



The Scottish Parliament
Pàrlamaid na h-Alba

DEVOLUTION (FURTHER POWERS) COMMITTEE

AGENDA

5th Meeting, 2015 (Session 4)

Thursday 19 February 2015

The Committee will meet at 9.00 am in the David Livingstone Room (CR6).

1. **Decision on taking business in private:** The Committee will decide whether to take item 3 in private and all future agenda items on views of evidence be heard in private.
2. **Evidence on Welfare Clauses:** The Committee will take evidence from—
 - John Dickie, Director, Child Poverty Action Group;
 - Richard Gass, Member of the Policy and Standards Committee, Rights Advice Scotland;
 - Paul Spicker, Professor of Public Policy, Robert Gordon University;
 - David Ogilvie, Head of Policy and Public Affairs, Chartered Institute of Housing;
 - Jim McCormick, Expert Adviser (Scotland), Social Security Advisory Committee.
3. **Evidence on Welfare Clauses (in private):** The Committee will consider evidence heard during the meeting.

Stephen Imrie
Clerk to the Devolution (Further Powers) Committee
Room T3.40
The Scottish Parliament
Edinburgh
Tel: 85206
Email: devolutioncommittee@scottish.parliament.uk

The papers for this meeting are as follows—

CPAG Written Evidence	DFP/S4/15/5/1
Paul Spicker Written Evidence	DFP/S4/15/5/2
Chartered Institute of Housing Written Evidence	DFP/S4/15/5/3
PRIVATE PAPER	DFP/S4/15/5/4 (P)
Rights Advice Scotland Written Evidence	DFP/S4/15/5/5

Child Poverty Action Group in Scotland Response to the Scottish Parliament Devolution (Further Powers) Committee call for evidence

CPAG in Scotland has extensive expertise on the UK social security system and its existing interaction with devolved sources of financial support and wider policy to prevent child poverty. We have played a lead role in informing the development of recently devolved areas of 'welfare' such as the Scottish Welfare Fund and are the leading national provider of independent second tier welfare benefits training, information and case work support for advisers and other frontline workers.

In our response to the Smith Commission's call for evidence we highlighted that the merits of any settlement should be judged by the extent to which they provided a realistic opportunity to reduce child poverty and wider socio-economic inequality. It is in this context that this paper sets out our initial thoughts on the policy and technical implications of the draft Scotland Bill clauses published on 22 January 2015.

The extent of power devolved

1. CPAG believes that the draft clauses, if enacted, potentially provide real opportunities to reduce child poverty and wider socio-economic inequality in Scotland (see para 15-24 below). It is worth noting, however, that the bulk of social security powers will remain reserved - as will other levers for tackling poverty, including the national minimum wage and wider economic and fiscal powers.
2. We also note that the clauses take a narrow interpretation of some of the recommendations made by the Smith Commission¹. In particular, paragraph 54 of the Smith Commission Report was widely understood to suggest that a power to create new benefits in areas of devolved responsibility should be enacted, as well as a new power to 'top-up' reserved benefits. The clauses as drafted, however, do not confer such powers. Instead, they allow the Scottish Parliament to create new benefits only in areas where *welfare* powers have been devolved (such as disability) and a power to make discretionary, short-term payments in limited circumstances (**clause 18**).
3. While devolving a power to create new benefits in any area would not have guaranteed the alleviation of, nor a reduction, in child poverty; it would have provided the Scottish Parliament with an opportunity to directly augment the income of low income families by, for example, creating new benefits for families at particular risk of poverty. The power to 'top-up' benefits might also

have been used to increase rates of tax credits and other existing family benefits, (the real value of which has been dramatically reduced by the UK government's limits on annual uprating).

4. CPAG is also concerned by **clause 18**, which limits the extension of powers to make discretionary payments (building upon the powers which underpin the Scottish welfare fund). Clause 18 states that powers will not include the ability to make a payment, "*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 the need result from an exceptional event or circumstances.*" The power to make discretionary payments already requires the presence of a risk to wellbeing to the individual. We urge the UK and Scottish Government to remove this clause which explicitly prevents the Scottish Government from mitigating the damage caused by an increasingly punitive sanctions regimeⁱⁱ and provides a vital safety net for individuals and families who might otherwise find themselves destitute.

Case study: A father with dyslexia, spinal arthritis and COPD was sanctioned for not attending a work-focused interview. He had told the jobcentre in advance that he didn't have enough money to get to the office, as it was not local to him. He was told to walk to appointment, but was unable to due to health conditions. He was sanctioned for 13 weeks. He was provided with a crisis grant from the Scottish welfare fund (£90 supermarket vouchers) which allowed him to purchase food.

5. We are concerned that this clause would result in the needs of vulnerable people going unmet not only in relation to sanctions but also in other areas where 'conduct' is an issue. It is well documented, for instance, that people with mental health problems struggle to manage the processes necessary to make a successful claim to employment and support allowance and have benefit stopped through failing to return forms or attend medicals.
6. The power to create a new benefit to replace carer's allowance in the draft clauses is also more limited than the Smith recommendations might reasonably be understood to have intended. **Clause 16** currently states that the power only extends to provide such a benefit to people who are 16 or over, not in full-time education, and not gainfully employed. This drafting will limit – for no stated reason - the Scottish Government's policy making discretion and prevent it from designing a benefit for carers who might for example be balancing their caring commitments with part time work or study.
7. There is also a concern that as drafted, **clauses 19** does not give the Scottish Parliament the power to allow local authorities to make discretionary housing

payments (DHPs) to individuals not in receipt of housing benefit. This could be detrimental to individuals who are currently subject to under-occupancy charges ('the bedroom tax') and for whom the application of the charge makes them ineligible for any housing benefit at all.

Case study: A family with one child was on a low wage and previously in receipt of a small amount of housing benefit. Application of the bedroom tax meant that the household no longer qualified for any housing benefit at all and – as a result - were not entitled to DHP.

