I will let Ed Pybus and Anne Baldock do that. In the past, we have certainly been approached by parents of learning disabled children who have missed out on the mobility component. There are a few changes that could be made to the entitlement criteria that would benefit those families who find it difficult to qualify for the higher-rate mobility component. I do not think that a huge number of families would be affected, but it is one of those cases where the learning difficulties can be quite profound but the children just miss out under the current entitlement criteria for children's DLA. We would probably seek a change to the entitlement criteria in that area.

The Convener: Theme 7 more generally was about what changes the witnesses would like to see to further enhance the new payment once it is embedded. I know that Pauline McNeill has an interest in this section. I do not know whether she wants to make any additional comments before we go to our other witnesses for further comments.

Pauline McNeill: I am content, convener. I think that you have covered it. Thank you.

The Convener: Would any of the other witnesses like to comment on what they would like to see enhanced or changed in the future once the payment is embedded?

Anne Baldock: Once it has been embedded and we have a lot more information about how it is working, we would want to tighten up some of the wording, for example around the change that has been made to night-time care, for which the wording is now "throughout the night" rather than the existing DLA definition. We would want to look at such things to see how they have been interpreted.

10:15

Also it would be a priority to include users in any reviews in order to get the best possible information from service users on how the payment has worked. For example, we might ask service users to look at the guidance that is issued to staff to make sure that it is being administered in the way in which it was intended. I think that you will see that only once we have some cases, and we can look at case law and challenges and that sort of thing.

The Convener: That is very helpful.

Ed Pybus: I hope that most of you are aware of the work that SCORSS did on the future of disability benefits in general in the paper that we published last year. The key call in that is to have a review of the whole system once we are past the safe and secure transition phase. I know that the Cabinet Secretary for Social Security and Older People has announced the intention to review the adult disability payment. I think that SCORSS members would call for that review to be extended to look at the whole disability benefits system to see what changes can be made. There are many calls from different organisations for different changes.

SCORSS's clear call is that the review must be based on the evidence and the importance of the agency gathering the correct evidence during the roll-out phase. As Bill Scott said, children with learning difficulties potentially find it hard to qualify for the mobility component of DLA. It is important that the agency collects the data on who is getting DLA, but and, even more importantly, who is refused CDP. The information can be looked at and a decision can be made about whether CDP should cover that group of people. There is a discussion to be had about the investment in social security.

Another call in the paper is for there to be a human rights budgeting approach or at least some way of reviewing the adequacy of disability payments. That covers both the level of disability payments and the amount that people get, and the scope—who is covered and who is not, because there will be a line. Some people will fall inside and some people will fall outside, but that decision has to be made based on the evidence that is gathered during the roll-out.

As I have indicated, many of the problems with DLA are around process. People find the system hard, they find it difficult to navigate, they find it stressful and they find that just claiming it can have an impact on their health and wellbeing. That should not happen in a social security system. As well as at looking at those sorts of things, any review has to look at the processes that have been brought in in Scotland. As we have said, there is an intention in the Scottish Government to do things differently and to abide by the principles in the act and in the charter, so any review will have to compare how it is rolled out with that in mind. That is important.

Finally, it is the position of SCORSS, but of CPAG in particular, that the devolved benefits system will still interact very closely with the DWP benefit system, so careful consideration has to be given to the impact that any changes that are made to the Scottish system will have on the reserved system. We note that changes have not been made because of the fear of how they might impact on DWP benefits. We must have that discussion. Are we going to continue to mirror the DWP system to make sure that there is no divergence? If there is divergence, how will that be managed?

If more children in Scotland become entitled to disability payments due to changes in the rules, households with low incomes may be entitled to additional premiums within their universal credit or other legacy benefits. How is that dealt with? Is that something that the Scottish Government will want to do in the next session? If so, how will that work in relation to the DWP and the fiscal framework and those bigger questions? Those are things that have to be sorted out before we get to the nitty-gritty of what kinds of changes need to be made. There are some big questions to be considered.

The Convener: That is very helpful. I had not thought about it. I think that it is called policy spillover where a Scottish Government decision impacts on reserved entitlements. If there is evidence of that, there could be a financial consequence so that the increase in UK benefits may be a cost to the Scottish Government and Parliament. I am sure that our successor committee will want to unpick some of that and follow it up.

