

SPICe Briefing

SCOTLAND ACT 2016: DISCRETIONARY PAYMENTS AND NEW BENEFITS

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The Scotland Act 2016 devolves a range of social security powers to the Scottish Parliament. This briefing provides information on the following:

- Discretionary payments: to top-up reserved benefits
- Discretionary housing payments (DHPs)
- Discretionary payments and assistance
- Power to create new benefits

The briefing covers the background to the development of these provisions in the Scotland Act 2016 and information on the current arrangements regarding DHPs and the Scottish Welfare Fund.

This briefing is part of a series of briefings SPICe has prepared on the social security powers in the Scotland Act 2016.



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EXECUTIVE SUMMARY

Among the social security powers devolved by the Scotland Act 2016 are various types of discretionary payments. These are:

- **Discretionary payments to 'top-up' reserved benefits:** the Scottish Parliament will have the power to provide 'top-up' payments to those in receipt of existing social security benefits reserved to the UK Government.
- **Discretionary Housing Payments (DHPs):** DHPs are currently administered by local authorities, on behalf of the DWP, and are aimed at helping people with their housing costs. They can be made to people entitled to Housing Benefit or Universal Credit (that includes a housing element for rent costs). In 2016-17, the DHP budget in Scotland is £50.2m of which £35m has been provided by the Scottish Government to mitigate the impact of the "bedroom tax".
- **Discretionary Payments and Assistance:** the Scottish Parliament will have powers over discretionary payments to help alleviate a short-term need for people whose well-being is at risk. In effect, this widens the existing provision in the Scotland Act 1998 that has allowed for the creation of crisis grants as part of the Scottish Welfare Fund. As is the case now, the Scottish Parliament will be able to continue to make provision for occasional payments to help vulnerable people needing to establish or maintain a settled home (i.e. existing community care grants).

The Scotland Act also devolves the:

- **Power to Create New Benefits:** the Scottish Parliament will have the powers to create new social security benefits (other than pensions) in areas not otherwise connected with reserved matters.

During parliamentary scrutiny of the Bill the main area of debate was the extent to which the provisions, particularly top-ups and new benefits, reflected the Smith Agreement. There was also debate about the approach the Bill's provisions took to those who have been sanctioned. Payments made under these powers cannot be made simply to offset a reduction in another benefit because of a sanction. However, payments can be made to claimants who have been sanctioned in exceptional circumstances.

The Scottish Government has said that it will use the powers over DHPs to continue to mitigate the impact of the bedroom tax. The SNP Manifesto also made further proposals, including protecting the Scottish Welfare Fund. A Social Security Bill is expected to be introduced by the end of the first year of this parliamentary session.

INTRODUCTION

The Smith Commission (2014) proposed a range of welfare powers be devolved to Scotland including: benefits for carers, disabled people and those who are ill; the regulated social fund and powers to vary the housing cost element of Universal Credit (see SPICe briefing 15-07 for more on the Smith Commission proposals). It was also recommended that a range of discretionary powers be devolved and these are the subject of this briefing.

This briefing is part of a series of SPICe briefings on the social security aspects of the Scotland Act 2016 which are listed at the end of this briefing.

FUNDING

The Smith Commission (2014) proposed that where the Scottish Government creates a new benefit, or uses its discretionary powers then it would need to fund this from its own resources.

However, where a benefit or discretionary payment already exists and is being devolved (e.g. Discretionary Housing Payments (DHPs)) the block grant would be adjusted for the value of the benefits spent in Scotland¹. Reflecting this, the Fiscal Framework stated that:

“For welfare, [...] the chosen method will be the Barnett formula”. (para 16, HM Government 2016)

The Smith Commission also proposed that:

“Any new benefits or discretionary payments introduced by the Scottish Parliament must provide additional income for a recipient and not result in an automatic offsetting reduction in their entitlement to other benefits or post-tax earnings if in employment.” (Smith Commission 2014 para 55).

Reflecting this, the Fiscal Framework stated that:

“The Governments have agreed that any new benefits or discretionary payments introduced by the Scottish Government must provide additional income for a recipient and not result in an automatic offsetting reduction by the UK government in their entitlement elsewhere in the UK benefits system. Any new benefits or discretionary payments introduced by the Scottish Government will not be deemed to be income for tax purposes, unless topping up a benefit which is deemed taxable such as Carer’s Allowance²” (HM Government 2016 para 89).

The complex interaction between different social security benefits means that ensuring this is adhered to in practice may prove to be particularly complex for the social security powers. It will, for example, require UK legislation to refer to any new Scottish benefits for the purposes of exempting them from counting as income.

The Smith Commission’s report also stated that, “The UK Government’s Benefit Cap will also be adjusted to accommodate any additional benefit payments that the Scottish Parliament provides” (Smith Commission 2014 para 54). As the Command Paper stated,

¹ (or more detail see SPICe Briefing *Scotland Act 2016: New Social Security Powers*)

² Carer’s Allowance is being devolved, so increasing the rate could be done via a Scottish equivalent to Carer’s Allowance under section 22 rather than through the power to top up reserved benefits under section 24. See *SPICe Briefing Scotland Act 2016: Carer’s Allowance*

“...the UK Government will ensure that if Scottish Ministers were to increase the amount of a payment in relation to any benefit included within the cap, then the additional amount provided by the Scottish Government would be disregarded for the purposes of the cap, and only the amount of the payment equivalent to that provided by the UK Government would be subject to the cap” (HM Government 2015 para 4.3.13).