8. Extending the power to make discretionary payments to non 'housing benefit' claimants would ensure that these households could access DHPs in the interim (before all claimants in Scotland are in receipt of the housing element of universal credit rather than housing benefit). Otherwise, the 'bedroom tax' cannot be fully mitigated through DHPs.

RISKS

9. It is vital that in devolving aspects of the social security system claimants and their families are not disadvantaged as a result of administrative difficulties. The importance of this issue cannot be overestimated. Of all the cases processed by CPAG in Scotland's advice line and early warning system, more than 30% relate directly to maladministration and administrative error, often with negative implications for claimants.
10. Common difficulties include poor information sharing between and within agencies (such as the DWP and local authorities), correspondence going missing or not being registered and staff error.
11. Thorough planning, alignment of IT systems and staff training will be vital to ensure these problems are not aggravated by devolution of aspects of social security.
12. Areas of the proposed settlement which need further consideration to avoid the risk of creating new and complex interfaces between devolved and non-devolved areas and increasing the risk of error and maladministration include:

Passported benefits: Eligibility for one benefit (such as DLA or PIP) is often used as a 'passport' for access to another (such as employment and support allowance or universal credit for full-time students). Difficulties may arise where a 'passporting' benefit (such as DLA/PIP) is devolved, while the other (ESA, for example) is not. This could result in a situation whereby the Scottish

Government changes eligibility criteria for one benefit, thereby increasing entitlement to a second, administered by the UK Government.

There is a need for the UK and Scottish Government to identify all relevant passported benefits and ensure that working agreements and information sharing arrangements are in place. Though claiming a passported benefit can be a complicated process, it is currently made less complicated by the fact that the DWP administers both DLA and ESA. Establishing good information sharing procedures will be essential in order to ensure that there is no detriment to *the claimant*. Individuals should not lose out on existing entitlement because of administrative difficulties or political wrangling and it is essential that arrangements are clarified before the clauses are enacted.

Transfer / legacy cases: There is a need to ensure that individuals are aware of how their existing claims will be affected by the devolution of social security powers to Scotland. There has been great uncertainty over the last few years for many people in receipt of benefits (particularly DLA) as eligibility criteria and procedures for accessing benefits have changed repeatedly. It is therefore important that, where possible, claimants are not subject to even more uncertainty and financial insecurity or unnecessarily transferred to PIP only to be moved onto a new benefit shortly afterwards.

13. Above all, any changes to the way in which benefits are administered must be person centred and prioritise accessibility and claimant experience. There is also a need to ensure the rights of claimants are protected with adequate national accountability, oversight, and the right to an independent appeal.
14. Devolution of policy responsibility needs to be accompanied by clear proposals for the delivery infrastructure required to ensure minimum standards of entitlement are protected across Scotland with adequate accountability and oversight. CPAG believes this is likely to be best achieved through a national Scottish benefits agency. A delivery agreement with the DWP is also an option, but might restrict opportunities for policy divergence. The other alternative we can think of, delivery by local authorities carries real risks, including the erosion of national standards of delivery, a lack of transparency and an increasingly confusing landscape for claimants.
15. It is also vital that any devolved disability and carers benefits remain as income benefits to which eligible claimants have statutory entitlement, and that they are not confused with social care support. One of the potential arguments for devolution of attendance allowance (AA) has been the potential to pool social security and social care resourcesⁱⁱⁱ. However, such a pooling of a cash benefit and social care budgets would deprive many disabled people of a say on how their money is spent. Furthermore our understanding is that many disability

benefit claimants are not receiving any social care service/funding from the local authority. If a devolved disability benefit was pooled with funding for social care there is a very real risk may vulnerable people would lose out completely on a vital source of income that helps meet the costs of their disability. This is particularly worrying at a time when resources at local and national level are being squeezed. Disability benefits could just end up subsidising local social care budgets, removing a key source of direct income for disabled people, intended to help cover the day to day costs of disability. Pooling AA/DLA /PIP with social work monies could also result in assistance being reserved for the most severely disabled people (who are in need of social care services) while excluding those with relatively low level or early stage disabilities. This undermines the preventative role that AA, DLA and PIP play by ensuring that disabled people can afford to continue to live as independently as possible, with minimal reliance on public services.

16. The wider risks associated with localisation of benefits are well documented in relation to England's local welfare assistance scheme. Previously administered at UK level, devolution of this discretionary scheme to local level has resulted in confusion, erosion of entitlement and a lack of transparency and oversight. While Scotland has avoided many of these problems by establishing a national scheme, local delivery of the Scottish Welfare Fund has in itself led to significant variation in how support is accessed and provided.

OPPORTUNITIES

17. The powers that would be devolved by enactment of the draft clauses provide potential opportunities to increase family income, alleviate child poverty and promote fairer distribution of resources within the household.
18. **Clause 21** devolves administrative powers over universal credit, albeit exercisable only following consultation with and the agreement of the UK government. This could be used, for instance, to ensure that the main carer in each household (rather than the nominated individual) receives the universal credit payment. This is likely to increase in the proportion of women exercising control over family finances. Research shows that women are more likely to spend family income on the needs of the household rather than individual needs^{iv}. The power to make more frequent payments and direct payment of housing costs to landlords potentially allows families to choose the manner of payment that is most suitable, helping families to budget in the way that is best for them.
19. **Clause 20**, which devolves power over the housing element of universal credit for renters could be used to help ensure more families get the support they

need to secure and sustain their homes. This could be done by ensuring that the housing element of UC is sufficient to cover the rent charged by the landlord, keeps up with increasing private rents and does not include an under-occupancy charge (bedroom tax). If adequately resourced and carefully planned, this could have a direct impact on levels of child poverty (as measured after housing costs to reflect the actual disposable income of families).

