

LEGISLATIVE CONSENT MEMORANDUM

Welfare Reform Bill

1. This Supplementary Memorandum has been lodged by Nicola Sturgeon MSP, Cabinet Secretary for Health, Wellbeing and Cities Strategy, under Rule 9.B.3.1(c) of the Parliament's standing orders. The UK Welfare Reform Bill 2011 (the Bill) is currently undergoing Committee scrutiny in the House of Lords, following a Second Reading debate on 13 September.

2. The Bill currently remains largely as introduced and as described in the initial Legislative Consent Memorandum lodged by the Scottish Government on 3 March 2011. One significant alteration is the addition, by UK Government amendment of a new clause which gives UK Ministers powers to make changes to the UK Child Poverty Act 2010. In the main, these changes relate to the role and scope of the Child Poverty Commission which was to be established under the Act. The proposed amendments make provision within the legislative competence of the Scottish Parliament and so trigger the need for legislative consent. They are discussed in more detail at paragraphs 63-66 below. A further, less significant change, enabling Scottish Ministers to share information will also require legislative consent and is described at paragraphs 48-50 below.

3. The UK Minister for Welfare Reform, Lord Freud, announced in the debate on 13 September that it was his intention to bring forward a number of technical amendments to the Bill, during the House of Lords Committee stage. It is anticipated that these will be largely of a technical nature, to introduce a requirement for affirmative procedure on the first exercise a number of delegated powers in the Bill, as a result of the Report by the Delegated Powers and Regulatory Reform Committee¹

4. The latest DWP advice to the Scottish Government is that they expect the Bill to commence its Report Stage in the House of Lords before Christmas and to receive Royal Assent in January 2012. As the Bill has not yet reached its final amending stage, it is possible that further amendments will be made. The latest version of the Bill (as brought from the House of Commons) can be found at:

<http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0075/12075.pdf>

Introduction

5. This supplementary memorandum sets out the Scottish Government's advice to the Parliament and its position on the Bill's proposals, both legislative and where these proposals may have an impact on devolved policy and services. It does not include a draft legislative consent motion. This is because, as was made clear in the debate in the Scottish Parliament on 5 October, the Scottish Government's final position on the Bill will take account of the UK Government's response to its legitimate concerns. These are discussed below. As the UK Government has not yet made its final response, the Scottish Government is not currently in a position to set out the terms of a draft motion at this time. The Scottish Government expects to be able to bring forward a motion before the Scottish Parliament rises for Christmas recess. This timetable will enable the

¹ <http://www.publications.parliament.uk/pa/ld201012/ldselect/lddelreg/182/18202.htm>

Parliament to meet the requirements for legislative consent set out in the Sewel Convention.

6. The memorandum provides an update on the Scottish Government's continuing work to put in place arrangements to take responsibility for those components of the welfare system which the Bill will devolve to Scotland. The Scottish Government is also providing further supplementary comment in evidence to those committees of the Scottish Parliament scrutinising the Bill. For example, the Cabinet Secretary for Infrastructure and Capital Investment wrote to the Convener of the Infrastructure and Capital Investment Committee on 24 October, setting out the Scottish Government's position, as shared by COSLA and our key stakeholders, on the main issues relating to housing benefit changes in Scotland.

7. The Scottish Government supports the simplification of the welfare system, where this will shorten the journey from unemployment to work, make it easier for the most vulnerable to access benefits and reduce costs. The Scottish Government is prepared, in terms of general principle, to consider the Welfare Reform Bill and the introduction of Universal Credit (UC), as a means of effecting this simplification.

8. However, the Scottish Government has concerns with regard to the Bill. These have been expressed to the UK Government on a number of occasions, for example when the Cabinet Secretary for Health, Wellbeing and Cities Strategy met with the Secretary of State for Work and Pensions on 15 September.

9. The Scottish Government also recognises concerns expressed by stakeholders, for example: the Scottish Campaign for Welfare Reform who said in their evidence to the Scotland Bill Committee that, "*It is critical that, before they vote on a Legislative Consent Motion, all parties take the time to consider the Bill's impacts very carefully and think about whether we want such impacts in Scotland*".² Citizens Advice Scotland (CAS) who have written that, "*CAS firmly believes that, although this is a Westminster bill covering a reserved area, its impact on the people, services and economy of Scotland as well as the current devolution settlement, means the Scottish Parliament must scrutinise its proposals and assess its probable impact*".³ and CoSLA who wrote to the Convener of the Infrastructure and Capital Investment Committee to ask that the Committee, "*take the time to have a thorough investigation into the wider Scottish implications of reform*".

