OFFICIAL REPORT
AITHISG OIFIGEIL

Social Security Committee

Thursday 8 February 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 8 February 2018

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SOCIAL SECURITY COMMITTEE
4th Meeting 2018, Session 5

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Pauline McNeill (Glasgow) (Lab)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Jeremy Balfour (Lothian) (Con)
*Mark Griffin (Central Scotland) (Lab)
*Alison Johnstone (Lothian) (Green)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Ruth Maguire (Cunninghame South) (SNP)
*Adam Tomkins (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jeane Freeman (Minister for Social Security)

CLERK TO THE COMMITTEE

Simon Watkins

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Social Security Committee

Thursday 8 February 2018

[The Convener opened the meeting at 09:00]

Social Security (Scotland) Bill: Stage 2

The Convener (Clare Adamson): Good morning and welcome to the fourth meeting of the Social Security Committee in 2018. I remind everyone to turn mobile phones and other devices to silent mode so that they do not disrupt the meeting or its broadcast. No apologies have been received.

Our only agenda item is consideration of the Social Security (Scotland) Bill at stage 2. We continue where we left off last week, and we will not go beyond the end of part 2, chapter 2. There are 17 groups of amendments up to the end of part 2; we might well not get through them all this morning but we will endeavour to do our best.

I welcome the minister and her accompanying officials.

Section 3—Preparing the first charter

Amendments 143 and 144 not moved.

The Convener: The first group is on consultation on the Scottish social security charter. Amendment 145, in the name of Jeremy Balfour, is grouped with amendments 103 to 105, 12, 13, 106 and 107.

Jeremy Balfour (Lothian) (Con): Amendment 145 is fairly straightforward. I am sure that this Government will do what the amendment requires without such provision being in the bill, but as we look forward to the years ahead, I am concerned about future Governments and members of the Scottish Parliament, who will not have had the benefit of sitting round this table.

It is important that people with mental disability are consulted appropriately when changes are being made and consultations are going on. I appreciate that the Government has consulted people with mental disability in getting us to where we are today, but we must future proof the bill. About 33 per cent of people in receipt of disability living allowance or a personal independence payment have a mental disability. Such people might have felt excluded from consultations in the past. The provisions in amendment 145 would provide a reminder to the Government and the Parliament that not just people with physical disability but people with mental disability should be consulted.

I move amendment 145.

Mark Griffin (Central Scotland) (Lab): Amendments 103, 105 and 106—and amendment 108, to which we will come—are designed to ensure that equality is embedded in the bill and therefore in our social security system. I welcome the Government's advance notice that it will support the amendments, which are also supported by Engender, Scottish Women's Aid and the Coalition for Racial Equality and Rights.

We know that many equalities groups, particularly women, people from black and minority ethnic groups and disabled people, experience higher rates of poverty and might therefore depend more on the social security system. We also know that such groups experience inequality in different ways. The barriers and disadvantages that people will face might not be known about from the off, given the lack of available data—that is what prompted me to lodge amendment 108, to which we will come. It is important that on-going engagement be required. There should not be any groups that the Scottish social security system deems hard to reach, and we should take extra care to make sure that all groups—especially the most disadvantaged—are involved and included. That was the reason behind my lodging amendments 103 and 105 to 107.

Amendment 104 is part of a package of amendments related to the give me five campaign's proposal to top up child benefit, to which we will come. It would mean consulting all parents. Even though it could be argued that child benefit is a reserved benefit, consulting parents would still have particular value since the Scottish Government has the power to top up that benefit. The proposal is worth including in the bill.

The Convener: Thank you. I call the minister to speak to amendment 12 and the other amendments in the group.

Jeane Freeman (Minister for Social Security): Thank you, convener, and good morning.

Let me start with amendment 145, in the name of Mr Balfour. Implicit in that amendment is a very important point: that those in receipt of disability assistance are a diverse group, including people with both physical and mental health conditions. Such groups have different needs, and I agree that it is crucial that the views of both are fairly represented in the charter co-design process. However, I hope to persuade Mr Balfour and the committee that we have in place robust plans to deliver the nuanced engagement that he seeks.

"About your benefits and you", the recently published research from the experience panels, found that 39 per cent of respondents with a disability had a mental health condition and that 50 per cent had a physical disability or condition. We are developing plans to supplement experience panels with ways of engaging seldom-heard groups, who may not be comfortable engaging in focus group-style activity. We are working with stakeholders to ensure that we have additional involvement in areas of particular interest. As part of the charter co-design, we are also looking to work with key stakeholders—including organisations that support those with both physical and mental health conditions—to facilitate engagement with the people whom they represent.

In my view, amendment 145 is, to an extent, prescriptive, in that it requires ministers to focus on a particular split—a "representative proportion". That could produce unintended results that I am sure none of us would want. The question has to arise whether it is more important to achieve the perfect proportional split with a small number, or to engage with larger numbers of both those with a physical disability or condition and those with a mental health condition, even if the split is not in the right proportion.

I therefore invite Mr Balfour not to press amendment 145, on the basis that we are already thinking carefully about such issues.

I am pleased to support amendments 103 and 105 to 107, in the name of Mr Griffin. The amendments reflect what the Scottish Government already intends in relation to the consultation on the charter, and there is benefit in codifying the requirements in the bill—especially in relation to future reviews of the charter. We may want to bring some minor adjustment to their wording at stage 3, but I am happy to support the amendments.

I cannot, however, support amendment 104, as there is no reason to consult anyone who is in receipt of benefits that the Scottish social security benefits system will not deliver when it comes to our charter. Equally, there would be no reason to choose just one of the many benefits that remain reserved to the United Kingdom Government—for example, universal credit, income support, child tax credits, maternity pay or pension credit—as the charter does not relate to them. Those benefits are all for the UK Government to deliver and be responsible for.

My amendment 12 is a technical amendment that I hope the committee will find it easy to support. As the committee will be aware, the Scottish Government has committed to co-designing the charter in partnership with those who have direct experience of the system. That work will be under way before the bill is passed and receives royal assent. Amendment 12 simply ensures that all the consultation work counts towards fulfilling the consultation duty.

Amendment 13 is rooted in my conversations with Professor Sally Witcher and Bill Scott of Inclusion Scotland. They are strong advocates of the rights-based nature of the system that we propose and the charter, which will give practical effect to that approach. Their concern is that if a future Government does not share that commitment it may seek to use the powers given to ministers in section 5 to review the charter in order to substantially dilute it. As a safeguard against that, amendment 13 requires ministers to consult the commission on social security when reviewing the charter. As a further safeguard, as I said last week when we discussed amendments on charter approval, I will be happy to work with Ms McNeill in ensuring that the Scottish Parliament has a role in scrutinising any changes to the charter.

Mark Griffin: Before the minister completes her comments, can she expand on the reasoning behind amendment 12? The amendment states that

"it is immaterial that anything done by way of consultation was done before the Bill for this Act was passed".

I am concerned that that would rule out any evidence gathered by the experience panels. Is the minister able to allay those concerns?

Jeane Freeman: Amendment 12 seeks to ensure that, in advance of the preparations for and conclusion of the work on the charter, the consultation work that has been undertaken to date and which will continue to be done on the illustrative regulations for the benefits that we intend to deliver in wave 1 will count towards our requirement to consult. Mr Griffin is a bit thrown by the word "immaterial", as I was when he first raised the matter with me, because it sounds as though it means that such consultation does not count. I am advised that, in the lawyers' world, it does count. What can I say? Perhaps Mr Tomkins can help us out.

Adam Tomkins (Glasgow) (Con): I think that your interpretation is correct, minister.

Jeane Freeman: Thank you.

The Convener: No one else wishes to speak, so I ask Mr Balfour to press or withdraw amendment 145.

Jeremy Balfour: I intend to press amendment 145. I hear what the minister says and I take her word very seriously, but I still think that it is important to have within the legislation a clear duty that those who have mental disability will be consulted appropriately. I know that the Scottish Association for Mental Health and other groups

are keen to have that backstop in case of any change of Government or policy.

We will support the amendments lodged by the minister and Mark Griffin.

The Convener: The question is, that amendment 145 be agreed to. Are we agreed?

Members: No

The Convener: There will be a division.

For

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

Against

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

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

Amendment 145 agreed to.

Amendment 103 moved—[Mark Griffin]—and agreed to.

Amendment 104 moved—[Mark Griffin].

The Convener: The question is, that amendment 104 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 104 agreed to.

Amendment 105 moved—[Mark Griffin]—and agreed to.

Amendment 12 moved—[Jeane Freeman]—and agreed to.

Section 3, as amended, agreed to.

Section 4—Publication of the charter

Amendment 146 not moved.

Section 4 agreed to.

09:15

Section 5—Reviewing the charter

Amendment 13 moved—[Jeane Freeman]—and agreed to.

Amendments 106 and 107 moved—[Mark Griffin]—and agreed to.

Amendment 147 not moved.

Section 5, as amended, agreed to.

After section 5

The Convener: The next group of amendments is on the effect of the charter. Amendment 61, in the name of Adam Tomkins, is grouped with amendments 18, 18A and 50.

Adam Tomkins: Last week, we had a debate about a similar provision on the effect of the principles. I do not want to reheat or repeat that debate but, during the debate, Mr Macpherson and the minister were kind enough to indicate that they would support amendment 61. The amendment's purpose is to clarify what we, as the Parliament, intend the effect of the charter to be in order to avoid unnecessary, and potentially expensive, litigation to resolve that question. The wording is similar to wording that already appears elsewhere in the Scottish statute book. That is all that I want to say about amendment 61 at the moment.

Amendment 18A, in my name, seeks to amend amendment 18, which is in the minister's name. I hope that the minister will not press that amendment. If she does not press it, I will not press amendment 18A, because it would be redundant. In fact, I believe that amendments 18 and 18A are both redundant, given the evidence that the committee obtained a fortnight ago from the Scottish Public Services Ombudsman on the jurisdiction that the ombudsman already has under her empowering legislation to investigate complaints of injustice arising from maladministration by the Scottish social security agency. That is a result of the way in which the agency is to be created as an arm of the Scottish Government. I hope that the minister agrees that amendment 18 is now unnecessary and will not press it.

I move amendment 61.

Jeane Freeman: I am pleased to support amendment 61, in the name of Adam Tomkins. I think that it would be helpful to draw the committee's attention to our consultation on draft tribunal rules, which we launched on 22 January. We propose that tribunals must have regard to the social security charter when considering appeals in relation to devolved social security assistance,

which complements amendment 61 in an important way.

