



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Social Security Committee

**Thursday 25 January 2018**

**Session 5**



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**SOCIAL SECURITY COMMITTEE**

**2<sup>nd</sup> 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:**

- Rosemary Agnew (Scottish Public Services Ombudsman)
- Jeane Freeman (Minister for Social Security)
- Niki Maclean (Office of the Scottish Public Services Ombudsman)
- Dr Jim McCormick (Disability and Carers Benefits Expert Advisory Group)
- Judith Paterson (Disability and Carers Benefits Expert Advisory Group)

**CLERK TO THE COMMITTEE**

Simon Watkins

**LOCATION**

The Mary Fairfax Somerville Room (CR2)



**Scottish Parliament**  
**Social Security Committee**

*Thursday 25 January 2018*

*[The Convener opened the meeting at 09:00]*

**Decision on Taking Business in  
Private**

**The Convener (Clare Adamson):** Good morning, everyone, and welcome to the second meeting in 2018 of the Social Security Committee. I remind everyone to turn mobile phones and other devices to silent, as they may disrupt the broadcasting.

Agenda item 1 is a decision on whether to take item 3 in private. Do members agree to do so?

**Members** *indicated agreement.*

**Social Security (Scotland) Bill:  
Stage 2**

09:00

**The Convener:** Under agenda item 2, we will take evidence on the Scottish Government's proposals for a Scottish social security commission. We welcome to the committee—particularly as they had relatively short notice—Dr Jim McCormick, who is chair of the disability and carers benefits expert advisory group, and Judith Paterson, who was chair of the workstream on scrutiny that was undertaken by that group. We are very glad to see them.

I have an introductory question. In your document, you recommend around five commissioners—the number is not definite—in the commission. Would that provide enough breadth of knowledge and expertise in the commission to fulfil the functions as required?

**Dr Jim McCormick (Disability and Carers Benefits Expert Advisory Group):** Good morning. We have the findings and recommendations of our workstream, which Judith Paterson chaired, and, as of last week, Scottish Government amendments and other amendments from members. The proposal to have a chair plus a maximum of four other commission members is in a Government amendment rather than a workstream conclusion. We did not take a view on the size of the commission, but I will offer one thought.

It strikes us that, when the commission is established, it will have different phases of work. For the duration of this parliamentary session, when the commission will be in set-up mode and taking regulations for assistance upstream with quite a lot of intense activity, that number might be too small. The flexibility of a core membership might be needed, but the ability to draw routinely on committee or sub-committee members in a way that perhaps would not be true in steady state further down the track when fewer regulations come in a typical parliamentary year might also be needed. We have an open mind on that. We are not sure that there is a simple answer, but the bill will require some clarity and precision on that point.

**Judith Paterson (Disability and Carers Benefits Expert Advisory Group):** It is useful that the amendments provide for the core membership of the commission plus a wider and more flexible membership. I expect that the commission would have to draw on that flexibility.

**Adam Tomkins (Glasgow) (Con):** Good morning. In general terms, do the Government

amendments satisfy your report's recommendations?

**Judith Paterson:** Our core advice was that an independent scrutiny body was needed to provide independent assurance about how policy is translated into workable legislation and to drive the learning and improvement that are needed in the system. On those primary functions, we see in the amendments that there will be a statutory scrutiny body that will provide scrutiny of regulations as well as oversight via charter principles. Those core functions are absolutely in line with what the group recommended.

On wider issues, some things are left more open. Decisions have still to be made and conversations still have to be had down the line about exactly what the body will end up looking like.

**Dr McCormick:** There is provision for ministers and the Parliament to request that the commission advise and report on various themes; there is also a general powers provision, which is quite important, because it allows an independent commission to use its discretion and report proactively, not just when requested but when it chooses to do so because it sees a particular reason to report.

Broadly, as far as the functions are concerned, we think that the recommendations in our report have been addressed fairly thoroughly. There are particular points that remain more open, as Judith Paterson said, but some of that is probably okay, in terms of how the commission will want to operate. I do not think that there are many red flags in the amendments that we have seen thus far.

**Adam Tomkins:** It is really important that the commission is independent, that its recommendations are made public and that ministers have to give reasons if they disagree with or want to depart from the commission's recommendations—I think that that is the view of the whole committee, given what we said in our stage 1 report on the Social Security (Scotland) Bill.

All that seems to be covered in the Government amendment, which is therefore to be welcomed. However, what would you say in response to the challenge that, when it comes to the making of substantive social security law in Scotland, the amendment will make an unelected commission more powerful than elected members of the Scottish Parliament?

**Judith Paterson:** I would highlight the very different role of the commission, compared with the role of the Parliament and the committee. The role of a commission is not to try to challenge Government policy but to provide assurance that

the policy has been arrived at in the way in which it should have been arrived at, that is, by considering the options and their impact on various groups, exploring the delivery challenges and so on—it is not about challenging the policy itself.

Of course, the Parliament can do all those things, but it can do much more: it can hold the Government to account on whether it has delivered the policies that it said it would deliver, and it can put forward its view on whether the policies are right or wrong. The roles are very separate.

For the approach to work, the commission must complement the work of the Parliament. We might want to talk about the enhanced scrutiny that comes with that. The proposed amendment leaves it rather open to the Parliament or the committee to decide what kind of enhanced scrutiny it wants to bring to bear, on a case-by-case basis. There is an argument to be made that a case-by-case approach, with the super-affirmative procedure not pinned down in the bill, could be a strength, but I think that there is an issue for the Parliament to consider about where it really gets to make a difference.

**Adam Tomkins:** Throughout our scrutiny of the bill, we have been thinking hard about the relationship between primary and secondary law-making powers. We must now also think about the relationship between the powers and functions of the Parliament and those of external advisers, such as the proposed commission, in making law. The commission will have a law-making function.

That leads me to my final question. The one thing in your report that jarred with me was the recommendation that, as well as having a role in advising on law making—a role that I fully support—the commission should have a role in scrutinising, investigating and almost enforcing complaints about the Scottish social security charter. That does not seem appropriate; playing an important role in the making of regulations is a very different function indeed from ensuring that those regulations are implemented properly, in accordance with the principles and the charter.

I will not support any Government amendment that seeks to blur those two functions. It is an important constitutional point on the separation of powers that those who are directly or indirectly involved in the law-making process should not be involved in policing, enforcing or investigating complaints about how those laws are then implemented.

I would like your response to that point.

**Dr McCormick:** We approached all those questions with a completely open mind. There

were different opinions to start with in our workstream on those and other points.

There is a distinction between complaints that take the pathway of individual redress—colleagues from the Scottish Public Services Ombudsman’s office will have a lot to say about that in the next panel—and what we envisage that the body might do. On oversight, the body will try to spot how the system performs as a whole against the principles in the bill and how those are expressed in the charter. We were not persuaded in the end that, when the existing functions of the SPSO, Audit Scotland and possibly others are added together, there was a distinctive and specialist spotlight on the performance of the system.

Clearly, those bodies will have particular lenses through which to view how the system is performing, such as value for money or complaints. We think, however, that someone has to perform the function of overseeing in an independent way the broad performance of what the system is there to do. We are not sure that other bodies can do that currently. While it is possible that their remits could be expanded, there is still a question to be answered.

We considered that it was consistent to bring together the roles in one body to make the function proportionate and viable. We concluded that the roles could sit together. Of course, that would have to be tested and that is why we proposed a review clause so that the way in which the functions were then exercised, and how the role sits with those of other bodies and the Parliament, could be considered.