20. There are also opportunities attached to the Scottish Parliament being given control over employment programmes such as the Work Programme and Work Choice (**clause 21**). In particular, this could allow for initiatives to be developed that are more suited to the local labour market, local skills and local employers. This could help to minimise the imposition of arbitrary and inappropriate job-seeking tasks that can undermine claimants' efforts to move into work and increase the individual's chance of being sanctioned.
21. It is important to note that while the draft clauses devolve delivery of employment programmes, their policy and operation would still be restricted by UK Government policy in relation to conditionality, including when sanctions are applicable and what conditions must be met by job seekers. It is therefore essential that work programme providers are aware of the need to do all they can to help claimants fulfil their conditions in order to avoid being sanctioned.

Case Study: A father was sanctioned for being fifteen minutes late for an appointment with the work provider and was sanctioned for 13 weeks as a result. He only received two hardship payments throughout his 13 week sanction period because he was not informed that he still had to sign on every two weeks in order to access them. This situation contributed to the client becoming homeless, at first sleeping on a friend's floor and then subsequently sleeping rough. He was assaulted and hospitalised during this time and has had no contact with his children since becoming homeless.

22. Draft **clause 18** would also give the Scottish Parliament the power to provide financial assistance for the purpose of meeting maternity expenses. This power could be used to increase the rate at which Sure Start Maternity Grants are paid, thereby boosting family finances at a time when low income families are at risk of experiencing poverty. Devolution of control in this area also provides an opportunity to restore the grant for second and subsequent children. Devolution of Sure Start Maternity Grants might also enable the Scottish Government to link their delivery with health services in Scotland in order to maximise uptake, particularly amongst low income, vulnerable families. It would, however, be essential to ensure that contact with health services was a means of facilitating access to the Maternity Grants, rather than

becoming a condition of access.

23. Devolution of disability benefits in **clause 16** could be used to create more adequate benefits and to ensure assessments processes treat people with greater dignity and respect. This might include, for instance, minimising the use of assessments where medical evidence exists and is sufficient, eliminating assessments for individuals with chronic, degenerative conditions and ensuring any assessments are performed by an appropriately qualified specialist.
24. **Clause 25** would mean that the operation of all reserved tribunals would be devolved to the Scottish Parliament (other than the Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission). This would devolve control over rules of procedure, membership, administration and funding of tribunals. This will provide an important opportunity to facilitate access to social security appeals. This is a right which has proved illusory for many given increasing delays and the barrier created by the new mandatory reconsideration process. While the Scottish Parliament will have no control over delays caused by mandatory reconsideration and other reserved matters, new tribunal procedures and investing in capacity could potentially reduce delays. The average clearance time for social security appeals to the First-tier Tribunal was 30 weeks in the most recent quarter for which figures have been published.^v

For more information please contact John Dickie, Director of Child Poverty Action Group in Scotland jdickie@cpagscotland.org.uk, 0141 552 3656

ⁱ https://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf

ⁱⁱ Joseph Rowntree Foundation; Sanctions and Conditionality in the UK (2014)
<http://www.jrf.org.uk/sites/files/jrf/Welfare-conditionalty-UK-Summary.pdf>

ⁱⁱⁱ http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_114922

^{iv} The Gendering of Income within Households, <http://www.radstats.org.uk/no075/pahl.htm>

^v https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385759/tribunal-grc-statistics-quarterly-jul-sep-2014.pdf

The proposed draft clauses on welfare



Submission to the Devolution (Further Powers) Committee

Professor Paul Spicker,
Robert Gordon University

1. This paper covers five main issues:

- ! *The powers of the Scottish Parliament relating to benefits.* There is no general power to create new benefits; instead, there are specified exceptions to reserved powers.
- ! *The "no-detriment" principle.* The proposed arrangements would involve complex negotiations and cross-charging between governments.
- ! *The draft clauses.* This paper reviews clauses 16-22. The powers offered in the clauses are restricted: the most serious case is the severe restriction of powers to offer benefits to people with disabilities.
- ! *Implementing changes.* There are financial and administrative constraints on what the Scottish Parliament will be able to do with the devolved powers, and there is some risk of increasing the complexity of the system.
- ! *Differences between the Smith Commission and the White Paper.* The key differences are the absence of powers to develop new benefits, to top up, or to distribute benefits beyond narrowly defined categories of recipient. The draft clauses are written as if their purpose was to define the benefits that Scottish Parliament should deliver, rather than delegating the powers to make decisions in this field.

The powers of the Scottish Parliament relating to benefits

2. Schedule 5F of the Scotland Act 1998 reserves "Schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits." It goes on to explain that

" '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."

This Schedule implies a presumption that all benefits are reserved unless explicit provision is made to the contrary.

3. Schedule 5F is subject to several named exceptions. The draft clauses in the White Paper (16, 17 18 and 19) operate almost wholly by adding further exceptions. The exceptions will be, in brief:

- 1. Disability benefits (including industrial injuries benefits)
- 2. Carer benefits

3. Social work services (existing exceptions, including provision for social welfare, disability and child care)
4. Maternity, funeral or heating expenses
5. Discretionary payments (such as the Scottish Welfare Fund)
6. Special assistance to people leaving care or homeless
7. Discretionary Housing Payments

4. The White Paper claims that its clauses "will provide powers to create new benefits or other payments in devolved areas of welfare responsibility" (4.1.5). Para 4.3.10 restates that and notes that the powers of the Scottish Parliament will apply "as long as they specifically relate to areas of welfare responsibility that are devolved".

5. These are not the same terms as those used by the Smith Commission. They recommended that there should be power to create "new benefits in devolved areas" - the limitation to "areas of welfare responsibility" changes the meaning. Devolved areas include (for example) the care of older people, housing, sustainable energy, employment services and education. New benefits in these areas will not be permitted under the proposed revisions, because all are subject to the general reservations in Schedule 5F.