I do not intend to rehearse the arguments that we heard a week ago. I agree with Mr Tomkins that the role to be played by the ombudsman's office is clear from the evidence that the committee received from Dr McCormick and the Scottish Public Services Ombudsman. For that reason, I do not intend to move amendment 18 or amendment 50.

The Convener: I invite Mr Tomkins to wind up, and to press or withdraw amendment 61.

Adam Tomkins: I have nothing further to say. I press amendment 61.

Amendment 61 agreed to.

The Convener: The next group of amendments concerns the right to social security. Amendment 116, in the name of Mark Griffin, is grouped with amendment 117.

Mark Griffin: I feel that amendments 116 and 117 would advance the Scottish Government's objectives of ensuring that Scotland's social security system is world leading and of taking a human rights based approach to social security.

The Scottish Government's response to the Social Security Committee's stage 1 report acknowledges that Scottish ministers have a duty to comply with human rights treaties such as the International Covenant on Economic, Social and Cultural Rights. However, the bill will not, as drafted, place any duty on them to comply with the right to social security as defined in international human rights law, or to have regard to it.

The Scottish Government's response also acknowledges that international human rights are substantive and real, and reaffirms its commitment to giving effect to those rights. It is important to be clear that the human right to social security is not principally protected by the European convention on human rights, which means that full compliance with the ECHR will not on its own deliver protection of the right to social security.

The right to social security is found in a number of international human rights instruments, most notably in article 9 of the ICESCR. The detail of the right to social security is provided in general comment 19 from 2007. That comment provides that social security must be available, adequate and accessible and addresses issues of coverage, eligibility, participation and information and physical access.

Amendments 116 and 117, in obliging Scottish ministers and public authorities—in particular, the new agency—to

"have due regard to the right to social security",

would ensure that the content of the right features as a driver for good policy and decision making, thereby building a system that is based on human rights. The amendments would also introduce a vital means of holding the Scottish ministers and the new agency to account for their decision-making processes.

There is a precedent for the approach that I propose: it has been embedded in various legislation including the Community Empowerment (Scotland) Act 2015, the Land Reform (Scotland) Act 2016 and the Children and Young People (Scotland) Act 2014. Only last week, during portfolio questions, the Cabinet Secretary for Communities, Social Security and Equalities said:

"It is imperative that we acknowledge that the UK Government's proposals to repeal the 1998 act or even to withdraw from the European convention on human rights ... put at risk the most vulnerable members of society and hit them the hardest. Therefore, the Scottish Government is committed to defending the existing human rights safeguards ... and to embedding human rights, equality and respect in everything that we do, so that everyone in Scotland can live a life of human dignity."—[*Official Report*, 31 January 2018; c 11-12.]

Amendments 116 and 117 would simply put that aspiration into legislation, so I ask committee members to support them.

I move amendment 116.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): The overarching issue that amendments 116 and 117 concern is an extremely important one to consider, given what we said about it in our discussions during stage 1.

However, a number of questions need to be asked about being prescriptive in the way that is proposed in relation to specific pieces of international law, given that there is already an overriding commitment to human rights in principle and the fact that ministers are expected to uphold international law and the courts are expected to take account of treaties when it comes to domestic legislation.

I would like to ask a number of questions to enable me to understand what advantage amendments 116 and 117 would bring, and to determine whether the proposal might be counterproductive by creating vulnerability in terms of judicial review and having other consequences in terms of suppressing the operation of the system.

I ask Mark Griffin to elaborate on the intention behind amendment 116, given that it mentions only the International Covenant on Economic, Social and Cultural Rights. Is he suggesting that only the covenant should be looked at, to the exclusion of other treaties? Should it be given higher status? I am trying to understand whether

he thinks that the ICESCR is more important than, say, the European social charter.

Why does amendment 117 require judicial consideration of the views of the United Nations Committee on Economic, Social and Cultural Rights but not the opinions of the Council of Europe's European Committee of Social Rights, for example?

Does the International Covenant on Economic, Social and Cultural Rights provide enough detail to make it legally applicable? Has Mark Griffin considered that its vagueness might lead to successful judicial review, with the result that regulations would be void and people would not be paid?

Human rights are interrelated and indivisible, so is it a good idea to take a piecemeal, bill-by-bill approach? The cabinet secretary said that human rights should apply

"in everything that we do",—[*Official Report*, 31 January 2018; c 12.]

as Mark Griffin said. Should we take a more Scotland-wide approach?

The First Minister's advisory group on human rights is considering how best to reflect human rights instruments in domestic legislation across the spectrum. Do amendments 116 and 117 cut across that work?

It is important to recognise that UN committees are not elected, so there is a democratic question to consider before we enshrine in primary legislation a provision in that regard.

Ministers are held to account in circumstances in which they fall short of treaty obligations under international law. Social security as a human right is a founding ideal of the system—that is stated in the principles in the bill. The charter will set out in detail the actions and standards that are required to realise that in practice, and the Scottish commission on social security will be able to review performance independently.

We need to think carefully about an approach that is as prescriptive as the one that Mark Griffin proposes. We need to consider whether a better approach would be to see human rights as part of the overarching principles in the bill—as they are—and not to give precedence or preference to certain bits of international law, when a more comprehensive overarching consideration of international law might be more effective.

Adam Tomkins: Ben Macpherson has asked a series of important questions about what would be significant amendments. The most important point that I pick out of that suite of questions—which Mr Macpherson has rather thrown at you, Mr Griffin—is this: the International Covenant on Economic, Social and Cultural Rights is not judicially enforced; it is policed and monitored by an international committee of unelected UN experts. Amendments 116 and 117 would require judicial recognition in Scottish courts and tribunals of the opinions and reports of that committee.

We have tried to clarify the legal status of the principles and the charter, rather than make it more murky. It seems to me that there is a no doubt unintended risk that amendments 116 and 117 would—by requiring courts and tribunals in Scotland to take judicial cognisance of non-judicial reports and opinions from the committee that polices the international covenant at UN level—blur the distinction between where there is a right to social security that is judicially enforceable, and where there is a right to social security that ministers and MSPs must bear in mind as they make and implement regulations. I am sure that that is not an intended consequence of the amendments, which I am sure are well intentioned. Nonetheless, it is a significant demerit in how the amendments have been drafted.

That is not to say that the other issues that Mr Macpherson identified are unimportant. However, that is the most significant one, for me.

George Adam (Paisley) (SNP): I agree with Mr Tomkins and Ben Macpherson. The minister has said from the start that social security as a human right is a founding principle of what we are trying to do, and the charter sets out the actions and standards that are required in that regard.

The problem that I have with Mr Griffin's amendments 116 and 117 is purely to do with me. Mr Macpherson and Mr Tomkins come from a legal perspective. I think that I know what Mr Griffin is trying to do, but I am a bit confused as to whether he will be able to do it with the amendments. My concern is that we could, the minute the lawyers get their hands on the amendments, end up with a murky mess. I understand where Mr Griffin is coming from, but the amendments are a bit confusing, which gives me some concern. However, it might just be me: I have been confused before.

09:30

The Convener: I would not like to comment, Mr Adam.

Jeane Freeman: The Government is serious about human rights and about following through on our treaty obligations. As members have said, the Scottish ministerial code states clearly that every minister has an overarching duty to uphold the law, including international law and treaty obligations, in everything that they do.

To ensure that that happens in the new system, amendment 118 in my name will enable the proposed new independent Scottish commission on social security to "have regard to" international law standards in performing any of its functions. That is a conscious and deliberate inclusion on our part. More than that, the commission will be required to

"have regard to any relevant international human rights instruments"

when considering proposed regulations. That means that, when considering any reforms, the Government, Parliament and the public will always be able to have the benefit of independent expert opinion on how proposals measure up against treaty obligations.

That input from experts who have specialist knowledge of social security will be invaluable, because international treaties are necessarily expressed in general and high-level terms. The proposed commission will have the skill set to translate what the treaties require into the Scottish context. Should it appear that the new system is falling short of those requirements in any respect, it will be for Parliament and the Government to do something about it. In that way, the bill will ensure that respect for international obligations is built into the system from the start in a way that ensures that the system gives practical and meaningful effect to people's rights.

The bill will achieve that in other ways, too. The principles establish human rights as a founding ideal of the system. In fact, the principle in section 1(b) goes further than the key provision of the instrument that establishes social security as a human right. Through the charter, those ideals will be carried from the statute book to everyday delivery of services. The charter will be co-produced with the benefit of input from the Scottish Public Services Ombudsman's office and, as we agreed last week, will be subject to agreement by Parliament through the amendment that we will work with Ms McNeill to lodge at stage 3. In addition, the charter will have the benefit of the clarity that Mr Tomkins's amendment 61, which we have just discussed, brings to it.

There are already numerous examples of the co-productive nature of our approach, such as the experience panels, the design of the process of information and the options in our universal credit Scottish choices. Those few examples barely scratch the surface, but they are indicative of an approach that will consider every detail and leave undone nothing that is needed to fulfil people's rights.

Mr Griffin's amendments 116 and 117 represent a different approach and I cannot support them. Rather than involving subject experts in designing the system so that compliance with international standards is embedded from the start, his amendments would leave it to the general courts to evaluate the system once it is in operation.

Last week, Mr Griffin helpfully did not press his amendment 138 because of the unintended consequences that we discussed and the risk that it posed for people's incomes. The risks that are posed by his amendments 116 and 117 are the same. They would open the door to the courts striking down regulations that will provide the basis on which people will be given assistance. Should a court uphold a challenge, ministers would be required to stop applying the assistance that had been challenged—to stop paying that assistance—unless they could convince the court to suspend its decision, pending an appeal.

Even if a challenge ultimately failed—the system is designed to ensure compliance with treaty obligations, so all such challenges should fail—the fact that a case was taken, and that the steps in the process on which I have touched were gone through, would cause significant uncertainty for people. Moreover, it would inevitably divert money away from the people whom the social security system should help and, instead, put it into legal fees and court costs. To expose to those risks the new system and, more important, the people who will rely on it for support, is unwarranted. The proposals were not mentioned, let alone supported, in the committee's stage 1 report. The committee has heard no evidence from legal academics, the Law Society of Scotland, the Faculty of Advocates or the judiciary on the consequences, unintended or otherwise, of taking this unprecedented approach.