This was also reflected in the Fiscal Framework which stated that new benefits would not count towards the UK set ‘benefit cap’ (para 90).

SANCTIONS AND DISCRETIONARY PAYMENTS

Another issue common to all the powers discussed in this briefing, and which created concern amongst stakeholders and the Scottish Parliament’s Devolution (Further Powers) Committee, was the approach to sanctions. The Act provides that a discretionary payment or new benefit cannot be used to mitigate the imposition of a sanction unless there are also exceptional circumstances and the need is immediate.³

Although the general approach applies to all discretionary payments, most of the discussion was in relation to the clauses on short-term payments that require to be met to avoid a risk to the well-being of an individual (this is discussed more fully below). In a letter to the Devolution (Further Powers) Committee the Secretary of State said;

“Similar to the other discretionary payment clauses, 22 and 23, and clause 26⁴, the power to create new benefits, payments cannot be made solely to off-set a reduction in a reserved benefit. This is because under the Smith Commission Agreement the sanctions and conditionality policy remains reserved. It is therefore appropriate that discretionary payments, or new benefits, introduced by the Scottish Government can’t be used to systematically undermine this reserved policy. The conditionality and sanctions system is an integral driver of claimant behaviour across the whole claimant journey, and as such has clear impacts on the rate at which claimants flow-off out of work benefits (which are remaining reserved) and return to work.

However, this does not mean that sanctioned claimants cannot be given discretionary payments. A discretionary payment may still be made if the need arises due to some other exceptional circumstance or event not related purely to the reduction in benefit”. (Mundell, D 2015)

³ This restriction does not apply to ‘exception 8’ which remains the same as in the current Scotland Act 1998 which has allowed the creation of community care payments under the Scottish Welfare Fund. In relation to exception 7, the restriction applies unless the need is short-term as well as immediate (this is similar to the existing provision in the Scotland Act 1998 which has allowed crisis grants to be provided under the Scottish Welfare Fund). (see Annex for text of amended Scotland Act 1998 following Scotland Act 2016).

⁴ Now sections 24, 25 and 28 in the Act as passed.

DISCRETIONARY HOUSING PAYMENTS (DHPS)

The Scotland Act gives the Scottish Parliament legislative competence for Discretionary Housing Payments.

DHPS - CURRENT ARRANGEMENTS

Local authorities can make DHPs to individuals:

- who are entitled to Housing Benefit (HB), or Universal Credit (UC) where it includes a housing costs element for rent payments
- and who require further financial assistance with housing costs.

Local authorities have discretion to make DHPs, decide how financial hardship is assessed, the amount that is to be paid (within certain limits) and how long the payments are to be made for. The relevant regulations are the *Discretionary Financial Assistance Regulations 2001 [SI 2001/1167]*⁵. Local authorities must also take DWP [guidance](#) (2016) into account.

How can DHPs be used?

DHPs can be used to provide financial support for tenants in the private and social rented sectors, or those who have yet to take up a tenancy. In addition to rental costs it could also include: rent in advance, deposits and other lump sum costs associated with a housing need such as removal costs.

The regulations set out circumstances in which DHPs cannot be made. These include: service charges; increases in rent due to outstanding rent arrears, or any reductions in benefit because a sanction has been applied.

The various types of shortfalls in housing benefit that a DHP can cover include shortfalls arising from changes to benefit entitlements as a result of welfare reforms, for example reductions in housing benefit where the benefit cap or bedroom tax has been applied.

DHPs and the Bedroom Tax

DHPs are being used by the Scottish Government to mitigate the impact of the bedroom tax. The Scottish Government's expectation is that if a tenant affected by the bedroom tax applies to their local authority for a DHP they should be provided with one (assuming they are entitled to it).

As at November 2015, 70,857 HB claimants in Scotland were subject to the bedroom tax (DWP Stat-Xplore) (equivalent figures do not exist for UC claimants). It is not clear exactly how many of these claimants will have received a DHP to cover the bedroom tax as the DHP statistics do not show this (see below). But evidence provided to the Welfare Reform Committee (2015a) from a few local authorities suggested that only a minority of tenants affected by the bedroom tax were not receiving a DHP because they had not contacted the council.

Using DHPs to mitigate the impact of the bedroom tax is considered by the Scottish Government to be a temporary measure. The Scotland Act 2016 also gives the Scottish

⁵ Made under sections 140B(1), 140C(1) and (4) and 189(4) to (6) of the Social Security Administration Act 1992, and section 70 of the Child Support, Pensions and Social Security Act 2000

Ministers powers in relation to the housing element of UC and the Scottish Government has said that it will use this power to abolish the bedroom tax for Universal Credit claimants (Scottish Government 2015a).

DHP Funding

The DWP provides local authorities with funding for DHPs (see Table 1). An additional £70m (to cover the years 2018/19 – 2019/20) was announced as part of the Autumn Statement, although it is not known how it will be allocated between the years.

Table 1: DWP DHP Budget GB, 2014-15 to 2020-21

	2014/15 £m	2015/16 £m	2016/17 £m	2017/18 £m	2018/19 £m	2019/20 £m	2020/2021 £m
DWP budget	165	125	150	185	170	155	140
					£70m		

Source: HM Treasury 2015(a)(b) DWP 2015a

“Top- Ups” and Scottish Government Funding

Local authorities can “top up” their DHP allocation from their own funds. Since September 2013, the Scottish Government has provided local authorities with additional funding to top up their DWP allocations, to mitigate the impact of the bedroom tax.