10. The Scottish Government has carried out analytical work, to support a better understanding of the wider impact and has published an overview of this work to date^{4,5}. The published paper begins to examine the potential impact that these changes, particularly the introduction of Universal Credit, are likely to have on individuals in Scotland. This has primarily been undertaken by examining specific benefits in isolation. However, some work has also been undertaken, in conjunction with DWP, to produce a Scottish analysis of the introduction of Universal Credit on households in Scotland. This

² <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6451&mode=pdf>

³ http://www.cas.org.uk/Resources/CAS/Migrated%20Resources/Documents/Politicians%20briefing/ScotlandBillCttee_WelfareReformBill.pdf

⁴ Scottish Government (August 2011) *Overview of Analytical Work on Welfare Reform Aug 2011* <http://www.scotland.gov.uk/Topics/People/welfarereform/Overview#top>

⁵ An initial analysis of the Welfare Reform proposals was also produced for the WRSG. Scottish Government (February 2011) *Welfare Reform Scrutiny Group - Paper WRSG 1-04 (Rev): Analytical Note On Welfare Reform* <http://www.scotland.gov.uk/Topics/People/welfarereform/Initialanalysis#top>

work has been used in discussions with our external stakeholders reference group, the Welfare Reform Scrutiny Group⁶ (WRSG) and has helped with the development of the case study analysis which is currently being taken forward in collaboration with WRSG members. The Scottish Government expects to draw upon this work in its evidence to the Health and Sport Committee. Specific work has also been undertaken on housing benefit reforms⁷ in conjunction with the Scottish Government's Housing Benefit Stakeholders Advisory Group.

11. The Scottish Government's ability to produce cumulative in-depth analysis of some of the changes is constrained by the limited information available, particularly on the operation of the new Universal Credit, the new Personal Independence Payments and how some benefits (such as tax credits) will be treated under the new system. As a result, the analysis undertaken by the Scottish Government on welfare reform primarily focuses on estimating the impact of each change separately. It should be noted that complex linkages between benefits and individual behaviour make it difficult to predict how individuals will react to the new benefit system and how benefit take up rates may change.

12. Given these constraints, further analysis, in conjunction with the WRSG, will focus on building up case studies to form a detailed picture of how these reforms are impacting on specific household-types. This will also contribute to our understanding of how these reforms will potentially impact on the future demand for devolved services and Scottish Government budgets. Future work will have within its scope: the implications for passported benefits; the need to progress ongoing discussions with DWP on having some comparable analysis of their reforms produced for Scotland; and modelling and equalities impact assessments on the successor arrangements for Council Tax Benefit and the Social Fund in Scotland.

13. The analytical work undertaken to date supports the Scottish Government's principal basis for concern which is that it is clear that the Bill will have a significant impact on Scotland, particularly on a range of devolved services such as health, social care, housing, employability and vulnerable persons' support but that the Bill remains essentially a piece of enabling legislation, with the detail to be set out in subordinate legislation at a later time. The UK Government has not to date provided sufficient information for the Scottish Government to be able to advise Parliament of what the extent of the impact on Scotland will be.

14. It is the Scottish Government's belief that, where it has a legitimate interest, there should be a space within the existing devolution framework for mature and constructive negotiation to improve UK legislation from a Scottish perspective, for example to better reflect variances in devolved policies or service provision. This is the basis on which the Scottish Government is seeking to progress its concerns with the UK Government. It is worth noting that this approach is supported by the Report of Sir Kenneth Calman's Commission on Devolution.

15. In response, the UK Government has taken part in discussions and has indicated that it is content for these to continue. However, there has not yet been any clear substantive agreement on any of the key issues raised by the Scottish Government,

⁶ <http://www.scotland.gov.uk/Topics/People/welfarereform/scrutinygroup>

⁷ Scottish Government (January 2011) *Housing Benefit changes: Scottish Impact Assessment* <http://www.scotland.gov.uk/Topics/Built-Environment/Housing/supply-demand/chma/marketcontextmaterials/hbchangesscottishimpact/>

such as the need for the Scottish Parliament to be better consulted on welfare reform. For this reason, the Deputy First Minister advised the Scottish Parliament on 5 October that “as things stand, [she] could not recommend to Parliament that it support an LCM”.

16. With the above in mind, therefore, the Scottish Government invites the Parliament to consider the following issues in particular, which will be taken forward through inter-governmental discussions in the final stages of the Parliamentary process.

- Given that the Bill is essentially a piece of enabling legislation and that the practical impacts on the people of Scotland, Scottish Government policy and devolved services will not be set out on the face of the Bill but will be determined by subordinate legislation; whether there should be a requirement in the Bill for the UK Government to seek the consent of Scottish Ministers to the making of UK subordinate legislation applying in Scotland, which impacts on areas in which the Scottish Ministers exercise functions but does not fall within their executive competence;
- Given that the Bill presents an opportunity to ensure that our Scottish policy, which recognises kinship carers as a distinct, third group of carers for “looked-after children”, is formally recognised by the UK benefits system, in terms of kinship carers’ entitlement to child benefit and child tax credits (or the appropriate component of UC), whether the Bill should include an amendment to this effect;
- Whether there is a need for greater flexibility in the operation of the Bill’s proposals to make payments in respect of the housing component of UC direct to claimants and its proposals to limit payments in respect of housing support to social rented sector tenants who may be adjudged to be “under-occupying” their property;
- What further work should be done to ensure that the abolition of the Disability Living Allowance (DLA) and its replacement with the new Personal Independence Payment (PIP), will not impact negatively on established Scottish social care policy such as our National Strategy for Self-Directed Support.

