OFFICIAL REPORT
AITHISG OIFIGEIL

Social Justice and Social Security Committee

Thursday 28 March 2024

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 28 March 2024

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SOCIAL JUSTICE AND SOCIAL SECURITY COMMITTEE
10th Meeting 2024, Session 6

CONVENER

*Collette Stevenson (East Kilbride) (SNP)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Katy Clark (West Scotland) (Lab)
*John Mason (Glasgow Shettleston) (SNP)
*Roz McCall (Mid Scotland and Fife) (Con)
*Marie McNair (Clydebank and Milngavie) (SNP)
*Paul O'Kane (West Scotland) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Richard Gass (Rights Advice Scotland)
Lynne Macfarlane (Forum of Insurance Lawyers)
Alan Rogerson (Forum of Scottish Claims Managers)
Alastair Ross (Association of British Insurers)
Erica Young (Citizens Advice Scotland)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Social Justice and Social Security Committee

Thursday 28 March 2024

[The Convener opened the meeting at 09:00]

Decisions on Taking Business in Private

The Convener (Collette Stevenson): Good morning, and welcome to the 10th meeting of the Social Justice and Social Security Committee in 2024. We have received no apologies this morning.

Our first item of business is a decision on whether to take agenda items 5, 6 and 7 in private. Do we agree to do so?

Members *indicated agreement.*

Social Security (Amendment) (Scotland) Bill: Stage 1

09:00

The Convener: Our next agenda item is our fourth evidence session on the Social Security (Amendment) (Scotland) Bill. The bill is at stage 1. Today, we will focus on part 7 of the bill, which concerns recovery from compensation payments.

I welcome to the meeting Lynne Macfarlane, who is a solicitor advocate at the Forum of Insurance Lawyers; Alastair Ross, who is assistant director and head of public policy for Scotland, Wales and Northern Ireland for the Association of British Insurers; and Alan Rogerson, who is a member of the Forum of Scottish Claims Managers. I thank you very much for accepting our invitation to the meeting.

I will mention a few points about the format of the meeting before we start. Please wait until I or the member asking the question says your name before speaking. Do not feel that you have to answer every question. If you feel that you have nothing new to add to what has been said by others, that is okay.

I ask everyone to keep questions and answers as concise as possible.

We now move to questions. I invite Paul O'Kane to begin.

Paul O'Kane (West Scotland) (Lab): Good morning. First, for the benefit of the committee, I ask the witnesses to give a brief overview of how the current system of compensation recovery works. That would be a useful place to start. I will start with Alastair Ross, who is sitting in the middle, and then others can pitch in.

Alastair Ross (Association of British Insurers): I will defer to Alan Rogerson, who is a practitioner, to take you through it.

Paul O'Kane: That is fair. I decided to go to the middle—I do not know why I did that.

Alan Rogerson (Forum of Scottish Claims Managers): I should explain that my other day job is working for Aviva Insurance as a senior claims manager, so I have practical experience of how the recovery benefits system works in the United Kingdom currently.

The process begins when a claim for compensation comes in to an insurer or a compensator, which then registers the claim with the compensation recovery unit of the Department for Work and Pensions. The unit goes away in the background and checks whether benefits that could have been as a result of the accident or

incident that is being claimed for were paid to that person. After that, the compensator receives either a certificate to say that there are no such benefits, or a schedule of benefits that are due to be recovered from the compensator if the compensator pays the claim. The way in which those benefits work under the UK scheme is very similar to what is proposed for the Scottish scheme. They are aligned to individual heads of claim.

A compensator cannot make an offer to an injured person until they have a certificate of recoverable benefits. That is a very important point to make, because any delay in that process means a delay in the person getting their rightful compensation. At the point of settlement, then, if the insurance company is making an offer of, for example, £5,000, and £3,000 of that is for the injury and the other £2,000 is for loss of earnings, and there is a benefit repayable of £1,000 that is related to loss of earnings, the injured person will get £4,000 in their hand from the compensator and £1,000 will go back to the compensation recovery unit. The £5,000 remains the £5,000 regardless, but it is offset against the person's damages and what they receive at the end of the day.

Paul O'Kane: That was a helpful overview. Does anyone want to add anything?

Lynne Macfarlane (Forum of Insurance Lawyers): There is also an opportunity to seek a review or reconsideration of the certificate. That is in the existing scheme. If you, as the compensator, receive a certificate and consider that some of the benefits that have been attributed to the accident are not, in fact, attributable, you can seek to review or appeal the certificate. That is an integral part of the process.

Alan Rogerson: I have one tiny point to add—Lynne Macfarlane reminded me of it. It is not just the insurer who can ask for an appeal or review. The claimant solicitor can do that, too, if they do not believe that those benefits are linked to the accident.

Paul O'Kane: Are witnesses content that the Social Security (Amendment) (Scotland) Bill enables the same system to be created for Social Security Scotland that exists for DWP benefits? I wonder whether you might want to comment on the synergies.

Alastair Ross: We have a system that is operated by the DWP and works well. Insurers are familiar with it and are committed to prompt payment, once settlement has been agreed. We want to get those moneys through so that they can get to the injured person and the social security provider.

Our preference would very much be to align with that model. As we understand what is set out in the bill, the two options are essentially to outsource or enter into an agency arrangement with the DWP, which would give familiarity with the current process, or to go down the route of having a separate Scottish system, which would mean insurers adapting to operating two systems and being able to identify situations where they had to go down the existing DWP route or down a separate Social Security Scotland route. There are areas of uncertainty there that it would be good to have clarified. If, for example, somebody is resident in Scotland but suffers an injury while they are in another part of the UK, or vice versa, how would insurers work that out?

In addition, it may be helpful to clarify that, for the purposes of the bill, we are talking about the payment of moneys to, in this case, Social Security Scotland for benefits payments that result from the injury that has happened. If somebody was already receiving social security payments before the accident, those would not be covered. The payments that we are talking about are if somebody was, for argument's sake, working and no longer able to work. The devolved Scottish payments that would be triggered by that accident would come into play, as opposed to existing payments to people. Hopefully that makes sense; I think that it is an important point to understand.

From an insurance industry point of view, our preference would be the agency model that has been set out. I think that the Scottish Government has also indicated that that is its preference. The three of us have taken part in consultation events with the Scottish Government in advance of the introduction of the bill. It is fairly unusual for insurers, insurance lawyers and claimant lawyers to agree, but this is one of the rare times when we are all in agreement. You do not have the Association of Personal Injury Lawyers in front of you, but I have spoken to Gordon Dalyell and the APIL is very supportive of the agency route. That seems to be the most practical option.

Obviously, it is for the Scottish ministers and the DWP to agree on the details of that, how it would work—including, presumably, some kind of agency fee—and how it would compare to the figures that have been set out in the financial memorandum. We might come back to the financial memorandum later, but that is an important aspect of the matter.

Paul O'Kane: Thank you. That was a comprehensive overview of that interaction, if you like, in the bill, and the views of insurers. Does anyone else want to contribute anything at this point?

Lynne Macfarlane: I am here to represent the Forum of Insurance Lawyers, so I am very concerned with, essentially, the litigation process. The main issue that we have in our minds is the

smooth running of the litigation process. Receipt of a certificate of recoverable benefits is an absolute cornerstone of what we all do, whether we are a defender solicitor or a pursuer solicitor working in personal injury. If we do not have an accurate certificate, or a prompt certificate, that has a significant knock-on effect on the litigation process. From a defender point of view, I would be unable to offer advice to my client on what might be a reasonable settlement proposal, because I would not know what benefits are attributable or deductible from damages. If I was a pursuer's lawyer, I could not offer advice to my client about whether that offer is reasonable and should be accepted.

If the front end of the system does not operate promptly and smoothly, we will have real difficulties in progressing litigation, not just from a settlement point of view but from a court point of view. In essence, if a solicitor decides that a case is to be defended and wishes the case to proceed to a full hearing on evidence or a proof, the court must be given evidence about benefits that the compensation recovery unit can recover. The compensation recovery unit certificate would routinely be lodged with the court, and if the presiding judge or sheriff was minded to award damages, he or she would have to take that certificate into account. Therefore, if the process breaks down and we are not in receipt of a valid, prompt and accurate certificate, that puts at risk the litigation process.

The Convener: It is also good to know that you are working in harmony with one another.

Jeremy Balfour has a supplementary question.

Jeremy Balfour (Lothian) (Con): This might be a daft-laddie question, but what happens at the moment? Lynne Macfarlane, is there an agreement between the DWP and Social Security Scotland? What happens day in, day out? Some benefits have been devolved, but the recovery powers in the bill have not been enacted yet.

Lynne Macfarlane: I will pass that on to my colleagues, because I am very much concerned with the front end rather than the back end.