I am sure that all of us here value Scotland's record on human rights. The Scottish Government certainly does, which is exactly why the First Minister has established an expert group under the leadership of Professor Alan Miller to look holistically at what more can be done to embed the protection of internationally recognised rights in Scotland. That is the proper place for that discussion to be held. That group of experts, after considering international evidence and expertise, will recommend an overarching Scotland-wide approach to protect, enhance and embed human rights across all of Parliament's legislation.

As a responsible Parliament, we should see the work of that group and take time to consider its recommendations based on robust and considered evidence. That will allow the whole Parliament the opportunity to discuss the issues fully on a properly informed basis, and to consider the right approach for Scotland.

The Convener: I invite Mr Griffin to wind up and to say whether he wishes to press or withdraw amendment 116.

Mark Griffin: The Scottish Government's response to the stage 1 report acknowledges that ministers have a duty to comply with human rights treaties such as the ICESCR, but the bill does not place any duty on ministers to comply with or have regard to the right to social security as defined in international human rights law. The reason why my amendments 116 and 117 link to the particular UN instruments is simply that that is the evidence that the committee received during stage 1 and subsequently in briefings from organisations including the Scottish Human Rights Commission.

I accept the argument that we should take a Scotland-wide holistic approach but, as I said, there are examples where my approach has already been used—I mentioned the Community Empowerment (Scotland) Act 2015, the Land Reform (Scotland) Act 2016 and the Children and Young People (Scotland) Act 2014. I take on board the Government's point that a potential court action could strike down regulations and lead to claimants not receiving payments, but that risk that the Government refers to demonstrates just how important it is for the Government to discharge its duty properly in the first place. The Government should seriously consider the credibility of that course of action, were there to be any doubt that an action would breach human rights.

On justiciability, judges have dealt ably with questions of rights. For example, they have considered what constitutes torture, what a fair trial means and what is unlawful interference with privacy. Giving meaning to concepts that are found in legislation is a clear function of the judiciary, in relation not just to human rights, but to any area of law. The realisation of rights depends on Government policy. It is for Parliament to put that policy into law, but review of Government policy to ensure that it is consistent with constitutional principles and obligations under human rights law is clearly a function of the judiciary. That is review and not policy making, and the courts are well aware of their function in that regard.

Judicial enforcement of human rights is fundamental. Having a right without a remedy raises questions about whether it is, in fact, a right at all. For that reason, I will press amendment 116.

The Convener: The question is, that amendment 116 be agreed to. Are we agreed?

Members: No

The Convener: There will be a division.

For

Griffin, Mark (Central Scotland) (Lab)
Johnstone, Alison (Lothian) (Green)
McNeill, Pauline (Glasgow) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Motherwell and Wishaw) (SNP)
Balfour, Jeremy (Lothian) (Con)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 116 disagreed to.

Amendment 117 not moved.

Before section 6

Amendment 14 not moved.

Section 6—Annual report

The Convener: We now move to a new group, on the annual report and other accountability mechanisms. Amendment 62, in the name of Jeremy Balfour, is grouped with amendments 79, 108, 148 and 80.

Jeremy Balfour: It is a welcome move in this bill that there will be an annual report that will outline what has happened. It is important that those who are looking at the system and who have expectations about how it will be taken forward can find that simply reported on in the report. Amendment 62 is a fairly benign amendment, but it is important to say in the legislation that the report must set out how the expectations have been met. The amendment is just giving clarity, as I am sure that that will happen anyway, but we have to remember that we are looking to the future. I hope that the Government can accept the amendment.

I move amendment 62.

The Convener: I invite Mr Griffin to speak to amendment 79 and the other amendments in the group.

Mark Griffin: Amendment 79 allows us to have a debate about how we use the powers to tackle disability poverty. Of households living in poverty, 42 per cent have at least one disabled person. I know that we have debated how disability benefits are not income replacement benefits, but they overcome the additional costs with which someone with a disability lives and that could push that person into poverty. The disability could present a barrier to employment, which could also push that person into poverty.

Amendment 79 is supported by Disability Agenda Scotland, Camphill Scotland, the Carers Trust, the Health and Social Care Alliance Scotland, the Scottish Independent Advocacy Alliance and Leonard Cheshire Disability. I feel that there is a precedent with the Child Poverty (Scotland) Act 2017, which includes a number of

explicit targets, and the implementation of the socioeconomic duty. Any reform of the social security system in Scotland should address the failure of the benefits system to adequately compensate disabled people for the extra costs that they face in order to live an independent life.

The extra costs that are associated with disability, which average around £550 per month, are one of the several reasons why there are higher rates of poverty among disabled people. Amendment 79 would require the Government to assess the levels of poverty in households with a disabled person or persons, to take into account the added costs of having a disability and to work to reduce that rate of poverty.

I touched on amendment 108 in an earlier debate about how we ensure that people with protected characteristics are covered from the outset. It would put that in the legislation and give that additional protection.

The social security charter is not intended to confer rights on individuals. The agency will evaluate and report on its own performance, and it will determine the form and content of customer satisfaction surveys. It is a known issue that the agency could then start focusing on its own performance targets. Amendment 148 would help to ensure that the principles have teeth and would make the agency and ministers more accountable to Parliament, to those people who depend on the assistance provided and to the wider Scottish public. It could also assist in identifying unmet need and contribute to continuous improvement.

09:45

Amendment 80 is supported by Disability Agenda Scotland, Camphill Scotland, the Carers Trust, the Health and Social Care Alliance Scotland, the Scottish Independent Advocacy Alliance and Leonard Cheshire Disability. The social security commission will not be truly independent from the act, and we seek an independent review of the act. The bill places duties on ministers to keep the charter under review, but it does not place any duties on ministers to keep the social security system or the legislation under review. We feel that review would offer an opportunity to identify areas in the legislation where changes are necessary and that the review should consider the extent to which the levels and types of support that are available under the system have met and are meeting the needs of those who require support.

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

Ruth Maguire (Cunninghame South) (SNP): I am concerned about amendment 79. Disability benefits are not income replacement benefits; they are an acknowledgement of the additional costs that people with disabilities incur. They are not means tested or taxed. I am really concerned that amendment 79 undermines the principle that all people living with a disability incur additional costs and that is what those benefits are for.

George Adam: On the positive side, so that Mark Griffin does not feel that I am being negative about everything that he is putting forward today, I will support amendment 108. However, in relation to amendment 79, I agree with my colleague Ruth Maguire that we are in awkward territory when we start talking about those benefits. They are not income based at the moment; as Ruth Maguire said, they are there to support people in difficult times with the extra costs that their disability involves. We would be setting an unusual and difficult precedent, and I could not possibly go back to the disabled groups in my constituency and say that I had voted for that. It is a point of principle for me. However, I am with Mark Griffin on amendment 108.

Ben Macpherson: I have concerns about amendment 80, because this Parliament has a role in reviewing legislation through relevant committees such as the Public Audit and Post-legislative Scrutiny Committee—that is a function of Parliament. The amendment seeks a review of the act—if it is passed, which it will be, of course—within months of the final parts of the social security system in Scotland being delivered. That is premature, in my view.

Jeane Freeman: I am happy to support amendment 108, in the name of Mark Griffin. However, other amendments in the group are more problematic.

I urge members not to support amendment 62, in the name of Jeremy Balfour. As we discussed last week in the context of our discussion on amendment 60, in the name of Jeremy Balfour, the Scottish ministers and the social security agency are, legally, the same person. Therefore, there is no need to have a separate reporting requirement for the agency, because the reporting duty on ministers will cover everything that is done by the ministers in the guise of the agency. In fact, the agency cannot competently be the subject of separate reporting requirements, because it will not have a separate legal personality.

Although I share the commitment to reducing poverty, I cannot support amendment 79. Others have made the point that disability benefits are not income replacement benefits. They are—deliberately—not means tested or related to income or poverty levels. They are not taxed, for that reason, and they do not result in reductions to other benefits. My point is that Mr Griffin's amendment 79 misunderstands what disability benefits are for. I supported amendment 1, in the

name of Alison Johnstone, which placed in the bill the principle of reducing poverty for all people. I think that that is the right approach.

There is little about the sentiment in amendment 148, in the name of Mark Griffin, with which I disagree. Co-design is a centrepiece of the Scottish approach to social security and it is entirely right that we should think about ways to ensure that the voices of people who rely on the system continue to be heard in the long term. The problem with amendment 148 is that it would make for bad law. It is overly prescriptive in seeking to codify not just precisely what information should be collected but the means through which it should be collected. That is not helpful. As our approach to consultation and experience panels has demonstrated, there is a space in which innovation is possible and desirable. The right people to inform us about that are the many professional researchers who are working on the project, in partnership with our stakeholders and experience panels and the people of Scotland.

What the legislation should provide is what is already there: a fundamental principle that the system is built with the people of Scotland on the basis of evidence. That will carry through to commitments in the charter and the associated reporting duties, and ministers will be held accountable—robustly, I imagine—for delivery. I therefore cannot support amendment 148 and I invite the committee to reject it.

Finally, I understand the thought behind amendment 80, which Mr Griffin lodged, but I do not think that it is necessary. It intrudes into what is properly the role of the Parliament. The Scottish Government amendments that provide for the setting up of the Scottish commission on social security establish, by definition, an independent body that will be required to report on any matter on which ministers or the Parliament ask it to report.

In addition, amendment 148 would require a review three years after royal assent. By my calculation, that would be 2021. At that point the full devolution of all benefits will have taken place, but we will hardly be able to say that the system has been fully operational for any length of time. The proposal is entirely unworkable.

Should the Parliament determine that a review of the kind that Mr Griffin envisages is necessary, it can simply ask the commission to undertake a review, without adhering to the rigid schedule that is outlined in amendment 148. Should the Parliament decide, for whatever reason, that it would be more appropriate for a person or body other than the commission to conduct the review, there is nothing to stop the Parliament commissioning a review from someone else.

I also highlight that, apart from any periodic review that might be organised, the system and its underpinning legislation will be subject to robust and continuous monitoring, through the various reporting duties that the bill places on ministers, parliamentary scrutiny, including that of this committee and the Public Audit and Post-legislative Scrutiny Committee, the role of the commission, the separate procedures that relate to the charter and the scrutiny that Audit Scotland will undertake. That is a strong set of arrangements for identifying areas of the system that require change and refinement, legislative or otherwise.