Previously, legislation had limited the amount that local authorities could spend on DHPs. However, in autumn 2014, the power to set the limit on DHP spending was transferred to Scottish Ministers. Scottish Ministers used this power to remove the limit on spending in Scotland.⁶ As Table 2 shows total funding for DHPs in Scotland 2016/17 is £50.2m.

Table 2: Scottish DHP Budget 2013/14 to 2016/17, £m

	2013/14	2014/15	2015/16	2016/17
DWP	18	15.2	13.3	15.2
Scottish Government	20	35	35	35
Total	38	50.2	48.3	50.2

Sources: Scottish Government (2014)(2015b) (2015c) DWP 2016b

DHP Statistics

The Scottish Government publishes statistics on the number of DHP applications and awards made by local authorities. These are available at this link:

<http://www.gov.scot/Topics/Statistics/Browse/Social-Welfare/dhp>

⁶ This power was transferred by [The Scotland Act 1998 \(Transfer of Functions to the Scottish Ministers etc.\) Order 2014](#) Following the transfer of powers, the Scottish Government laid the *Discretionary Housing Payments (Limit on Total Expenditure) Revocation (Scotland) Order 2014* in the Scottish Parliament on 10th November 2014 removing the cap on DHP spending in Scotland altogether.

Over the period 1 April 2015 to 31 December 2015, local authorities made over 100,000 DHPs. The total value of awards spent or committed across Scotland was £46.9m - 97% of the budget of £48.3m in 2015-16. Local authorities have different policies and practices around how they administer DHPs and how often applications must, or can, be made (Scottish Government 2016a).

These statistics do not provide information on the reasons why DHPs were made. Instead, these statistics are published by the UK Government. Over the period April to September 2015, the majority of spend in Scotland (90%) was made to cover a bedroom tax reduction. Only 5% of expenditure was unrelated to a welfare reform (DWP 2015a).

SMITH COMMISSION AND THE SCOTLAND BILL

The following section traces the development of the clauses relating to DHPs in the Scotland Act.

Smith Commission and Draft Clauses

The [report of the Smith Commission \(2014\)](#) (para 49) recommended that DHPs should be devolved.

Draft clause 19 proposed to devolve legislative competence over DHPs (HM Government 2015). During its scrutiny of the draft clauses, the Devolution (Further Powers) Committee received evidence claiming that the clause would not allow full mitigation of the bedroom tax as entitlement to a DHP was linked to housing benefit eligibility. This is because some tenants' bedroom tax reduction has meant they have "slipped off" housing benefit and are no longer eligible to receive it. Therefore, they would not be eligible for a DHP.

Following this evidence, the Committee sought clarity from the UK Government on the interplay between the power to remove the bedroom tax and DHPs. Its report considered that, "...it is essential that the application of these clauses should not have the effect of causing detriment to individuals in receipt of discretionary housing payments" (Scottish Parliament Devolution (Further Powers) Committee 2015a).

Scotland Bill as introduced

Draft clause 19 became clause 22 in the Scotland Bill as introduced, with drafting changes that removed some of the restrictions as to what DHPs could cover (for example, water charges).

The draft clauses would not have allowed DHPs to be paid where the requirement for the payment arose as a result of a sanction. However, when the Scotland Bill was introduced this was changed so that a DHP could not be made because of a sanction, unless the requirement for it also arises from some exceptional event or circumstances and the requirement for it is immediate. This is consistent with other clauses – see above for more discussion about sanctions.

The Scottish Government argued that clause 22 failed to deliver the Smith Commission recommendation on autonomy as it would result in DHPs being subject to restrictions:

"The exclusion of the ability to make payments where the need arises from the impact of UK Government policies on conditionality and sanctions constrains the effectiveness of these powers in providing necessary support to key groups." (Scottish Government 2015 d)

[Their alternative clause](#), proposed to remove some restrictions, including those relating to sanctions (Scottish Government 2015d).

Commons Committee & Report Stages and House of Lords Proceedings

At Committee Stage of the Scotland Bill no changes to the Bill were made, despite opposition amendments to clause 22 being lodged, including one reflecting the Scottish Government’s alternative clause.

At Report Stage, a government amendment (76) removed the part of the clause that limited the amount of assistance an individual could receive.

In response to concerns that there may be people with a bedroom tax reduction that may not be eligible for a DHP because they are no longer eligible for HB, David Mundell MP, Secretary of State for Scotland, said in a letter to the Devolution (Further Powers Committee) in November 2015:

“...in order to be eligible for a DHP, a person must be entitled to Housing Benefit or another reserved benefit payable in respect of rental costs.

To remove the link between DHPs and receipt of a reserved benefit relating to rental costs would fundamentally alter DHPs and there was no intention in the Smith Agreement for this to happen.” (Mundell 2015)

The Secretary of State for Scotland also set out that the Scottish Government would be able to provide discretionary payments to meet short term needs regardless of whether or not a person is entitled to a reserved benefit and the Scottish Government could also consider provision under the new power to create new benefits.

No amendments were made to the clause by the House of Lords. These provisions create exception 6 to the reservation of social security in the Scotland Act 1998. See Annex 1.

FUTURE USE OF THE POWERS

In its stocktake paper, published in October 2015, the Scottish Government (2015e) reaffirmed its commitment to effectively abolish the bedroom tax through the use of DHPs and changes to the housing element of UC.

In its inquiry into the *Future Delivery of Social Security in Scotland*, the Welfare Reform Committee supported stakeholders who said that the bedroom tax should be abolished (Scottish Parliament Welfare Reform Committee 2015b). Other Committee recommendations regarding DHPs and the Scottish Government’s response are listed below.