Alan Rogerson: The short answer is that nothing happens, at the minute. If a person receives universal credit or any of the UK-led benefits, the compensation recovery unit works as normal. At the minute, because the legislation is not in place yet, there is no mechanism for recovering any devolved Scottish benefits. The headline of the bill is first about replicating in Scotland what exists in the UK and then about the mechanism for recovering the benefits.

Jeremy Balfour: At the moment, if I am on a benefit in Scotland, is that not included in any certificate that is presented to the court?

Alan Rogerson: If it is a devolved benefit it is not on any certificate, at the minute. If it is a UK benefit, such as universal credit or industrial injuries disablement benefit, it appears on the certificate and the money goes back into the DWP.

Bob Doris (Glasgow Maryhill and Springburn) (SNP): There might be a few daft-laddie questions this morning, so I apologise, but I would prefer to understand properly.

Our briefing paper says that applicable benefits could be claimed back for up to five years. Does the certificate relate to benefits that have been received up to the date of the award or do you fast forward? If, as a direct result of an injury, a claimant will be on devolved or reserved benefits for ever or for a prolonged period, is that taken into account for clawback? How does that work?

Alan Rogerson: The certificate relates to benefits that are payable after the accident. The benefits have to result from the accident, which was the point that Alastair Ross made.

When an insurer or a compensator receives a certificate, there is a list of dates on the left-hand side and then there are the benefits being paid and the amounts. The amount accrues as it goes down the page. At the point when the compensator settles the claim, everyone is clear and you literally go across the grid to find the figure for the benefits that need to be repaid and deducted from the injured person's settlement.

Bob Doris: So, it relates to benefits actually received and is a full and final settlement. There is no predication of future benefits being accrued.

Alan Rogerson: That is absolutely right. It stops as at the point of payment.

Lynne Macfarlane: I will add to that. It sounds like an odd process and I appreciate that we are trying to explain an odd process from our perspective. However, through the life of the litigation, a solicitor who is dealing with a litigation or a claim will periodically reapply for an up-to-date certificate. The certificate that is provided to that solicitor will have a date of expiry. As a responsible solicitor, I would always require to update the certificate before the expiry date so that I am aware of the accrued benefits and what should or should not be deducted. That is an important part of the process, because if you are not in receipt of a valid certificate that is valid until a particular date, you will not be in a position to effect resolution of the litigation.

09:15

Roz McCall (Mid Scotland and Fife) (Con): Thank you for helping us out by providing such in-depth answers. I am certainly not a lawyer, so I

have some daft-lassie—as opposed to daft-laddie—questions.

You alluded to this on the opposing side, but I want to narrow it down a bit. Do you have any views on the necessity of the proposed provisions? What would be the implications of not enabling compensation recovery for Social Security Scotland benefits? I am not sure who is the best placed to answer that question.

Alastair Ross: I am happy to kick off on that. We partly touched on this in response to Mr Balfour, but if, for whatever reason, you were to choose not to go down the proposed route, those moneys would simply not be recoverable, which would mean that there would be an imbalance between what happens at DWP level and what would happen at Social Security Scotland level. That would be the most obvious implication of not proceeding in the proposed direction.

From the insurance industry's point of view, we support the principle of the bill that social security payments should be recoverable in the event that an insurer or their customer is liable for the injury that meant that someone had to start receiving social security support. I absolutely agree with that. It makes sense to apply that principle to the devolved system as well as to the system that the DWP operates. Having an imbalance in that respect would certainly not benefit insurers. We are talking about insurers paying out a gross sum and that sum being divided, with part of it going back to Social Security Scotland in order to address the potential shortfall and avoid avoidable compensation.

If we did not go down the proposed route and did not enable compensation recovery for Social Security Scotland, there would be a loss of income and compensation payment. On the other hand, I point out that going down the proposed route would not generate any additional moneys on top of what can reasonably be expected. I do not think that it would be the case that a separate Social Security Scotland system would recover a greater proportion of moneys than the DWP system would. There would not be a contrast in that respect between the agency agreement with the DWP and a separate Social Security Scotland system.

Roz McCall: That is very helpful. We need to have a balanced view on that issue, and your comments help with that.

The Convener: We move on to theme 2—options for delivery—on which Katy Clark has questions.

Katy Clark (West Scotland) (Lab): The Scottish Government's preferred implementation option is to have an agency agreement with the Department for Work and Pensions. What are the advantages of an agency agreement with the DWP for the recovery of compensation payments? Perhaps Alan Rogerson would like to come in first.

Alan Rogerson: The issue is not so much the advantages of going down that route but the disadvantages of not going down it. We have heard about the litigation process and the importance of having a certificate, but if we ended up having two certificates and two different methods of getting them, along with everything else, that would create confusion for everyone, and it could lead to delay in the system. That is probably why the agency route was more appealing to everyone who was asked during the Scottish Government's consultation phase.

To follow up on the point that Alastair Ross made in response to the previous question, a cost benefit analysis probably needs to be carried out to allow us to see what we would recover versus what it would cost to implement. It would seem that the agency route would be cheaper to deliver, because the infrastructure is there. Given that the DWP already asks local benefits offices what benefits have been paid to a particular person, it would surely be easier for everyone involved to ask about Scottish devolved benefits at the same time.

Katy Clark: Thank you. Would any of the other witnesses like to comment?

Alastair Ross: As Alan Rogerson said, we have a proven system that is familiar to all users, from insurers and compensators to claimant lawyers. Everybody understands how the system operates at the moment. If there was a different system, training would require to be provided to make sure that people understood and could identify which system they would have to follow. That is what would happen if the systems were separated out, rather than continuing with the agency agreement with the DWP.

I will not get into the details just now, but if you are going to take the route of having a separate Scottish system, that would, I presume, require procurement in order to build an information technology platform, which would be an additional cost.

I also presume that there would be a cost to the agency arrangement and, as Alan Rogerson says, a cost benefit analysis would need to be carried out in order to understand the best value for money for the taxpayer, for want of a better term.

The only other question that I have in my mind, having looked at the papers, including the financial memorandum, relates to the set-up costs for the option of a separate Social Security Scotland system. I think that the operating costs would come in at about £5 million a year once it was set up and running, and the estimated figures for what

would be recovered come to round about the same. I presume that one would offset the other, so you would have to balance that against the cost benefit analysis in the DWP agency system.

Katy Clark: I will pick up on the point that Alastair Ross has just made. If, for any reason, the Scottish Government and the DWP were unable to negotiate an agency agreement, what other options might be available? You have alluded to one option.

Alastair Ross: I expect that option 1 would be simply not to recover the money, and we have already talked about the implications of that. Option 2 would, I presume, be to build a separate Scottish system, with everything that that entails in terms of procurement, the IT system and the training. I do not know whether you would also need legislation for that.

Katy Clark: Therefore, you presume that Social Security Scotland would operate that system.

Alastair Ross: I expect so, yes.

Katy Clark: Alan Rogerson, are there other options?

Alan Rogerson: I will be honest and say that I cannot think of another option. Those are probably the only options that we have been able to come up with.

Katy Clark: That is helpful. Lynne Macfarlane, do you want to come in on that?

Lynne Macfarlane: The only thing of practical assistance might be the possibility of having just one certificate. From the front-end perspective, if there was one certificate that set out all benefits that are recoverable, English and Scottish, the insurer would then pay that amount and the back-end process would then be left between the Scottish ministers and the DWP.

Bob Doris: Let us assume that there is an agency agreement. I might return to the other options, but that issue has been explored pretty well so far. We cannot just do that overnight. The suggestion is that there could be a lead-in time of at least a year. Would any of the witnesses want to put on the record what has to be done to support the industry in order for there to be effective implementation so that this is a success once we get there? What steer would you give the committee and the Government to ensure that any agency agreement is a success?

Alan Rogerson: If the agency agreement was that the compensator still reports in exactly the same way that it does now to the DWP, absolutely nothing extra need be done from the compensator side. Everything would then be about what happens at the back end between the DWP and Social Security Scotland. We have a system where we would register the claims, and that system talks to the DWP directly. All big compensators will have exactly the same. For those that do not have that system, there are ways to notify the claims in a traditional manner, using forms. That still happens.

Bob Doris: Mr Ross, your organisation has talked about training and other potential requirements ahead of time, in relation to lead-in time. I can read the quotation:

> "Insurers would need at least 12 months' notice of this change and details of the new system in order to support its smooth introduction, and provide training for claims handlers to understand the new system and the social security applicable."

From Mr Rogerson's perspective, it is a case of press the button and on we go because there is a single point of contact and things at the point of use—as Lynne Macfarlane was talking about—carry on as before. The numbers simply change with a disaggregated breakdown. However, are other things lurking, Mr Ross, that need a wee bit of attention?