Further Devolution

17. Notwithstanding the above issues, which will be progressed through inter-governmental discussions, the Scottish Government recognises that the Bill does contain measures to devolve responsibility for elements of the discretionary Social Fund whilst having the effect of devolving responsibility for providing relief to individuals to reduce their Council Tax liabilities. In considering the wider impact of the UK Government’s welfare reforms, it would be appropriate for the Scottish Parliament to take the Scottish Government’s increased responsibilities in these areas into account.

18. Council Tax Benefit (CTB), presently administered by Local Authorities and funded by the Department for Work and Pensions, will be abolished in Scotland and the rest of the UK from 2013. The UK Government’s intention is that the successor schemes, based on offering relief for Council Tax, will not be part of the Social Security System. From April 2013, Scotland will get a fixed addition to its budget which the UK Government assert will correspond to CTB paid in Scotland minus 10 percent.

19. Whilst welcoming the additional responsibilities, the Scottish Government is profoundly concerned about the impact of this UK Government policy. The 10 percent

reduction in spending on CTB will reduce household incomes for over half a million people on the lowest incomes in Scotland. This potentially undermines the Scottish Government's actions to protect household incomes.

20. Additionally, the work needed to ensure that a new scheme is operational before April 2013, thus ensuring continuity of support, will be complex and challenging, particularly at a time when local government resources are already under pressure, and now that the timescales are already extremely difficult. Whatever new arrangements are put in place will require Local Authority business processes and IT systems to be designed, implemented and tested whilst the new arrangements will require legislation in the Scottish Parliament, which in turn will need to be informed by consultation.

21. Scottish Ministers have highlighted their concerns to the UK Government about the impact of the reduced budget and the need for this major change to be conducted over a more realistic and better managed timescale. A joint COSLA/Scottish Government Group has been convened to identify a way forward for the successor arrangements that will provide relief to individuals' local tax liabilities in Scotland. The Scottish Government will take the outputs of this group to inform a consultation later this autumn.

22. In respect of those elements of the discretionary Social Fund which will be devolved, the Scottish Government is taking on new responsibilities to deliver successor arrangements for community care grants and crisis loans for living expenses. The Scottish Government indicated in 2009, in our response to the recommendations of the Commission on Scottish Devolution (specifically, Recommendation 5.22),⁸ that devolution of the wider discretionary Social Fund would fit well with our existing responsibilities, for example, with wellbeing, social work and housing and would present opportunities to better align funding with Scottish priorities. It was disappointing, however, to be subsequently advised that the UK Government would only devolve part of the discretionary fund.

23. The Scottish Government has reviewed current arrangements, in respect of those elements which will be devolved, and has assessed their fit with existing policy. Our conclusions are set out in our consultation on how the successor arrangements might operate, which we launched on 5 August.⁹ As stated in the consultation document, the Scottish Government believes that successor arrangements should continue to address similar needs to the current scheme. The consultation document also confirms that we are not seeking views on alternative uses for the funding.

24. The Scottish Government has identified a range of alternative options for future delivery. These include:

- Continuing with the current centralised delivery model or moving to more localised delivery;
- Using on-line, telephone or face-to-face delivery channels;
- Re-focussing scheme eligibility on particular groups, for example, older people, or on particular life events, for example, moving back into the community;

⁸ <http://www.scotland.gov.uk/Publications/2009/11/09152544/2>

⁹ <http://www.scotland.gov.uk/Publications/2011/07/29104056/1>

- Providing goods and services instead of, or as well as, cash grants;
- Including other support such as budgeting or other advice, and offering support to increase saving; and
- How we might operate an improved appeals process.

25. The consultation closes at the end of October. A number of responses have already been received. A stakeholder event, to seek the views of those with experience of the current system, has also been held. Once the consultation has closed and we have had an opportunity to analyse the responses, we will make decisions on the successor arrangements and introduce any required legislation into the Parliament.

Legislative Consent

26. There are five areas where the Bill as it is now triggers the need for legislative consent. Four of these were identified and discussed in the initial Memorandum lodged on 3 March, the fifth, as mentioned above, reflects a UK Government amendment made in the House of Commons. The forthcoming motion will therefore need to cover:

- Introduction of UC (Specifically; clauses 33, 42 and 43);
- Data sharing (clauses 120 and 126) [N.B. the additional requirement in respect of clause 120 is a new requirement which has arisen as a result of a UK Government amendment in the House of Commons];
- Introduction of PIP (clauses 75, 89 and 91);
- Changes to Industrial Injuries Disablement Benefit (clause 65); and
- Establishment of the Social Mobility and Child Poverty Commission (clause 135 and schedule 13)

Introduction of Universal Credit

Background

27. The Bill gives Scottish Ministers the power to make consequential, supplementary, incidental and transitional provisions by regulations, in relation to the introduction of UC, where such provisions fall within the competence of the Scottish Parliament. The UK Government has described UC as, “a fundamental change for Britain’s welfare system”¹⁰ and as setting “a new course for the welfare state”.¹¹ As the Scottish Government’s initial memorandum to the Parliament stated, “The Bill does as expected, in terms of setting up a new benefit – it sets out the structure of the benefit, entitlement conditions, claims and payments, decision making and appeals, conditionality, sanctions and the repeal of existing benefits”. What the Bill does not do is provide sufficient detail as to the operation of UC. This will be set out in regulations and other subordinate legislation, much of which the UK Government has not yet made available.

