Inclusion Scotland

Written Evidence

Scottish Parliament Devolution (Further Powers) Committee: Implementing the Smith Agreement - The UK Government’s Draft Legislative Clauses

1. Introduction

1.1. Inclusion Scotland is a network of disabled peoples’ organisations (DPOs) and individual disabled people. Our main aim is to draw attention to the physical, social, economic, cultural and attitudinal barriers that affect disabled people’s everyday lives and to encourage a wider understanding of those issues throughout Scotland.

1.2. As the national network organisation for DPOs, Inclusion Scotland has attempted to ensure that disabled people have been enabled to engage in the constitutional debate. The timetable for the Smith Commission precluded us from completing this engagement prior to submitting our written submission. Our submission therefore relied upon previous engagement activity and the resulting ‘Vision for an Inclusive Scotland’, published in advance of the Referendum.

1.3. Inclusion Scotland and partner organisations held two engagement events in one in Glasgow and one in Inverness. These were attended by over 100 disabled people. We have also received the views of over 100 more disabled people, through a members’ survey. We found that those we consulted were keen to see more powers devolved to Scotland. Overall we believe the preference was for ‘devo-max’, but the purpose of the consultation was to find out our members’ priorities and the issues that matter most to them as disabled people. These priorities were reflected in our MSP briefings for debates in the Scottish Parliament on 10 and 18 December 2014.

1.4. Whilst Inclusion Scotland welcomes the additional powers that will be devolved to Scotland, Inclusion Scotland is disappointed that these do not go as far as disabled people want to see. However, this evidence concentrates on the additional powers included in the Smith Commission and the draft clauses to implement these, rather than any additional powers we would like to have seen.

2. General principles

2.1. The Scotland Act 1998 was deliberately drafted so that rather than listing matters over which the Scottish Parliament does control (devolved powers), it specifies the matters over which it does not (reserved matters). This approach was intended to

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1 Submission B00205, https://www.smith-commission.scot/resources/
2 http://www.inclusionscotland.org/documents/AVisionBooklet_000.pdf
3 Scottish Disability Equality Forum; Glasgow Disability Alliance, Glasgow Centre for Inclusive Living; and Scottish Campaign for a Fair Society
4 http://www.inclusionscotland.org/reports.asp
maximise the flexibility that the Scottish Parliament has in those areas that are not reserved.

2.2. Since 1999, there have been a number of modifications to the Scotland Act, mainly through Section 30 Orders but also the Scotland Act 2012, which have mainly been expressed in terms of the specific powers being devolved as exceptions to a reserved matter rather than the removal of the reserved matter itself.

2.3. Attempting to retrofit additional devolved powers to Schedule 5 of the Scotland Act rather than to revise the reserved matters in that schedule have blurred the clarity that was intended by the Scotland Act. In addition, as the new powers have tended to be expressed in terms of the existing legislative powers that have been devolved rather than removing the reserved matter, this can have the consequence of limiting the flexibility of the Scottish Parliament and the Scottish Government in the new devolved area.

2.4. A very current example is the Welfare Funds (Scotland) Bill, passed by the Scottish Parliament on 03 March 2015. During consideration of the Bill at Stage 2 and Stage 3, amendments were tabled to add “families under exceptional pressure” to the list of qualifying individuals. This group is included in the guidance for the interim Scottish Welfare Funds scheme, and Scottish Ministers have given an assurance that:

“there is no barrier now, nor under the permanent arrangements by virtue of the bill’s wording, to prevent families under exceptional pressure from accessing welfare funds. Regulations and guidance will ensure that applications from that group continue to be given priority.”

2.5. However, the Minister rejected the amendments to include “families under pressure” on the face of the Bill on the grounds that:

“The qualifying groups in the bill mirror what is in the section 30 order, and we must stay within that to keep the competence of the bill. To accept the amendment would take the bill outwith the competence of the Scottish Parliament.”