Alastair Ross: As I said, I defer to Alan Rogerson, because he is the practitioner. We were thinking that there would be an element of training just to ensure that the claims handlers were aware of the separate Scottish system, in case it is brought up in the conversations that they have when they go through the claims handling process. The claimant or their representative may raise that—they may say, "I'm now in receipt of the Scottish child payment—is that factor being taken into account?" There would need to be an element of education and training to ensure that the claim handlers were aware of, and understood, the situation, and were not confused by it.

With regard to being able to roll this out across various sites, a period of 12 months would not be unreasonable. I am not saying that training would take 365 days, but we would need to ensure that we were able to familiarise people with the system and bring them up to speed with the new terminology. They would need only to know about the presence of the system—they would not necessarily need to operate it, but they would need to be aware of it. That is the main point.

Alan Rogerson: In making my earlier point, I missed out the back-entry aspect that insurers would do, but they would do that as a matter of course. The front end would be the same, and nothing would need to be done if we were still reporting the information to the DWP in the normal way.

With regard to what the ABI quote refers to, if there was an alternative method and we, as compensators, needed two different ways to notify these claims, that is where the new systems, and

even more training and everything else, would come in.

Bob Doris: I do not want to create a division between the witnesses—although it would be nice to get one, because you are all agreeing with each other.

Mr Ross, I think that you are saying that we would need awareness raising of the terminology and the phraseology around the different system in Scotland, rather than taking it for granted that all individuals who work in the sector would be fully aware of the situation. I am sure that they are aware, but we would need to get it right and be 100 per cent sure. Is that what you are saying?

Alastair Ross: Yes. As Alan Rogerson touched on, there are the major compensators, which are working at scale, but there are also some mid-sized and smaller firms that may well have much smaller volumes of these cases. When such cases come up, they would still need to be able to recognise and understand the situation, and go through the appropriate route. It is about ensuring that there is sufficient time available to make sure that claims handlers are aware of the distinctions. At this point in time, they may not be aware, because they currently do not have to include in the compensation recovery process things such as the Scottish child payment and the other devolved payments that we now have. Awareness of those aspects is probably relatively low in the compensator community, for want of a better term. My point was that we would need to provide some capacity to educate people and bring them up to speed with that.

Bob Doris: So the big takeaway for us is the need for a single point of contact for the sector in delivering on this. You guys do not have to address the complexities—it is for the DWP and Social Security Scotland, between them, to deal with those. You do not have to see those complexities as long as the front-end user that Lynne Macfarlane was talking about can just continue as they always have done, with the appropriate training.

Sorry, Lynne—I apologise if I have misrepresented your position.

Lynne Macfarlane: No, not at all. I just want to add a bit of colour to that, with regard to the appeal and review process. Under the bill as it is drafted, if someone wishes to appeal on Scottish benefits, they would have to do so to the Scottish ministers, but if they wish to appeal on English benefits, they would have to appeal to the DWP. There is, therefore, some prospect of a divergence in practice in relation to the appeal process. We do not know how that will play out in due course, but it might cause a little bit of confusion and uncertainty.

Bob Doris: That is helpful—thank you.

The Convener: We move to theme 3, which is the financial memorandum to the bill.

Marie McNair (Clydebank and Milngavie) (SNP): Good morning, panel. Mr Rogerson, do you think that the figure for estimated recoverable payments of up to £5.5 million per year by 2028-29 is reasonable?

Alan Rogerson: I noted that the financial memorandum is heavily caveated in that respect. When I first read it, I went back and did a little bit of digging in my own organisation. That is where I came up with the figure of £992 per claim that we note in our submission. I could not necessarily square the two, because I think that, by 2029, the cost per case would be about £3,600, if my maths is correct. I was not sure how that would all work in practice. I am not clear and I am doing it every day, so I made a freedom of information request to the DWP to try to get some more information on what payments it is recovering now for Scottish benefits. If I get that information, I hope that I can extrapolate what it might mean for the recovery in Scotland. I am certainly more than happy to share anything that I get back with both the Scottish Government and the committee, if it arrives in time.

09:30

Marie McNair: That would be very helpful to the committee, thank you.

The Convener: Jeremy Balfour would like to come in with a supplementary question, and then I will invite John Mason in.

Jeremy Balfour: This is probably not within your area, but I will ask my question just in case it is. In the financial memorandum, I noticed that it is estimated that it will cost £3.78 million to implement the scheme, which seems quite a lot of money to me. Will you unpack what we get for that £3.78 million and explain why it is so expensive?

Alan Rogerson: I will try. I am not an IT expert by any manner of means, but IT projects seem to run away with themselves. From our side, it certainly seems that there would be a lot of IT requirements if there was a central Scottish social security recovery of benefits office that was talking to local benefits agencies and working out exactly what was to happen and when it was to happen.

I had a quick look at the UK compensation recovery unit figures to see how many cases were notified last year, and I saw that about 484,000 cases were registered. If Scotland accounts for 8 per cent of the general population of the UK, and we look at it that way, that is about 38,700 cases per year that would need to be registered and looked at, and for which there would have to be a

check with the benefits office to see whether there were benefits there before coming back and issuing certificates. There must be a bit of manpower or IT resource required behind that but, unfortunately, I cannot give you any more detail on the deliverables.

Jeremy Balfour: Thank you.

The Convener: John Mason, did you want to come in on any of the different elements of the costs?

John Mason (Glasgow Shettleston) (SNP): I think that that was a reasonable answer to the previous question.

The Convener: Bob Doris would like to come in.

Bob Doris: In asking my question, I should caveat it by saying that I absolutely agree that the idea of having a single point of contact and as little disruption as possible for claimants, defenders and the sector makes absolute sense. However, I am looking at the amount-recoverable estimates from Social Security Scotland compared with the set-up and on-going running costs. It could effectively be cost neutral at the end of the day, or it might not collect very much.

I suppose that there are commercial negotiations behind the scenes between the DWP and Social Security Scotland, so the more figures that are put in the public domain, the more the DWP can squeeze for a better deal for itself in relation to this. We could get to a point in the future where the figures show that it makes sense to set up a stand-alone Scottish system, which could still dovetail nicely with the UK system. The bill does not suggest that, and I am not suggesting that—I am asking a question about future proofing, given that it is pretty self-evident from the numbers, if I have looked at them accurately, that the benefit to the Scottish taxpayer of doing this at all is relatively minimal in the first instance. If we fast forward five or 10 years, and the numbers show that there is a business case to set up a stand-alone Scottish system, do you have any reflections on how that could be done, and whether there is a way of dovetailing nicely with the wider UK system?

Alan Rogerson: I think that that is a leap into the unknown. The legislation that we have in Scotland talks about five discrete benefits, one of which relates to loss of earnings, with the others relating to care and mobility components. The UK legislation has 20 different benefits, and 11 of those all relate to loss of earnings—the loss of earnings being the one that I see day in, day out on certificates. In answer to your question, it is possible. It may need to be considered as we go, but it is a huge leap into the unknown in terms of knowing what you are going to get back, when you are going to get it back and how much it is going to cost to implement.

On the agency agreement—I am not part of this negotiation, obviously—if the Scottish ministers were minded to do it on a percentage basis of what is recovered and goes back to the DWP, you would future proof your agreement with the DWP.

Bob Doris: That is helpful. I see nods from the other witnesses.

Alastair Ross: I absolutely recognise your premise. You are talking about a lot of different variables. As you say, in five or 10 years' time, it could be a different proposition, as could the Scottish fiscal position. Would a budget in 10 years' time have the capacity to pay for a one-off set-up cost if a system was deemed to be required at that point in time?

The other big variable is that, as Alan Rogerson said, we are talking about five discrete payments. Would a future Government want to extend that? We know that the intention is to increase the value of the Scottish child payment over time. Would that go beyond inflation? Would new payments come in? All those factors would come into account.

It is very hard to say today what a five or 10-year case would look like when many different components could change.

Bob Doris: That is very helpful and important to put on the record. The key thing is that, whatever happens in the future, we take the insurance industry and litigators with us in that process to ensure that there is no disruption to the most important thing, which, as Lynne Macfarlane keeps going on about, is the front-end business of ensuring that people get the compensation that they deserve.

Jeremy Balfour: I have a couple of questions. I am sorry—my mind is working a bit slowly this morning. I go back to the question about the appeal processes being different for Social Security Scotland and the DWP. Is it possible under the agreement, if it is signed by the two parties, that one party could waive its right of appeal and allow either Social Security Scotland or the DWP to do the whole process? Would that legally be possible?

Lynne Macfarlane: Yes, that could be possible, but it is certainly not set out in the bill as proposed. At the moment, the bill sets out that an appeal should be to the Scottish ministers, in relation to Scottish benefits.