6. Beyond that, the defined areas of 'welfare responsibility' are tightly circumscribed. Employment support is an area of welfare responsibility (clause 22), but it is largely confined to longer-term support and there is no provision for associated benefits to be paid. The definition of disability is related to a "significant adverse effect" on day to day activities or care needs. The test is restrictive: it would not allow for, say, a universal Blind Person's Allowance, or an allowance for people undergoing rehabilitation and recovery. The definition of carers in clause 16 excludes young carers, students and people in employment. And although the Smith Commission proposed to devolve "benefits for carers, disabled people and those who are ill", illness that may not be immediately disabling at the point of assessment (such as terminal cancer) is not considered in the clauses.

7. The key point here is that the legislative presumption against introducing new benefits remains - there is no general power to create benefits. Equally, the restricted definitions of disability close off several options for different kinds of integrated service provision, such as the merging of disability benefits with self-directed support or the replacement of existing systems of compensation for disability with the kind of unified scheme used in New Zealand. The White Paper does not permit the Scottish Parliament to develop or design an integrated welfare system within its areas of responsibility.

The "no detriment" principle

8. The principle of 'no detriment' is outlined in the Smith Commission's report (94 and 95). The first part of the principle, that there should be "No detriment as a result of the decision to devolve further power", is relatively straightforward, because it is a decision to be made once for all time. The second part is not: that there should be "No detriment as a result of UK Government or Scottish Government policy decisions post-devolution." Smith states that "Where either the UK or the Scottish Governments makes policy decisions that affect the tax receipts or expenditure of the other, the decision-making government will either reimburse the other if there is an additional cost, or receive a transfer from the other if there is a saving."

There are many areas where benefits and services overlap. If people go into hospital, some

benefits are suspended, and the patients become entitled again when they leave the hospital: does that mean that the Scottish health service should compensate the DWP if it introduces a policy to speed up discharges? If a person is released early from prison, that person may become entitled to benefits: should there be a charge for a policy to release prisoners earlier? If someone becomes unemployed, the benefits bill increases: if the Scottish economy falters, should the Scottish Parliament be subject to financial penalties for increasing the costs to the UK? And if the rules change relating to benefit suspension, they are likely to make demands on local support services: should the DWP refund the local authorities and the Scottish Welfare Fund? It is not clear that the conflicts this creates have any satisfactory resolution. Michael Keating has described the principle as 'a minefield ... politically contentious and technically complex.'

9. There must be doubts, too, as to whether an unqualified principle of 'no detriment' is workable in practice. In any of the examples considered here, making an accurate assessment of costs and cross-charging depends on a level and quality of information that could only be supplied through a wholesale redesign of benefits and services. The White Paper interprets the 'no detriment' principle to imply that there should be detailed cross-charging for variations in policy - examples include assessments relating to Vehicle Excise Duty and employment programmes. In relation to Universal Credit, the White Paper argues that

"Benefits paid net of income tax – some benefits are paid net of income tax, so if the Scottish Government changes income tax in Scotland, this will have a direct impact on the level of benefits that the UK Government will be liable to pay. Under this 'no detriment' principle, the Scottish Government would receive any savings from lower UK Government benefit spending or meet any costs of higher UK Government benefit spending." (para 2.4.16)

This paragraph mis-states the issue. The problem is not about "benefits paid net of income tax", but benefits where entitlement is calculated on the basis of income net of tax. Universal Credit goes up when net income goes down, so if the Scottish Government raises tax, part will be refunded for people on low incomes receiving UC. The calculation will be difficult, the amounts of money involved uncertain.

10. The impracticality of levying charges or claiming compensation for displaced costs means that in practice, demands for compensation will have to be approximate. In Northern Ireland, penalties have been imposed on the Northern Ireland Assembly for failure to enact welfare reforms. The bulk of the £268m savings that are not being made are attributable to two benefits: ESA (£140m) and PIP (£105m). In the case of ESA, many of the savings which have been made have been done through people failing to claim JSA after reassessment. The extraordinarily high success of appeals implies that many of the decisions made on ESA have been wrong; a large number of further appeals lodged have not been heard. In the case of PIP, the claimed savings have not been realised, and are highly disputable; they rely on the assumptions that tighter assessments will save money (the experience of introducing PCA for Invalidity Benefit in 1996 suggests the opposite) and that more inclusive rules for mental illness and fluctuating conditions will not increase costs.

11. There seems to be a related approach anticipated in the paragraph on employment programmes in 2.4.16. The presumption here is that the UK government's employment programmes will be effective and save money. It seems to follow that if Scotland's employment programmes differ, in ways that do not offer the same benefits imagined by the DWP, there will be a cost attached; and because the basis of charging is estimation and assertion rather than evidence, such a charge could be imposed even if Scotland's approach subsequently proved to be

more successful in practice.

The clauses in detail

Clause 16: Disability, industrial injuries and carer's benefits

12. The definition of disability in clause 16 is restrictive. A disabled person is someone "to whom a disability benefit is normally payable" (p 106). A disability benefit is paid for "a significant adverse effect that impairment to a person's physical or mental condition has on his or her ability to carry out day-to-day activities ... or a significant need (for example, for attention or for supervision to avoid substantial danger to anyone) arising from impairment", which must not be short term. Contrast clause 22, where "'disabled person' has the same meaning as it has in the Equality Act 2010". The use of different definitions of a disabled person in different clauses of the draft Bill is odd. The variations in language from the Equality Act seem to imply that clause 16 is meant to be more restrictive than that definition, but that could only be determined in a court; the process of interpretation is liable to cause confusion and uncertainty. This has been identified as a particular area of concern by the Royal National Institute for the Blind.

13. There are two other problems with the new definition of disability. The first is that the form of words largely restricts the power to deliver benefits to the criteria which happen to be applied now (and incidentally, to different criteria from the new Personal Independence Payment, which stresses capability rather than severe functional impairment). There is a strong case for doing things differently - for example, basing some kinds of disability provision, particularly for degenerative conditions, on medical diagnosis rather than the assessment of capacity. That would not be possible directly within the existing clause, because that would imply the distribution of benefits to some people who did not meet the conditions required for disability benefits to be exempt from reservation. The second problem is a gap: the Smith Commission proposed the devolution of powers relating not only to disability but to those who are ill. The use of a more restrictive definition is a matter of concern to some agencies working with disability, such as the Multiple Sclerosis Society and the Scottish Association for Mental Health. The use of the Equality Act definition of disability would have automatically brought in some classes of illness, such as people with multiple sclerosis or HIV/AIDS; the new definition does not.