¹⁰ <http://www.dwp.gov.uk/docs/universal-credit-full-document.pdf>; page 5, para 21.

¹¹ <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110309/debtext/110309-0001.htm#11030953000002>, col 919.

28. As the Cabinet Secretary for Health, Wellbeing and Cities Strategy made clear to Parliament on 5 October, the Scottish Government believes that the lack of available detail on the operation of UC, specifically the lack of information on how UC will integrate with devolved policies and services in Scotland, presents significant risks. These risks would be mitigated if the UK Government was to introduce a requirement to seek the consent of Scottish Ministers to the making of UK subordinate legislation applying in Scotland, which impacts on areas in which the Scottish Ministers exercise functions but which does not fall within their executive competence.

29. The Scottish Government believes that there is precedent for such a requirement, for example in the Public Bodies Bill 2010-11, and that there is a compelling argument to support it. A requirement for Scottish Ministers' consent would provide assurance to the Parliament that the implementation of the UK Government's welfare reforms would be carried out in a way that is consistent with good governance, sensitive to Scotland's delivery environment and that aligns with existing devolved policies and services, such as those that deliver a wide range of devolved "passported" benefits.

30. The Scottish Government has raised the issue of the lack of available detail with the UK Government on a number of occasions. Most recently, the Cabinet Secretary for Health, Wellbeing and Cities Strategy discussed the matter with the Secretary of State for Work and Pensions. The Scottish Government is currently awaiting further developments from this meeting. The Scottish Government is aware that further detail will be made available in the course of the House of Lords Committee scrutiny of the Bill and that drafts of some subordinate legislation will be made available.

31. Closer involvement in the making of subordinate legislation would enable the Scottish Government to continue to pursue and to protect Scottish interests directly, at a policy level, as the UK Government moves to implement UC. The Scottish Government notes that many of the key concerns raised by Scottish stakeholders, for example, in respect of the UK Government's proposals to limit housing support payments to social rented sector tenants who may be adjudged to be "under-occupying" their property, could be addressed through regulations as well as on the face of the Bill. For this reason, it would make sense to place the involvement of Scottish Ministers on a structured, secure, statutory footing, in order to enable appropriate interventions on behalf of the people of Scotland.

Kinship care

32. The Scottish Government also believes that the introduction of UC presents an opportunity, one which aligns very well with the UK Government's stated aim to simplify the overall system, to address the specific, Scottish issue of the treatment of kinship carers by the UK benefits system. This issue arises from a Scottish policy, which recognises kinship carers as a distinct third group (the other two being foster carers and the state care system) of looked after children. UK legislation does not recognise kinship carers in this way, which creates irregularities in terms of their support and treatment by the benefits system.

33. The Scottish Government believes that kinship care is considerably more cost effective than fostering or residential care. It is a more stable placement and leads to higher positive destinations for care leavers. Recognition for kinship carers, by the UK

benefits system, in terms of kinship carers' entitlement to child benefit and child tax credits (or the appropriate component of UC) would offer scope for the benefits system to help families help themselves and builds foundations to reduce longer-term demands on state support. The Scottish Government has held discussions with the UK Government, on the opportunity that UC presents, to simplify the system for kinship carers but has not yet been able to reach a definite agreement. The Scottish Government will update the Parliament on progress in its committee evidence.

Passported Benefits

34. The underlying policy driver for the UK Government's inclusion in the Bill of a power for Scottish Ministers to make consequential, supplemental, incidental or transitional provisions by regulations is to enable the Scottish Government to address consequential, supplemental, incidental or transitional issues created by the Bill for devolved passported benefits. Passported benefits are benefits to which a person is entitled by right of their entitlement to another benefit. At present, a person receiving Jobseekers Allowance (JSA) is also entitled to receive Council Tax Benefit. JSA acts as a "passport" to Council Tax Benefit. Other examples of passported benefits in Scotland would include legal aid, free school lunches and the "blue badge" disabled mobility scheme.

35. The issue is that the Bill will abolish all of the "passporting from" benefits (JSA in the example above) and replace them with UC. In the past, UK benefit changes have largely been on a like for like basis and so any changes in eligibility have been accommodated by updating the appropriate regulations (for example, by replacing references to Unemployment Benefit with references to JSA). Crucially, UC will be used to top up income for those in work as well as out of work. Therefore, receipt of UC will not, in and of itself, stand as reliable proof of sufficiently low income for the purposes of establishing entitlement to passported benefits.