Jeremy Balfour: From a practitioner's perspective, would it be easier to have one port of call for an appeal?

Lynne Macfarlane: Yes; I think that it would be a lot easier and a lot more practical. From a practitioner's point of view, it would be easier to prepare for an appeal to one point of appeal rather than to two different points of appeal where there is a possibility for divergence of views.

Jeremy Balfour: This is my final question, you will be glad to hear. The bill includes a power to create a criminal offence for failure to comply with the requirements of an investigation. Are witnesses familiar with any similar powers in the current system, and do you have any comment on whether it is reasonable to make it a criminal offence to neglect to comply with an investigation?

Your light has gone on, Lynne, so we obviously think that the question is for you.

Lynne Macfarlane: I will let Alan take that.

Alan Rogerson: I am not aware of that at all. I would need to go back and have a look at that, Mr Balfour. I have not seen that in the legislation. As I understand it, most of the legislation is lifted straight from the UK legislation, so perhaps that provision exists in the UK legislation. I have never heard of it being acted on, so I am not sure.

Lynne Macfarlane: In my 25 years of litigation experience, I have never encountered it.

Jeremy Balfour: There is always a first time.

The Convener: Does anyone have any further supplementary questions to put to our witnesses?

We have plenty of time in hand, so thank you very much. That concludes the evidence session. Thank you very much for joining us. After recess, we will hold a final evidence session with the Cabinet Secretary for Social Justice before we report on our findings.

I now suspend the meeting briefly to allow for a panel change before we move on to the next item.

09:39

Meeting suspended.

09:49

On resuming—

Social Security Scotland

The Convener: Welcome back. Our next agenda item is an evidence session on the client experience of Social Security Scotland's redetermination and appeals process. Earlier this month, the committee heard from today's witnesses as part of the scrutiny of the Social Security (Amendment) (Scotland) Bill. Today's evidence session is intended to allow a wider discussion of the client experience of redeterminations and appeals, so our discussion will go beyond the proposals in the bill.

I welcome to the meeting Erica Young, who is policy officer for Citizens Advice Scotland, who joins us in the room, and Richard Gass, who is the chair of Rights Advice Scotland, who joins us remotely. Thank you once again for accepting our invitation.

We were also meant to hear from Kirsty McKechnie from CPAG—the Child Poverty Action Group. Unfortunately, Kirsty is unable to join us today, but she will provide her contribution to the evidence session in writing.

I will move swiftly on to our questions, and Paul O'Kane will ask the first question.

Paul O'Kane: Good morning. I will begin by looking at the theme of redeterminations. Social Security Scotland's client survey suggested that most people who think that a decision has been wrong do not actually ask for it to be redetermined. Many of the reasons for that are focused around the idea that the redetermination will not be successful. What more could and should Social Security Scotland do to support clients to request redeterminations?

Erica Young (Citizens Advice Scotland): There are two strands to that, which are framed within the overarching need to get decisions right first time, and that is perhaps where some of the focus should be.

One part of it is making sure that people are correctly signposted to advice and support when a decision is provided to them. At the moment, regardless of whether their decision is negative or positive, people get an overwhelming amount of paperwork and they are told that they can submit a redetermination. When people look at that, it can feel quite adversarial. However, if the decision was simply accompanied by signposting to advice, that might be a little more reassuring for people, as they would feel that there is less process to deal with.

The process might also be a little less off-putting for people if they had more channels through which to submit a redetermination request. For example, unless they have a mygov.scot account, which is very difficult for people, they cannot electronically submit a redetermination request. An electronic route that is not through a mygov.scot account would be helpful.

The other thing that Social Security Scotland could do is ensure that information about a client's particular communication needs is proactively gathered at the commencement of a claim. We have had some cases where clients' imperative communication needs have been completely overlooked. For example, a couple presented at one of our citizens advice bureaus, and both of them—the carer and the cared-for person, who was also the adult disability payment claimant—were profoundly deaf and required a British Sign Language interpreter. They had been trying to report their challenge to an award for some considerable time—three to six months. They were offered a home visit, which is wonderful, but in order to access that home visit, they were required to download an app on their phone and arrange a video appointment to book the home visit. Basic failures such as that make all the difference to whether someone has the confidence that their decision will be properly looked at again.

The same applies to supporting information. If people feel that their supporting information was not appropriately or thoroughly addressed, that can make them think that there is no point in proceeding with a redetermination because their evidence is not going to be considered properly.

I will qualify that by saying that Social Security Scotland has made enormous progress in the way that it handles evidence on quite a few different levels, so I would not say that that is a general critique, but it is the kind of thing that can go wrong in the process.

Paul O'Kane: That practical example is helpful, thank you. I am sure that we will want to explore that in more detail. Richard Gass, would you like to add anything about your experience?

Richard Gass (Rights Advice Scotland): Some of the problems arise from trying to do something good and better in the first instance. When claimants make their claims, they are advised that the agency will seek out information, which, indeed, the agency does, and then the claimants get the decision through. At that point, the claimant with an unsuccessful claim does not really feel that there is anything further to add. They have made their claim and the agency has sought out the additional information. Now, all that will happen is that another person will look at the same information and the claim will not get much further forward.

When reconsiderations were introduced by the DWP, it was as an exercise to manage down the number of cases proceeding to appeal. We probably carry a problem because claimants do not fully distinguish between Scotland and England. Going through the mandatory reconsideration stage at the DWP is seen as a fruitless exercise, so there could be some well-founded belief that there is no point in pursuing a redetermination.

If I could be so bold, I might suggest that we should abolish the redeterminations and combine them into a single process. If a claimant is not happy with a decision and would like to take it further, the agency could correct it or improve upon it, if it is able to, but, if not, the decision would proceed to appeal.

The thing about an appeal is that it is independent. Folk will feel that it is not people marking their own homework. It involves an external agency that will look at the decision. I certainly felt that that was a better system in the past, and I would encourage us to embrace that again.

Paul O'Kane: Thanks for that. I recall the discussions at the time of the passage of the bill around how that system might work. It might also tie into the point about accessibility. The process might be a more accessible if you go straight to an appeal. Do you feel that, in terms of some of the points that Erica Young made about accessibility, it would be easier if we just went straight to that process?

Richard Gass: Yes, I do not disagree with anything that Erica said. There seems to be a bit of a hang-up about using prescribed forms and so on, which makes the role of the adviser that bit more tricky. We would quite like to go out to visit somebody and, if we can identify a claim, we make the claim because we have the tools in the bag to do so. If we visit somebody and they have already had an unfavourable decision, we want to have the tools in the bag to be able to resolve that when we are in that person's house, rather than it being a case of "Well, we need to download a form", or "You don't have a printer", or finding out that the letter that the person was sent went in the fire along with the decision notice. We just want things to be simple and to be able to bring the tools with us.

Paul O'Kane: Great, thank you. I have a question about some of the challenges arising from differences in where people live. Are there differences between rural, semi-rural and urban areas in terms of clients' experiences of redetermination?

Erica Young: I have found that only about 12 per cent of our ADP clients come from very rural

or, specifically, remote areas. We find that the logistics of doing home visits can be more challenging in rural areas. Some can involve a round trip of three to four hours. If you have a multi-stage process, you are perhaps supporting that client to complete the application, then supporting them to complete the redetermination and, potentially, supporting them through an appeal. Logistically, that can be extremely difficult for a bureau, but it might be the only way that that person can access the process. That again comes down to how the things are lodged.

What Richard was saying about prescribed forms is quite a significant issue for our bureaus. A lot of bureaus would like to put in statements and evidence in their own format, or in the preferred format of the claimant, rather than having to use the prescribed form from Social Security Scotland. That is definitely a gap, and it can be relevant to rural areas because advisers have to make sure that they have all the right paperwork.

Digital connectivity and postal services are also much more volatile in rural areas. Potentially, there can be delays caused by post not arriving or by digital connectivity going wrong during the process, so the client then has to return to the bureau or another home visit has to be organised.

The other difficulty with rural areas is that clients can be located quite far from their medical professional input, and getting supporting evidence can be a bit more difficult logistically, and a bit slower.

10:00

The broader context to all that is the higher cost of living in rural areas, and we cannot lose sight of that in this discussion. The money has extra urgency for people living in rural areas. We did a pilot project on food insecurity and different ways of providing people with food, and we found that the three areas with the highest rates of repeat visits for emergency food assistance were all in rural areas. We also found that those clients preferred food-bank referrals over cash or supermarket vouchers, because the local supermarkets that they could realistically access were simply too expensive.

Richard Gass: If folk in rural areas cannot physically get into an advice centre but they can phone in, we would like people to engage with that person over the telephone. If there was an online mechanism for lodging a redetermination or an appeal, we could do that with the person over the phone. Where a specific form is required, if we are not able to visit we would need to post it out and have it returned, which is a bit of a barrier.