Welfare Reform Committee Recommendation	Scottish Government Response
56. The Committee acknowledges the important role that DHPs can have in maintaining people living independently in their own homes. In the interests of preventative spend it encourages the Scottish Government to explore options of increasing the flexibility around how DHPs can be awarded in Scotland in order to fund this goal.	The new powers over DHPs are limited in relation to eligibility. We will aim to have alignment between services including, for example, the Independent Living Fund Scotland and other devolved benefits to support prevention and independent living wherever possible.
57. The Committee expects that the Scottish Government’s proposal to scrap the so called	We remain committed to effectively abolishing the bedroom tax and have already undertaken steps

<p>bedroom tax will help address stakeholders' concerns about DHPs being taken away from their original purpose.</p>	<p>to mitigate its effects. Removing the under-occupancy charge for UC claimants would mean that DHPs will no longer be needed to mitigate the bedroom tax in UC. However, housing benefit will remain reserved, so DHPs will still be needed to mitigate the bedroom tax for these claimants until the transition to UC has been completed.</p> <p>DHPs are used to support those struggling to meet their housing costs for a number of reasons including the benefit cap and LHA rates. Funding for these purposes has remained intact and has not been diverted from bedroom tax mitigation. Decisions on future Scottish Government funding will be made as part of the budget process and will depend to some extent on how much funding DWP allocate to local authorities.</p>
<p>58. The Committee recommends that The Scottish Government takes the opportunity presented by the devolution of new powers to issue new guidance on DHPs and develop a standard application process across all Local Authorities. This would be of particular benefit to housing providers operating across more than one Local Authority area.</p>	<p>We will look at opportunities to improve the current system for DHPs using the powers being devolved to the Scottish Parliament, including reviewing the application process and the guidance currently provided to local authorities by DWP.</p>

Source: Scottish Parliament Welfare Reform Committee 2015b, Scottish Government 2016b

DISCRETIONARY PAYMENTS AND ASSISTANCE

<p>The Scotland Act 2016 expands the current provisions in Schedule 5 of the Scotland Act 1998 that have allowed for the establishment of the Scottish Welfare Fund which provides crisis grants and community care grants.</p> <p>The Scottish Parliament will have legislative competence to provide discretionary assistance (financial or otherwise) to help alleviate a short-term need for people whose well-being is at risk. The main change from the current provision in the Scotland Act 1988 is that the need for assistance will not have to be “immediate” or to have arisen out of an “exceptional event or circumstances.”</p> <p>As is the case now, the Scottish Parliament will be able to continue to provide occasional financial, or other, assistance to help vulnerable people needing to establish or maintain a settled home (i.e. existing community care grants)</p>

THE SCOTTISH WELFARE FUND

As part of the *Welfare Reform Act 2012*, the UK Government abolished the discretionary Social Fund, with effect from 1 April 2013. It consequently transferred the funding spent in Scotland on the discretionary elements of the Fund (Community Care Grants and Crisis Loans for living expenses) to the Scottish Government. For further information see SPICe briefing [Scottish Welfare Fund](#) (Lyall and Johnson 2014).

An amendment was also made to Schedule 5 of the Scotland Act 1998 to provide a new exception to the social security reservation.⁷ The transfer of Social Fund funding and legislative changes allowed the Scottish Government set up the Scottish Welfare Fund (SWF).

The SWF provides two types of grant:

- **Crisis Grants** to provide a safety net when someone experiences a disaster or emergency situation, such as a fire or flood and there is an immediate threat to health and safety.
- **Community Care Grants (CGC)** to enable people to live independently or continue to live independently, preventing the need for institutional care. A CCG may also be able to help a family facing exceptional pressure.

Local authorities in Scotland administer the scheme and decide when grants are paid, taking into account Scottish Government guidance. Initially, the SWF was introduced on an interim basis to allow the Scottish Government to learn lessons from the interim scheme, before putting the new arrangements on a statutory basis.

From 1 April 2016 a permanent scheme was introduced by [The Welfare Funds \(Scotland\) Act 2015](#) placing a duty on local authorities to deliver welfare funds, in line with the Welfare Funds (Scotland) Regulations 2016 and statutory [guidance](#) issued by Scottish Ministers. One of the main changes the Act makes within the permanent scheme is the introduction of an independent review process carried out by the Scottish Public Services Ombudsman.

Funding

The Scottish Government budget for the Scottish Welfare Fund since April 2013 has been £33m each year, with £5m each year for administration costs. Local authorities carry forward any underspend from the previous financial year, and can top up their allocation with their own funds. The method of the distribution of funds from 2016 has been changed to align more with need and is based on the Income Domain of the Scottish Index of Multiple Deprivation⁸.

Statistics

Scottish Government statistics on the Scottish Welfare Fund are available at this link: <http://www.gov.scot/Topics/Statistics/Browse/Social-Welfare/swf>

The latest statistics cover the period up to 30 September 2015. Since the scheme began in April 2013 through to 30 September 2015, nearly 178,000 unique households received at least one award from the Scottish Welfare Fund. Of these 88,607 unique households received a Community Care Grant and 123,088 unique households received a Crisis Grant.

Over the same period, 16% of unique households receiving Community Care Grants have received awards on more than one occasion while 50% of unique households receiving Crisis Grants had received awards on more than one occasion (Scottish Government 2016c).

⁷ *Scotland Act 1998 (Modification of Schedule 5) (No.2) Order 2013: SI 2013/192*

⁸ Information provided by Scottish Government officials.