2.6. Notwithstanding the question mark over how a matter can be outwith the competence for primary legislation, but within competence for regulations and guidance, this problem could have been avoided had the original Section 30 Order been phrased in terms of which parts of the Social Fund remained reserved rather than which parts were being devolved.

2.7. The Smith Commission proposals amount to a significant change in the devolved powers of the Scottish Parliament. Attempting to retrofit these to the existing Schedule 5, as proposed in the draft clauses, by expressing them in terms of new devolved powers which are framed in line with existing legislation and policy, rather than in terms of removing the reserved matters, may fail to achieve the spirit or intention of the Smith Commission

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6 Official Report, 03 March 2015,
2.8. A better approach would be to redraw Schedule 5 to take account of what matters remain reserved taking account of all changes since 1999 and the Smith Commission proposals.

3. Disability Benefits

3.1. Welfare powers featured as the biggest priority during our consultation. 87% of survey respondents wanted to see welfare devolved and 81% listed it as a priority power for devolution. The devolution of disability and working age benefits was given the most priority. Inclusion Scotland therefore welcomes the proposal to devolve powers over benefits for carers, disabled people and those who are ill.

3.2. Devolution of disability benefits in theory gives the Scottish Parliament the ability to design a new system of support for disabled people that is focussed on supporting independent living and meeting the additional costs of daily living faced by disabled people. Potentially, this could see better co-ordination of disability benefits, social care funding, self-directed support, the proposed Scottish Independent Living Fund and support for employment, education or training.

3.3. The Smith Commission states at paragraph 51 that the Scottish parliament will have “complete autonomy in determining the structure and value of the [devolved] benefits or any new benefits or services that might replace them”.

3.4. However, the clauses are drafted in a way that reflects the existing system of disability benefits. This may unintentionally restrict the autonomy for Scotland to construct a new system based on empowering disabled people to lead active and productive lives and promoting the human rights of disabled people and independent living.

3.5. For example, as pointed out by Professor Paul Spicker in his evidence to the Committee, draft clause 16 imposes a restrictive definition on what is a disability benefit, which will limit the autonomy of the Scottish Parliament to determine the eligibility criteria for any disability benefit created under the devolved powers.

4. Other Welfare Powers

4.1. There is a difference of opinion about what the Smith Commission meant by “new powers to create new benefits in areas of devolved responsibility” (para 54). The UK Government has interpreted this as referring only to the welfare powers referred to in paragraph 44. It is hard to see that this was the intended purpose of this recommendation, given that the Smith Commission has already stated at paragraph 51 that the Scottish Parliament will have complete autonomy to create new benefits in these areas.

4.2. The Smith Commission also proposed that the Scottish Parliament will have new powers to make discretionary payments in any area of welfare, but draft clause 18 restricts what is meant by a discretionary payment. For example, it restricts the

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7 Disabled people have defined Independent Living as: “Disabled people of all ages having the same freedom, choice, dignity and control as other citizens at home, at work and in the community. It does not mean living by yourself or fending for yourself. It means rights to practical assistance and support to participate in society and live an ordinary life”. Our Shared Vision of Independent Living In Scotland” 22 April 2013 http://www.scotland.gov.uk/Publications/2013/04/8699
8 http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/Meeting%20Papers/Public_Papers%287%29.pdf
circumstances where assistance can be given for financial hardship caused by the imposition of a benefit sanction.

4.3. Inclusion Scotland remain concerned that disabled people are be disproportionately impacted by the UK Government welfare benefit changes. Whilst recognising that working age benefits – primarily Job Seekers Allowance and Employment Support Allowance, which will be replaced by Universal Credit – are not proposed for devolution, we would like to see more flexibility for the Scottish Parliament to provide support for people affected by the more punitive aspects of the new welfare regime, such as unrealistic work-related requirements, sanctions, mandatory reconsiderations and the work capability assessment.

4.4. There has been some comment on whether draft clauses 20(4) and 21(3) amounts to a UK Government veto on the devolved powers on Universal Credit. Given that agreement cannot be "unreasonably withheld" by UK Ministers, it probably does not constitute a veto, although it could result in a delay the implementation of mitigation policies agreed by the Scottish Parliament. This may not be consistent with the spirit of the Smith Commission which implies that the devolved welfare powers can be exercised without the need to obtain prior permission from the DWP.