In rural areas there is no tenement culture, as I would refer to it in Glasgow, where everybody somehow knows everybody's business, and someone might say, "So, you've been turned down for that? You need to go and see that chap down the road." People living in a rural area might not have that.

Paul O'Kane: That is an interesting point. There is a variance of views on whether people are more exposed in a rural area and whether there is more stigma. We would certainly want to consider that; it is a useful point.

The Convener: Still on the theme of redeterminations, I invite Roz McCall to ask some questions.

Roz McCall: I welcome the witnesses back to the committee. I really appreciate your candour and honesty on these questions. It is important that the committee hears about how we get things right and where the issues are when it comes to redeterminations.

About 75 per cent of child disability payment redeterminations are decided in favour of the client. Does that raise any concerns with you about the decision-making process for that benefit? We will start with you, Erica, if you do not mind. Please be as open and honest as you can on this point.

Erica Young: We see very few redeterminations or appeal advice inquiries in relation to child disability payment. Relative to adult disability payment, it is actually quite a small area of advice for us. The majority of the problems that we see in relation to child disability payment concerns difficulties when parents separate—ensuring that the right parent has the right payment.

It would be easier if I followed up some technical points in writing with the committee, but we have picked up some potential issues with how the mobility criteria are being interpreted for child disability payment. I would need to explore that in a lot more depth to determine whether any real conclusions can be drawn from that, but there are signs that there may be some issues there.

I know that there are deep issues around interpretation and application of the criteria, certainly for specific activities and descriptors under the interaction between ADP and the personal independence payment. I can go into that in more detail as the discussion continues.

That is all that we can say so far about child disability payment.

Richard Gass: If 75 per cent of cases are overturned at redetermination, something clearly did not go right initially. You would need to explore whether additional evidence was provided for the redetermination. If so, that could explain things. If not—if no further information was provided in the

vast majority of cases—then two people looking at the same facts have come to different conclusions, and that suggests an internal training issue.

I know that, for a lot of children, schools are the source of additional supporting information, so we probably need to find out what information has been provided, whether the school provided it, and whether it was helpful or whether the claimant or their parent comes back with evidence to contradict what the school has provided.

Roz McCall: I just want to make sure that I have this right. If additional information has come forward in the cases in which there is a positive redetermination, the argument would be that we should look for that proper information up front. Is that what you are saying—that we should really look at how we front load the process to ensure that we have the information right the first time, as was alluded to earlier?

Richard Gass: Well, the process will be that, when the claimant indicates someone who can provide that information, the agency will seek that information. However, we will not know whether the person who was to provide the information actually provided it. There are too few cases. We will perhaps know more about that when we get to see cases proceeding to appeal and see what happened with the claim and then with the redetermination. At this point in time, the answer that you are looking for lies within the agency: for how many of those cases was further information provided, and for how many cases did just a second glance at the same facts bring about a second decision?

Roz McCall: I understand that.

That leads on to the adult disability payment. Why do you think that most requests for redetermination are about adult disability payments? Does it suggest anything about Social Security Scotland's decision making for that benefit? I will go the other way round, if that is okay—you alluded to adult disability, Erica, but we will start with Richard this time.

Richard Gass: The people who claim adult disability payments, unless they are brand-new claimants, will have previously been claiming the DWP variant—the personal independence payment or the disability living allowance. What we found—particularly in Glasgow, but I imagine that it is true elsewhere—was that customers came back to us regularly every two to three years because they had a review of their benefit and had to jump through the hoops again. I offer a possibility that it might be that a number of your ADP client group are familiar with the need to not just accept a negative decision but to push a bit further. However, I do not have evidence to back up that comment.

Roz McCall: No, but it is a valid point, and I accept that. Erica, do you have anything to add to that?

Erica Young: The PIP legacy on the psychology of individuals who claim adult disability payment is certainly quite a significant factor in the decision making of those individuals, especially when they do not seek out advice. As to why the redetermination rate is so high in relation to ADP, the obvious answer is, frankly, the need. The second obvious answer is the sheer complexity of the criteria and what is being assessed, and the amount of supporting information that can sometimes be required to make an accurate decision. That process is not an exact science, and it is difficult.

I have also found that some confusion exists among decision makers—I have on-going work with Social Security Scotland on which case law applies that had previously been applied to the equivalent criteria in PIP, and on the extent to which that case law then carries over to the same criteria in relation to adult disability payment. It particularly affects social engagement, planning and following journeys activities at the moment—those are the ones that I would pick out.

The other factor in all that is the balance of responsibility in relation to supporting information. Evidently, it is much easier for a decision maker to get a decision right first time if all the correct supporting information is supplied from the outset of a claim in adequate detail, but that is not a simple, straightforward thing for any client to provide.

There is a wonderful approach, too, whereby there is an automatic trust in the claimant's evidence on the form. The peril of that is that people who claim ADP have, in my experience, a tendency to play down what they are potentially experiencing—they take certain things for granted that they have normalised as being just their lives. They do not recognise that there are an awful lot of dependencies that they might not see as limitations—which is effectively for psychological protection. The process of drawing that out of a client is quite sensitive and also requires information from externals, such as informal carers, as we all know. If that information is not provided in proper detail in the course of a claim journey, the decision will come out wrongly.

Those are just some of the factors involved in applying for what is quite a complicated benefit with very difficult criteria, because it is a function-based benefit.

Roz McCall: Thank you. That was exceptionally helpful in allowing me to understand that process. I have no further questions.

The Convener: I will now bring in Katy Clark.

Katy Clark: In recent months, Social Security Scotland has been taking longer to complete redeterminations of adult disability payment applications. Have our witnesses any idea why that might be the case? What impact are the delays having on clients? How could those delays be addressed?

Erica Young: That issue needs to be seen as part of an ecosystem. Social Security Scotland was under enormous pressure to improve overall claim journey times. That has a knock-on effect on the entire system. My interpretation of it is that a huge amount of resource has been put into trying to improve journey times at initial application stage, which has then slowed down redeterminations and caused a backlog. That is just my interpretation of what might or might not have been going on.

The impact on clients, however, is very evident. I hesitate to throw around overused terms such as "Kafka-esque" but, in so far as it describes processes that can feel as though they do not have a clear end point, have shifting parameters and are opaque, it is certainly apposite.

I will talk the committee through an example of how long the process can take. We helped a gentleman, whom I will call John. Having felt too overwhelmed to claim PIP, he was eventually coaxed into claiming ADP. His application was refused. He applied for a redetermination, at which point he was awarded the daily living and mobility components at standard rate. The CAB that he was working with advised him that, given his circumstances, he should be entitled to the mobility component at the enhanced rate. His case was then taken to appeal. Prior to the appeal being heard, his condition deteriorated further so he reported a change of circumstances to Social Security Scotland. The appeal was then heard and was successful. Because of that, he withdrew his change of circumstances report, only to find out, a week later, that Social Security Scotland had decided to take the case to the Upper Tribunal. John had lost his change of circumstances report and was now having to find out that his case was going to appeal. That was 18 months from when he had originally made his claim.

The impact of such delays on people is not just financial; they also affect the networks within which claimants travel. They might become more dependent on family and friends, which can create strain. We are seeing cases in which carers are struggling to engage with Jobcentre Plus because they are not currently on carers allowance because they are awaiting the outcomes of ADP applications. Their work coaches are saying, "Well, you have to be subject to a full claimant commitment, because you are not currently on carers allowance. We do not have any evidence that you are a full-time carer." Of course, that person might have just given up work.

In some cases, they might have moved in with the person they are caring for. For example, we helped one lady who was a single parent to a little five-year-old. She was regularly in and out of hospital with the person she cared for, because his epileptic seizures had become so serious. The pressure that that lady was under was enormous. That is one example of the challenges that people are experiencing as a result of delays. They are putting additional pressure on people at a time when they are already facing a multitude of pressures.

Katy Clark: Would Richard Gass like to respond?

Richard Gass: I do not have much to add, other than to say that delay will breed the thought, "What is the point?" If you make a claim, you hope that you will get an award. Six months later, you are thinking, "Well, I'm not going to get an award." The chances are that, when you get a decision that you have been unsuccessful, you might not feel inclined or motivated to seek advice on whether it was correct. Financial needs are in the here and now, so the faster we can get decisions made, the better. As Erica Young put it, it is not just claimants' financial circumstances that are in jeopardy from the delays.

Katy Clark: Are there any other changes that you have not highlighted but that you feel need to be made to the redetermination process? That is for Erica Young first.