36. The Scottish Government will have to review the basis on which all our existing passported benefits will be available in the future. This will also be true for Scottish local government where some services and discounts are accessed by virtue of receipt of a UK benefit (for example, leisure discounts). We understand that some third sector organisations pay grants and offer services on the basis of benefit entitlement. We will be working with CoSLA, SCVO and others to ensure that Scottish organisations are aware of the need to revisit existing arrangements and recast eligibility in the light of the changes.

37. This will be a complex piece of work. In some cases, changes to primary and secondary legislation will be needed to effect the change. The individuals and groups who are currently eligible for passported services will change as we must ensure that we fully understand the consequences and take further policy and legislative decisions as a result. The task is made more difficult by the fact that Universal Credit, as far as the Scottish Government is currently aware, will not contain any obvious points of reference on which to pin future eligibility. Also, the UK Government will migrate people from the "old" to the "new" regime over the period from 2013–2017, meaning that, potentially, new schemes and successor arrangements may have to run in parallel for up to four years. Finally, there is the issue of the overall impact on the Scottish Government, local government and third sector providers' resources and budgets to consider as the number of people entitled to services changes.

38. This issue is not unique to Scotland. The same onus will be on the other Administrations to review the basis on which the passported benefits for which they are responsible will be delivered. The UK Government has asked the independent Social Security Advisory Committee to consider the impact of Universal Credit on eligibility for passported benefits and services. It will report in January 2012. Scottish Ministers have agreed that the review should include Scotland in its terms of reference, but it is limited in scope and excludes consideration of Housing Benefit and Disability Living Allowance. The SSAC review is also referred to at paragraph 70 below.

Legislative Consent

39. The reason for seeking legislative consent is quite straightforward; Scottish Ministers are being given a new additional power to make such amendments to Scottish legislation as might be necessary, in relation to the introduction of UC and the need to review the basis for devolved passported benefits. This clearly amounts to an alteration of executive competency and, as such, will require the consent of the Parliament.

40. However, the Scottish Government believes that it is important to be very clear about the full extent of what the Parliament is being asked to consent to. In one regard, this can be seen as quite a narrow alteration, as it only extends to the introduction of the new benefit.

41. However, the Scottish Government believes that the UK Government's proposed reforms will have a significant impact on devolved resources, services and policy and that its initial analytical work supports this. However, it is by no means clear what the extent of that impact will be, over what timescales it will fall, what resources might need to be put in place to mitigate any negative impacts and what the practical consequences will be for our stakeholders and the people of Scotland.

42. The Scottish Government has raised legitimate concerns with the UK Government on matters such as housing (e.g. its proposals to make payments in respect of the housing component of UC direct to claimants, which has a potentially significant impact on funding for social housing in Scotland) and childcare (e.g. the risk that vulnerable lone parents will be sanctioned under the terms of their Universal Credit "Claimant Commitments" because of a lack of appropriate childcare). The Scottish Government will provide the Parliament with a full account of the issues it has discussed with the UK Government, along with an update on the progress of these discussions, when it gives evidence to Committee.

43. The Scottish Government will bring forward a legislative consent motion on the Bill before the Scottish Parliament rises for Christmas recess. This will enable the Parliament to meet the requirements for legislative consent set out in the Sewel Convention. Given the significant impact, the Scottish Government agrees with the wide range of Scottish stakeholders who believe that it would be appropriate for the Parliament to examine the matter of legislative consent in its wider context. The Scottish Government has made clear that its final position on a legislative consent motion will be informed by scrutiny in the Parliament and will take account of the UK Government's response to its legitimate concerns. The Scottish Government will invite the Parliament to consider a future legislative consent motion on that basis.

Financial Implications

44. The initial legislative consent memorandum stated there should be no direct financial implications as a result of the introduction of UC. However, it is clear that there will be indirect implications, for example, as the result of an increased need for devolved housing, social care and welfare advice services. As stated above, the UK Government has not yet provided sufficient information for the likely cost to future Scottish budgets of the introduction of UC to be accurately assessed. This has been raised with the UK Government in the course of our ongoing discussions.

45. There are economic implications to consider. UC will have a positive impact on Scotland's overall economy if it does what the UK Government claim it will and creates a greater incentive for more people to move from unemployment into work. However, this depends on a number of factors which UC does not directly address, not least the availability of sustainable jobs and the likelihood of quite widespread behavioural change, in terms of benefits claimants' relationship with the job market. The Scottish Government is in no doubt that some people in Scotland will be better off under UC. However, others will be worse off and it is this balance, between the "winners" and the "losers" that will determine the eventual impact on the Scottish economy. It is by no means clear on which side the scales will eventually tip.

46. The Scottish Government notes that, if UC does create an incentive for more unemployed people to return to work, then devolved skills and training programmes will undoubtedly have played a part in reducing costs. However, the dividend, in terms of the savings accrued by reducing the amount of benefit paid, will be returned entirely to Her Majesty's Treasury and no proportion will be retained to continue to improve and develop devolved services. The Scottish Government believes that this shows one example of the fiscal disincentives inherent in the current separation between devolved training and skills programmes and the reserved benefits system.