5. Employment Support

5.1. The Smith Commission proposes that “The Scottish Parliament will have all powers over support for unemployed people through the employment programmes currently contracted by DWP.” However, both the narrative and draft clauses appear to restrict this power to employment support schemes that last over a year. It is not clear why this restriction has been included and it appears to be a direct contradiction of the Smith Commission proposal.

5.2. Indeed, it can be argued that the most effective employment support schemes are short term schemes designed to identify the barriers preventing someone gaining employment and providing support, training and assistance to overcome these. If a scheme last for more than a year without supporting someone into employment, surely it has failed?

5.3. The UK Government also appears to have arbitrarily applied the reference to conditionality and sanctioning for Universal Credit (paragraph 46) to devolved employment support schemes, including the use of mandatory placements. It is not clear how this is compatible with the Scottish Parliament having all powers over support for unemployed people through the employment programme, for example if the Scottish Parliament determines that participation in such schemes should be voluntary.

5.4. Inclusion Scotland welcomes the powers to assist disabled persons to select, obtain and retain employment (22(1)(3)). Latest figures show that the employment rate for disabled people in Scotland has fallen to just 40.8%, despite the overall employment rate for working age population as a whole rising to 74.4%. The new powers present an opportunity to integrate support for employment with other support for disabled people to provide a comprehensive package to disabled people to assist them into sustainable employment and close the inequality gap in the employment rate.

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5.5. It is not clear if this draft clause includes the Access to Work Scheme (AtW). Take-up of AtW in Scotland is low and it only supports a tiny proportion of working age disabled people (just over 2%) to access and maintain employment. AtW can help pay for practical support and adaptations to support disabled people to start work or to stay in work if they acquire an impairment, or if an existing condition deteriorates. Inclusion Scotland has called for AtW to be devolved to enable it to be better promoted in Scotland and increase take up. AtW would seem to fall within the definition at 22(3)(a), but the Committee may wish to seek clarification on this.

6. Equalities and Human Rights

6.1. Disabled people told us that they wanted to see Equalities and Human Rights devolved. It was recognised that human rights are relevant to every area of life. If they are embedded in society and policy, then disabled people are more likely to be able to participate, and social and political systems that better reflect the makeup of society are more likely to follow.

6.2. Clearly neither the Smith Commission Proposals nor the draft clauses go as far as disabled people wanted, but the draft clauses appear to give the Scottish Parliament the power to enhance equalities protection in devolved areas. This may increase the scope to embed an equalities and human rights based approach to the provision of all public services in Scotland.

7. Tribunals

7.1. Inclusion Scotland welcomes the draft clauses transferring responsibility for administration of tribunals to the Scottish Government. Increased fees for taking cases to tribunals, in particular Employment Appeals Tribunals, has acted as a barrier to disabled people raising discrimination cases. Access to Justice is a fundamental Human Right, and we hope that the Scottish Parliament will use this new power to address the financial barriers caused by increased fees.

8. Conclusion

8.1. Whilst Inclusion Scotland is disappointed that the Smith Commission proposals do not match the aspirations of disabled people, particularly in relation to powers on welfare and taxation, we believe that there are substantial opportunities to design a fairer Scotland that promotes the right to Independent Living for disabled people.

8.2. However, the clauses as currently drafted seem unlikely to deliver in full what the Smith Commission proposed, and the way they have been drafted may restrict the ability of the Scottish Parliament to use the new powers to their best potential.

8.3. Inclusion Scotland believes that many of these concerns can be addressed if the draft clauses are redrafted in line with the original intention of the Scotland Act, that is defining the matters that are reserved to Westminster rather that the powers devolved to Scotland.

If you have any questions on this submission, or for further information, contact: Iain Smith; Policy & Parliamentary Officer, Inclusion Scotland

Visit our website: www.inclusionscotland.org