I therefore question the need to take the highly unusual step of setting out in primary legislation a requirement for independent reviews of whether the legislation is fit for purpose. It seems to me that such oversight and scrutiny is principally the job of the Parliament and that amendment 148 might therefore set a very unwise precedent.

For all those reasons I ask the committee not to support amendment 148.

Jeremy Balfour: I heard and accept the minister's comments about amendment 62, which I will not press.

I agree with members' comments about amendment 79. We do not want to go down a road that might lead to disability and other benefits being means tested or that might put people off claiming benefits because they think that they are linked to income.

I also agree on amendments 148 and 80. Their proposals could become quite time consuming and are overly prescriptive. In particular, on amendment 80, until the legislation has been up and running for a number of years, it will be difficult to judge how successful it is in practice. That is a role for a committee of the Parliament to undertake, not somebody else, and I hope that whoever is elected in 2021 will review the legislation in due course. Therefore, I will not support amendments 148 or 80.

Amendment 62, by agreement, withdrawn.

Amendment 79 moved—[Mark Griffin].

The Convener: The question is, that amendment 79 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Griffin, Mark (Central Scotland) (Lab)
Johnstone, Alison (Lothian) (Green)
McNeill, Pauline (Glasgow) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Motherwell and Wishaw) (SNP)
Balfour, Jeremy (Lothian) (Con)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 79 disagreed to.

Amendment 108 moved—[Mark Griffin]—and agreed to.

Section 6, as amended, agreed to.

After section 6

The Convener: The next group concerns the Scottish commission on social security. Amendment 15, in the name of the minister, is grouped with amendments 16, 16A, 16B, 118, 49, 53 and 54.

Jeane Freeman: I am happy to support amendments 16A and 16B, in the name of Mr Balfour, with the caveat that we will tidy up the wording at stage 3 to avoid any confusion that the reference to tribunal members refers to both Scottish tribunals and the equivalent bodies in England and Wales. However, I have no difficulty with the principle that members of the House of Lords, the First-tier Tribunal and the Upper Tribunal should not be appointed as commissioners.

The committee is probably clear about what the purpose of amendments 15, 16, 118, 49, 53 and 54 is and the effect that they will have: to bring into being the Scottish commission on social security. It will be similar to but, in a number of important ways, an improvement on the UK arrangements that allow for scrutiny of elements of the existing UK system by the Social Security Advisory Committee.

As we discussed a fortnight ago, the amendments will enable the commission to deliver all of the requirements of an independent scrutiny body set out by the disability and carers benefits expert advisory group in its report. Its primary role will be to scrutinise regulations, but the Scottish ministers and the Scottish Parliament will also be able to ask it to report on any matter relevant to social security that they want. The amendments also recognise the commission's role in relation to our social security charter.

Amendment 118 will enable the commission to have regard to international human rights instruments in performing any of its functions. That means that an independent group of experts will constantly review the Scottish social security system and judge it against international law standards. Of course, the Scottish Government and, indeed, the Parliament should always seek to uphold international law obligations anyway. However, placing that duty on the commission will ensure that the Government, the Parliament and, for that matter, the wider Scottish public will have the benefit of advice from experts in the field about what the international standards require.

Amendments 15, 16, 118, 49, 53 and 54 give clear and unequivocal effect to the Scottish Government's commitment to introduce a statutory independent scrutiny body. The schedule that we propose to add to the bill makes provision for the establishment of that body. Put together, the amendments deliver something genuinely new and important and I hope that the committee will support them.

I move amendment 15.

Jeremy Balfour: Because of the shortage of time, and with the minister's comments in my ears, I simply say that I intend to move amendments 16A and 16B.

10:00

Adam Tomkins: We support the Government's amendments in this group. We think that the creation of a statutory commission, which the committee called for in its stage 1 report, is an extremely important step forward, and we welcome the functions that are to be given to the commission by the minister's amendments. However, it is extremely important to pause and consider that, although the new statutory commission's scrutiny of the draft regulations that are to be made under the bill after it is enacted is welcome and necessary, it is not a substitute for effective parliamentary scrutiny. We need both the work of the statutory commission in accordance with the amendments that we are discussing and a super-affirmative procedure in the Parliament, given the nature, sensitivity, detail and substance of what is to be determined by those regulations.

That is not just my view or the view of my party; it is the view of the Parliament's all-party Delegated Powers and Law Reform Committee. A few weeks ago, the Social Security Committee wrote to the DPLR Committee to seek that committee's view about the Government's amendments relating to the creation of a Scottish commission on social security. We received a response on 6 February, and it is important to read a little bit of that response into the record today.

The DPLR Committee tells us that

"in a number of respects the Scottish Government's recommendations do not meet"

that committee's recommendations. It says:

"The establishment of the Commission as an independent scrutiny body is to be welcomed. However, in this Committee's view its role in relation to the scrutiny of proposals to make draft regulations undermines the ability of the Parliament to hold the Government to account and shape the draft regulations."

It seems to me that those are unambiguous words that this committee must take into account.

The DPLR Committee states that the approach that the Government proposes with regard to the creation of the commission is

"a unique approach to a super-affirmative procedure"

and that parliamentary consideration would be only an "adjunct" to the work of the commission.

Those are exceptionally important matters that go to the core of one of this committee's main concerns about the bill in our stage 1 scrutiny, which was about the appropriateness of the balance between primary and secondary legislation. As I have discussed with the minister previously, that is a judgment call and there is no one right answer to getting the balance between primary and secondary legislation, but it is clearly the unambiguous view of the DPLR Committee, which is the parliamentary committee that is charged with the responsibility of monitoring precisely that matter, that the bill, even with the amendments in this group, does not get the balance right.

I will work with other Opposition parties and, I hope, with the Government to seek to put the situation right at stage 3. I unreservedly welcome the Government's amendments in the group and will support them enthusiastically. However, although they are necessary, they are not of themselves sufficient. In addition to the statutory commission that will scrutinise from an expert point of view the draft regulations that will be made in due course by ministers, we need appropriate parliamentary scrutiny. The bill, even as amended, will not allow for that, so we will have to revisit the issue at stage 3.

I would like to be able to work with the Government to do that but, if the Government wants to stick with the current proposals and not move any further, I will work with other Opposition parties to seek to get the matter right at stage 3. In my view and the DPLR Committee's view, we have not got it right yet, even with this group of amendments, which I hope will be supported.

The Convener: I invite the minister to wind up the debate.

Jeane Freeman: As I said, I support all the amendments in the group, so I do not want to say much more on them, but I want to respond to the points that Mr Tomkins made. I am grateful for his support, which I note is enthusiastic, for the establishment of the commission.

I also note Mr Tomkins's points about super-affirmative procedure and the comments that were made by the Delegated Powers and Law Reform Committee. The unique approach that is being taken with the establishment of the commission does not, in and of itself, mean that it has no contribution to make with regard to a super-affirmative process. Indeed, as Mr Tomkins said, there is no right view in respect of the balance struck between primary and secondary legislation.

As I said, I note the comments that were made by the DPLR Committee and by Mr Tomkins. In fairness, I should say that I do not agree with all of them, but the Government would be foolish indeed not to pay attention to such points when they are raised. I am certainly willing to reflect on them and to have further discussions with Mr Tomkins and other committee members, if they so wish, in advance of stage 3 to see whether we can reach a view that provides additional reassurance not only to this committee but to the DPLR Committee with regard to the Parliament's role in these matters.

Amendment 15 agreed to.

Amendment 16 moved—[Jeane Freeman].

Amendments 16A and 16B moved—[Jeremy Balfour]—and agreed to.

Amendment 16, as amended, agreed to.

Amendment 118 moved—[Jeane Freeman]—and agreed to.

Amendment 18 not moved.

The Convener: Because amendment 18 has not been moved, amendment 18A will not be called.

Amendment 148 moved—[Mark Griffin].

The Convener: The question is, that amendment 148 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Griffin, Mark (Central Scotland) (Lab)
Johnstone, Alison (Lothian) (Green)
McNeill, Pauline (Glasgow) (Lab)

AGAINST

Adam, George (Paisley) (SNP)
Adamson, Clare (Motherwell and Wishaw) (SNP)
Balfour, Jeremy (Lothian) (Con)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 148 disagreed to.

Amendment 80 moved—[Mark Griffin].

The Convener: The question is, that amendment 80 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Griffin, Mark (Central Scotland) (Lab)
Johnstone, Alison (Lothian) (Green)
McNeill, Pauline (Glasgow) (Lab)

AGAINST

Adam, George (Paisley) (SNP)
Adamson, Clare (Motherwell and Wishaw) (SNP)
Balfour, Jeremy (Lothian) (Con)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 80 disagreed to.

Section 7—Meaning of "Scottish social security system"

The Convener: The next group of amendments is on the creation of new benefits. Amendment 119, in the name of Adam Tomkins, is grouped with amendments 63, 121 to 125 and 130.

Adam Tomkins: The Scottish social security system comprises three parts: the streams of assistance that are devolved in full, which include carers assistance and disability assistance; the power to top up any reserved benefit, which is provided for in section 45 of the bill; and the power to create new benefits within devolved competence. Those are the three parts of the package of devolved social security that was agreed in the Smith commission by all the parties represented in the Parliament, and which was legislated for in the Scotland Act 2016.

The bill deals with the first and second parts of that package, but it says nothing about the third part of it. The amendments in my name in this group are designed to put that right. We all agree that the bill is a foundation piece of legislation and one of the most important that the Parliament will enact, because it puts on a Scottish statutory footing devolved Scottish social security. However, it does that with regard to only two thirds of the three-part package that was agreed unanimously around the Smith commission table.

It is unfortunate that there is no provision in the bill to deal with the power to create new benefits. That is the purpose behind my amendments. I want to ensure that the bill puts on to the Scottish statute book all three elements of devolved social security: the benefits that are devolved in full, the power to top up reserved benefits and the power to create new benefits within devolved competence.

Amendment 119 seeks to amend section 7, which defines what the Scottish social security system is. That matters because the principles in section 1 and the charter in section 2 will apply to the Scottish social security system. That definition should include all three parts of the package that I have described. Amendments 119 and 63, which are alternatives—we do not need both of them—seek to amend section 7 to ensure that any new benefits that are created under the power to create new benefits will fall within the scope of the statutory definition of the Scottish social security system and that, therefore, the principles in section 1 and the charter in section 2 will apply to the design and delivery of those benefits.