10:15

Erica Young: Apart from not having to use a specific form, which has already been alluded to, being able to use a digital form of submission that does not involve having to use a mygov.scot account would be helpful. That is a simple and practical thing. I am doing a lot of work in the background on how to support people with information. That change would help to improve things at source, but it could also be transferable to providing support and information for redeterminations, which would also improve and speed up the process. If people are supplying that information at the outset, the redetermination is more likely to be successful.

Katy Clark: That is helpful. Richard Gass, you made some general points about the redetermination and appeal process. Is there anything you can add in relation to changes?

Richard Gass: Strip out any technicality. Make it as simple as possible. Make it so that, if someone has been turned down, they can just lift up their phone and say, "I am not happy. I want to

engage"—or whatever you want to call it. Strip away the technicality. That might involve removing a tier of decision making, because there will always be reconsideration by the agency prior to going to the tribunal to make sure that it has got its work correct. That would be important.

I know that we will come on to talk about appeals soon, but I will also say that the opportunity to lapse an appeal—which is in the bill—to enable the correct decision to finalise matters, is needed.

The Convener: We now move on to the theme of appeals.

Marie McNair: Good morning, panel. We appreciate you coming along to our committee again.

Mr Gass, what experience do you have of supporting clients with Social Security Scotland benefit appeals? How does it differ from appeals on reserved benefits?

Richard Gass: I have worked in welfare rights since 1986, so I have seen many changes. I am very experienced in DWP appeals. My personal experience of Scottish benefit appeals is from evidence that I have collected from my colleagues.

From the outset, we were promised that we were going to do things differently in Scotland and that it was going to be better here. The feedback that I am getting is that, in practice, it is not working out better. There have been attempts to make things better, but they have had unintended consequences.

An example is the requirement for the agency to send somebody a letter of appeal at the point of a negative redetermination. It is great that you are giving somebody the wherewithal to lodge an appeal, but to require that that be the sole tool with which to lodge the appeal creates a barrier that we find particularly tricky. In the UK system, we can lodge an appeal online. A client can phone us up, we can go through the online form with them and then we can submit the appeal. We cannot do that for Social Security Scotland benefit decisions.

The form for lodging an appeal for Scotland is 16 pages, although some of the pages are blank, whereas our standard appeal letter is a single page. We have stripped out all the unnecessary parts, but that 16-page form tries to cover everything. We now have a one-page form. If we require an ink signature on a form, we can post a single-page form to the claimant. It is quite easy for them to see where to sign, and everything else is already completed. To send 16 pages out is unnecessary and it flies in the face of green politics.

Marie McNair: Thank you. Tribunals are independent, but, given the resource available to Social Security Scotland compared with the appellant, do you think that the correct balance is given when allowing flexibility to both sides? For example, how easy is it for the appellant to secure an adjournment compared with Social Security Scotland?

Richard Gass: Is that question for me?

Marie McNair: Yes—sorry.

Richard Gass: We have not had enough Social Security Scotland appeals to be able to comment on that. I have not heard anything that suggests that it is more of a problem than getting an adjournment for UK benefits.

Marie McNair: I will move on to Ms Young. In your organisation's written submission, you refer to

"prolonged wait times for an appeal to be listed, poor communication and administrative 'hold-ups'"

arising from Social Security Scotland and the tribunal service. Can you expand on the issues that clients are facing?

Erica Young: I will start on a positive note. One of the big differences with the Social Security Scotland system as opposed to the reserved appeal system is that you do not have to request a statement of reasons because beautifully justified decisions are often available as a basis for challenge, which was not the case with the reserved system.

On a more difficult note, there is no timeline for Social Security Scotland to respond to an appeal request, whereas there is under the reserved system. Social Security Scotland can take as long as it wishes to respond to an appeal. We have had experiences where it delayed responding to an appeal, which held up the whole process.

Administrative delays relating to the tribunal often arise when it convenes a panel. There are understandable reasons for those delays, but they can hold things up quite significantly. More generally, the process seems to take a long time.

For example, I have a case of a lady who has many health problems. She was misdiagnosed with type 2 diabetes instead of type 1, so she was given the wrong treatment. She already had post-traumatic stress disorder from various difficulties in her life and she had other health problems involving incontinence. She originally applied for ADP in February last year but her appeal will not be listed until April this year, which gives a sense of the scope of the delays.

Another administrative complexity is that the tribunal is trying to achieve a fine balance between effective communication and giving people enough information and overwhelming them with too much information. Sometimes, the balance does not

work terribly well. Our advisers are having to chase up the tribunal to find out what stage things are at, what is happening, when the appeal will be listed and when the appeal bundle will be available, because they need to be able to see the appeal bundle and go through everything that is in it in order to be able to effectively represent their clients at hearings. The system could be much more streamlined, as Richard Gass alluded to.

Marie McNair: In earlier evidence, the committee heard concerns that tribunal hearings are being held over the phone rather than in person. How does that practice affect the quality of decision making? Are there any potential implications of that for a human rights-based approach to social security? I put that question to either of you.

Erica Young: I am happy to kick off. It has profound implications. We have to remember that it was a huge achievement to have consultations for the adult disability payment, for example, that were required only when they were absolutely necessary. The flipside of that is that, by the time a case reaches an appeal, there will have been no face-to-face interaction with the person. For many clients, presenting in person to a panel at tribunal can be hugely important in conveying their day-to-day lives and expressing their needs effectively, which can apply as much to mental health, sensory and neurodiversity conditions as it can to physical conditions. Many people who are in those circumstances will find it extremely difficult to articulate their circumstances over the telephone or on paper. That changes if they are in conversation with someone—the tribunal can simply observe them and the process is inquisitive, rather than intrusive; it is a process of curiosity and teasing out the evidence from simple observations, interactions and the body language of clients. Those things are simply not possible on the telephone.

I will give you an idea of how that can exclude people. We dealt with the case of a lady who had been through significant trauma related to abuse. Post-traumatic stress disorder was diagnosed. She had a number of gynaecological conditions as well as multiple other physical and mental health challenges. She had a consultation over the telephone but English was her second language and she did not have the confidence to request a female member of staff to conduct the consultation, so she was simply not able to explore any of those issues. She also became confused about what 20m means. That is difficult to explain to people on the phone, but if you are seeing them in person, you could potentially use body language and other visual cues to help them. As a result, she was refused ADP, so she had to go through a redetermination and appeal process, which was traumatising for her. People are confronting the possibility that they might never be who they used to be, which is very hard for them, and they are being asked to do that multiple times. Doing that over the phone or on paper feels remote for people.

Evidently, face-to-face hearings are not for everyone. Everybody recognises the advantages of the efficiencies that can be created by remote communication and it is important that everybody has the choice. That goes back to the human rights point. The process must be about the person's right to decide what works and what feels best for them with regard to communicating and getting access to justice.

Marie McNair: Mr Gass, do you want to add to that?

Richard Gass: Yes. When the appellant fills in their appeal form—all 16 pages of it—there is nothing in the form to indicate their preferred disposal of the appeal—by telephone, in person or by video. They do not get invited to comment at that stage. The Scottish appeals centre—that is not its name but we will call it that for now—then communicates with either the claimant or the representative. If there is no response to that communication, the appeal defaults to a paper hearing.

In any case where a representative is involved, logic would dictate that they are involved because they are going to help the person with the appeal, so it is not going to be a paper hearing, so that option should be knocked out straight away. However, at the point at which the reps are responding, the claimant needs to ask for something more than a telephone hearing or it will default to a telephone hearing.

That goes back to all the points that Erica Young made about the non-verbal communication that is possible when you see somebody in person. Somebody might have said that there is absolutely nothing wrong with a person, but you saw that person take three minutes to navigate their way to their chair and the difficulty that they had with sitting and getting out of the chair afterwards. That is all evidence that a tribunal gets at an in-person appeal and it is lost over the telephone.

When an appeal defaults to a telephone hearing and the person has not even been made aware that there was another way to do it, they can quite rightly feel aggrieved that they did not get a fair and impartial tribunal. It is folk on higher pay grades who make the decision about whether that is a breach of their human rights, but there is certainly an argument to be made.

Marie McNair: I have one more question, with your indulgence, convener. Mr Gass, you mentioned standard letters. Does that apply to

appeals? What are the benefits of those types of letters being accepted when an appeal is lodged?

Richard Gass: The advantage of the standard letter is that it streamlines the process for the advice agency. The letter is pre-populated with our contact details. It can be pre-populated with our availability and it can state categorically our preference for the type of appeal, and we can do all that on a single page, so it is a win-win situation.

Marie McNair: Do you think that standard letters should and could be accepted by the First-tier Tribunal for Scotland?