**The Convener:** Do you have a supplementary question on that area, Mr Balfour?

**Jeremy Balfour (Lothian) (Con):** I want to follow up on both those comments.

On the first, having looked at the Government amendments and your report, there seems to be a slight blurring of the functions of the new independent commission, whatever name we want to give it, and the role of this committee. To return to the point made by Adam Tomkins, if the new commission will have the role of scrutinising and commenting on legislation, will it not become judge and jury if it also takes on the investigation role? Is not the role of oversight of how the system is working for this committee rather than for an independent commission?

My second question relates to Judith Paterson’s remarks on the flexibility of the super-affirmative procedure. I take a slightly differently view. As the amendments are drafted, the powers of the minister and the commission to decide how to deal with future regulations seem to be far greater than those of this committee. Can you unpack what the

right balance is among the executive, a commission and the Parliament? The Parliament will clearly have a triangular and important role. Putting my colours on the table, however, I think that too much power has gone to two of the three bodies.

I am interested in your comments on that point.

**Judith Paterson:** On enhanced scrutiny and the relative roles of the commission and the Parliament, it might be useful to say a bit about the sequencing of the scrutiny. My understanding is that the Government will publish its proposals to the commission, to Parliament and to the public at the same time, so that there can be concurrent scrutiny by the commission and Parliament, with access to the same information.

09:15

The commission will then provide a report that is made public and that sets out its views on matters such as impact and delivery challenges and options, and on human rights and equalities. When that report is laid, there is another intervention point for Parliament—and for this committee—to have access to that thinking. The next stage is that regulations will be laid by Government at the same time as its response to the commission’s report. It will be quite important for Parliament to consider the timing of that, which Jeremy Balfour is right to say is not within the control of either Parliament or the committee. Neither is it within the control of the commission; the Government controls it. The question is then whether sufficient time and space are provided for Parliament to have access to full information and to give full scrutiny to the provisions. Therefore the sequencing and timing might be critical there. Culture and practice might make all the difference in that respect.

**Jeremy Balfour:** On a practical level, do you see a time at which members of the public, third parties, charities or interested groups might have the opportunity to give their evidence? In that sequence, do you see such evidence going predominantly to the commission rather than to the Parliament?

**Judith Paterson:** The commission would want to decide, case by case, whether it felt that it was necessary to go out and seek such views and to have such public consultation. There would be nothing to prevent people from submitting their views anyway, because the proposals are well known. However, some regulations will be complex and controversial, while others will be very straightforward.

With regard to what Parliament might do, there would be potential for confusion if it were also to choose to have a consultation process that would

run at the same time. There would be a need for bodies to work together to make sure that external parties knew exactly how their contributions might be most effective.

**Pauline McNeill (Glasgow) (Lab):** What Judith Paterson has just been talking about is the nub of the matter. Such confusion needs to be cleared up forthwith, and I agree that timing is critical. I think that we can assume that Parliament would want to consult, so that needs to be resolved. Have you had any discussions with ministers about the timing?

I am trying to get an understanding of the issue. I suppose that the commission's role is to provide expertise on regulations; that aspect is informative for the public, for ministers and for the Parliament. Once the Parliament has given its views, at what stage do you envisage that it would be able to use that expert advice and get the regulations amended accordingly? Should the process not be set out a bit more clearly, given that you have said that there might be confusion over it?

**Judith Paterson:** We have not had discussions with ministers on that point. As a workstream, when we consulted with people, including the Delegated Powers and Law Reform Committee, we simply took a view that there was no reason that the scrutiny that the commission performed could not sit alongside a super-affirmative process. However, we did not take a view on what that process should be, merely that the sequencing and timing were important. We have not gone any further than that. However, Ms McNeill is right to identify that how the bodies work together is very important.

**Pauline McNeill:** I have a few other questions on different areas.

**The Convener:** Other members want to ask questions, so if your questions are on different areas we will move on to them later. Mark Griffin has a supplementary question on this area.

**Mark Griffin (Central Scotland) (Lab):** We got to this point because there was a concern within and outwith the committee that the balance in favour of secondary legislation could lead to a situation in which the committee could well agree with 99 per cent of what the Government introduced and take issue with just a small aspect of it, which could lead to the whole set of regulations being rejected. It comes down to sequencing and timing. What role do you see for the committee and Parliament in interacting with the work that you do? Will you seek the committee's views in advance of preparing a report or is the commission's role purely to advise the committee rather than to seek its views?

**Dr McCormick:** Ministers will give their own version of this. Our understanding is that

Government wishes to draft a set of amendments that would allow for the committee and, indeed, the whole Parliament to make its own choices case by case, depending on the type of regulations.

On where you choose to be involved and to what degree, it is quite important that the committee asks searching questions to get assurance. The ideal would be that you and others in Parliament get expert input and assurance—or not, as the case may be, depending on the regulations—in a timely way that allows you to perform the function that you want to perform and not run out of time or get a commission report too late, or find that regulations are laid and you have to take or leave them. The ideal would be to have some space after the commission has reported on regulations and the Government's response to the report is known, but before the regulations are laid. It would give us a position that we do not have with Westminster and the other advisory bodies.

It is important that, as far as possible, that space is created and preserved so that the roles of the committee, of parliamentarians and of the commission can be genuinely complementary and can clear up concerns about confusion and duplication. It should all be about assuring ministers and Parliament, and challenging them when appropriate. It should not be about trying to usurp, duplicate or make things more complex than they already will be.

**Judith Paterson:** Paragraph 7 of amendment 55 seeks to allow ministers to lay regulations without responding to the commission's report. I just wanted to draw attention to that as something that the committee might want to explore with ministers when talking about how that power might be used. The provision looks like it will allow Government to do something when it thinks that it is urgent and needs to be expedited. The committee might want to explore where it sits with regards to that kind of urgency provision.

**Ben Macpherson (Edinburgh Northern and Leith) (SNP):** I would like to clarify what has been said about expert input, giving assurance and being complementary. I understand that this committee and Parliament will be able to ask the commission to look into things. Is that the case?

**Judith Paterson:** Yes. There is explicit provision for ministers and Parliament to request advice from the commission.

**Ben Macpherson:** May I ask another question, convener?

**The Convener:** Is it on this area?

**Ben Macpherson:** It is slightly aside from it.



**The Convener:** I would rather come back to you when we move on to other areas.

**Alison Johnstone (Lothian) (Green):** Judith Paterson touched on this area. Last year, controversial changes were made to the personal independence payment to undo the impact of a tribunal decision, without consultation with the United Kingdom Social Security Advisory Committee. The Scottish Parliament information centre briefing that we received for this meeting says:

“draft regulations could be laid before the Commission had reported”.

Given that, could the commission here be bypassed in a similar way?

**Judith Paterson:** Our workstream report recommended that all regulations should be put to the commission and that there should not be any exceptions to that, as there are with the UK SSAC. The UK Government has an urgency provision to lay regulations without putting them to the SSAC. The amendment would not allow that to happen here. If there were further changes to PIP, the Scottish Government would have to put the proposals to the commission before the regulations were laid—it could not happen the other way round. In Scotland, the proposals would come to the commission and the commission would report, although it might not have time to report before the regulations were laid—that is the urgency that is built into the amendment. It is not the same—not as bad, if you like—as the UK provision. Things could not happen in the way that you described.

**Dr McCormick:** It is worth reflecting that, in the case that was mentioned concerning PIP and the judge’s decision on that, the UK Government’s decision not to consult on the changes because it had previously consulted some years earlier on the primary legislation was not taken to be a very strong argument. That weakness was one of the main reasons that led to the judgment.