The other amendments in the group seek to add to the bill the power to create new benefits, and they do so in a manner that is fully consistent with the way in which the Scottish ministers want to design and deliver the benefits that are fully devolved. That is to say that the regulation-making powers in those amendments are the same as the regulation-making powers that the Scottish Government sought to promote through the amendments that we have just discussed and come to a decision on. The regulations would have to be laid before the Scottish commission on social security for its advice and input; in other words, the process is entirely the same.

The purpose behind my amendments is to ensure that the bill captures the whole of, and not just some of, devolved social security in Scotland, because at the moment it does not do that, which I think is a significant and—I would say—fundamental flaw in it.

I move amendment 119.

10:15

Ben Macpherson: I have some concerns about Mr Tomkins's amendments, which relate to an issue that he discussed very passionately with regard to a different group—an appreciation of appropriate parliamentary scrutiny. I appreciate that the Scotland Act 2016 allows Parliament to consider legislation to create new benefits, but section 28 of that act does not give the Scottish Parliament or the Scottish ministers the power to create new benefits. All transfers of responsibility are from Parliament to Parliament, and no responsibility is transferred directly to the Scottish Government, quite rightly.

My concern is that, if this group of amendments is passed, the power that we would give to the Scottish Government would allow it "by virtue of regulations" to create new benefits—that is stated in the amendments. I do not think that giving that power by virtue of regulations provides for adequate or appropriate Parliamentary scrutiny of

such significant steps and developments. The bill is primary legislation through which we can take forward the benefits that are being devolved. The same process of primary legislation should be undertaken for creating new benefits, which would be a significant development and the result of substantial policy proposal. This group of amendments would allow those significant steps to be taken through regulations, which would not allow for the appropriate scrutiny of the creation of such new benefits. Therefore, I will not be able to support the amendments.

Mark Griffin: We have said from the beginning that we support the principle that the power to create new benefits should be in the bill, but we share Ben Macpherson's concerns. We would expect that any new benefit proposed by the Government or an individual member through a private member's bill should come to Parliament through primary legislation, to give this committee or any other committee the ability to scrutinise it fully, take evidence at stage 1 and, potentially, amend it at stage 2. Parliament should be given the full role of scrutinising and strengthening any legislation on any new benefit.

We will not be supporting the amendments in their current form, purely because they give ministers the power to introduce a new benefit by regulation. We would prefer to see any new benefit introduced by the enactment of primary legislation.

Alison Johnstone (Lothian) (Green): I commend Adam Tomkins for his passionate commitment to ensuring that the Parliament uses its new powers to the max, but, if we introduce new benefits in the way that he has suggested, we would not be able to scrutinise the proposals to the maximum. The creation of new benefits is so important that each and every opportunity for us to consult and scrutinise is essential, to make sure that the benefits deliver as we would wish. I will not be supporting the amendments.

Pauline McNeill (Glasgow) (Lab): I want to put it on record that I am grateful to Mr Tomkins for raising this issue a number of times and reminding the committee that part of the provision in the Scotland Act 2016 makes it clear that ministers have the power to create new benefits.

I was torn by his proposal, if I am honest. I would prefer there to be clear reference in the bill to the fact that we have that power, but, since I agree 100 per cent with Mr Tomkins on the question that he raised earlier—on the scrutiny of draft regulations by parliamentary committees—I am more comfortable at the moment with the idea that the power should be exercised through primary legislation.

I agree that the bill should specifically say that what we have discussed in relation to the charter also applies to any new benefits, as a belt-and-braces approach. Is there any scope for consensus around that? I am sympathetic to the idea behind Mr Tomkins's amendments; my only objection is the procedure. If I had the choice, given what we have just discussed about primary and secondary legislation, I would be more comfortable if there had to be full consultation before ministers introduced a new benefit.

That would mean that this committee would have the right to have its own consultation with all the organisations that come before members, and to go through primary legislation line by line. That would be my preference, albeit that I am with Mr Tomkins on what he is trying to do, which I think is to ensure that we are fully aware that Parliament has those powers, and that the charter and the principles that underpin it would apply to new benefits.

George Adam: I will be brief. As Ben Macpherson said, the transfer is from Parliament to Parliament, and the Scottish Government cannot introduce new benefits on its own.

I am practical in everything that I try to do. In practice, we have only two choices. Either we have a situation in which the Scottish Government introduces primary legislation every time that it wants to create a new benefit, which would give everyone an opportunity for scrutiny, or we grant the Scottish Government the power to create new benefits via regulations. I do not think that any of us would be too keen on the latter, as it would bypass the whole structure of the Scottish Parliament, as everyone has said. I prefer the Government's option, which is for the Scottish Government to use primary legislation every time that it creates a new benefit. That is a practical way to move forward.

Jeane Freeman: I make it clear that section 28 of the Scotland Act 2016 provides an exception to the reservation of social security matters, as Mr Tomkins and other members know. That is not a power that any body other than this Parliament can exercise, or at least, the power cannot be exercised without the Parliament's consent. As colleagues have said, members of the Scottish Parliament have a choice: we can either choose to delegate the power to Scottish ministers on a case-by-case basis to provide for new benefits when the need is identified, and create them via primary legislation—so that Parliament can take evidence, debate and set out the purpose of a new benefit and its essential features in terms of who should be paid and what they should be paid—or we can delegate the powers wholesale, which I believe is what Mr Tomkins is proposing via his amendments, which would insert in the bill a

general provision to enable ministers to create new benefits by regulations.

Given our discussion about the need, in the view of committee members and the DPLR committee, for further improvements to the super-affirmative procedure, which the Government is willing to consider, it would be contradictory for us to pass an amendment that hands a blanket provision to ministers. Mr Tomkins's amendments allow for regulations that would be created under the new power to be scrutinised by the commission on social security, but they do not allow for the full scrutiny that would be applied to primary legislation. As members have said, that is entirely the wrong way to go. I do not believe that it is necessary to put in the bill that Parliament has the power to create new benefits, as that power comes with restrictions and constraints, as it does in the Scotland Act 2016. Nonetheless, later in this committee's proceedings, we will debate and discuss, as part of primary legislation, the creation of a new housing assistance benefit. That is entirely the correct way to do this, as it maintains an appropriate balance between creating benefits in primary legislation and delivering them via regulations.

Adam Tomkins: I thank all the members who have contributed to this debate. I will give an example of the kind of thing that we are talking about. Let us suppose that we identify in Scotland a particular problem with people who are sleeping rough after leaving terms of imprisonment, and that we want to create a new benefit that is directed at prisoners so that they do not have to sleep on the streets and would have temporary accommodation provided when they are released from prison. That is a new benefit that we could create; it falls completely within devolved competence, as justice and housing are within devolved competence.

Right now, if ministers identified that that was a problem in Scotland, they could use their budgets—there is about £75 million in the communities portfolio budget for this year—to design and deliver an ad hoc scheme of assistance, such as a housing first scheme, to prevent prisoners who are being released from jail from sleeping rough, and there would be absolutely no parliamentary scrutiny of that. It could all be done by ministers using their spending powers. The only scrutiny that members would have would be our scrutiny of the annual budget process, when we can decide whether we want to give £75 million to this portfolio or whether we think that it would be better assigned to some other portfolio in some other way.

Far from designing a scheme that reduces parliamentary scrutiny, I have tried to design one that increases parliamentary scrutiny. At the moment, these things could happen without any parliamentary scrutiny at all.

Pauline McNeill: That is an interesting example. Would it be possible to put into the bill that the creation of new benefits should be done by primary legislation rather than regulation?

Adam Tomkins: That is an interesting question. Given the range of strong exceptions that have been put to the scheme that I have proposed, the sensible thing to do at this point is for me to withdraw amendment 119 and for us to pause and, in advance of stage 3, think about whether there is a more satisfactory way of ensuring that the bill reflects the reality of the power in section 28 of the Scotland Act 2016, which is the power to create new benefits, as well as the power to top up and create new benefits.

I do not propose to move any of my other amendments in this group, apart from one. I will move amendment 63. It alters—it increases or enlarges—the definition of the Scottish social security system in section 7 of the bill, to ensure that any future enactment, or primary legislation, that contains provisions exercising the power provided for in section 28 of the Scotland Act 2016 to create new benefits, falls within the definition of the Scottish social security system, and that any future use by this or any other Government of that power through primary legislation will therefore be captured by the principles and the charter. Amendment 63 does not seek to delegate any parliamentary or legislative power to ministers; it is simply a tidying-up exercise that will ensure that the definition of "Scottish social security system" complies with what the Smith commission intended, and with what the Scotland Act 2016 enacts. I will move amendment 63 when we come to it, convener, but I will not move the others in this group.

Amendment 119, by agreement, withdrawn.

Amendment 63 moved—[Adam Tomkins].

The Convener: The question is, that amendment 63 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Balfour, Jeremy (Lothian) (Con)
Griffin, Mark (Central Scotland) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

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

Abstentions

McNeill, Pauline (Glasgow) (Lab)

The Convener: The result of the division is: For 3, Against, 5, Abstentions 1.

Amendment 63 disagreed to.

The Convener: I am conscious of time, so, as we are about to move to a new group, we will take a comfort break. Members should be back at 10:36 at the latest.

10:29

Meeting suspended.

10:36

On resuming—

The Convener: The next group is on the definition of "Scottish social security system". Amendment 120, in the name of Mark Griffin, is the only amendment in the group.

Mark Griffin: I will be brief. The definition of "Scottish social security system" in the bill is currently too narrow and fails to take account of other schemes to support low-income households that are already devolved. The amendments to automate benefits and to address the take-up of assistance and income maximisation that we agreed to last week largely rely on the existing definition. Widening the definition would give additional weight to the ambition in the bill. Amendment 120 would ensure that the same principles and safeguards that are afforded to devolved centralised social security are extended to devolved locally administered schemes. I ask members to support amendment 120.

I move amendment 120.

Ruth Maguire: I have concerns about amendment 120. Principally, it would bring in things that would not be delivered by the social security agency. Free school meals, clothing grants, discretionary housing payments and the council tax reduction are all delivered by local authorities. What consultation with local authorities has the member carried out to understand the implications of applying the principles and the charter, for example to the delivery of free school meals and clothing grants? What redress would people have if they felt that the local authority had not delivered those grants properly? That is another key question.