14. The definition of carers is also limited. Provision is to be made only for carers who are over 16, not in full time education, and not in gainful employment. This would prevent the Scottish Parliament from developing an integrated system for the support of carers.

15. The delegation of powers relating to Industrial Injury Benefits excludes payments for a group of specified industrial diseases (pneumoconiosis, byssinosis, lung cancer through asbestos etc.) There may be a good reason for this exclusion, but it has not been discussed. I note also that Vaccine Damage Payments, which were not mentioned in Smith, continue to be excluded under schedule 5F. It follows that the Scottish Parliament will not have the opportunity to integrate systems of compensation with the awards of its legal system.

Clause 17: Benefits for maternity, funeral and heating expenses

16. The Smith Commission referred in para 49 to devolution of the universal Winter Fuel Payment: clause 17 refers only to "expenses for heating in cold weather." The initial legislative authority for WFP was given "to meet expenses for heating which appear to the Secretary of State to have been or to be likely to be incurred in cold weather" (s 138(2) of the Social Security Contributions and Benefits Act 1992), and cold weather is "likely" in the winter, regardless of whether or not the weather actually is cold. Subsequent judicial cases have established that WFP is a legal entitlement for people living in warm countries; the actual weather experienced is not relevant. The draft clause has dropped the terms, "appear ... to be likely". On the face of the matter that means that there has to be cold weather before the payment can be made. The blanket presumption against benefit payments in schedule 5F should be taken to apply to WFP unless something specifically excepts it.

17. The exceptions to the exceptions in clause 17(3)b apparently include a reference to the Social Fund. The discretionary Social Fund was abolished by s70 of the Welfare Reform Act 2012. That left the Regulated Social Fund, and clause 17 was supposed to replace it. This sub-clause appears to reserve powers in relation to precisely those parts of the Social Fund that the main clause is supposed to be devolving. This may be a mistake.

Clause 18: Discretionary payments

18. Clause 18 refers to discretionary payments made on a short-term, individual basis, in terms previously used to provide for the Scottish Welfare Fund. The Scotland Act 1998 (Modification of Schedule 5) (No. 2) Order 2013 allows for "Providing occasional financial or other assistance to or in respect of individuals for the purposes of meeting, or helping to meet, an immediate short term need". The phrase is largely duplicated in clause 18; the word "immediate" has been dropped for most claimants, with the exception of those who are subject to conditionality.

19. These are not the discretionary powers promised by Smith. The Smith Commission proposed that "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." The White Paper comments that

"These payments can be made in any area of welfare, though the Smith Commission Agreement is clear that they must be discretionary. For this reason, the clause provides for a power to make a payment to meet a short term need to avoid risk to the well-being of an individual."(para 4.3.11)

This is a muddle; a discretionary power to make payments in any area is not the same thing as the replacement of the Discretionary Social Fund. A payment is discretionary, not because it is short term or individual, but because it is in the power of the delegated authority to determine whether or not the payment will be made. So, the Supplementary Benefits Commission (1966-1980) formerly operated an extensive system of administrative discretion based on an elaborate set of generally applied rules. Powers to make discretionary payments 'in any area of welfare' would go far beyond the scope of the Scottish Welfare Fund.

20. The exceptions in clause 18 are qualified by the exceptions to the exceptions in clause 17(3). The three clauses in 17(3) propose to qualify words relating to the 2013 Order that was made to legitimise the Scottish Welfare Fund. The power in the 2013 Order is framed in general terms, and currently if the Scottish Parliament want to do this by way of a loan, they have the power to do so. The clause 17.3.c reserves that same power. This will no doubt be represented as a clarification, but what it means in essence is that powers previously granted to the Scottish Parliament are being clawed back.

Clause 19: Discretionary housing payments

21. This clause ratifies the existing provision of discretionary housing payments, while preventing them being used in ways that might exceed existing entitlements. It also prevents Housing Benefit from being used for payment of service charges, which are an important element of care and support. It is not clear why this restriction should have been made, but the DWP has been piloting its Local Support Services Framework directly with local authorities and community partnerships, and the implication of the exclusion is that the DWP will retain this function themselves.

Clauses 20 and 21: Universal Credit

22. Smith recommends in relation to Universal Credit that

"44. The Scottish Government will be given the administrative power to change the frequency of UC payments, vary the existing plans for single household payments, and pay landlords direct for housing costs in Scotland.

45. The Scottish Parliament will have the power to vary the housing cost elements of UC, including varying the under-occupancy charge and local housing allowance rates, eligible rent, and deductions for non-dependents."

I assume that the reason why these powers are listed in two paragraphs, and why one paragraph refers to "administrative " powers when the other refers only to "powers", is that the Commission intended these two classes of reform to be tackled differently. Administrative powers are conveyed by regulations and practice; they are subject to negotiation and issues of practicality. Powers generally mean legislative powers, implying that the Scottish Parliament will have the power to decide levels of entitlement. Despite that, clauses 20 and 21 are couched in very similar terms, and they treat the two categories in much the same way: consulting with the Secretary of State about "practicability" and making regulations.

23. Clauses 20(2)b and 21 seem to allow for greater powers than Smith envisages. There are other reasons besides direct payment to landlords which might lead to benefits being paid to persons other than the claimant. Section 20(2)b refers to s 5(1)p of the 1992 Social Security Administration Act, which provides "for the circumstances and manner in which payments of such a benefit may be made to another person on behalf of the beneficiary for any purpose, which may be to discharge, in whole or in part, an obligation of the beneficiary or any other person." There have been long-standing arrangements to recover debts and overpayments this way - and the precedent means there should be no doubt that such arrangements are 'practical'. If the provisions allow variation in the 'time when universal credit is to be paid' (clause 21), the wording is broader than frequency would imply: it could include waiting times for the first payment.