Richard Gass: The legislation says that you are required to return the form that was issued to you as a consequence of your request for a redetermination, but is it physically that form? In some cases, it will be that form, because the person will have kept it. On other occasions, we will download a form from the website, so it is no longer the same form but it will not be distinguishable from the form. I can understand that you do not want people providing insufficient information when they are trying to lodge an appeal, so in those circumstances, it might be appropriate to send a letter requesting more information that says, "You've tried to ask for an appeal but you've not given us enough information. You've not identified the decision that you're appealing against. You've not provided X, Y and Z."

However, when the letter contains all the necessary information, that should be acceptable as the form. As I said earlier, the requirement for it to be that form is an unintended consequence—at least I would like to think that it is unintended—of the good intention of sending the person the wherewithal to lodge an appeal in the first place.

Marie McNair: Thanks for that. I could go on but I had better hand back to the convener.

10:30

Jeremy Balfour: I should remind members that I am on the enhanced rate of PIP and that I am a former member of the First-tier Tribunal for Scotland.

I notice that, at the moment, 365 of the 1,745 ADP appeals have been decided. Are you concerned that backlogs are already occurring in such a new system? Are you also facing that experience?

Erica Young: I go back to my previous example of the length of time that it takes from the point of application to the point of an appeal being heard. Nearly all our cases take in excess of a year from the point of application to the appeal being lodged. We have an example of a single mum with complex physical and mental health needs who applied for ADP on 26 February 2023 and whose appeal has still not been lodged—it is likely to happen sometime in April—so it is definitely a significant concern for us.

Jeremy Balfour: Richard, do you have anything else to add to that?

Richard Gass: I would say much the same. I took a couple of straw polls over a length of time, and the view is that Social Security Scotland appeals are taking approximately 15 months from decision to tribunal while DWP appeals are taking about 11 months. That will inevitably lead to a backlog.

Jeremy Balfour: In its written submission, VoiceAbility raised concerns about the availability of interpretation services. Do you have any experience of supporting clients who need interpretation or translation services and, if so, is that causing a delay?

Erica Young: That is not a point that I can speak to, unfortunately, but I will look into it. I saw that question and thought that it is something that we need to investigate. I will keep the committee informed if we have findings on that.

Richard Gass: We have an example in which an interpreter was involved in a telephone hearing and it was completely unsatisfactory. There were issues in relation to the person who was having their evidence interpreted; their communication with the interpreter was staggered and stalled because of poor telephony. It seems to be a common concern that, with telephone appeals, somebody always loses connectivity, which would not happen face to face. I think that interpreting services are best used in a face-to-face environment.

The Convener: I now invite Paul O'Kane to ask a question.

Paul O'Kane: I have just lost my place in my papers, convener. Can you give me one moment?

The Convener: Sorry, that is my fault. I offer you my humble apologies.

I invite John Mason to ask a question.

John Mason: I am glad that we got that sorted out.

I would like to ask the two witnesses about short-term assistance. My understanding is that short-term assistance kicks in if somebody already has an award and that award could either be removed or reduced. Generally, is that working, and how?

Erica Young: The figures speak for themselves. There have been only 125 applications for short-term assistance in the entire history of ADP. The

reason for that tiny number is that it applies in so few circumstances. The only example in which it would apply in the real world is if someone who was awarded ADP, granted the standard rate of both components and advised that they might be entitled to an enhanced rate on one then put in a redetermination and was found to have no entitlement at all. That is a very rare situation, but it can happen. The person would be entitled to short-term assistance because they were granted the standard rate.

In most circumstances, decisions that are redetermined or appealed are simply initial claims that have been refused; there would be no entitlement to short-term assistance for those standard everyday challenges. That is why its scope is so limited. I hesitate to make general recommendations at committee today, because we are still developing ideas on how we might move forward. However, I can say that, at the moment, STA applies in very limited circumstances. To the extent that it can help some people in some situations, it is wonderful that it is there, but it is very limited in its scope.

John Mason: Yes, because it would not apply at all if somebody is either not already getting a benefit or if the entitlement is going up; it applies only if the entitlement is coming down—I get that. However, it is early days.

There was a suggestion that there could be some disadvantage if people have short-term assistance in that it does not automatically mean that they would get carers support payments, for example. Do you see any downsides with regard to STA, or is it positive?

Erica Young: As far as the general principle goes, it is fantastically positive. There are some technical issues, which CPAG's early warning system has uncovered, around passporting, but we would need to look into that further, because it is not something that our network has raised so far—probably just because of the small numbers. However, it is worth keeping an eye on that, because it could be a big concern. One of the most significant financial implications of delays is not being able to access passported benefits. Things such as the blue badge in particular can be much more difficult to access if you are waiting for an award of ADP or it is under challenge. Those are quite complicated issues.

However, at least the person is getting the money and, even if it is not counted for passporting purposes and as an award of ADP, what matters is that the money keeps flowing. I have to say that I would be confused if it was not treated as an award of ADP for passporting purposes, simply because it applies when people have an existing award that has been reduced. Therefore, I would expect there to be very few circumstances in which that would interfere with passporting. In circumstances where someone was originally awarded the enhanced rate for mobility and was accessing a Motability vehicle and, on review, was put down to standard rate and could then no longer access the Motability vehicle, their short-term assistance could interfere, because the amount that they are awarded would have gone down and the short-term assistance covers the lower amount. We might need to investigate that further.

John Mason: Mr Gass, do you want to say anything on that?

Richard Gass: Short-term awards are a great idea, but they have a failing. Let us take a step back: a short-term award will exist only when someone had an award and, for whatever reason, lost that award and then seeks to challenge that decision and make a claim for that. They will then be given some protection, pending their appeal. The fact that it does not count for passporting could be remedied on the successful award if the STA was recovered and then replaced with the benefit in relation to which they have just been successful, therefore giving them an entitlement to the passported benefit through that whole period. That would be the way to go, to my mind.

With regard to low uptake—

John Mason: I am sorry to interrupt, but are you saying that that is not happening at the moment? I understood that the STA would just be taken off the backdated payment.

Richard Gass: If you are awarded more, you will get the difference between the STA that was paid and the higher amount. If you have been on a benefit, had it removed but awarded STA pending your appeal and your appeal is successful to restore you to the benefit position that you were in, no cash transaction is required. However, if, on appeal, you actually go up to a higher rate, you will be awarded the difference between the STA that you have received and the higher amount of benefit that you were successful in being awarded at appeal.

My understanding, which is from CPAG's discovery, is that, when someone is awarded STA and it is then confirmed that they should always have had their benefit with no financial difference, the STA covers the past period and, from the appeal date forward, they get their disability benefit. However, the DWP does not recognise STA as a qualifying benefit. Therefore, again, there seems to be an unintended consequence of the good idea of giving someone protection during the interim period. However, to make that successful, at the end of the day, you need to recover it and replace it with the disability benefit.

John Mason: Right. I think that I understand. Would that mean that there would be no change in somebody's finances but, instead of saying that for a certain period they received STA, they could say that they had the qualifying benefit for that period?

Richard Gass: Yes.

John Mason: I think that I have got my head round that.

Do you have any other comments or suggestions about the appeals process?

Richard Gass: I will not repeat what I have already said, but we do not require a separate form for STA, because it kicks in only in specific circumstances. There could be a tick box on the appeal form, rather than requiring another form. That might encourage more folk to lodge a claim.

John Mason: Whose decision would it be to make that simpler? Would it be for Social Security Scotland to change its procedures?

Richard Gass: It is Social Security Scotland's form, so it has control over that. If it gives us permission to use our forms, we will stick a tick box on them as well.

Erica Young: I will circle back to Richard Gass's point about the need for the redetermination process from the claimant's perspective. Our position is that there is no need for a claimant to submit a redetermination.

One practical illustration is that a claimant has to lodge the appeal papers with Social Security Scotland, which forwards them to the tribunals service; the claimant does not lodge the papers with the tribunals service. The idea of claimants having to take the step of a redetermination and then submit another set of paperwork to Social Security Scotland, which then forwards it to the tribunals service, does not make sense. If there were just one step, at which a claimant could simply lodge a challenge that would be treated as an appeal, and at that point Social Security Scotland decided whether to use the appeal-lapsing process to make a redetermination to avoid an unnecessary appeal hearing, that would be a much more streamlined process.

I understand that there are concerns about whether the idea of going to an appeal would be off-putting for people but, because they would be lodging the appeal through Social Security Scotland anyway, it would only be about the framing of it to get over that hurdle.

Ultimately, unlike a redetermination—which is effectively the agency marking its own homework—the appeal is through an independent body, and clients can be reassured that there will not be unnecessary hearings, because if Social Security Scotland realises that it has made a mistake in its decision it will then put forward an appeal-lapsing proposal that a client, through informed consent, can decide to accept or reject.

John Mason: Have you discussed that with Social Security Scotland?