Jeane Freeman: Amendment 120, in the name of Mark Griffin, extends the definition of "Scottish social security system" to cover matters over which Scottish ministers have no direct control, such as the delivery of free school meals and clothing grants, which are the responsibility of local authorities. The amendment also makes other unrelated matters subject to the charter, but fails to follow that through and to consider the implications for charter redress.

I do not support the amendment, which would put in place a perverse system of accountabilities, in which people would be accountable for the delivery of certain things that they have no hand in delivering, yet the people who deliver those things would not be accountable for that. The amendment would create additional confusion; in effect, it would provide for apparent accountability, but, in practice, that would be false. Logically, if the amendment were supported and ministers were to be held accountable for those services, it would be wise for ministers to seriously consider assuming responsibility for the direct delivery of some of them. The consequences of that for how our local authorities might feel, as well as for the local nature of such services, are such that I am sure that Mr Griffin would not wish us to pursue that approach.

There are a number of questions with regard to how an individual who believed that they had not received the correct support or assistance from a local authority, or not received it in the correct manner, would achieve meaningful redress. Therefore, I urge committee members not to support the amendment.

Mark Griffin: I take on board the points that have been made and I will not press amendment 120. We will seek to achieve the ambition in the amendment, which is to link some of the positive changes that we have already made with regard to the take-up of benefits, income maximisation and automation of assistance, in ways that are more likely to gather the support of committee members. We will also address the point about consultation that Ruth Maguire raised.

Amendment 120, by agreement, withdrawn.

Section 7 agreed to.

After section 7

The Convener: The next group is on the Scottish social security agency. Amendment 149, in the name of Pauline McNeill, is grouped with amendment 151.

Pauline McNeill: These are probing amendments; I will talk about why I lodged them.

The primary concept behind amendment 149 is to ensure that in carrying out their functions, ministers have regard to the social security principles. Some of the organisations that gave evidence to the committee are concerned that the current UK system does not treat people with dignity and respect. Those things are enshrined in the charter and will be primary themes of the new

social security agency that will be created under the Scotland Act 2016 and the bill.

Amendments 149 and 151 are designed to ensure that the principles in the bill will be applied and that ministers will be held to account if they are not upheld. Ministers would have a clear duty that they must have regard to all the principles and the charter when framing any regulations or guidance overseeing the operation of the new Scottish social security agency. That would give greater accountability to ensure a rights-based culture. I suppose that it is a belt-and-braces approach.

I am aware that the minister will probably draw attention to a letter that she issued to me—I do not know how widely it was circulated—in which she suggested that the wording is perhaps not designed to do that. I am interested to hear what the minister will say. She might take the view that what I propose is covered by other amendments or by provisions that are already in the bill.

I move amendment 149.

Jeane Freeman: As Ms McNeill anticipated, the Scottish Government opposes the amendments, the rationale being that they are unnecessary.

As the committee heard last week in relation to amendment 60, in the name of Jeremy Balfour, duties that the bill places on ministers are automatically and legally placed on the agency. Nothing further needs to be said in the bill; its silence on the agency is deliberate and correct.

Agreeing to the amendments would have unintended consequences, because they make provision for the agency to carry out all functions related to social security that ministers may carry out under the legislation. They would give the agency the power to carry out various functions that would not be appropriate for an agency to undertake, such as the ability to make subordinate legislation, which is one of ministers' functions under the bill.

10:45

If the concern behind the amendments is that ministers might create an unaccountable body to deliver social security, the committee having agreed to Mr Adam's amendment 77 last week that

"the delivery of social security is a public service"

is assurance enough in that regard.

We oppose the amendments. They are unnecessary and would have unwelcome consequences. I urge Ms McNeill not to press them.

Pauline McNeill: In view of the minister's comments, I am persuaded that the amendments are not required. All that I want to achieve is supported in other aspects of the bill.

Amendment 149, by agreement, withdrawn.

Before section 8

The Convener: The next group is on residence conditions. Amendment 64, in the name of Jeremy Balfour, is grouped with amendments 65 and 66, 70 to 73, 153A and 76.

Jeremy Balfour: What surprised me most about the bill when it was introduced last summer was that it had no definition of residency. It gave no indication about what an individual would have to do to get a benefit, where they would have to live and how long they would have to have lived there for, or anything like that. The bill is completely blank in that regard. Others will have greater knowledge than I, but it seems that not containing such a definition in a bill of this type is unique. I have spoken to many organisations and charities and they, too, were bemused by the lack of such a definition.

In amendment 64, I seek to add fairly standard residence conditions that can be found in other legislation. The conditions absolutely clarify at the basic level what has to be done and how long a person has to have lived in Scotland in order to receive a benefit.

I understand that the Government intends to have a residence condition for each of the benefits. That contradicts what it is trying to do in this legislation—that is, to make how to claim benefits understandable and open.

If we are to have slightly different residence conditions for each of the benefits—and any benefits that might come in future years—how will people know how to apply? Would that put people off applying? If there are different rules and a person is not successful in getting one benefit, will they think that, because they failed to meet the residence condition for that benefit, they should not apply for another one?

I accept the Government's perspective that, for some benefits, amendment 64 would need to be tweaked. At this stage, my intention would be to withdraw my amendments in the hope that I can work with the Government to come up with a general residence condition, with the proviso that any condition that a person must meet in order to get a benefit can be altered only by regulations laid by ministers.

I genuinely consider that we need residence conditions at the heart of the bill, so that people know how to apply and what benefits they can apply for. However, I accept that amendment 64

would not quite achieve what I want it to achieve, and I hope that the Government, or other Opposition parties, will work with me in that regard.

At this stage, I am interested in hearing the Government's view on my position.

I move amendment 64.

George Adam: Jeremy Balfour has brought up the issue of residency at every opportunity. He is the only member to have brought it up. I do not deny that it is an important issue, but rather than dealing with it in primary legislation, it might give us more flexibility if we had the ability to deal with it in regulations. That way, we could make changes when appropriate. I think that the way in which amendment 64 is framed will make things more complicated, although I accept that Mr Balfour has said that he wants to work with others to make his proposal work. If we go down the route that he suggests, we must get it right. I reiterate that residency has not been a major issue in the debate.

Pauline McNeill: I think that Jeremy Balfour has brought an important issue to the committee's attention. I agree that the wording of any residency provision could be critical to the operation of the bill as enacted.

I want to be clear about what it is that Mr Balfour is trying to capture. The term "residency" has a specific legal meaning for most pieces of legislation; I think that three years is the usual period. There might be some confusion if Mr Balfour continues to use the term, depending on what it is that he is trying to achieve. It is perfectly legitimate for people to move their permanent address from England to Scotland. Someone who does so might be eligible for the 11 new benefits, and the rules on that need to be clear.

Is that the situation that you are trying to address, Mr Balfour? What happens at the moment under the UK system? If someone moves from Birmingham to Glasgow, what do they have to show to the UK agency to prove that they have moved? I understand that the situation will be different once the bill is passed, because the benefits will be different, but why would it not be a case of following the existing process?

Alison Johnstone: I would be grateful if Mr Balfour could elaborate on the timescale that he presents—

"not less than 104 weeks out of ... 156 weeks".

Is that based on some form of consultation or on Westminster legislation? I would be interested to know where those figures came from.

Jeane Freeman: I am grateful to Mr Balfour for indicating that he does not intend to press amendment 64 or to move his other amendments in the group. Amendment 64 would create an absolute requirement that a person must have been present in Scotland for a period of two out of the past three years to qualify for all the forms of assistance that are outlined in chapter 2 of the bill. That blanket requirement is incorrectly applied to Scotland rather than to the wider UK.

Our legislative approach to residency reflects our general commitment to minimising complexity. The intention is to set out the residency conditions for each form of assistance in regulations. There are good reasons for that approach: it reduces the scope for confusion and will allow the full eligibility criteria for each benefit to be set out in one place. It is also sensible, because residency and presence criteria might differ for different types of assistance. For example, disability benefits might include temporary absence and presence conditions that are not relevant in the case of other devolved benefits, such as the best start grant. Therefore, a single set of criteria might be unworkable.

Although I am always content to discuss with members how an issue that they are attempting to address might be accommodated in primary legislation, in this case I think that finding a general clause that is deliverable in regulations that, of necessity, will vary from benefit to benefit will be a difficult ask. I am perfectly happy to look into seeing whether it can be done but I think that it will be a very difficult ask indeed, not least because, benefit by benefit, we also have to take account of residency requirements in other matters, not least in relation to European Union nationals.

I am grateful that Mr Balfour is not pressing his amendments. I am happy to continue discussion with him on whether what he wishes is something that the Government could support. However, I feel obliged to say that I think that finding a form of words for a general condition in primary legislation will be difficult. In addition, depending on how such a provision was worded, it is possible that it could not be amended by regulation—as is currently the case with amendment 65—so we would be boxing ourselves into a very tight corner indeed. However, I am happy to look into that.

Jeremy Balfour: I am conscious of the time so I will be brief. To answer Alison Johnstone's question, the timescales are taken from residency clauses in other bits of legislation. I suppose that, in the most extreme case, if we do not have a definition of residency, anyone could apply for Scottish benefits. We have to have some understanding that the benefits are for people who live in Scotland and reside in Scotland. I am trying to get at least the basic point clear that if I live in

Cornwall, for example, I cannot suddenly start applying for Scottish benefits.

That is my concern about the bill as it stands. I accept that there will be regulations but I still think that it is important at least to attempt to have a definition of what it means to be able to get a Scottish benefit in terms of residency. I will try to work with the minister and others on that, but at this stage, I withdraw amendment 64 and I intend not to move amendments 65, 66, 70 to 73, 153A and 76.

Amendment 64, by agreement, withdrawn.

Section 8—Duty to give assistance

The Convener: Amendments 121 and 122, in the name of Adam Tomkins, have already been debated with amendment 119. I ask Mr Tomkins to move or not move the amendments.

Amendments 121 and 122 not moved.

Section 8 agreed to.

Section 9—Meaning of "determination of entitlement"

The Convener: The next group is on determination by the Supreme Court. Amendment 19, in the name of the minister, is the only amendment in the group.

Jeane Freeman: I will be brief. Amendment 19 is a technical adjustment to make clear on the face of the bill that it is possible for an appeal to end with a decision of the UK Supreme Court.

I move amendment 19.

Amendment 19 agreed to.

Section 9, as amended, agreed to.

Section 10 agreed to.

Section 11—Carer's assistance

The Convener: The next group is on more than one cared-for person. Amendment 173, in the name of Alison Johnstone, is grouped with amendments 174 to 181 and 183.