THE SMITH COMMISSION AND SCOTLAND BILL

The following section traces the development of the sections in the Scotland Act 2016.

The Smith Commission recommended:

“Powers to create new benefits and top-up reserved benefits”

“54. The Scottish Parliament will have new powers to create new benefits in areas of devolved responsibility, in line with the funding principles set out in paragraph 95. The Scottish Parliament will also have new powers to make discretionary payments in any area of welfare without the need to obtain prior permission from DWP. In addition it may seek agreement from DWP for the Department to deliver those discretionary payments on behalf of the Scottish Government. All administration and programme costs directly associated with the exercise of this power (either as a result of changes to existing systems or the introduction of new systems) will be met by the Scottish Government in line with the funding principles set out in paragraph 95.

55. Any new benefits or discretionary payments introduced by the Scottish Parliament must provide additional income for a recipient and not result in an automatic offsetting reduction in their entitlement to other benefits or post-tax earnings if in employment.”
(Smith Commission 2014)

Draft Clauses

Draft Clause 18 sought to give effect to paragraph 54 of the Smith Commission Agreement regarding discretionary payments. The clause replaces the existing exception in the Scotland Act 1998 relating to “Providing occasional financial or other assistance.” This existing exception has allowed the creation of the Scottish Welfare Fund in Scotland.

The draft clause proposed a new broader exception that would provide the Scottish Parliament with legislative competence to provide discretionary financial or other assistance to help alleviate a short-term need for people whose well-being is at risk. Under the new power, there is no longer the requirement for the person’s need to be “immediate” or to have arisen out of an “exceptional event or circumstances”.

Where a person is in receipt of a reserved benefit that is subject to a reduction, suspension, or non-payability (for example as a result of a sanction) the discretionary payment for short term needs cannot be made unless, “..the requirement for it also arises from some exceptional event or exceptional circumstances and the need is immediate as well as short-term”.

In addition, the draft clauses proposed that the Scottish Parliament could make provision for (as it can now) occasional financial or other assistance payments to help vulnerable people needing to establish or maintain a settled home. Unlike the other proposals this did not include any restrictions regarding payments to people who have been sanctioned.

Some stakeholders suggested that the drafting of the clause, in the way it referred to discretionary payments to be made for “...a short-term need that requires to be met to avoid a risk to the well-being of an individual”, represented a narrow interpretation of the Smith Commission’s recommendations regarding discretionary payments). The omission of a clause to provide for a “top up” of reserved benefits was also highlighted (see below for top-ups) (SPICe 2015).

Stakeholders also raised questions about whether the draft clauses did in fact broaden the existing provisions in the Scotland Act 1998 that allow for the establishment of the Scottish Welfare Fund. Suggestions were made that the draft clauses appeared to represent a restriction on the existing position in relation to claimants who have been sanctioned. In a letter to the Devolution (Further Powers) Committee, the UK Secretary of State commented that the draft clause did broaden the current exception. As the Committee's report summarised:

“The UK Secretary of State for Work and Pensions further explained in his letter that draft clause 18 does broaden the current exception in that there will no longer be a requirement for a person's need to have arisen out of an exceptional event or circumstances. As such, a payment can be made to meet any need related to an individual's well-being as long as it does not create an on-going entitlement. The only exception is if the need has arisen as the result of a sanction to a reserved benefit. The clause does provide for a payment to be made in these circumstances if it is to cover an immediate short-term need that arises from an exceptional event or circumstance. This replicates the power in the Scottish Welfare Fund. The DWP therefore —”does not consider that the draft clause restricts the existing powers”. (Scottish Parliament Devolution (Further Powers) Committee 2015).

Scotland Bill as introduced

Draft clause 18 became clause 23 of the Scotland Bill as introduced – no changes were made to the wording of the clause, although the Scotland Bill did contain a new clause that would allow for discretionary top-ups to reserved benefits (see below).

The Scottish Government argued that powers over discretionary payments and assistance failed to deliver the Smith recommendation for autonomy as they are subject to restrictions. Their alternative clause proposed to broaden the definition of when discretionary payments could be made by removing some restrictions including those relating to sanctions (Scottish Government 2015d).

Commons Committee & Report Stages and House of Lords Proceedings

During Committee Stage opposition [amendments](#)⁹ were tabled but in the end the clause remained unchanged at Committee Stage and Report Stage.

No further changes were made to the clause by the House of Lords which became s.26 of the Scotland Act 2016. See Annex 1 for what are now exceptions 7 and 8 to the reservation of social security in Schedule 5 to the Scotland Act 1998.

FUTURE USE OF THE POWER

There has been little discussion about how these powers will be used. The SNP Manifesto (2016) said that it would protect the Scottish Welfare Fund.

⁹ Labour [amendments](#) 8 and 111 reflected the Scottish Government's alternative clauses aimed at delivering “spirit and substance” of Smith. SNP amendment 131 proposed the addition of the term “who are part of a family facing exceptional pressure” to part of the clause. This was not part of the Scottish Government's alternative clause.

POWER TO CREATE NEW BENEFITS

The Scotland Act 2016 s.28 gives the Scottish Parliament powers to create new social security benefits (other than pensions) in areas not otherwise connected with reserved matters

This provision was only inserted at a late stage in the passage of the Scotland Bill. The following section traces the development of the clauses in the Scotland Bill relating to the power to create new benefits.