Alison Johnstone has identified a significant point. Yes, there should be ample scope for thorough and rigorous scrutiny during primary legislation debate, but that does not remove the need for scrutiny of—and, where appropriate, thorough consultation on—at least some of the regulations. There may also be times when guidance is so significant that it needs to be given dedicated scrutiny.

We think that the amendments broadly allow for us to be in a better place in Scotland, but it is definitely worth the committee asking the Government whether it sees there being any exceptions. As we understand it, the only exceptions are when secondary legislation is being consolidated—so it has already been round

the loop, if you like—but it would be worth asking ministers more about that point.

**Alison Johnstone:** On that question of exceptions, regulations relating to determination of entitlement or the creation of new criminal offences and other issues appear not to be open to scrutiny by the commission. Do you have any reservations about those exceptions?

**Judith Paterson:** I will have to get back to you on that point—I am not very clear about whether that is the case. I thought that all social security regulations would be subject to scrutiny by the commission, but I will have a look into that.

**Alison Johnstone:** Thank you.

**George Adam (Paisley) (SNP):** Good morning. I want to follow on from something that Ben Macpherson mentioned, which gets to the nub of the matter. I do not buy into the idea that the amendments will make the commission or ministers more powerful than the Parliament—I am not buying that malarkey. I see the whole idea as being that the committee could ask the commission to carry out work on Parliament’s behalf, as Mr Macpherson said. Does that not add a further level of scrutiny, because, if the committee is being proactive, Parliament would, in effect, be guiding the commission?

09:30

**Dr McCormick:** The provision to which you refer would, in effect, establish a clearer relationship with the Parliament and ministers than there is at Westminster. That would give more assurance about Parliament’s legitimate role. It is important that Parliament should feel able to draw upon advice at the right time. The nature of social security is complex. There are interactions with the UK, obviously. Broadly, activity will need to start at speed, so the commission ought to be a form of expert assurance that can be drawn upon as appropriate.

A point that Judith Paterson made a lot in the workstream is that, although getting the bill and amendments right is really important, what will really make the system work is getting the culture and relationships right. That will be down to whoever is on the commission and how they, alongside Government and Parliament, interpret the relationships. As SSAC members, we have found that being able to be challenging but also have a constructive relationship with different bodies is tricky, but that is the space that we should aim for with that provision.

**Pauline McNeill:** So ministers should be able to seek but not require advice. However, according to the note that we have, the proposals would

allow ministers to direct the commission. Will you speak to that?

**Judith Paterson:** The commission's functions include a provision that ministers and Parliament—in, I think, the same terms—can request that the commission should report on any matter. For people to be able to trust in the commission, it is absolutely critical that it is independent. It needs to be independent to do its job and you are right to highlight the ability of ministers and Parliament to request advice.

Would such a request have to be complied with or would the commission be able to say no? As Jim McCormick said, you probably do not need to pin that down in legislation. It is about culture. Because we are setting the system up from scratch and building relationships from scratch in Scotland, we have a chance to set the tone and get the culture right from the beginning. Doing that would ensure that the commission is able to give its expert input to Parliament and ministers in the most helpful way and not get tugged in unhelpful directions—which could happen, because the bill is written fairly openly.

**Pauline McNeill:** So you would be concerned if the bill's provisions were designed to direct the commission to undertake work, because that would remove its independence.

**Judith Paterson:** It would depend. The commission's primary duties are to scrutinise the legislative proposals—that is first and foremost—and to provide strategic oversight of the system. With a small commission and proportionate resource, how much will be left over to provide advice? We will not know until we are there. Therefore, I would be concerned if there were requests that the commission could not comply with because of resource or should not comply with because they would compromise its independence.

**Ben Macpherson:** I want to get back to the commission's scrutinising function. How would the new scrutiny body ensure that the Scottish Government is independently held to account for delivering on the commitment within the principles and, more widely, for approaching social security differently from the way in which it is currently delivered, and that the system fulfils people's human rights by treating them with dignity and respect?

**Dr McCormick:** A great deal of how that question gets answered lies in what the charter looks like, how well it expresses the principles of the bill, and how clearly understood and communicated the charter is. In reality, we want a system, an agency and a charter that do a consistently good job of ensuring that decisions are right first time upstream, and that when things

go wrong—and things will go wrong in every bit of the system, because that is just the nature of the system—there is local and rapid resolution, and that we minimise unnecessary escalations by trying to locate responsibility for resolving things at the right point in the system.

One would imagine that there would be a clear route to requesting redeterminations, to appeals, to the tribunals service, and separately to individual complaints, and we will hear more about that in the next evidence session. As far as possible, when people have problems, either about their treatment procedurally or about mistakes being made with the outcome or the rate of payment, we want them to know quickly how those problems should be fixed and how they will be supported. There has been quite a lot of discussion of supporter roles associated with the bill. People should have recourse to more formal procedures where that is necessary and appropriate, and we should ensure that such procedures are done in a timely way. If we are to get that right in most cases, codifying and articulating that in the charter is the single biggest task that lies ahead of us.

**Ben Macpherson:** Absolutely, and that is a collective responsibility. It is important for us all to recognise the commission's role in assisting with delivery of the human rights requirements. Thank you for that input.

**Mark Griffin:** Should the commission have any role in overseeing guidance produced by the Government?

**Judith Paterson:** People told us that they thought that there should be a role in scrutinising guidance, because generally in the social security system—not just for the Scottish devolved benefits—more and more is left to discretion rather than to acts or regulations, and that discretion is governed by guidance. Sometimes that guidance can be just as important as the regulations themselves, so scrutiny is required to ensure that the guidance works as well as it should for people. You will have seen in the amendments that there is no formal role built in for guidance, but it seems to me that such a role is not precluded either, so that is something that the committee might want to keep an eye on as guidance emerges. If Government is not asking the commission to look at guidance, and the commission is not doing it of its own volition, or is unable to do it, the committee could use its powers to request advice on something in order to make that happen.

It is not something that you would need to build in as a primary function in legislation, but I think that the commission could play a useful and necessary role in that. All of that is predicated by the need for such oversight activity to be proportionate, because there is guidance on

absolutely everything, so it would need to be guidance of the kind of order that is, in a sense, substituting for regulations by driving the rules.

**The Convener:** As members have no further questions, I thank Dr McCormick and Judith Paterson for their attendance. If you could get back to the committee on the issues that Ms Johnstone raised, that would be helpful, and if you want to write to the committee with any further information, please feel free to do so.

I suspend the meeting while we change witnesses.

09:40

*Meeting suspended.*

09:41

*On resuming—*

**The Convener:** I welcome our next panel. We really appreciate you coming. Rosemary Agnew is the Scottish Public Services Ombudsman, and Niki Maclean is director and John Stevenson is head of improvement, engagement and standards at the SPSO.

To set the tone for the discussion, can you tell us what discussions you have had with the Scottish Government about handling complaints that relate to the charter and the broader decision-making standards in the Scottish social security system?

**Rosemary Agnew (Scottish Public Services Ombudsman):** Good morning, and thank you for inviting us.

We have had discussions about who handles complaints and what legislation is required to ensure that complaints are handled at the appropriate time and in the right way. We have also spoken to the Government about the wider issue of learning from complaints to bring about improvement and the role that complaints have in terms of scrutiny. If all we ever do is answer individual complaints, nothing much will ever change.