24. Some concern has been expressed about the problem of obtaining consent from the UK government for any proposed changes. Any changes would require new iterations of the administrative and computer process to deliver Universal Credit. The IT system is unusually elaborate; administration and IT for Universal Credit are projected to cost £12.845 billion over its 'whole life' (source: <http://transparency.number10.gov.uk/assets/client/pdf/dwp-expenditure.pdf>), apparently 2012-2021. Small alterations in the IT process may call for generic changes in the process, and the proportionate cost of such alterations is likely to be prohibitive. The complexity and expense of proposing any alteration to Universal Credit make it uncertain that such alterations can ever happen.

Clause 22: Employment support

25. Clause 22 is restricted to disabled persons and support for people claiming reserved benefits for at least a year. It does not therefore allow Scotland (with the exception of people with disabilities) to make provision for unemployed people who do not receive benefits, or those for whom lesser intervention is appropriate.

26. It should also be noted that in relation to these powers, the UK government will retain "the ability to make mandatory referrals to Scottish Government programmes" (4.4.6). That seems to imply that the Scottish Government will have the duty to provide programmes in these terms, and to meet the expense.

Implementing changes

27. The removal of reservations does not imply that the UK will cease to have powers relating to benefits, or that it will no longer exercise them. Transitional arrangements would consequently be based on negotiation, and the UK system will continue to apply until the Scottish Parliament is ready to exercise any powers instead. There are important constraints on the exercise of such powers. The first is financial: if benefits are provided for from a fixed budget, then every increase for one claimant has to be set against a decrease for another. The second is administrative: differentiating the terms on which benefits are delivered will necessarily imply capacity for processing claims and delivering benefit. A third limitation is the interaction of benefits. Most of the benefits which are envisaged in the draft legislation are non-contributory benefits, which can be delivered in conjunction with other sources of income without interacting with them. The same is not true of means-tested benefits, including variations to Universal Credit and Council Tax Reduction.

28. Part of the complexity of benefit systems relates to the management of transitional arrangements. Because changes in benefits generate winners and losers, those who stand to lose often have a protected status for a period of years. (An example is the proposed devolution of Severe Disablement Allowance, which closed to new claims in 2001.) An alternative approach is to capitalise entitlements and buy them out. This has the disadvantage of requiring more funding in the short term, but costs in the longer term are equivalent, and the approach has the marked advantage of avoiding unnecessary complexity.

Translating the Smith Commission into practice

29. The clauses in the White Paper are not faithful to the recommendations of the Smith Commission. The key differences are the absence of the power to create new benefits, and the restrictions placed on the categories of people to whom benefits refer.

30. There are other smaller differences, which may be unintended or the result of problems in drafting. The wording of the clauses on Universal Credit is one example; the exclusions to the exclusions in clause 17 may be another.

31. The Smith Commission also suggested that there would be provision to allow topping up of existing benefits. I think from Smith's para 54 that it was intended that such a top-up for other benefits would operate through a discretionary payment, but there is no general mechanism to allow for it. The main precedent for topping up benefit has been Housing Benefit, but that

benefit is locally administered. I expressed doubts in my submission to Smith as to how far 'topping up' could be done in practice: "Wherever delivery is the responsibility of a UK-wide agency it will be necessary for the operating service first to distinguish potential claimants with Scottish entitlements, and next to offer distinct rates or calculations for those claims. The mechanisms do not exist to make this possible." There is provision in clause 19 to top up benefits for housing, limited to topping up to existing levels of entitlement, but that is all; it is not open to the Scottish Parliament to make other reserved benefits more generous.

32. The drafters of the clauses in the White Paper have mistaken their remit. The purpose of the draft Bill is not to define for Scotland the terms on which benefits may be delivered. It is to give the Scottish Parliament the necessary powers, so that it can define the terms on which benefits are subsequently delivered. By specifying the scope of future legislation in terms of existing benefits, the draft clauses deny the Scottish Parliament the power to develop in other ways that fall outside the specified rules. Those powers should in every case be broad enough to allow the Scottish Parliament to act within the agreed sphere of devolved activity.

33. In summary, the differences between the Smith Commission and the White Paper are as follows:

The Smith Commission	The White Paper
New benefits in devolved areas	New benefits in devolved areas of welfare responsibility
Benefits for carers	Benefits for unemployed carers
Benefits for disability and those who are ill	Benefits for people with 'significant' functional impairments or care needs
Universal Credit: frequency direct payments to landlords	Universal Credit timing to whom payable
Industrial Injuries Disablement Benefit	Industrial Injuries Benefits, excluding prescribed industrial diseases
Cold weather and Winter Fuel Payment	Cold weather payments
Topping up reserved benefits	Additions to Housing Benefit/ housing costs

Professor Paul Spicker
10 February 2015

Chartered Institute of Housing Scotland Written Evidence for the Devolution (Further Powers) Committee



Proposed New Powers for Scotland

CIH contact: David Ogilvie, Head of Policy & Public Affairs: david.ogilvie@cih.org

1. General Comments

- 1.1 CIH Scotland welcomes the opportunity to give evidence on the draft legislative clauses which set out proposed new powers for Scotland. This is an exciting time for the future of Scotland within the UK and our aim as the independent voice of housing and as part of a UK wide organisation is to ensure that any new powers granted result in a housing and welfare system that works for everyone both in Scotland and the UK as a whole.
- 1.2 When the draft legislative clauses were published our initial reaction was to welcome the proposed additional powers for the Scottish Parliament in so far as they might help to positively influence the direction of the Scottish housing system. Members will appreciate that the prospect of the Scottish Parliament having powers to make changes to the Universal Credit system, including the ability to mitigate the “bedroom tax”, and greater influence over the methods of Universal Credit delivery are of particular interest to social housing providers.
- 1.3 However, upon closer inspection and in light of debate in recent weeks, we have a number of concerns about the need for greater clarity on a number of fronts, particularly around the interdependencies between taxation and welfare powers.