SMITH COMMISSION AND DRAFT CLAUSES

The Smith Commission report had recommended that: "The Scottish Parliament will have new powers to create new benefits in areas of devolved responsibility" (para 54). However, in the Command Paper and draft clauses, this was interpreted only as enabling new benefits in those areas of social security that were being devolved such as carers benefits, disability benefits and the regulated social fund. The Command Paper stated at para 4.3.10:

"...the Scottish Parliament will be able to replace those benefits and payments for which powers are being devolved with any of its own design as long as they specifically relate to areas of welfare responsibility that are devolved."

The Scottish Parliament's Devolution (Further Powers) Committee interpreted this part of the Smith report more widely. The [Interim Report](#) of the Committee stated at para 522 that:

"The Committee recommends that the UK Government re-consider the draft clauses designed to devolve the creation of new benefits and enable the top-up of reserved benefits." (Scottish Parliament Devolution (Further Powers) Committee 2015)

SCOTLAND BILL

On introduction, the Scotland Bill did not include an explicit provision for creating new benefits. At Committee stage in June 2015, the UK government argued that the Scottish Parliament already had the power to create new benefits. Priti Patel MP, speaking for the UK Government stated that:

"On areas of devolved responsibility outside welfare, we believe that the Scottish Parliament has the powers to provide financial assistance to people in devolved areas—it currently does so in some areas already. We do not consider that the social security reservation prevents the Scottish Parliament from providing such financial assistance." (Hansard, 2015a, col 1365)

An example of the provision of financial assistance in a devolved area is the Education Maintenance Allowance. There are also existing exceptions to the reservation of social security which allow local authorities to provide financial assistance such as kinship care allowances.

Despite the view outlined above, at Report stage, the UK Government brought forward a new clause (then clause 34), to provide for the creation of new benefits. David Mundell described this new clause as enabling new benefits in areas of devolved responsibility.

"I have proposed important changes to the Bill so that the Scottish Parliament can create its own new benefits in any area of devolved responsibility. [...]"

This power is significant: the Scottish Parliament will no longer be able to say that it is constrained by Westminster in deciding what it does, and it will be able to choose what additional benefits to offer people in Scotland.

I must, however, make very clear a few important points about the new power that the Scottish Parliament will get to create new benefits in devolved areas. Any new benefits that the Scottish Government want to deliver will be in parallel to the benefits that are delivered by the UK Government. The new power does not affect Westminster's ability to legislate for and to deliver support, and it does not enable the Scottish Parliament to change or amend reserved Westminster legislation in any way. The Scottish Parliament will need to both fund and deliver any new benefits from Scottish funds. (Hansard 2015b, col 134 to 135)

Ian Murray, MP (Labour) supported the new clause saying:

"...now that the amendments are before the House, we believe that the benefits issue has been resolved and that therefore the vow has been delivered. This is a crucial victory for the Scottish Parliament, the importance of which cannot be overstated. I said at the end of the Committee stage that if the Government did nothing else they should concede to my amendment 31 to allow the Scottish Parliament the power effectively to design its own social security system. Their new clause 34 does that, and we will support them on it." (Hansard, 2015b col 151).

Responding to the changes made on both new benefits and top-ups (see below p.17) the Convener of the Devolution (Further Powers) Committee wrote to the Secretary of State on 12th November 2015 saying the Committee thought the new clause was an improvement.

"Whilst there are potentially substantial financial and administrative obstacles ahead in using these powers, the Bill's provisions are an improvement." (Crawford, 2015)

The House of Lords Constitution Committee's report on the Scotland Bill was cautious about the introduction of this amendment to the Scotland Bill, describing it as:

"a wide ranging provision which creates a new exception to the social security reservation to provide the Scottish Parliament with new powers to create new benefits in areas of devolved responsibility

[...]

It would appear that the potentially open-ended nature of the powers to be devolved in this area create an area of possible confusion and disagreement.

[...]

It is not clear that the full implications of these changes, tabled so late in the legislative process in the Commons, have been fully considered. The House may wish to clarify how the boundaries of devolved competence will be regulated under this Clause, and what efforts are being made to avoid disputes arising, not only here, but in other areas of welfare policy where powers are shared between the UK and Scottish governments. As noted above (paragraphs 20 and 21) the House may also wish to consider whether such clarity is possible while negotiations on a new Memorandum of Understanding are underway." (House of Lords Constitution Committee, 2015). ([paras 46-47](#))

No changes were made by the House of Lords. Therefore, in its final form, section 28 of the Scotland Act 2016 requires that any new benefit:

1. is supported from the Scottish Consolidated Fund
2. is not a benefit of a type otherwise devolved in the Scotland Bill (e.g. carer's benefit, disability benefit, expenses for heating in cold weather)
3. **is not connected with reserved matters (other than matters reserved by this section)** (i.e. Section F1 to Schedule 5 – reservation of social security schemes)
4. does not provide assistance to those who are subject to sanctions - unless there are exceptional circumstances and immediate need
5. **does not provide assistance by way of pensions to or in respect of individuals who qualify by reason of old age**¹⁰

This becomes exception 10 to the reservation of Social Security in the Scotland Act 1998.

The Explanatory Notes describe the new provision as giving: "...the Scottish Parliament powers to create new benefits in areas of devolved responsibility (para 209). The fiscal framework refers to: "Power to create new benefits in areas other than pensions." (HM Government 2016, para 119).

FUTURE USE OF POWERS

The Convener of the Devolution (Future Powers) Committee noted (Crawford, 2015) that there are: "potentially substantial financial and administrative obstacles ahead in using these powers." As noted above the House of Lords Constitution Committee considered that the new clause was potentially confusing.