The Social Security (Scotland) Bill is not just new legislation; it is fairly fundamental in the sense that it represents an opportunity to do something different in a different way. We have consistently made the point that, although legislation and standards are important, we need to keep sight of the person. That is important in the context of complaints, because we are talking about assisting individuals who are likely to be going through a stressful and vulnerable time and we need to keep the process as simple and straightforward as we can for them.

In our discussions with the Government, in considering the proposed changes, we have looked at whether there should be a complaints process in relation to rights. We have discussed the concept of oversight, because there are other issues that flow out of complaints. We learn many things, and consideration needs to be given to what we do with what we learn and with the information that we identify about systemic issues, because such information is likely to give an indication of how well the charter and the bill as enacted are working.

In that context, our discussions have included the issue of information sharing. We think that it is crucial that we can share information with the commission—I will pick up on why I think that that is so important later on. We also think that it is crucial that we can get access to Department for Work and Pensions information. We say that largely on the basis of our experience as reviewer for the Scottish welfare fund. Time is critical when it comes to assistance.

I am conscious that complex complaints come to us that can take a year to look at, not because anybody is doing anything wrong but because they are so complex. Complaints about assistance, such as reviews of the welfare fund, have to be done virtually in real time because somebody is depending on that money.

09:45

Information sharing, which is the other area that we have talked about, is also crucial in terms of complaints and oversight. There is one other thing that the committee might want to consider. We focused on information sharing between us, the Government, the DWP and the commission. However, when you consider the breadth of what the charter will look at in terms of rights, other organisations in the public sector are also likely to have information that tells you about how those rights are working in practice. The context in which information can be made available to look at systemic issues becomes very important.

That brings me to a point about the commission itself. There was discussion earlier about questions such as whether it should be able to look at complaints about the charter, whether it should be able to look at complaints about rights and whether it should have an oversight function. I think that, to an extent, the semantics are getting in the way here.

We can look at this from the perspective of a service user. If somebody who wants assistance applies for it but does not get what they have applied for, there is an appeal tribunal route in relation to the decision on their money. However, what happens if, in the process of that decision,

officers are busy? We all have bad days—what if officers are rude to a service user, or do not respond to correspondence, or do not take account of essential information because something went wrong in the post room?

Those are service issues and they will come to the SPSO. However, from the individual's perspective, they are unlikely to say, "You breached my right under the charter." They are likely to say, "I didn't get my money in time and it is because of a delay," for example. That is why the SPSO is important, because everything comes back to the charter. I completely agree with Jim McCormick. The wording of the charter is crucial because what flows from that are processes, procedures, timescales, and policies, which should embed the charter in the day-to-day delivery of assistance.

The average person should not need to know that they have a right to this or that. They have a right to a benefit and they have a right to a good service and they have a right to be treated as a human being, with respect and dignity. If those rights are embedded in how the service is delivered, that charter is met.

If the service is not delivered because of how those policies and procedures are implemented or even written, the SPSO is likely to pick up on that at an individual level. Almost by definition, if there is maladministration in the delivery of the service, there should be a way of translating that back over time to systemic issues or even personal issues about how individuals are treated. Used in that way, the charter almost becomes a set of service standards in relation to how we look at complaints. That is very much in keeping with the current complaints process anyway.

It may well be that a particular individual applies for a couple of different types of assistance and they get the money that they are entitled to but it is a long-drawn-out process—one would hope not, but I am thinking of a worst-case scenario. The complaint to us may well be, "I applied for this benefit and that assistance and, although ultimately I got what I was entitled to, the experience was appalling—it was awful."

We monitor those issues over time, as we do with complaints. We have found that well over half of our recommendations are about making service-based improvements. For a new function, service improvement is even more critical, because that tells us how well that service is being designed and bedded in.

As Jim McCormick said, it will not go perfectly from the start, but we must ensure that we have a way of picking that up quickly. What do we do then? I come back to the point about semantics getting in the way. There is a difference between

the oversight of the effectiveness of a charter and complaints about that charter. Complaints will predominantly be about service issues, but other groups, such as advocacy or third sector groups, will find through their stakeholders and users that there seem to be flaws in aspects of the charter. That is not so much about complaints as it is about concerns, issues and comments. It is important that the commission is able to take those matters and look at them in a more abstract and holistic way.

I will give you an example. We gather information from our complaints about health, and that intelligence is used by Health Improvement Scotland. We share the information so that there can be a holistic look at performance. That does not exist for social security so, in a way, we must create it. If we share our intelligence with the commission and it also has the powers to look at other concerns, that will give a very good basis for challenging—but, more important—improving the system and feeding back to this committee and to ministers. It will also give you a different lens through which to look at regulation. When you are considering new regulations—I will leave aside the debates about space and time—we could tell you the experiences that are being fed back to us and whether we think that the regulation will fix those issues.

By having an SPSO complaints process and a commission that has the ability to look at concerns and wider issues—which are not necessarily couched in terms of complaint—you will build a way of looking at the wider and the particular and the bridge between them. The feedback route will then be about the scrutiny and the development of the regulations and performance over time.

Issues might not emerge for six months, or possibly longer. My experience of having been in organisations when new regulation comes in is that you would probably be better with less detail than more detail, because as soon as there is specific detail on, for example, who to send a complaint to, you are stuck with that approach. However, if you gave an oversight function to the commission—we have such a function under our own act—you would provide the flexibility to look at the things that you do not expect, because you cannot foresee what the issues are likely to be.

The other fundamental point is that that approach will open up the scrutiny of the system to a wider number of stakeholders, so you would get different perspectives on the effectiveness of different things.

I will also pick up a point that Jim McCormick made about the charter. My understanding after speaking to the Government is that the charter will be co-produced. It will involve citizens who will use the service, which is a good way to go. However,

the scrutiny of it is the really important thing, because charters tend to be written in broad terms. That is great, and it is very good in terms of the principles, but if we do not reassure ourselves at every level that those principles have translated into somebody getting their assistance in their bank account when they need it, they are empty words.

It is good that service complaints come to the SPSO—I am not just saying that because I am the SPSO; I have a very good team around me and we are good at looking at these things. However, the fundamental thing, beyond that, is the ability to share intelligence that can be collected in a central place so that a holistic view can be taken and there can be effective feedback and reporting to Government and this committee.

**The Convener:** Thank you for the clarity that you have given us about individual complaints and the strategic oversight, which were the words that Dr McCormick used to describe the role of the commission in this regard. Have you had any discussion about how that feedback loop would work? Would it involve a relationship between you and the commission, you and the Government or a mixture of those relationships? Perhaps it is too early to have reached the conclusion about that.

**Rosemary Agnew:** I think that it is too early to say. I come back to the point about less detail probably being better. It is worth thinking about the legislation as being the enabler rather than the thing that instructs you to do things. The enabling aspect involves effective information sharing, the ability to raise issues at any point and the power of the commission to bring issues to this committee. The enabling framework is provided by the legislation and the important bit is the translation of the legislation through the detailed regulations and the charter.

I said that I was not going to comment on timescales, space and so on, but I will give a personal perspective. If we want regulation to be right, we have to give it enough time to be scrutinised properly. I have been lucky enough—I think that “lucky” is the right word—to come into working environments that are legislatively bound, which is to say that they operate within a framework. If the detail of the enabling framework is not properly thought through and considered by lots of different people—because it is important to get different people’s comments on the effectiveness of the framework—you end up with something that causes people to start developing workarounds, which makes things complicated for the person at the end point who is just saying, “Please can I have some money?”