2. Powers over Welfare and Taxation

- 2.1 Our submission¹ to the Smith Commission’s call for views on the devolution of welfare and taxation powers to Scotland made three main points:
 - Housing Benefit should not be devolved in isolation;

¹ CIH Scotland submission to the Smith Commission: http://www.cih.org/publication-free/display/vpathDCR/templatedata/cih/publication-free/data/CIH_Scotland_submission_to_the_Smith_Commission

- The welfare system should continue to be delivered by the UK Government with Scotland having the option to ‘top up’ housing benefit with revenue raised in Scotland; and
- In order to be able to make viable changes to the welfare system, the Scottish Government would need to be given adequate powers to raise revenue through taxation.

2.2 Our main concern was that if certain elements of welfare were devolved to the Scottish Government without the means to fund these changes, this could result in a situation, similar to that in Northern Ireland, whereby the Scottish Government would technically have the *power* to make changes to welfare provision but the complexity of the system and lack of fiscal leverage would mean that, in reality, the opportunity for implementing and changes would be severely restricted.

2.3 Under the terms of the draft legislative clauses, the Scottish Government would be required to cover the cost of administering any changes to the way Universal Credit is delivered. However, the clauses lack sufficient detail on how the transfer of taxation powers would work in practice. It is not currently clear how an increase in taxation in Scotland would impact on the block grant received through the Barnett formula. Until this is clarified, it is hard to predict the true cost of implementing any changes to the welfare system in Scotland except to say that we can be fairly certain the costs would be significant.

2.4 Within the confines of a limited budget, any government is faced with difficult budget choices. During 2013/14 only 14,780 homes were completed in Scotland². Our population is estimated to increase by an average of nearly 18,000 people each year until 2022³ and last year over 29,000 households in Scotland were classed as homeless⁴. What Scotland needs is to have both a welfare system that works and a significantly increased supply of affordable housing. These objectives should not be placed in opposition to one another. However, if the Scottish Government is to take on the responsibility for administering a modified version of Universal Credit in Scotland, then significant additional costs will need to be borne by the Scottish Government. For example, we know that the IT system for Universal Credit is projected to cost £12.845billion over the period 2012-2021.⁵ On the purely hypothetical basis that Scotland might stand to share 10% of that cost, in excess of £1Bn

² Scottish Government Housing Statistics, all sector new build completions by financial year: <http://www.scotland.gov.uk/Topics/Statistics/Browse/Housing-Regeneration/HSfS/NewBuildAllSector>

³ General Register Office for Scotland, Population Projections, Table 1: <http://www.gro-scotland.gov.uk/statistics/theme/households/projections/2012based/list-of-tables.html>

⁴ Scottish Government Homelessness Statistics, table 25: <http://www.scotland.gov.uk/Topics/Statistics/Browse/Housing-Regeneration/RefTables/adhoc-analysis/annualreferencetables201314>

⁵ <http://transparency.number10.gov.uk/assets/client/pdf/dwp-expenditure.pdf>

would need to be found in the Scottish Budget over that period just to fund a viable IT system to support Universal Credit in Scotland.

- 2.5 With regards to the legislative clauses regarding changes to the delivery of Universal Credit (20 and 21), we echo the voices of many across the housing sector calling for a clearer statement on how the powers can be used.
- 2.6 The duty for the Scottish Government to consult the Secretary of State before making any changes to Universal Credit delivery in Scotland has been interpreted by some to mean that the UK Government would hold a 'veto' over these powers. Others suggest that the Scottish Government would have to consult but could ultimately make their own decisions. In reality, given the ambiguous way the clauses are currently drafted, either interpretation could be argued. We would hope that through the legislative process, greater clarity could be delivered for the benefit of both the Scottish and UK Parliaments.
- 2.7 In addition, these clauses state that the timing of any changes would have to be agreed by the Secretary of State and that he or she may not unreasonably withhold consent. But this raises the question – who decides what is 'reasonable'?
- 2.8 We would agree that if any changes are to be made to the welfare system in Scotland, that the two Governments must work together to ensure that housing and welfare across the UK provide a good quality of life for those who are in need of support. We would however suggest that significant work is still required on this legislation to provide the clarity required on what is an issue of critical importance for housing providers and tenants.
- 2.9 Consideration of the practicalities around the powers to change certain aspects of Universal Credit in Scotland raises further questions. The CIH has previously acknowledged the potential for positive outcomes arising from the implementation of Universal Credit, particularly with regards to the application of a single taper rate and reducing the withdrawal of benefits as a person moves into work. But it is unclear how a single taper rate could be applied if the housing element of Universal Credit was separated out to allow variances in Scotland. This is just one of various ways in which there would appear to be a risk that we could end up with a more complex welfare system than we already have.

3. Other Powers

- 3.1 Our submission to the Smith Commission also called for the devolution of further powers over property and land tax and the ability to vary or reduce VAT on housing repairs or improvements. We believe that these measures would help to address issues of supply and affordability within the housing sector and help to incentivise repairs and improvements in the private sector. It is disappointing that these measures have been overlooked.
- 3.2 We also put forward a case for the devolution of powers over the energy market to enable the Scottish Government to influence the cost of energy and address the serious issue of fuel poverty in Scotland. The power to determine how energy supplier obligation funding is spent in Scotland is welcome but the lack of influence over how the funding is raised or how much is raised is disappointing.

David Ogilvie
Head of Policy & Public Affairs
Chartered Institute of Housing Scotland
Email: david.ogilvie@cih.org

February 2015



Evidence for the Scottish Parliament's Devolution (Further Powers) Committee on the Welfare Clauses contained within the Draft Clauses published by the UK Government document - Scotland in the United Kingdom: An enduring settlement.