One example of how the power could potentially be used was given by David Mundell in a letter to the Devolution (Further Powers) Committee (Mundell 2015a). Discussing the use of discretionary payments to provide for housing costs to those disentitled to Housing Benefit due to the 'bedroom tax', he referred to the Scottish Parliament's ability to provide discretionary housing payments and to create new benefits. This suggests that the scope of the new power would include provision for housing costs.

In their election manifestos both the SNP (2016) and the Scottish Labour Party (2016) said that they would reverse the proposed removal of housing benefit entitlement from 18 to 21 year olds, although they did not explicitly say that they would use the power to create new benefits to achieve this.

Their manifestos also referred to changes to the state pension, the SNP noting that the Scottish Government would *not* have the power to create a new benefit for women losing out on the existing state pension because of increases in the state pension age.

The Scottish Liberal Democrats (2016) proposed creating new benefits to assist people with mental health problems saying: "When the Scottish Parliament gains the power to create new benefits we will use that power to help people who are at risk of losing their job, or entitlement to other benefits, because of a mental health problem."

¹⁰ While new benefits created under this clause cannot be old age pensions, there are other devolved benefits under other clauses whose current entitlement is based on old age. These are Attendance Allowance, Winter Fuel Payments and some aspects of Industrial Injuries Benefits. Therefore there can be some Scottish social security benefits based on old age.

TOP-UPS TO RESERVED BENEFITS

The Scotland Act 2016 (section 24) enables the Scottish Parliament to provide 'top-up' payments to those in receipt of existing, reserved social security benefits, with the exception of housing costs.

While this provision was not included in the draft clauses it was included in the Scotland Bill as introduced.

SMITH COMMISSION AND DRAFT CLAUSES

In the Smith Commission report paragraphs 54 to 56 were titled "powers to create new benefits and top-up reserved benefits." However, those paragraphs did not specifically repeat those words. Instead, the agreement referred to:

"...new powers to make discretionary payments in any area of welfare without the need to obtain prior permission from DWP."

The Command Paper (HM Government 2015) interpreted this as referring only to short term payments on a case by case basis:

"...The Scottish Government will be able to make payments to individuals on a case-by-case basis, but will not have the power to create permanent entitlement to any new payments beyond the scope of the devolved benefits described earlier." (para 4.3.11)

As mentioned under 'new benefits', the Devolution (Further Powers) Committee considered that the Smith agreement envisaged a broader power to top up reserved benefits on an on-going basis.

SCOTLAND BILL

The Scotland Bill as introduced differed from the draft clauses by including, at clause 21, provision to top up reserved benefits by means of an ongoing entitlement. The Explanatory Notes on introduction to the Commons stated:

"These top up payments could be paid on an individual case by case basis or provide on-going entitlement to specific or all benefit claimants" (para 159)

While the clause would allow top-ups of reserved benefits they cannot create entitlement to a reserved benefit. In other words, a person would have to be in receipt of the particular reserved benefit in order for it to be 'topped up.' Nor could the power be used to assist with housing costs. However, there is provision elsewhere in relation to housing costs – in particular the devolution of DHPs and the ability to vary the housing element of Universal Credit.

There have been no subsequent changes to this clause, which became section 24 in the Scotland Act as passed, creating exception 5 to the reservation of social security in the Scotland Act 1998.

FUTURE USE OF THE POWERS

In its inquiry into the *Future Delivery of Social Security in Scotland*, the Welfare Reform Committee (2015b) heard evidence that supported the new powers. While cautious about how much could be achieved given available budgets, witnesses made various suggestions for the use of the “top-up” power. For example, it was suggested by the Child Poverty Action Group that the powers could be used to reverse some of the benefit changes that they claim have impacted on child poverty such as the switch from RPI to CPI as a measure of inflation and subsequent benefit uprating of 1%. The organisation has subsequently proposed topping up child benefit (CPAG 2016). The Scottish Green Party (2016) has also proposed topping up child benefit.

Prior to the 2016 Scottish Parliament election, the Scottish Government had previously referred to topping up UK Government changes which had been planned to tax credits (although the UK government subsequently decided not to proceed with the changes concerned). In the Scottish Parliament, Alex Neil MSP said, with reference to top-ups and the power to create new benefits:

"We will establish the most effective way to administer any top-ups to tax credits. We will properly cost our proposals before we bring them before this parliament. We will identify where any additional funding will come from." (Scottish Parliament Official Report, 4th November 2015)

In their election manifestos both the SNP(2016) and Scottish Labour Party (2016) proposed topping up the pensions of a certain group of women whose pensions will be paid at a lower rate under the new single tier scheme than under the previous arrangements. This affects women born between 1951 and 1953. While men of that age have been transferred to the new single tier pension, women have not been. This means that, on UK Government estimates, they are £6 per week worse off on average. This is only one of a number of issues with how pension changes affect women. For further discussion see Saga (2016). While the provision on new benefits cannot be used for pensions, there is no such explicit restriction on the power to top up reserved benefits.

ANNEX 1: SCHEDULE 5 PART 2 – HEAD F

[Note: This shows those sections of the Scotland Act 1998 as amended by the Scotland Act 2016 which provide for devolution of discretionary payments and new benefits. It shows wording as at 18 April 2016, as if all amendments made to that date were in force.]

Head F – Social Security

F1. Social security schemes

Schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits.

Requiring persons to—

- (a) establish and administer schemes providing assistance for social security purposes to or in respect of individuals, or
- (b) make payments to or in respect of such schemes,

and to keep records and supply information in connection with such schemes.