**Adam Tomkins:** I would like to ask a preliminary legal question before going further. Given that the Scottish Government proposes to

set up the Scottish social security agency as something that sits within the Administration, do we need an amendment to the Scottish Public Services Ombudsman Act 2002 to give you the jurisdiction to investigate complaints in relation to the agency, or is that ability already there because it is part of the Government?

**Rosemary Agnew:** That ability is already there because it will be part of the Government. The amendment that is required relates not to our ability to consider complaints but to our ability to share information with the commission.

**Adam Tomkins:** So we do not need to add the agency to the list of authorities in schedule 2 to the act in order to give you jurisdiction to investigate complaints.

**Rosemary Agnew:** No.

**Niki Maclean (Office of the Scottish Public Services Ombudsman):** I believe that that would have to happen in order to enable us to consider complaints about the commission.

**Rosemary Agnew:** Yes, about the commission but not about the agency. I am sorry; I thought that the question was about the agency.

**Adam Tomkins:** It was about the agency, but the clarification is also helpful.

Clearly, your primary function is to investigate complaints about injustice or hardship arising out of maladministration. What do you do if you have a series of related complaints about related injustice or hardship arising out of related maladministration from the same agency or body?

**Rosemary Agnew:** I am not convinced of the wisdom of saying that I do not totally agree with something, but I do not totally agree that the assessment of complaints is our primary function. It is the one that everybody focuses on, because it is the one that gets the most attention, but we have an equal responsibility, through the complaints standards authority, for complaints handling, the standards for complaints handling and the performance of the authority.

10:00

I feel very strongly about that element of our work, which is one that we are developing further. We are improving our internal intelligence gathering, and where we find that the same issues come up with the same public body, we raise that directly with that public body. Where we find that there is the same issue across a number of public bodies, we can use that information to inform and report in a different way. For instance, we can use our reporting powers—an example of that is the report that was issued on informed consent.

I talked earlier about health complaints and Health Improvement Scotland. Sometimes we find specific things that we can share and, ultimately, I can lay a report before Parliament on pretty much any issue that I find through complaints. However, it is worth stressing that the best learning comes at the front line—

**Adam Tomkins:** Sorry to interrupt you but, in response to the convener's first question, you painted a picture of a three-way distinction between oversight, complaints and appeals that go to the tribunal. I am trying to understand exactly how bright the line is between a really good ombudsman, who looks at complaints in the round, holistically and in a joined-up way, and oversight. You seem to be saying that, because you have the ability to lay special reports—in other words, to bring any matter to the attention of Parliament at any time—and because you have much more flexibility than courts and tribunals do to roll complaints together, so that they are considered together rather than severally and in a kind of desiccated way, that is precisely the oversight that we need.

**Rosemary Agnew:** It is, and that is oversight of complaints. There may be things that are related specifically to the charter or to the operation of the bill once it is enacted.

I think that guidelines have been mentioned. We can raise guidelines. Some of it is a matter of judgment about whether we should do our own report and submit it to Parliament, because we think that there is a really significant issue. That may be one route that we take, and I would expect to consult a range of stakeholders about that.

It may be that we have information that we think is indicative of something but is not conclusive enough. Although we may find three complaints on the same subject within two months, the reality is that what reaches the ombudsman is a small proportion of what is really happening. Most complaints get resolved or addressed very early on so that, by the time a complaint reaches us, it may not be truly representative. We can choose to look into that further, and we would talk to the organisations concerned.

I do not think that there is a clear line at this point. It is a case of different types of oversight and deciding where it would be best to try to address the issues. If a complaint relates to a particular organisation, it is likely that we will continue to tackle it in the same way. We would tell the organisation that we have consistently found an issue and we would ask it how we can support it to get it right at the point of delivery. If we find something that might be indicative of the underlying charter rather than an individual organisation, we might need to report differently and share information with the commission,

because the commission will have a much wider remit in terms of what it can report to Parliament and in terms of its relationship with ministers.

**Adam Tomkins:** Let us be absolutely clear. Your evidence to us is that you already have the powers that you need to look at what Jim McCormick on the first panel called patterns of maladministration. I know that your work is driven by complaints but, if you received a series of complaints that revealed a pattern of injustice or hardship that was arising out of a pattern of maladministration by a particular agency—in this instance, the social security agency—you already have all the powers that you would need to draw that to the attention of the Scottish Parliament, ministers and others.

**Rosemary Agnew:** Yes, we do.

**Niki Maclean:** Can I add to that?

**Adam Tomkins:** Please do.

**Niki Maclean:** Rosemary has answered the question, but the important point to note is that, as she said, we are dependent on the complaints that people choose to bring. In the health sector, for example, certain types of complaints are far more emotive and far more likely to end up at our door. What we see is, therefore, potentially slightly skewed depending on how emotive the complaints are and what people choose to progress. As Rosemary says, it is the tip of the iceberg.

**Adam Tomkins:** Thank you.

**Rosemary Agnew:** I will raise one other point about our powers, picking up on Niki's point that we are reliant on the complaints that people bring. We are talking to the Government separately about some extension to our powers. That came about through a different context, as it is about own-initiative powers that are more consistent with the European ombudsman model. We may come across issues that we do not have specific complaints about, some of which it may be appropriate to take to the commission. Our ombudsman service would be greatly enhanced if we were able to pick those up as well, although I am not saying that in relation to the bill that we are discussing. At the moment, the answer is that, between us, we have the powers on particular complaints and authorities.

**Pauline McNeill:** Just to make it real for people, I note that you gave the example of a service issue whereby someone says, "I didn't get my money on time." You said, "The wording of the charter is crucial." I wrote that down when you said it, because I thought it might be a critical point. Let us follow that example through. If an individual repeatedly got payments late, would they have to rely on the charter in some way to bring a

complaint? I want to be clear about why you believe the charter is important.

**Rosemary Agnew:** In a way, the complainer should not even need to know that the charter is there. They should not have to refer to it. In the same way, when somebody makes a complaint to us about health, they do not say, "This hospital didn't comply with the National Institute for Health and Care Excellence guidelines"; they talk about their experience. The charter is key because it is, in essence, the framework within which I expect the agency to write its policies and procedures, and it is how it is going to deliver its service. The way in which the service is delivered is almost the translation of those rights and principles.

Let us say, for argument's sake, that the charter says, "You have a right to be treated with respect and dignity." Somebody who comes to us to complain might not say, "I wasn't treated with respect and dignity." They might say, "They wouldn't answer my phone calls." The charter is key because, from the perspective of scrutiny, we need to be able to see that it is embedded in how the service is delivered. If the service is delivered well, the charter will have been delivered.

There is another side to why the charter is key, which is about the general principles and the wider stakeholders, who will understand the issues that individuals or groups of individuals have been through. The main thing for me is to ensure that there is enough between us in terms of oversight and scrutiny that, if something is not working, we will be able to trace it back to the charter. It is almost like the genetic strand that runs through everything.

**Pauline McNeill:** Thank you. Finally, do you think that there will be resource implications if you take on additional complaints as a result of the creation of a new social security agency?

**Rosemary Agnew:** "Yes" is the short answer. Drawing on past experience and the experience that we have between us, I think that the resource implications will come down to a combination of two things, the first of which is the volume of complaints. To a large extent, we can do some analysis of that, because the complaints side is likely to be less prevalent than the appeals side. We are likely to see more people appealing about the amount that they have been awarded in assistance. There is probably a way in which we can look at national statistics to get a view of what the complaints position might look like and what that might translate into in terms of complaint investigation resources.