Erica Young: It has certainly been raised. It will be part of what we feed into the formal review of ADP. All the concerns, as well as the positives, about ADP are being continuously fed to Social Security Scotland monthly. We provide regular briefings to Social Security Scotland, and we find that those conversations are enormously productive.

John Mason: That is great. Maybe we can raise that, as well.

The Convener: We will move on to the final theme, which is on the reviews that Erica Young has just touched on.

Bob Doris: I am not sure how much time I have, convener, but I have a couple of short questions that relate to that last line of questioning. Do we have time for that?

The Convener: Yes, we have plenty of time.

Bob Doris: It is a bit of repetition, but I want to clarify a couple of things. In relation to the debate about whether redeterminations or appeals should be used, some witnesses have said that appeals sounded off-putting for some clients and that they wished to keep redeterminations. Other witnesses shared the views of Erica Young and Richard Gass. Are we overcomplicating things a little?

I think that Ms Young said that it does not matter what we call the process, as long as we de-risk it for the individual. An appeal could include a redetermination clause, which is what Mr Gass said. That would mean that it would move from an appeal and there would be nothing to prevent Social Security Scotland from doing an internal review or redetermination, anyway, in quick order, to see whether there was a glaring inaccuracy in the initial claim. I think that Ms Young called it the appeal-lapsing proposal.

Could we pursue Mr Gass's idea whereby redetermination and appeal is one process? We would then just need to get the wording or phraseology of that right to ensure that the process is not off-putting for clients. There must be a way to square the circle.

10:45

Erica Young: It is absolutely about framing it as one streamlined process for clients. If we soften the language around appeals so that it sounds more like an overarching challenge, that would be much more accurate, because that is exactly what people are actually doing, in that it is one process

to challenge a decision. A case would go to an appeal hearing if Social Security Scotland does not use the appeal-lapsing proposals that are in the Social Security (Amendment) (Scotland) Bill to make a redetermination. We could potentially abolish the term "redetermination" altogether, and there would effectively just be an internal review when an appeal is lodged because a different decision is made.

It is definitely a matter of framing to prevent people from feeling that the process is too formal. The word "appeal" suggests a process that is too formal.

Bob Doris: Did I characterise your suggestion correctly, Mr Gass?

Richard Gass: Yes—that was correct.

Another point is that a claimant or appellant can withdraw their appeal. Someone may be told that they are challenging a decision, which will progress to an appeal, requiring the agency to look again at its decision, but the person will be given the opportunity later to withdraw their appeal if they choose to. So, folk can withdraw appeals.

Bob Doris: That is helpful. Right at the start of this line of questioning, Ms Young mentioned a specific case study where CAS had been supporting somebody. You called the person John for the purposes of anonymity, Ms Young. In that case, there was an appeal to the Upper Tribunal by Social Security Scotland that was unexpected, and it was made despite the fact that John's condition had deteriorated. He sought a redetermination on the basis of that deterioration in his condition. We have to capture that properly.

Do correct my terminology, Ms Young—my apologies. There is a wider point that I wish to make.

Erica Young: That precisely illustrates the problem with the complexity of the system. In between the First-tier Tribunal hearing, which was successful, and the appeal by Social Security Scotland to the Upper Tribunal, John reported a change of circumstances, and a change of circumstances triggers a review process.

A review process can be scheduled because, whenever anyone is awarded ADP, they will be given a review point when the reward can be looked at again, which could be two years, five years or 10 years. That is called a scheduled review. An unscheduled review is when someone reports a change of circumstances. John's unfortunate mistake was that, when he was successful at the First-tier Tribunal, he withdrew his request for a change-of-circumstances internal review. He thought that everything was fine and that he did not need to proceed any further, as he had been awarded the maximum at the First-tier Tribunal. In the background, unbeknown to John, Social Security Scotland was appealing to the Upper Tribunal.

Bob Doris: That explanation is helpful. It seems common sense that there should be a duty on Social Security Scotland in such circumstances to tell people such as John not to withdraw from the process, because it still has the right to appeal to the Upper Tribunal, and that what John sought in the first place would be locked in until any potential Upper Tribunal appeal has been disposed of. That must be a pretty straightforward thing to make happen.

More widely, Ms Young, you have given one case study or example, but I am sure that there are lots of others where, if common sense were to prevail, we could just fix things. Is there a general need for a review of the guidance, advice and information that Social Security Scotland gives out in such circumstances?

Erica Young: I agree entirely with that point. We have to remember the stress that clients are under and that they are not necessarily taking everything in. It was in excess of a year since John originally applied for ADP, and it was sheer relief to be awarded what he had asked for at the First-tier Tribunal. The first thing that he thought at that point was that he did not want to have any more process involving the benefit, so he immediately withdrew his change of circumstances. He did not want to have any other process going on, as he was so exhausted and drained after what had been happening. He was not thinking of the possibility of Social Security Scotland appealing the decision further.

It could perhaps have been made clearer to John that there could be further processes, but in a sensitive and trauma-informed way—to bring in that key word at this point—recognising that, in stressful situations such as that, and having gone through an exhausting and draining process, people do not take in a lot of information in the way that they might do normally.

Bob Doris: I would have thought that, in such a situation, a basic duty of care from Social Security Scotland would kick in.

I will mop up one final aspect of this helpful line of questioning. Mr Gass talked about the bespoke one-page form that distils all the key information that you can assist clients in completing, which they then sign and off it goes. However, because of the specifics of legislation, a 16-page form has to be sent as part of a box-ticking exercise. I know that this is a rather mundane workaround, but could that form not simply be sent blank with an addendum attached to it? As long as that form had been sent in, it would still count. That is a workaround and not a solution.

Are there clear workarounds, in the very short term, that you could work with Social Security Scotland to secure?

Richard Gass *indicated agreement*.

Bob Doris: You nodded your head, Mr Gass, but the *Official Report* will not show that.

Richard Gass: I was not sure whether you were directing that at me.

Yes, some councils do, in fact, send in the necessary form with an appendix that has the additional details.

I am not sure whether you are hearing me, because my screen has frozen.

Bob Doris: We can hear you fine, even though you have had your hand raised for quite a long time.

That is clear, Mr Gass. I had better move on to my line of questioning before I enrage the convener—

The Convener: I think that Jeremy Balfour has a supplementary question.

Jeremy Balfour: I have a quick question to clarify what has been said. Some of the changes that the witnesses have suggested with regard to how the appeal process would work would need a change in the primary legislation. It is not purely about administration and filling out forms. If we were to go to a one appeal or redetermination process, we would need to change the 2018 act. Is that correct?

Mr Gass is nodding—can you just say yes for the record?

Richard Gass: Yes.

Jeremy Balfour: Thank you.

The Convener: I will bring you back in, Bob, but can you try to be as concise as possible?

Bob Doris: Yes. I apologise. I will be really brief with my next questions. I think that that was an important line of questioning, and Jeremy Balfour has helped to clarify how we would get the change that we would like.

For brevity, I will just read verbatim from our briefing paper. What experience do the witnesses have of supporting clients to request reviews of best start grant or job start payment? It is a different process—it is a review process, not an appeal or redetermination. Do you have any experience of supporting clients in that area? Ms Young, do you want to come in first?

Erica Young: Our experience is really small. In quarter 1 of 2023-24, we had only two appeal cases and 12 reviews. It is quite a small area of advice for us, which is potentially a positive thing, as it suggests that most applications are going smoothly. We appreciate that those with no recourse to public funds can access best start foods, for instance.

Bob Doris: That is helpful, and I appreciate your brevity, because it gets me in the good books with the convener.

Richard Gass: I have nothing to add. We have little experience and certainly no comments of negative experience so far.

Bob Doris: That is even better, Mr Gass.

What are the witnesses' views on having a review process for those benefits, as opposed to a redetermination or an appeals process? So far, is the process working fine, or would you like to see any changes? I suspect that, with little experience, there might not be a lot to say. For the record, Ms Young, what are your thoughts on that?

Erica Young: As a general point, I would go back to the previous discussion about framing. It is important to have consistent framing, which people can understand more easily, across different benefit types and benefit journeys. Bringing terminology more into line helps clients to make sense of and understand the system better.

Bob Doris: So, at the very least, the terminology should be aligned, if not exactly the process.

Erica Young: Yes. I appreciate that the process cannot be identical across benefit types, because of the differences there, but if the terminology and basic processes were similar, it would help.

Bob Doris: That is helpful.

Richard Gass: In so far as it is possible, the system for challenging a decision should be mirrored, so that folk do not have to then check whether it is this process or that process. The language does not matter, as long as the process is much the same.

Bob Doris: Thank you. I have no further questions.

The Convener: That concludes our questions. I thank the witnesses for attending. You have given us some really useful information and examples, which will help us to consider our next steps.

That concludes our public business for today.

10:55

Meeting continued in private until 11:37.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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