Alison Johnstone: Since lodging the amendments, I have discovered that in the lawyers' world, as Ms Freeman pointed out earlier, "an individual" can be more than one person. Prior to lodging the amendments, I was of the view—as I am sure that many colleagues are—that an individual was indeed only one person. If only I could be more than one person when it comes to voting. [*Laughter*.] Alas, it seems that that is not the case. Having now acquainted myself with section 22 of the Interpretation and Legislative Reform (Scotland) Act 2010, I will not press amendment 173 and I will not move amendments 174, 175, 177 to 180 and 183. I would like further discussion about amendments 176 and 181.

11:00

During stage 1, many groups representing carers, including Carers Scotland, Carers Trust Scotland and the National Carers Organisation, gave evidence on carers who provide care for more than one person. The issue was also raised by the Health and Social Care Alliance Scotland. The current carers allowance can be claimed only in respect of one person, which means that someone who cares for more than one person is not recognised for the additional care that they provide.

People with multiple caring roles are significantly less likely to be able to take up paid work and they incur extra costs in looking after more than one person. Furthermore, under the 35-hour minimum care requirement, if you provide 20 hours of care for one person and 15 hours for another, or another arrangement that might add up to even more than the 35-hour requirement, that is disregarded if it is not care for one person. People who need support will miss out on it because the hours requirement recognises only one cared-for person.

Rather than being a deliberate attempt to not recognise additional caring responsibility, those are perhaps natural outcomes of the fact that carers allowance is officially an income replacement benefit. Nonetheless, by introducing carers assistance we are going back to the drawing board and we can build in recognition of the fact that people who care for more than one person require additional support.

Research from the Scottish Parliament information centre suggests that, in 2018-19, around 15 per cent of carers allowance recipients in Scotland will be caring for more than one person. That represents around 12,000 people who provide extra care but who do not receive any recognition for it.

I appreciate that the Government has already recognised the issue, having pledged to pay a supplement to carers who are caring for more than one disabled child. I am sure that we all welcome that. However, we need to go further. Amendments 176 and 181 take us in that direction. Amendment 176 would ensure that any regulations setting an hours requirement would need to take into account hours spent caring for a second person or more people. Amendment 181 is intended to make it clear that higher or additional payments can be made to people with additional caring responsibilities.

I appreciate that no rules have yet been decided on eligibility or value for carers assistance. The

details of how carers assistance will work will be laid out in regulation, as is right. I do not want to pre-empt any consultation process. However, it is such an important issue and has been raised so many times by the relevant groups that we should make it absolutely clear now that the regulations can be drafted to reflect a situation in which a carer provides care for more than one person and to ensure that when carers assistance comes to be set up, the issue that has been raised by me and many carers groups and individuals is given due consideration.

I know that the minister shares the broad intention behind amendments 176 and 181. I am willing to listen to any concerns that she might have around the wording and any suggestion that she may make on working together before stage 3 to ensure that the issue is addressed.

I move amendment 173.

Ruth Maguire: My understanding is that the bill allows for all the flexibilities that Alison Johnstone is looking for in relation to caring for more than one person. I hope that Alison Johnstone or the minister will be able to clarify that. Regulations on carers assistance will come before the committee; when they do, it will be important that we consider the whole package that will be offered to carers as well as gathering more evidence. We have had information from carers organisations, but it would be good to take evidence in the round at that point.

Jeane Freeman: I am grateful to Ms Johnstone for not pressing amendment 173 and not moving her other amendments in the group. We have had some interesting insights into the legal mind and world this morning.

I turn to amendment 176, which is a substantive amendment. As Ms Johnstone said, it would put a requirement on the Government to base any calculation of eligible hours for carers assistance on the total number of hours that are spent caring for multiple people.

I fully appreciate the point that Ms Johnstone makes, and the fact that many of Scotland's carers are splitting their hours of care between more than one person and might be missing out on support despite having significant caring responsibilities. I am also sympathetic to the principle that we should recognise a wider range of caring situations and ensure that we are providing support to those who need it. I want to ensure that we fully support carers, as I know Ms Johnstone does. She has always been an effective champion for carers; indeed, she persuaded the Government to introduce a young carers allowance.

If assurance is being sought that the bill, as drafted, provides the powers for changes to be made in the number of hours of care required, for carers assistance to be varied based on the number of people who are being cared for, or for hours to be aggregated, I am happy to give Ms Johnstone and the committee that assurance. However, there are many potential improvements to be made to carers support, and I believe that we should make them together, through the development of and consultation on carers assistance regulations, which will be brought forward following the passage of the bill.

We have made clear our commitment to co-design those regulations with the relevant organisations and partners, and to allow for any proposed changes that are to be consulted on with the public to be considered by this committee. Importantly, we would also consult the carer benefit advisory group and the independent disability and carers benefits expert advisory group, as well as, of course, the future Scottish commission. I believe that that approach will ensure that changes to carers assistance are made in a robust and coherent way and that they take into account what the priorities should be.

I ask Ms Johnstone not to move amendment 176. I invite her instead to take part in the discussions with me as we develop carers assistance regulations. I have valued her opinion in the past and would very much welcome her advice again as we take forward this work.

The Convener: I invite Ms Johnstone to wind up and to press or withdraw amendment 173.

Alison Johnstone: I appreciate the minister's comments. In response to Ms Maguire, I agree that the bill allows such actions, but I am seeking a requirement on the Parliament and the Government.

I will reflect further on what the minister has said. I reserve the right to bring back an amendment at stage 3, but I seek leave to withdraw amendment 173 and I will not move my other amendments in the group.

Amendment 173, by agreement, withdrawn.

Section 11 agreed to.

Schedule 1

Amendments 174 to 178 not moved.

Amendment 65 not moved.

Amendments 179 to 181 not moved.

The Convener: We move to a new group, on the form of assistance. Amendment 20, in the name of the minister, is grouped with amendments 20, 20A, 20B, 20C, 21, 22, 22A, 22B, 22C, 23, 24, 24A, 24B, 24C, 25, 26, 26A, 26B, 26C, 27, 28, 28A, 28B, 28C, 29, 29A, 29B, 29C, 30, 31, 31A, 31B, 31C and 32.

Jeane Freeman: Our policy intention, which has been clear from the outset, is to ensure that an individual has the right to choose the form in which they receive assistance. We have never suggested that payment in forms other than money would be imposed. Provision for assistance in kind is already included in the bill to allow the Scottish ministers flexibility to explore options for other forms of assistance that might be offered as an alternative to money, where that is appropriate. However, in response to concerns raised by a number of stakeholders at stage 1, I have lodged amendments 20 to 32 to make the policy intent clear.

Amendments 20 to 32 set out that an individual must agree to receive payment of assistance in a form other than money. In addition, they make it clear that an individual has the right to withdraw agreement if they are receiving assistance in kind and revert to receiving money. The amendments also provide that ministers cannot make deductions from someone's assistance in order to recover an overpayment unless the individual either agrees to that or has refused to agree to a repayment plan unreasonably. That, too, gives legal expression to a policy commitment that the Government has made from the beginning, which is that we should always, in the first instance, try to agree a mutually acceptable repayment plan with an individual when there has been an overpayment that requires to be recovered.

I do not understand the point of Mr Griffin's amendments. They do not appear to change the legal effect of my amendments and do not represent good law making, so I cannot support them. In every case, his A amendments state that regulations must provide for assistance to be given in the form of money unless they do not. I do not see the point of that proposition. Obviously, if the regulations do not provide for assistance to be given in a form other than money, the assistance must be given in the form of money.

Mark Griffin's B amendments unnecessarily complicate the text. My amendments state that assistance can be given in a non-monetary form only if the individual has agreed to that. Mr Griffin's amendments add a further statement to say that, before agreeing to receive non-monetary assistance, the individual must first have been offered assistance in monetary form. I am not at all sure that, technically, Mr Griffin's B amendments address the right points in my amendments. More importantly, I do not understand why the offer of one form of assistance should be made before the offer of another. If we are asking someone to choose between money and other forms of assistance, we should present the person with both options at the same time so that they can choose between them. If the concern is that people will somehow be led into taking assistance in a non-monetary form without understanding that they have a choice, that indicates that there is a lack of understanding of the basic principle in Scots law that agreement requires an offer and acceptance.

I do not believe that Mr Griffin's amendments add anything in legal terms to my amendments or make them more deliverable, and I would urge the committee not to accept them.

I move amendment 20.

Mark Griffin: I will support the amendments in the name of the minister; my amendments are simply probing amendments that I will not move. They were lodged on the back of concerns among organisations such as the Child Poverty Action Group, RNIB Scotland, Citizens Advice Scotland and Inclusion Scotland that, as the minister said, people might be led to a particular course of action and agree to accept a non-monetary form of assistance.

The wording of the amendments suggests that, if an applicant were to be offered assistance in the form of money without any alternative, it would have to be made clear that they would have the right to accept that or not before there was any discussion about alternative payments. However, I accept the minister's reason for not accepting the amendments. We will discuss with her the best way of reflecting the ambition of the organisations that have relayed concerns to me.

The Convener: For procedural reasons, Mr Griffin, I must ask you to move amendment 20A.

Amendment 20A moved—[Mark Griffin].

11:15

Jeane Freeman: I thank Mr Griffin for indicating that he will withdraw amendment 20A. I think that the amendments in my name provide a robust position on which to move forward.

Amendment 20A, by agreement, withdrawn.

Amendments 20B and 20C not moved.

Amendment 20 agreed to.

The Convener: We now move to what might well be today's final group of amendments, which is on terminal illness. Amendment 182, in the name of Mark Griffin, is grouped with amendments 67 to 69, 189, 191 and 192.

Mark Griffin: We will support amendments 67 and 68, in the name of Jeremy Balfour, both of which are backed by MND Scotland and Marie Curie. However, we will not support amendment 69.

Because the definition of "terminally ill" that is used in the current system covers only the last six

months of life, far too many people who are diagnosed with a terminal illness do not get the support that they need quickly enough or have to go through a face-to-face assessment. According to the outside evidence that I have received, clinicians simply do not feel confident enough or have the appropriate information to predict a disease trajectory for a range of conditions—particularly motor neurone disease—and, therefore, to predict whether a person is in the last six months of their life, allowing them to access the fast-tracked benefits. At present, only those with terminal cancer diagnoses receive benefits in that way. We feel that expanding the definition as proposed to ensure that the last two years of life are covered will allow more conditions such as MND, heart failure and chronic obstructive pulmonary disease to qualify.