The other resource implication is for John Stevenson's team, and it concerns improvements, standards and engagement. If we find that something systemic is going wrong, as Niki

Macleon said, we will raise that directly, but we need the resource to do that. We are not talking about huge additional resources; we are talking about perhaps one or two people, but it would be wrong to say that there is no resource implication. My plea is that the resource be considered in terms of not just numbers of complaints but the value-adding work that tries to get it right first time for public bodies.

**The Convener:** There are no further questions from committee members. I thank the witnesses for their attendance at committee this morning. We look forward to hearing more from you as we go through the bill process.

**Rosemary Agnew:** We will be very happy to answer any supplementary questions that the committee might want to send to us.

**The Convener:** That is helpful. Thank you.

I suspend the meeting briefly for a changeover of witnesses.

10:12

*Meeting suspended.*

10:17

*On resuming—*

**The Convener:** We will now take evidence from Jeane Freeman, the Minister for Social Security. We also warmly welcome to the committee from the Scottish Government Chris Boyland, the legislation team leader, and Ann McVie, the deputy director of social security policy.

I understand that the minister wants to make an opening statement.

**The Minister for Social Security (Jeane Freeman):** I do. Good morning and thank you for the opportunity to be with the committee this morning.

I place on record my particular thanks to all those who are involved with and assist the short-life expert working group, which produced in a very short space of time a thorough report on the scrutiny of devolved social security arrangements. I know that the committee has spent some time looking at the report this morning.

With the benefit of the group's considerations and our own reflections, we have now moved on. Last Wednesday, the Scottish Government lodged amendments, some of which, in my view, provide a carefully considered, clear and comprehensive response to the committee's recommendations on scrutiny at the end of stage 1 and the working group's recommendations. The amendments were lodged after careful consideration of all the evidence that was provided during the stage 1

process and the extensive consultation that has been undertaken to date. They deliver on the commitments that I made on scrutiny and the super-affirmative procedure when I appeared before the committee on 2 November and during the stage 1 debate on 19 December.

The amendments demonstrate that the Scottish Government has listened to the concerns of stakeholders, the working group and the committee. We have made the improvements that people wanted us to make where they are consistent with our social security principles.

As the committee knows, we propose to set up an independent scrutiny body to strengthen protections around the charter, to allow people to seek redress when they feel that the commitments that are set out in the charter have not been met and to apply an enhanced level of parliamentary scrutiny to regulations that are made under the bill. I will say a little more about each of those points.

Amendments 15 to 17 give clear and unequivocal effect to the Scottish Government's commitment to introduce a statutory independent scrutiny body that is to be called the Scottish commission on social security. They also address feedback from and concerns raised by a wide range of stakeholders.

Amendment 16 makes provision for the establishment of SCOSS. We propose that it should have a chair and two to four members. Its members would be appointed by ministers, subject to the need to ensure that the body has the right mix of knowledge and expertise, including knowledge of the effects of disability arising from a physical or mental impairment.

SCOSS will have specific functions, and ministers will be able to confer additional functions on the body by regulation. As well as scrutinising regulations, the body will have other functions, including the preparation of reports on any matter that either ministers or the Parliament suggest and on whether the system as a whole is delivering on the expectations that are set out in the charter. That last function is particularly important, because it means that stakeholders such as welfare rights advisers, who support and advise people who use the system, will be able to refer evidence to SCOSS when they believe that the system is falling short of the charter.

Amendment 13 further strengthens protections around the social security charter by placing an additional duty on the Scottish ministers to consult the scrutiny body on any proposed changes. That would enable the scrutiny body to highlight any concerns to both ministers and the Parliament prior to any changes being made. It also fits well with the other duties that we are proposing the body should carry out.

In addition, those amendments provide that, when it is carrying out its functions, SCOSS must have regard to relevant human rights instruments and, in the case of its scrutinising proposals for regulations, to the social security principles. Giving SCOSS an on-going role in assessing whether components of the system, such as future regulations, as well as the wider system as a whole deliver on the requirements of human rights instruments will help to ensure that those human rights are taken into account.

Amendment 18 addresses the question that was raised during stage 1 about whether the rights that are set out in the charter will be meaningful only if individuals are able to seek redress when those rights have been breached. Many stakeholders including the Equality and Human Rights Commission, the Scottish Human Rights Commission, the Child Poverty Action Group, Citizens Advice Scotland and HIV Scotland supported that view.

As individual complaints imply casework, the Scottish Government believes that that function should be separate and distinct from the strategic oversight role that SCOSS would have and, therefore, that it should be undertaken by a separate body. Amendment 18 provides for ministers to specify more detail in regulations, including which body should undertake the function of handling and investigating such complaints. That is for purely pragmatic reasons. Discussions with relevant parties continue, and my officials and I, as the committee has heard, have had very helpful discussions with the ombudsman and her colleagues—as, I am sure, the committee has had today. It will still take time to make arrangements with the appropriate body and agree the detail of how the function will work in practice.

Amendments 55 and 56 fulfil our commitment to apply an enhanced level of parliamentary scrutiny to regulations that are made under chapter 2 of part 2 and section 45 of the bill. They introduce requirements on ministers to publish proposals for regulations, to refer their proposals to SCOSS and to notify the Parliament that they have done so. Once it has considered ministers' proposals, the commission must prepare and publish a report, taking into account social security principles and any relevant international human rights instruments.

The Scottish ministers will then have a duty to provide a response to the report, which should be submitted to the Parliament when the draft regulations are laid. In making their response, the ministers must set out where the regulations differ from the report and why. They must explain what they have done to address recommendations in the commission's report, and they must say



whether they disagreed with the commission's conclusions and, if they did, why.

If the committee considers the proposed approach alongside amendments 15 to 17, which establish the commission, I hope that it will agree that the proposals provide the enhanced level of scrutiny that is required while addressing concerns that the balance between primary and secondary legislation must be properly struck.

I trust that, having heard what I have said this morning as well as having seen the written summary of our amendments, the committee will be able to agree that our proposals address the seven primary recommendations of the working group's report. I am more than happy to take questions.

**The Convener:** Thank you, minister.

**Pauline McNeill:** My questions relate to the scrutiny role of the Parliament and this committee. The committee had a good evidence session this morning with the expert panel, who set out issues to do with the sequencing of scrutiny in relation to the commission's role, the minister's reply and the committee's role. From what I have heard, it appears that some of that still needs to be sorted out. It appears that the committee will have no statutory role until the draft regulations are laid and can no longer be amended. Such an approach gives control of the enhanced scrutiny process to the commission. What is the Government's rationale for having the commission set the super-affirmative procedure, rather than setting out provisions in statute? Are you satisfied that the approach will enable committees of this Parliament to do their job and scrutinise regulations?

**Jeane Freeman:** Of course. In preparing draft regulations, the Scottish Government will consult. It will then pass the draft regulations to the commission, at the same time publishing them and informing this committee—or whichever committee of the Parliament is the appropriate one at the time—that it has done so. Thereafter, the commission will have a job to do: it could choose to consult on the regulations and take views, as could this committee, and it must give its conclusions on the Government's proposals. The Government will respond to those conclusions and then lay the draft regulations before the Parliament, for the Parliament to make a determination.

In my view, there is room to ensure that there is sufficient time for consultation and for committees of the Parliament to take the role that they think is appropriate. It is not for me to tell committees what to do. I had the benefit of listening to most of the evidence that the committee heard this morning. The point about creating the proper time and

space for those things to take place—which I think that Dr McCormick made—was well made.

**Pauline McNeill:** In view of that, should the process be more clearly set out in statute? The commission can choose whether to consult; it might choose not to consult. The committee might consult, but how can it affect regulations that have been laid? It cannot amend them.