47. The Scottish Government believes that, in order for UC to be effective there will be an urgent need for good quality, sustainable jobs for the unemployed to move into. The Scottish Government is very clearly committed to action to support jobs and growth, however, for as long as the key fiscal powers remain reserved, the financial implications of the introduction of UC will remain to be decided, in part, by others.

Data Sharing

Background

48. As indicated at paragraph 11 above, there has been a UK Government amendment made to the Bill, since the initial memorandum was lodged, which introduces, at clause 120 (Information-sharing for prevention etc. of tax credit fraud), a further requirement for legislative consent. This amendment will change Section 122B of the Social Security Administration Act 1992 (which currently enables Scottish Ministers to supply information relating to prisoners to the Secretary of State and persons providing services to him, for certain social security purposes) by extending the purposes for which information can be shared under this section to cover the prevention etc. of tax credit fraud. The UK Government has agreed to bring this amendment on the basis that it will only enable supply and that the Secretary of State cannot require information to be shared. The other requirement (now clause 126) for legislative

consent, which would be used to provide for data sharing between the Scottish Government and DWP remains as stated in the initial memorandum.

Legislative Consent

49. At present, such information can be supplied for the social security purposes set out in Section 122B(2) of the Social Security Administration Act 1992, which provides for the sharing of information relating to passports, immigration and emigration, nationality or prisoners. In future, while these categories will be retained, Scottish Ministers will also be able to share information for use in the prevention, detection, investigation or prosecution of offences relating to tax credits. This amounts to a technical extension of executive competence and will, therefore, require the consent of the Parliament.

Financial Implications

50. As Scottish Ministers already have the ability to share information under existing categories, e.g. information relating to passports, immigration etc. and this amendment amounts only to a technical extension of their power, the required infrastructure should already be in place and any new burdens should not be onerous. It is unlikely, therefore, that this change will have material financial implications.

Introduction of Personal Independence Payments (PIP)

Background

51. The UK Government's abolition of the Disability Living Allowance (DLA) and its replacement with the new Personal Independence Payment (PIP) takes place against a background of health and social care improvement in Scotland, for example the forthcoming introduction of the Self-Directed Support (Scotland) Bill this session. As with other areas of the Welfare Reform Bill, the Scottish Government's focus has been to ensure that the UK Government's proposals will interact effectively with and will not impact negatively on devolved policy and services. The new PIP will be required to interact effectively with a very wide range of devolved health and social care services which offer vital support to some of the most vulnerable people of Scotland. However, in common with Universal credit, the Bill does not provide sufficient detail regarding the operation of PIP, much of which will be in regulations, which have not as yet been prepared by the UK Government.

52. The Scottish Government has legitimate concerns that the introduction of PIP will not lead to greater simplification in Scotland, but instead, because of a failure to take into account the complex interaction between UK disabled benefits provision and devolved social care policy, will result in vulnerable people being subjected to separate regimes with qualifying periods and assessment criteria that are at variance with each other, in order to access the care and support they need.

53. One area in which these interactions become particularly complex, is in the provision of support to carers, by way of Carers Allowance. There is a risk that any narrowing of entitlement to disability support through the PIP will have a knock-on effect on Carers Allowance, where care is still needed even if all of the entitlement criteria for PIP are not being met. If the qualifying benefit is withheld and Carers Allowance is no longer paid, some carers could be faced with the difficult decision; either to leave the

benefits system, because their care commitments might mean their being unable to comply with the terms of a Claimant Commitment, in order to qualify for UC, or to suffer the punitive financial consequences of paying for care. In the event that carers did seek employment, it is still unlikely that they would be able to meet the costs of replacement care. In many cases local authorities would have to meet these costs.

54. The Scottish Government has raised these legitimate issues with the UK Government. Most recently the Cabinet Secretary for Health, Wellbeing and Cities Strategy discussed the matter with the Secretary of State for Work and Pensions when they met on 15 September. It is hoped that these discussions will result in an agreement to allow officials from both Governments to ensure that interactions are mapped out and understood. However, this remains to be confirmed. The Scottish Government will provide an update on progress with these discussions in its evidence to Committee.

Legislative Consent

55. As with the introduction of UC, the reason for seeking legislative consent is quite clear: Scottish Ministers are being given a new, additional power to make such amendments to Scottish legislation as might be necessary, for example, to remove references to the existing benefit (DLA) and replace these with references to PIP. As with UC, there will be a need to address the issue of benefits that are passported from DLA. Also, as with UC, this can be construed as quite a narrow requirement for consent.

56. The Scottish Government agrees with the wide range of Scottish stakeholders who believe that it would be appropriate for the Parliament to examine this matter of legislative consent in its wider context, that of the implication of these changes for Scottish health and social care policy and services. The Scottish Government has made clear that its final position on a legislative consent motion will be informed by scrutiny in the Parliament and will take account of the UK Government's response to its legitimate concerns. The Scottish Government will invite the Parliament to consider a future legislative consent motion on that basis.