Evidence Session Thursday 19 February 2015 09.00 am

Richard Gass on behalf of Rights Advice Scotland

Rights Advice Scotland is an organisation representing Welfare Rights Officers in Scottish Local Authorities. Rights Advice Scotland aims to be a key player in the field of social welfare law and to promote the excellent work and breadth of knowledge of our members and campaign for the uptake of benefits and for benefit reform.

Evidence for the Committee

On 27th November the Smith Commission report was published outlining recommendations for the devolution of specified powers to the Scottish Parliament.

On 22nd Jan the UK Government published Scotland in the United Kingdom: An enduring settlement containing draft clauses of legislation as a first step to delivering the proposals in the Smith report.

Focusing on the proposal for devolution of welfare:

The recommendation in the Smith report at paragraph 49 is that following benefits will be devolved

49(1) Benefits for Carers and disabled people

- Disability Living Allowance
- Personal Independence Payments
- Attendance Allowance
- Carers Allowance
- industrial Injuries Disablement Benefit
- Severe Disablement Allowance

49 (2) The Regulated Social Fund:

- Cold Weather Payments
- Sure Start Maternity Grants
- Funeral Payments
- Winter Fuel Payments

49 (3) Discretionary Housing Payments

The general principle within the Scotland Act is that Social Security matters are reserved unless there are specified exceptions.

Clause 16 in the 'enduring Settlement' document attempts to describe in law the exceptions that are required to the Scotland Act to allow the benefits in paragraph 49(1) above to be devolved.

The wording of the clauses is slightly awkward but probably does achieve its goal. However is it necessary in **Exception 1** to firstly exclude from the exception Severe Disablement Benefit and Industrial Injuries at clause 16(2)(a) only to then include them again in 16(2)(b) and 16(2)(c) respectively. This just adds unnecessary complexity an unfortunately common feature with Social Security law.

The inclusion of Severe Disablement Allowance (SDA) seems a bit at odds with the fact that Employment and Support Allowance (ESA) is reserved (and will become part of Universal Credit). The UK Government intention had been that all recipients of SDA should have been re assessed (alongside Incapacity benefit claimants) under ESA by now and that in the future would move to Universal Credit. Clearly this ESA migration process is behind schedule if there are still people on SDA.

The inclusion of SDA could lead to a situation where there some people are entitled to the UK benefit, ESA (or UC equivalent) because they are disabled and unfit for work and others entitled to a Scottish version of SDA for the same reasons.

In Clause 16 **Exception 2** - Carers Benefits are to be devolved however this does not apply to any element of benefits that are reserved. This could give rise to difficulties e.g. If in Scotland we were to introduce a more generous carers allowance in terms of eligibility rules how would this be treated for the carer's premium within means tested benefits which are reserved?

In **Exception 3** does the inclusion of definitions of benefits restrict the scope to broaden entitlement for example Carers Benefit? A relevant carer cannot be in full time education or gainfully employed. Will these mean that in Scotland we could not expand entitlement to those in education or working?

Industrial Injuries are included for devolution but not Lump Sum payments in respect of the asbestos related diseases.

Clause 17 **Exception 4** allows the regulated Social Fund to be devolved.

Issue: Current Social Fund payments for Funeral Grants have been criticised as being inadequate to cover the cost of a simple funeral and often leaves claimants with substantial debt. Families do not know how much of a grant they will get therefore the shortfall is unknown. Too often Funeral directors do not offer a funeral that is within the constraints of the grant.

Unless additional resources were made available to improve the Funeral Grants the best that could be achieved would be awards along current lines. This could expose the Scottish Govt (or local Govt if used as the delivery mechanism) to criticism for not improving a benefit unfit for purpose. This could also apply to maternity grants and cold weather payments.

Clause 18 **Exception 5 and 6** the Smith proposal at paragraph 54 was to allow discretionary payments in any area of welfare. The clause however restricts this power to short term and occasional needs.

Clause 19 **Exception 7** this will devolve the power to make Discretionary Housing payments to cover additional housing costs. This power could continue the ability to cover the shortfall arising from the 'under occupancy charge' otherwise known as the 'bedroom tax'. There is however an express statement preventing the use of DHPs for help with cost of Water and Sewerage charges amongst others. Water and Sewerage charges might have been an area warranted some benefit consideration.

Universal Credit

While Universal credit is to be a reserved matter the Smith Report at paragraph 44 recommended the devolution of powers with regard to:

- Frequency of payments
- Who the Payments are to
- making payment direct to landlords for rent element

In addition at paragraph 45 the report recommended devolution of powers relating to

- Under occupancy Charge (Bedroom Tax)
- Local Housing Allowance rates

- Eligible Rent
- Non Dependent Deductions

Clauses 20 and 21 refer to these areas in their clause tile but give no further specific detail; as such we will need to await future regulations. It is however stated that Scottish Ministers cannot make regulation to vary these areas without consultation and approval from the Secretary of State.

Other Issues not covered in the wording of the draft clauses.

Disability benefits for working age adults are being changed from DLA to PIP and there reassessment process has accelerated in last few months. This transfer process for Scottish claimants at this time with the potential confusion and even distress for claimants is somewhat surprising given that this is an area to be devolved. This could mean that disabled claimants could be subject to one change only to have another change applied in two years time.

In the Smith report and in “Enduring Settlement” reference is made to either negotiating with DWP for delivery arrangements or for separate arrangements to be set up in Scotland for the devolved benefits. While it may be attractive to put in place Scottish delivery arrangements this may expose a substantial financial and reputational risk for the body or bodies delivering the benefits particularly so if budgets are not increased.

Currently the proposed devolved benefits are funded in full by UK Government. What appears to be proposed is a direct transfer of the budget at the time of the transfer of the new powers. This will fail to take into consideration the likely increase in claimant volumes. With advances in medicine and the fact that people are living longer there will be increasing demands on the budget as such there needs to be a mechanism to allow this to grow to match changes in population.

Further discussion on these issues can be explored during the oral evidence session.

Richard Gass
Rights Advice Scotland
17th Feb 2015