**Jeane Freeman:** The committee can ask the commission to undertake work on its behalf. Given the wording of amendment 118, I see no reason why a committee of the Parliament cannot ask the commission to engage with it in its consultation on and consideration of the draft regulations.

**Pauline McNeill:** But the fact remains that the committee cannot amend the regulations once they have been laid, does it not?

**Jeane Freeman:** That is the nature of the affirmative procedure, as I understand it.

10:30

**Jeremy Balfour:** There is something that I am still slightly confused about. I am thinking of the situation in which the Government lays its draft regulations, the commission seems to be happy with them and does not want to take any evidence on them, but the committee is not happy with them and the commission says that it does not want to carry out an investigation. At that point, I see no room for this committee or any other committee to say that it wants to carry out a public consultation on the regulations. I am a bit confused about the timescale. If the commission says that it is happy with the regulations and that no public consultation needs to be carried out, but this committee—or any other committee—says that that is necessary, my reading is that, as things stand, the committee could not stop the Government seeking Parliament's approval of the regulations.

**Jeane Freeman:** This committee could not stop the Government laying regulations, but it could oppose them and Parliament would vote against them. We are talking about the affirmative procedure.

**Jeremy Balfour:** The point that I am trying to make is that there would be no room for this committee to take evidence if the Government wanted to push ahead with its regulations. Only the commission could take evidence.

**Jeane Freeman:** Let us compare the situation with how things stand at the moment. We are establishing a commission that ministers will have a statutory obligation to consult on changes that they want to make or new proposals that they want to introduce. The commission will take a view—as it should do as an independent body—on how it wants to respond to that consultation. Its

response must be laid before the Parliament at the same time that the Government lays the regulations. At that point, the Government might lay regulations that are different from the draft regulations because it has listened to what people have said and changed them. Alternatively, it might not. It will have to explain why it has changed the draft regulations or why it has not. Through the affirmative procedure, the Parliament will decide whether to approve the regulations.

If this committee wants to have an additional role in that process, it is for the committee to decide what that role might be. I am sure that members will recall that, as far back as June last year, I raised with the committee the idea of scrutiny through the use of the super-affirmative procedure. I asked the committee to give me the benefit of its views on the matter. If it now has views on that, I would be happy to hear them.

**Jeremy Balfour:** For the record, I would like you to clarify whether it is the case that, as your amendments stand, this committee could not carry out an independent inquiry into the regulations unless the commission approved that.

**Jeane Freeman:** It is not for me to determine what the committee chooses to do.

**Jeremy Balfour:** We could not do so because there would not be time.

**Jeane Freeman:** There is nothing in our amendments that would prevent the committee from taking such action, if it should wish to. I am not preventing it; I simply have not included such a course of action in our amendments, partly because it is not for the Scottish Government to tell parliamentary committees how to conduct their business. For the record, I am not preventing, vetoing or blocking the course of action that Mr Balfour suggests. I am not enabling it, because I do not believe that it is for Scottish Government ministers to tell parliamentary committees how to conduct their business. I think that that is clear.

**Adam Tomkins:** I wanted to ask a different question, but I have a supplementary on the same issue.

**The Convener:** Other members want to come in, but I will let you ask your supplementary.

**Adam Tomkins:** I fully understand that the minister is not preventing, blocking or vetoing what Jeremy Balfour has suggested, but the concern that he and Pauline McNeill have expressed to you is a concern about whether, in practice, the committee will have time to take such action, given the nature of the process.

The question is not whether we need the Scottish ministers to enable it but whether, in practice and in fact, there will be time to enable us physically to assemble evidence, and to take it,

consider it and report on it before Parliament has to make a yea or nay decision about whether it wants to vote for the regulations. That is the concern.

**Jeremy Balfour:** Yes.

**Jeane Freeman:** There are more than two parts to the answer on the question of time. There is what we have to do with regard to this parliamentary session, in which we will introduce a number of regulations under each of the benefit headings. We will need to discuss with the committee how we do that in order to ensure the maximum time for it to take whatever steps it wishes to take. Should the committee—and, indeed, the Parliament—agree with the amendment to establish the commission, as we have outlined, we will have to establish it. Therefore we might say that, in the lifetime of this Parliament, there will need to be flexibility and discussion around the kind of space and time that Dr McCormick referred to, given the overall constraints in that we all have three years before the next set of elections.

Thereafter, though, as far as I understand the way in which the process works, setting the business of the Parliament is a matter for our respective parties' business managers to agree when issues are tabled for vote. Should business managers from parties represented on this committee hear from members of the committee that the timetabling of a vote on regulations from Government was too short to allow the committee to do the work that it believed that it should do, there would be a debate in that body about when the regulations were laid for the vote by Government.

**The Convener:** Thank you. I will bring in Mark Griffin.

**Mark Griffin:** My question has been covered.

**Pauline McNeill:** I have a quick supplementary question, convener.

**The Convener:** A very quick supplementary, then.

**Pauline McNeill:** I apologise for asking, but I think that this has not been fully examined. Minister, you made the point that it is open to the committee to choose to consult once it has seen the draft regulations, and to try to influence the process. However, the analysis that we have from SPICe is quite clear that the scrutiny process at the moment is in the hands of the commission. Would it not make sense to write something into the legislation to ensure that the committee has adequate time to consult on the draft regulations? Otherwise, what will happen is that the regulations will be laid, in their final form, and it will be an all-or-nothing situation: we will have to accept them

even if there is something in them that we have not influenced.

**Jeane Freeman:** I would not presume that members of this committee—individually and collectively—are so quiet and unassertive that they would allow such a thing to happen. The committee is perfectly capable of exercising its views and deciding how it wants to proceed.

There is a straightforward, practical difficulty with setting time limits, in that some regulations may not require a significant amount of time, while others most definitely will, with regard to who requires to be consulted and who would be impacted. Therefore I am not sure how we could reasonably set some kind of time limit on the matter, but, of course, if committee members have a view, as I asked for in June 2017, I will be very happy to hear it.

**Alison Johnstone:** I am interested to understand how proactive you think that the commission might be. Do you imagine that it could look into any aspect of social security in Scotland that it might wish to—which, obviously, would be dictated, to some extent, by its capacity and resource—or do you see it as purely reacting to instruction from the committee and/or the Parliament?

**Jeane Freeman:** Amendment 118 is clear that, in addition to responding to what the Scottish ministers and the Parliament might require it to do in meeting its functions with regard to regulations, the commission would have the opportunity to consider other matters that it believed to be relevant to the operation of social security in Scotland. Those would be for the commission to determine.

We are clear in the amendment that the commission is an independent body—a corporate body—and it will be responsible for its own operation and running. We have taken steps to ensure its independence. Given how the amendment is set out, the commission clearly has a job to do with respect to regulations and other matters, but it also has the powers to respond to issues that Scottish ministers or Parliament ask it to look at, as well as to initiate such work itself. As you heard from the ombudsman, the commission and the ombudsman clearly have an important role in looking at information and evidence on systemic matters relating to the operation of social security.

**Alison Johnstone:** We have the list of members of the UK Social Security Advisory Committee. I suppose that we are looking for a commission that is capable of independent thought and of challenging views. Is that what you are aspiring to? How will we ensure that we have the right mix? The commission is quite small—

there is a lot of work for a small group of people. How will we make sure that we have the correct people in the role?