I am giving my colleagues a note to say that we are about to end the evidence session in case there is a burning question that they feel they need to ask before we finish.

Anne Baldock was very helpful in saying that we should use the real-life experience of young people and families going through this new Scottish entitlement for disability assistance and analyse it, look at it in the round and see how we should change or enhance or improve it in the future. Ed Pybus was talking about how we should look at this in the round, not in isolation, so we should look at child payments and the new adult disability assistance—and assistance for older people with disabilities as well, I would imagine—once they are all in. We should not look at any in isolation but should look at all the new Scottish benefits together.

If we do that in the round, we are not reviewing child disability assistance as speedily as we could, because the benefits come in on a phased basis. Should we wait until they are all implemented and have been in existence for a while before we conduct a review? Will it be for the Scottish Government or a future committee to review some of that, or should we look for some early lessons from child disability assistance? We are talking about timing, are we not?

Anne Baldock: It would be too good an opportunity to miss not to take the experiences of the CDP into account when reviewing the adult disability payment, just because of the way it is timed. If the review for the adult disability payment is in 2023, you will have so much information from the child disability payment that can help. Certainly, it might take a wee while longer, but there is nothing to say that in the interim you cannot be checking how the CDP works, getting all the information in and having the discussions. When we look at disability payments for all three age groups, we need to take on board what has been learned from the very first one.

The Convener: It seems to me that it is not an either/or and that it is both, but I just wanted to check.

Bill Scott: I agree with Anne Baldock. I think that we should learn from every part of the roll-out with each of the new benefits how we can improve things for the subsequent one that will be rolled out, because there will be lessons each time. I am sure that the new agency is learning. For example, take-up rates will be crucial, because it is a new benefit with a new name and a new agency to claim it from. People will have to know that and know about their right to apply. There will definitely be issues that we can learn from and put into a review of disability benefits in general.

We need to look across the life course as well. Each of those benefits interacts with another when someone crosses over the boundary between the children's benefit and the adult benefit and then the one for those who have retired. In that sense, we need to look at them in the round.

I remember that the Scottish Government's initial consultation looked at having one benefit that lasted a lifetime, where there would be no transfer and someone would just stay on disability assistance, or whatever it was called; there might be different entitlement criteria at different points in a person's lifespan, but someone could apply when they were a child and still be getting the same benefit when they were 70 or 80. It seems to me sensible to look at all three together.

The Convener: Thank you.

Ed Pybus, your answer will be the final comment, so you will have the last word.

Ed Pybus: One of the problems that we see with the DWP is that its systems allow for changes that may or may not be policy changes that the Westminster Government would agree to. We have just done a report, "Computer Says 'No!'", about the fact that we are told that things cannot be done to improve the system because the computer will not let us. I am very relieved to hear from Scottish Government officials in the social security programme that they are devising a system that can be agile and can be updated. It is important that that ability is utilised and real-time feedback happens, so when the pilots start for the transfer from DLA to CDP, the real-time gathering of information about what works and what does not work is picked up and put into the amending processes and, if need be, legislation is amended where there are gaps and so on.

It is important to not only to have that ability but to make sure that it is utilised, which comes back to gathering the data about where there are problems and are not problems.

It is important that people with lived experience of the system are feeding into the development of processes and what does and does not work. One way to ensure that that happens is to have regular training with staff in the agency and people with lived experience, so that training is not just based on case studies but involves staff meeting people who have lived experience and can understand it. That is key to ensuring that staff get direct feedback. It is also key to building a genuinely person-centred culture in the agency. I know that that is something that DACBEAG has previously suggested and I hope that it can be built into on-going training so that people who have experience of the agency are giving direct feedback to the agency staff and completing that circle.

The Convener: Thank you very much. Thank you to all our witnesses this morning for helping us with the session. That concludes item 2.

Indeed, thank you for all your support, given that this may be your last appearance in front of the committee before the election. Thank you all for your support over the years. I know that you have been regular attenders at the committee, and your support has been invaluable, so thank you all.

We previously agreed to take item 3 in private. We will do that on another digital platform, so I will close the meeting on this platform and see members in a private session shortly. Thank you.

10:28

Meeting continued in private until 11:45.

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