Financial Implications

57. The introduction of the PIP should be covered by transitional arrangements on the same basis as the introduction of UC, meaning that those in receipt of the benefit should not incur any financial loss. However, the UK Government has stated its intention, in introducing the PIP, to reduce the cost of disabled support by 20%. It is not clear how it expects to make this saving, although the likelihood is that it will be found from a narrowing of entitlement.

58. The risk is that a targeted reduction in expenditure on disability benefits will have a displacement effect on the cost to local authorities of ensuring appropriate care and protection and will impact on Local Authorities' ability to deliver services to all those to whom they have a statutory duty. As one third of new DLA/PIP award recipients are also receiving social care, the reduced income to Scottish councils may approach £1 million. There could also be secondary adverse impacts on passported benefits which could further affect social care funding by reducing local authority income streams.

59. As with the introduction of UC, the Scottish Government has been progressing work to analyse the extent of the potential financial impact of the PIP. The Welfare Reform Scrutiny Group includes members of disability organisations such as

Independent Living Scotland, who have been assisting in developing a better understanding of the likely impact on services and costs.

Changes to Industrial Injuries Disablement Benefit

Background

60. As stated above, the Scottish Government supports the simplification of the welfare system. This change, which re-routes payments to trainees who have suffered an accident or injury while on a Scottish Government training scheme, e.g. the Training for Work programme, through the UK benefits system rather than through an anomalous, devolved scheme is a clear example of simplification which should result in increased efficiency. The claimant should not notice any difference in support, as payments will continue to be routed via DWP as before but the administration of the benefit will be streamlined.

Legislative consent

61. The Scottish Government recognises that, to date, Scottish Ministers have in effect not exercised the shared executive powers, which will be reduced by this change. While being clear that the Scottish Government's final position on a legislative consent motion will be informed by scrutiny in the Parliament and will take account of the UK Government's response to its legitimate concerns, the Scottish Government supports the overall principle of benefit simplification and will invite the Parliament to consider this specific legislative consent requirement on the basis that it will lead to some, admittedly minor, simplification of the overall system.

Financial Implications

62. As stated in the initial memorandum, there are no financial implications associated with this reform.

Establishment of the Social Mobility and Child Poverty Commission

Background

63. This section refers to UK Government amendments laid in the UK Parliament during the House of Commons stage of the Bill's progress. In the main, the amendments relate to the role and scope of the Child Poverty Commission which was to be established under the UK Child Poverty Act 2010.

64. The significant effects of the proposed amendments would be to:

- Broaden the scope of the CPC to include reporting on Social Mobility. The CPC would have its remit extended and be renamed the Social Mobility and Child Poverty Commission (SMCPC);
- Remove the requirement for UK Government and Scottish Ministers to seek the advice of the CPC prior to publishing child poverty strategies;
- Require the SMCPC to publish annual reports on UK wide progress on child poverty, including implementation of the Scottish strategy; and

- Remove the requirement for the Secretary of State to consult with devolved administrations on all appointments to the SMCP (Scottish Ministers would retain the right to appoint an individual member of the SMCP).

65. The Scottish Government has concerns with regard to these amendments. It seems neither necessary nor appropriate for the SMCP to apply the level of scrutiny that amendments appear to suggest, i.e. to report on implementation of the Scottish child poverty strategy. The Scottish Government believes a more proportionate approach would be to lodge any Scottish report on child poverty, which Ministers are already required by statute to produce for the Scottish Parliament, with the UK Parliament. This could be as an annex to the report on the UK strategy, which would be prepared by the SMCP.

66. The Scottish Government has been pursuing these concerns with the UK Government and some progress has been made. For example, UK Ministers appear to have recognised the need for each Administration to consult each other before making appointments to the SMCP. However, there remains a need for further clarification, particularly around the remit for the SMCP and the scope of its proposed report. The Scottish Government will provide an update on its discussions with the UK Government in its evidence to Committee.

Legislative Consent

67. The repeal of Section 13(1) and (2) of the Child Poverty Act 2010 removes the obligation on Scottish Ministers to seek advice from the SMCP in connection with the preparation of a Scottish child poverty strategy and to have regard to that advice. The amendment to Schedule 1 renews Scottish Ministers' power to appoint a member of the SMCP. Although this is an existing power, it is accepted that, as the Commission will undergo changes, particularly to its scope and remit, the duty to appoint Commissioners is altered. These amendments amount to an alteration of the executive competence of Scottish Ministers and will therefore require the consent of the Scottish Parliament.

Financial Implications

68. As the SMCP will be funded by the UK Government and the Scottish Government has already been engaged in matters in respect of the original Child Poverty Commission, there are no new financial implications associated with these amendments.

Consultation

69. The UK Government has taken steps to consult with Scottish stakeholders. A specific welfare reform event was held in Edinburgh in April 2011. UK Government officials have also met with stakeholders such as the Scottish Campaign on Welfare Reform and CoSLA. The Scottish Government has accepted an invitation to join the Universal Credit Senior Stakeholder Board, taking a formal role in DWP's governance structure and providing advice and guidance to the Programme Board. UK Ministers have also, at the Scottish Government's suggestion, agreed to the principle of a jointly chaired stakeholder forum, which would enable Scottish issues, with regard to the delivery and implementation of UC, to be raised directly with DWP's programme delivery teams.