**Jeane Freeman:** I do not necessarily agree that it is too small. In setting out amendment 118 I wanted to ensure that the commission was large enough to secure the breadth of expertise that is absolutely required, but not so large that it cannot function as effectively as it would want to—it might want to work quickly from time to time. The commission will have the capacity to ensure that, when it needs additional expertise to inform its considerations, it can bring that in. That could relate to what I consider the important element of amendment 118, which is the requirement for the commission to consider compliance with human rights instruments. There is an important distinction between that and what currently exists. It is an important follow-through on our commitment in primary legislation for the system as a whole. The commission might have as one of its members an individual with expertise in that area, but it might not, in which case it would be expected to bring in such expertise to assist it.

I hope that the commission will be able to form a productive relationship with the body that will continue to look after social security in England and Wales, in order to ensure that what any Government here brings forward fits with the delivery and implications of social security legislation for England and Wales.

**Adam Tomkins:** I do not have your amendments in front of me, minister, so I cannot remember which number it is, but you referred in your opening remarks to an amendment that will confer on you the power to make, by regulations, anybody—it is unspecified—responsible for oversight of the charter. What is going on there? That seems to be a very odd amendment indeed, particularly given that we just heard from the ombudsman that she will already have the power to investigate complaints with regard to the agency because you are proposing to set the agency up as part of the Scottish Government. She has all the powers that she needs to roll complaints together so that she can look at systemic issues, rather than looking at issues individual complaint by individual complaint. Why do we need the amendment at all when the ombudsman already has the powers? Do you know which amendment I am talking about?

**Jeane Freeman:** I will read it: if you do not have the amendments in front of you, there is no point in my giving you the number. The amendment is under the heading “Charter-based complaints” and states that

“The Scottish Ministers are to make regulations conferring on a person the function described.”

Is that the one that you mean?

**Adam Tomkins:** Yes.

10:45

**Jeane Freeman:** Given our most recent discussions with the ombudsman, Rosemary Agnew, and given her evidence this morning on the ombudsman's powers and role, I think that we need to reflect on that amendment again—

**Adam Tomkins:** We agree about that.

**Jeane Freeman:** —and decide on whether it is something that we want to press.

This morning, the ombudsman placed significant emphasis on the charter—a view that we share—and gave helpful clarity in her explanation of why the charter is so important. Rosemary Agnew also made it clear to the committee—as she has always done in our conversations with her, hence the importance of coproduction—the importance of wording that is understandable and accessible, but which also provides the foundation from which the ombudsman will then conduct work, as appropriate.

In that regard, I have requested the ombudsman—I am delighted that she has agreed—to act as our critical friend as we go through iterative coproduction of the charter.

**The Convener:** On that note, what is your view of the importance of having an annual report on the charter and a five-yearly review, given that we are setting up the system from scratch?

**Jeane Freeman:** As was said earlier this morning, nothing is ever perfect from the outset. I think that it was also said that it is always sensible at the outset to roll back a little on the detail and to engage in the practice. The reporting process will allow us—ministers, Parliament, and others—to see how the system works in practice, to continue to take views about where there is room for improvement and then to make necessary improvements.

The timeframes that we set largely make sense in respect of giving the system time to work, but also in terms of not leaving it too long before we introduce improvements that the system's working in the initial period demonstrates are clearly needed.

**Mark Griffin:** A couple of points arose in our first panel session with Jim McCormick and Judith Paterson. The first one is on the ministerial power to lay draft regulations before the commission has produced its report. I think that the view of the first panel was that that is “not as bad” as the current UK Government system. That does not seem quite like a ringing endorsement, so why do you feel the need to retain that power? The other point was on

guidance. What role would the commission have in scrutinising ministerial guidance?

**Jeane Freeman:** I have the benefit of having heard that session. I am happy to say unequivocally that what we are proposing is more than significantly better than the current situation; I am happy to have that conversation with others.

The power that was being referred to is in subsection (7)(b) of the proposed new section in amendment 55. Our thinking is that when we ask the commission to look at draft regulations, we will—depending on the size of the regulations and the degree of detail—look to reach an agreement with the commission about how long it needs to do the job that it is being asked to do. That obviously feeds back into some of the earlier discussions about space and time. However, it may well be that, having reached an agreement with us that it has six weeks, eight weeks or whatever to respond and produce a report, the commission does not meet the timeframe. Scottish ministers may feel that the draft regulations are of such import that they require to lay them, even though the commission has not met the agreed timeframe to respond. That is why subsection (7)(b) is proposed.

On Mark Griffin's second point, on guidance, I have the benefit of having heard what the ombudsman and Ms Paterson said on that issue, too. It is fair to consider whether something can be done on proportionate scrutiny of guidance. The point was well made that a great deal of guidance can be produced, although we do not intend to replicate the DWP's approach, so there will be some guidance that does not require significant scrutiny and other guidance that does. I am happy to reflect on what was said on that.

**Mark Griffin:** Can the minister give the committee an assurance that the power to lay draft regulations before the commission has published a report would be used only in exceptional circumstances?

**Jeane Freeman:** I can absolutely give that reassurance. Mark Griffin will recall that the idea that ministers be required to consult an independent scrutiny body before they lay regulations before Parliament came from the Scottish ministers, so of course I see situations in which that does not happen as being exceptional.

**George Adam:** I will ask about Rosemary Agnew's evidence, some of which I found compelling. She said that the charter is almost the heart and soul of the whole system. However, unlike what we have heard in previous discussions, she said that it is not important if individuals do not know the charter verbatim and that it is more about delivery. That is compelling: to me, the whole process is about the individual.

What are your thoughts on that? It is as simple as making sure that people get paid the money that they need and when they need it. We have to go through the technical issues but, at the end of the day, it comes down to the individual. Is not that the whole point?

**Jeane Freeman:** I agree. I, too, have found my discussions with Ms Agnew compelling. I appreciate the importance that she attaches to the charter in respect of how the ombudsman will fulfil its role in relation to social security. I am keen that the charter is written in language that is genuinely accessible and understandable, but I appreciate the view that the ombudsman has expressed that an individual will not need to go to the ombudsman and say, “My rights have not been met”, in order for the ombudsman to act. A person could simply say, “This is what happened to me—I’ve exhausted the agency’s complaints process and still haven’t got anywhere.” That individual may have received the entitlement that they were due and at a level that they are content with, but might still feel that they were dealt with poorly and want redress. As I understand it, the ombudsman would respond to that by considering what the individual had described, what the agency had to say and how that sits with what the charter requires by way of the agency’s behaviour, and would then reach a view. That will be helpful.

**George Adam:** When we heard from our first panel of witnesses, some of my colleagues almost hinted that the commission and the Government would become so powerful that the committee would not get a look-in. We mentioned that issue earlier. For the record, is not it the case that the committee could proactively pursue issues? That is how this place works—it is up to individual members to take things forward. Therefore, the scenario that we were discussing is just the normal way of doing business.

**Jeane Freeman:** That is absolutely right—that is how this place works. At the end of the day, the most powerful body is the Parliament, because it will say yes or no to regulations that are laid before it, and it is as entitled to say no as it is to say yes. In discussing the issue with the committee previously, I said that my view is that if the commission and the committee were critical of regulations, it would be a daft Government that did not listen but pressed ahead nonetheless. That Government should, reasonably, expect to lose.

**George Adam:** There is also the point that we have a Parliament of minorities and, as you rightly said, there is a process for business managers to go through. There are checks and balances right across the process.

**Jeane Freeman:** That is correct.

**The Convener:** As members have no further questions, I thank the minister for attending.

10:56

*Meeting continued in private until 11:11.*



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