Amendments 182, 189, 191 and 192, which complement the amendments in the name of Jeremy Balfour that we are supporting, seek to put in place the same special rules that exist in the current system for those qualifying for social security, including a fast-track process, a less intrusive assessment process, a higher rate and more flexible payments. At present, nothing in the bill allows for such a system, which is what these amendments seek to put in place, with the details to be set out in regulations.

That said, I appreciate the course of action that the minister is taking and acknowledge the lack of formal consultation that has been carried out on the issue. Although the issue was flagged up in the committee's stage 1 report as something that we felt had to be addressed, I would be happy to work with the Government when the consultation stage is concluded, as would other organisations such as MND Scotland and Marie Curie, which have been lobbying hard—and rightly so—to change the period specified in the definition of "terminally ill" from the current six months and to put something clearer in place to allow people with terminal diagnoses to benefit from the changes that we want to be made.

We want to avoid the situation that we currently see, whereby, on occasions, people die before they receive the benefits to which they are entitled. Given the terms of the minister's letter, I will not press amendment 182 and will not move the other amendments in my name.

I move amendment 182.

Jeremy Balfour: The bill is intended to protect the most vulnerable people in our society. There can be no one more vulnerable than someone who goes to hospital and is told that they have a terminal illness. All of us will have had friends or family who have gone through such an experience. It is a devastating experience and one that I am sure none of us hopes to go through ourselves.

I seek not to change any of the regulations or rules regarding what happens at the moment. All that I seek to do is extend the period that is specified in the definition of "terminally ill" from six months to two years. As I said, slightly sarcastically, during the evidence session, we are all terminally ill. At some point, we will have to make a judgment call as to where the number of years that we have left will go. I also welcome the letter that we received from the minister this morning, with regard to consulting with medical professionals and individuals. However, I will still move amendment 67, because I believe that we should indicate, at this stage, that having in the definition a period of six months to live is not appropriate for where we are today. I do not believe that it is, and I hope that the committee does not believe so either. Of course, we may come back and say that 24 months is not the right figure either.

Once we have taken evidence and had our consultation and discussion, I will be happy to work with all MSPs to find an appropriate figure. Clearly, things have moved on and do change with regard to illness and the way in which doctors can do their work and make predictions. At this stage, to say that we will move to a figure of two years would indicate where we want to go and would be helpful in giving greater security to people who have terminal illness hanging over them.

I appreciate that the system will be different in the future, but it is important to point out that there have been a number of cases in which people applied but did not get the money before they died. That seems to miss the whole point of having benefits, which is to help people who have illnesses or disabilities.

I turn briefly to amendment 69, in my name, which, perhaps unhelpfully, has been picked up by some MSPs who are not members of the committee and has not been read as a whole. I will not move the amendment today, but, at some point—in regulations or if the bill is passed—we should look again at the situation that it addresses. I say that because, thankfully, some people who receive a terminal illness diagnosis survive way beyond three years due to medicine, science or other reasons. As I have told the committee, when I sat as a tribunal member, someone came to us who had been on a high-rate mobility benefit for nearly 25 years, having gone through a terminal illness and survived it. He was living a very normal life thanks to the medication that he was on. That was not the individual's fault—nothing had changed in his circumstances—but the department had missed it.

The reasoning behind amendment 69 is in no way that we should intervene when someone is close to death but that we must make sure that benefits go in the right way to the right people. However, I accept that the wording is not exactly as it should be, so I will not move amendment 69.

It is important to note that we have received lobbying letters from various groups saying that six months is simply too short a period. I accept that, even in the third sector, there are different views on that time period. I will be happy to see other evidence in due course but, at the moment, I think that setting a period of 24 months is right. If we pass amendment 67, it will send a strong message to people that we understand what they are going through and that we want the benefits to help them while they are alive, not when they are gone.

The Convener: I am conscious of the time, but I will allow other members to contribute to the debate.

George Adam: I would like to know where clinicians stand on the issue. We have not heard that in the evidence that we have taken.

I know that Mr Balfour is not going to move amendment 69, but I still have concerns about that arbitrary way of looking at terminal illness. If, by the grace of God or by luck, someone has gone into remission after two years, I really do not think that we can start making judgments at that stage. People with long-term conditions can go into remission but can still end up with a terminal condition. I appreciate that Mr Balfour has said that he will not move the amendment, but I have serious concerns about that issue.

We need to get more information on the other amendments to ensure that we get everything right. If we do not, we could leave things open.

Ben Macpherson: I will be as succinct as possible.

I commend both members for lodging these amendments. The issues that are involved are extremely important—I have corresponded privately on them with Marie Curie and the Government.

I welcome Mark Griffin's decision not to press or move his amendments. The issue of fast tracking is fundamentally important, and I warmly welcome the fact that he wants to work with the Government to get the details right so that we can deliver fast tracking for those who need it. I urge the Government to engage as constructively as possible with Mark Griffin to get that process right.

On the general point around the definition of terminal illness, I appreciate Mr Balfour's decision not to move a number of amendments. I also urge him not to move his remaining amendments. The minister has written to clinicians, and we should gather that evidence to ensure that we get this absolutely right. I would hate Mr Balfour's proposal to fall at this stage, as that would mean that we would not have the chance to approach the issue at stage 3. We should all work together and get it right at stage 3.

Pauline McNeill: I will try to shorten what I was going to say. It is unfortunate that this group of amendments is going to be split by the need to finish up.

I am supportive of Jeremy Balfour's suggestion that we should indicate the general direction that we want to head in. This is a matter for the committee, but I would like to think that, once we have had the feedback from the clinicians, after the consultation that the Government is conducting, the committee could come to a consensus on the issue. However, having spoken to the organisations that have been mentioned, I am of the view that a six-month period is far too short.

I am pleased that Jeremy Balfour is not going to move amendment 69. I do not know what the answer is to the question that he raises. There will be cases in which people live way beyond expectations—we might just have to accept that. Nevertheless, I am absolutely against the idea that the agency should review the situation after three years. One way of solving the problem might be to include the notion of the agency having some discretion in the matter. However, at the moment, it is vital that we do not head in the direction of making that period of time an absolute obligation on the agency.

11:30

Alison Johnstone: I congratulate both Mark Griffin and Jeremy Balfour on lodging their amendments, because this is a hugely important issue. Given what I have heard today and the action that the minister is taking, I make it clear that I whole-heartedly agree that the period of six months is entirely inappropriate. We absolutely have to look at that. However, when Mr Balfour referred to the proposed period of two years, he said that it is a judgment call, and I wonder whether that is the best approach in this instance.

I can see clearly—I am sure that Mr Balfour does, too—the benefits of consulting a range of learned, experienced professionals on the matter to ensure that we get the right outcome. Taking time and discussing the matter with the Government may mean that he can bring back a better proposal—perhaps one in which there is no requirement around the issue of time. It may be that his amendments constrain and limit the options, which could be better explored with the affected groups.

I am finding the issue rather difficult. I would like the minister, when she speaks, to give absolute clarity and an assurance that any amendments that the Government lodges at stage 3 will be, at the very minimum, as strong as what Mr Balfour is suggesting. I am speaking to amendments 67 and 68; I whole-heartedly agree that amendment 69 should not be moved. Can the minister confirm that any amendments that the Government lodges at stage 3 will not weaken what Mr Balfour is suggesting but build on it?

Perhaps Mr Balfour could suggest whether he feels that it would be worth while to take advantage of the expertise that is on offer to bring back a strengthened proposal at stage 3, having worked with the Government.

Jeane Freeman: I welcome Mr Griffin's intention to withdraw amendment 182 and not move his other amendments in the group. I am grateful to him for that. I am happy to work with him to ensure that we have a clear proposition on fast tracking that, as a minimum, replicates the current special rules for how we fast track individuals who have a diagnosis of terminal illness.

I ask Mr Balfour not to move any of his amendments in the group. I am grateful to him for expressing his intention not to move amendment 69, which I think is the right course of action. As Ms McNeill said, it is a difficult question to work out exactly what, in all fairness, could be done when an individual has a diagnosis of terminal illness but, fortunately and happily, they live beyond the expectation of that diagnosis. I am unsure, indeed, whether anything should be done in those circumstances. It is a very difficult question for us to deal with.

I cannot give Ms Johnstone the assurance that she seeks, precisely because it is important to hear the views of our clinical, medical and health professionals. That is why I have written to them as I have. Not only are they charged with determining whether an illness is terminal; they will also be responsible in many respects for the deliverability of what we do, and it would be wrong—just as the proposals in Mr Balfour's amendments are wrong—for me or the committee to presume what that clinical community was likely to say on what is a complex and difficult matter in advance of its having had the opportunity to say it.

That is why, in my opinion, Mr Balfour's amendments should not be moved. If they are moved, I hope that the committee will oppose them so that we can have the benefit, collectively, of that community's professional and expert opinion to help us to reach a view on how we might define terminal illness, given the commitment that I have made about how we will take forward fast tracking. It is important to state that there is no consensus on the issue in the stakeholder community. That is an indication of the complexity of the matter and the difficulties around it.

Any definition of terminal illness that the agency works from must be one that the clinical and health community is comfortable with and believes is deliverable in a fair and consistent manner across the country. For that reason, I ask Mr Balfour not to move any of his amendments in the group but to work with us. I also ask the committee to work with us. I will, of course, share with the committee the opinion that I receive as a result of the consultation.

I am grateful to Mr Griffin for not pressing his amendment 182 and for not moving his other amendments in the group. If Mr Balfour moves his amendments, I ask the committee to oppose them.

Mark Griffin: I seek to withdraw amendment 182, given that it seems that all members of the committee and the Government agree that a change is desirable. I am more than happy to work with the Government, the professionals that the minister is consulting and the external stakeholders who provided evidence to the committee to reach a mutually agreed way forward.

Amendment 182, by agreement, withdrawn.

Amendment 21 moved—[Jeane Freeman]—and agreed to.

Amendment 183 not moved.

Schedule 1, as amended, agreed to.

Section 12 agreed to.

The Convener: I know that we have run on, but I thank you for your perseverance. We will continue after the recess, and a new marshalled list will be issued a week on Monday. I will look to see everyone well refreshed after the recess. Thank you very much for your attendance this morning.

Meeting closed at 11:36.

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