70. The Scottish Government understands that progress is also being made on other proposals for better engagement, such as the seconding of CoSLA officials into DWP's programme structure. Also, as stated at paragraph 38 above, the Social Security Advisory Committee, who have been commissioned by the UK Government to carry out an independent review of Passported Benefits under UC, issued their call for evidence on 15 June 2011. The deadline for contributions was on 22 July. The consultation document is available on the SSAC website at:

<http://ssac.independent.gov.uk/pdf/consultation-passported-benefits.pdf>

Conclusion

71. As this supplementary memorandum has made clear, the Scottish Government supports the simplification of the welfare system, in terms of general principle. The Scottish Government also supports the presumption that issues, such as welfare, which so clearly impact on both reserved and devolved interests will be resolved by mature inter-governmental negotiation based on openness and mutual respect. This is a shared position. Sir Kenneth Calman's Commission on Scottish Devolution acknowledges in its report that:

*"5.230 Whether [these benefits] remain reserved, as we have concluded, or are devolved, it is clear that the overlapping responsibilities of the UK and Scottish Governments and Parliaments will mean that this is an area where coordination and joint working will be needed. If they remain reserved then, given the close links between these benefits and devolved responsibilities, there should be more scope for them to be adjusted to deal with changes in those areas. That will mean that there should be greater scope than there is now for Scottish variation in these policy areas, in line with the scope for variation in the devolved policy areas to which they are connected."*¹²

72. The Commission's Report goes on to recommend that:

"RECOMMENDATION 5.19: There should be scope for Scottish Ministers, with the agreement of the Scottish Parliament, to propose changes to [benefit] systems (as they apply in Scotland) when these are connected to devolved policy changes, and for the UK Government – if it agrees – to make those changes by suitable regulation."

73. The Scottish Government also recognises the Report of the first Scotland Bill Committee of the Scottish Parliament:

209. We also believe that . . . there needs to be further inter-governmental work covering the interface of devolved and reserved matters such as welfare, benefits, employment and skills issues. We would urge the creation of an inter-governmental forum in this area to create a space for dialogue on these matters to take place. We are well aware of the historical problems that can arise when such dialogue is non-existent or does not reach an amicable solution. This is particularly true at a time when the UK Government is making major changes to

¹² Commission on Scottish Devolution (2009) *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century – Final Report*. June 2009. Available at: <http://www.commissiononscottishdevolution.org.uk/uploads/2009-06-12-csd-final-report-2009fbookmarked.pdf>

*the benefit system and we urge that those changes should be thoroughly discussed in the intergovernmental machinery, on the basis of an agreed memorandum of understanding on the need to consider the impacts on devolved responsibilities. Just as there is scope for considering whether there should be a statutory underpinning for the finance relationships, so there may be a case for a statutory basis for intergovernmental consultation on appropriate aspects of welfare reform.*¹³

74. However, the Scottish Government believes that, there is still some way to go to bring these crucial ongoing discussions to a satisfactory conclusion. For the avoidance of doubt, the Scottish Government is not pursuing these negotiations with the aim of winning any further extension to devolved powers. The Scottish Government's position on this is a matter of public record, but that further devolution remains a separate discussion. In this context, the Scottish Government is pursuing negotiations with a view to establishing a mature and responsible role that sits within the existing devolution settlement, for both Government and the Parliament to represent Scottish interests in the design and implementation of welfare and benefits policy.

75. The Bill has arrived at the final stages of its Parliamentary passage and negotiations will have to be concluded in the near future. As stated above, the Scottish Government will bring forward a motion before the Parliament rises for its Christmas recess. In the meantime, the Scottish Government has lodged this legislative consent memorandum, in order that its position on the Bill might be clear and in order to support the important work of the Parliament's committees in scrutinising the Bill. In its evidence to committee, the Scottish Government also hopes to clarify some of the potential impacts these changes could have on its statutory duties, such as the 2012 Homelessness commitment, on local authorities and stakeholders who will be called upon to implement the UK Government's reforms and on all of the people of Scotland who will be affected by this "fundamental change for Britain's welfare system".¹⁴

76. The Scottish Government is confident that the Parliament will also be mindful of these wider responsibilities, which go far beyond the requirements for legislative consent under Sewel, and that this will be reflected in the Parliament's scrutiny of the Bill and its support for the Scottish Government's ongoing efforts, in the context of the issues raised by this Bill, to secure better outcomes for the people of Scotland.

SCOTTISH GOVERNMENT

October 2011

¹³ Scottish Parliament Scotland Bill Committee. 1st Report, 2011 (Session 3). *Report on the Scotland Bill and relevant legislative consent memoranda* (SP Paper 608). Available at: <http://archive.scottish.parliament.uk/s3/committees/scotBill/reports-11/sbr11-01.htm>

¹⁴ <http://www.dwp.gov.uk/docs/universal-credit-full-document.pdf>; page 5, para 21