The circumstances in which a person is liable to maintain himself or another for the purposes of the enactments relating to social security and the Child Support Acts 1991 and 1995.

The subject-matter of the Vaccine Damage Payment Scheme.

Illustrations

National Insurance; Social Fund; recovery of benefits for accident, injury or disease from persons paying damages; deductions from benefits for the purpose of meeting an individual's debts; sharing information between government departments for the purposes of the enactments relating to social security; making decisions for the purposes of schemes mentioned in the reservation and appeals against such decisions.

Exceptions

[Only those exceptions relating to discretionary payments and new benefits are included]

Exception 5 [power to top up reserved benefits]

Providing financial assistance to an individual who—

- (a) is entitled to a reserved benefit, and
- (b) appears to require financial assistance, in addition to any amount the individual receives by way of reserved benefit, for the purpose, or one of the purposes, for which the benefit is being provided.

This exception does not except discretionary financial assistance in a reserved benefit.

This exception also does not except providing financial assistance to meet or help to meet housing costs (as to which, see exception 6).

This exception also does not except providing financial assistance where the requirement for it arises from reduction, non-payability or suspension of a reserved benefit as a result of an individual's conduct (for example, non-compliance with work-related requirements relating to the benefit) unless—

- (a) the requirement for it also arises from some exceptional event or exceptional circumstances, and
- (b) the requirement for it is immediate.

For the purposes of this exception "reserved benefit" means a benefit which is to any extent a reserved matter.

Exception 6 [discretionary housing payments]

Providing financial assistance to an individual who—

- (a) is entitled to—
 - (i) housing benefit, or
 - (ii) any other reserved benefit payable in respect of a liability to make rent payments, and
- (b) appears to require financial assistance, in addition to any amount the individual receives by way of housing benefit or such other reserved benefit, to meet or help to meet housing costs.

This exception does not except discretionary financial assistance in a reserved benefit.

This exception also does not except providing financial assistance where the requirement for it arises from reduction, non-payability or suspension of a reserved benefit as a result of an individual's conduct (for example, non-compliance with work-related requirements relating to the benefit) unless—

- (a) the requirement for it also arises from some exceptional event or exceptional circumstances, and
- (b) the requirement for it is immediate.

For the purposes of this exception—

“rent payments”—

- (a) has the meaning given from time to time by paragraph 2 of Schedule 1 to the Universal Credit Regulations 2013 (S.I. 2013/376) or any re-enactment of that paragraph, or
- (b) if at any time universal credit ceases to be payable to anyone, has the meaning given by that paragraph or any re-enactment of that paragraph immediately before that time;

“reserved benefit” means a benefit which is to any extent a reserved matter.

Exception 7 [discretionary payments and assistance i.e Scottish Welfare Fund]

Providing financial or other assistance to or in respect of individuals who appear to require it for the purposes of meeting, or helping to meet, a short-term need that requires to be met to avoid a risk to the well-being of an individual.

This exception does not except providing assistance where the requirement for it arises from reduction, non-payability or suspension of a benefit as a result of an individual's conduct (for example, non-compliance with work-related requirements relating to the benefit) unless—

- (a) the requirement for it also arises from some exceptional event or exceptional circumstances, and
- (b) the need is immediate as well as short-term.

Exception 8 [discretionary payments and assistance i.e Scottish Welfare Fund]

Providing occasional financial or other assistance to or in respect of individuals who have been or might otherwise be—

- (a) in prison, hospital, a residential care establishment or other institution, or
- (b) homeless or otherwise living an unsettled way of life,

and who appear to require the assistance to establish or maintain a settled home.

[...]

Exception 10 [power to create new benefits]

Schemes which provide assistance for social security purposes to or in respect of individuals by way of benefits and which—

- (a) are supported from sums paid out of the Scottish Consolidated Fund,

(b) do not fall within exceptions 1 to 9, and

(c) are not connected with reserved matters (other than matters reserved only by virtue of this Section).

This exception does not except providing assistance by way of pensions to or in respect of individuals who qualify by reason of old age.

This exception does not except providing assistance where the requirement for it arises from reduction, non-payability or suspension of a reserved benefit as a result of an individual's conduct (for example, non-compliance with work-related requirements relating to the benefit) unless—

(a) the requirement for it also arises from some exceptional event or exceptional circumstances, and

(b) the requirement for it is immediate.

For the purposes of this exception “reserved benefit” means a benefit which is to any extent a reserved matter.

In this exception the reference to schemes supported from sums paid out of the Scottish Consolidated Fund does not include schemes—

(a) in respect of which sums are at some time paid out of the Scottish Consolidated Fund, but

(b) which are directly supported from payments out of the Consolidated Fund, the National Insurance Fund or the Social Fund, or out of money provided by Parliament.

Exclusions from exceptions 1 to 10

Nothing in exceptions 1 to 10 is to be read as excepting—

(a) the National Insurance Fund,

(b) the Social Fund, or

(c) the provision by a Minister of the Crown of assistance by way of loan for the purpose of meeting, or helping to meet, an intermittent expense.

Interpretation

“Benefits” includes pensions, allowances, grants, loans and any other form of financial assistance.

Providing assistance for social security purposes to or in respect of individuals includes (among other things) providing assistance to or in respect of individuals—

(a) who qualify by reason of old age, survivorship, disability, sickness, incapacity, injury, unemployment, maternity or the care of children or others needing care,

(b) who qualify by reason of low income, or

(c) in relation to their housing costs or liabilities for local taxes.

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