The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DEVOLUTION (FURTHER POWERS) COMMITTEE

Thursday 19 February 2015

Session 4

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DEVOLUTION (FURTHER POWERS) COMMITTEE
5th Meeting 2015, Session 4

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Duncan McNeil (Greenock and Inverclyde) (Lab)

COMMITTEE MEMBERS

*Linda Fabiani (East Kilbride) (SNP)
*Rob Gibson (Caithness, Sutherland and Ross) (SNP)
*Alex Johnstone (North East Scotland) (Con)
*Alison Johnstone (Lothian) (Green)
*Lewis Macdonald (North East Scotland) (Lab)
*Stewart Maxwell (West Scotland) (SNP)
*Mark McDonald (Aberdeen Donside) (SNP)
*Stuart McMillan (West Scotland) (SNP)
*Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

John Dickie (Child Poverty Action Group)
Richard Gass (Rights Advice Scotland)
Jim McCormick (Social Security Advisory Committee)
David Ogilvie (Chartered Institute of Housing)
Professor Paul Spicker (Robert Gordon University)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Devolution (Further Powers) Committee

Thursday 19 February 2015

[The Convener opened the meeting at 09:02]

Decision on Taking Business in Private

The Convener (Bruce Crawford): Good morning, ladies and gentlemen. Welcome to the fifth meeting of the Devolution (Further Powers) Committee. As usual, I ask everyone to make sure that their phones are put into the appropriate mode for the purposes of the meeting. We have not received any apologies, but Linda Fabiani is attending another event at the moment and will join us in due course.

The first item on the agenda is a decision on whether to take item 3 and all future agenda items of its kind in private. For the first time, we have an adviser with us and we will have an opportunity to discuss the evidence that we have received and have a summary of it. I suggest that we have that discussion in private and that we do likewise in the future. Are members content with that?

Members *indicated agreement.*

Draft Legislative Clauses (Welfare)

09:03

The Convener: Agenda item 2 is evidence from some experts in the welfare field on the draft legislative clauses. John Dickie is the director of the Child Poverty Action Group in Scotland; Richard Gass is a member of the policy and standards committee of Rights Advice Scotland; Professor Paul Spicker is from Robert Gordon University; David Ogilvie is the head of policy and public affairs at the Chartered Institute of Housing; and Jim McCormick is a member of the Social Security Advisory Committee—Duncan McNeil and I met him recently and had a very interesting discussion with him. I thank you all for joining us.

We have five witnesses who will give evidence in an area that can be quite complex and detailed. Therefore, I ask my colleagues and the witnesses to be as succinct as they can be, otherwise we will have difficulty in getting through all the evidence that we need to get through. We will try to finish at about 11 o'clock at the latest. If we can keep questions and answers tight, that will help. I know that that is not always easy, given the subject matter, but we need to do what we can.

I will kick off the session with a general question. We have now all had the chance to see the details of the United Kingdom Government's draft clauses on welfare in the command paper "Scotland in the United Kingdom: An enduring settlement". I would like to get an overview of how they are drafted and the practical challenges that lie ahead in implementing the new powers. I know that that is a big issue in many ways, but who wants to kick off? John Dickie is looking interested.

John Dickie (Child Poverty Action Group): I am certainly interested. Our concern is how social security powers, wherever they lie, can be used to prevent child poverty and the wider inequalities that underpin that poverty. The way in which any devolution package is delivered, as well as how those powers might be used, can have a huge impact on the efficiency and effectiveness of financial support to individuals and families. In our mind, there is no question but that the draft clauses interpret the Smith commission's recommendations pretty narrowly. With some of the opportunities that we thought would flow from the Smith recommendations, such as the possibility of creating new benefits in Scotland and of topping up benefits, the draft clauses do not give effect to the recommendations in the way that we, and people more widely, understood would be the case.

Another key point is that the bulk of social security powers will still lie at UK level, which is important for us in relation to how we influence social security policy. Having said that, there are real opportunities in the powers that are proposed for devolution and in the draft clauses, even as they stand. For example, there are opportunities to improve the delivery of universal credit and, potentially, levels of housing support, given the devolution of the housing element of universal credit. There is the potential to provide support with maternity costs and to improve the adequacy of and access to disability and carers benefits.

Those are real opportunities, but the important point, which I think is what the committee is looking to draw out today, is about how the clauses are given effect and how that can be done in such a way that it minimises the impact of creating new administrative interfaces and ensures that claimants do not fall between the interfaces. We need to ensure that we have a system that allows for the delivery of minimum standards for social security payments in Scotland and that there is adequate accountability and adequate oversight, with opportunities for claimants to appeal. We need to ensure that there is no loss of passporting arrangements. When replacement benefits are created under devolution, we need to ensure that claimants in Scotland can continue to be passported and can access the reserved benefits to which they would currently be passported.

The final key issue for us is to ensure that, through the process, we protect the role of cash benefits as a social security entitlement, particularly in meeting the extra costs of disability.

There are real opportunities, but there are also real risks. We need to ensure that we get the process right and that we get the package right in a way that means that we improve the potential of our social security system to tackle poverty and do not create any unnecessary new holes that claimants can fall through.

The Convener: You have given us a good overview and covered a breadth of issues. Does anyone want to add any supplementary information? Are those all the issues, or are there other things that we need to consider?

Richard Gass (Rights Advice Scotland): A major concern will be whether the level of money that comes over will be sufficient. It is fine having new powers to deliver and expand benefits but, if the finances do not match that, what might be an opportunity today could over time become a problem for the Scottish Government or for the delivery agents.

The Convener: That is helpful.

Jim McCormick (Social Security Advisory Committee): I offer a thought about accountability issues. Smith observed that we have weak intergovernmental working, which is a problem and is not an ideal context for welfare devolution. The draft clauses go some way to responding to that, but they also contain an explicit reference to concurrent powers in relation to universal credit, which puts us formally into a very different place in terms of how Governments, and therefore Parliaments, will need to work together. We are used to thinking in terms of reserved/devolved splits, but now there are shared areas.

We need to start thinking about appropriate oversight, scrutiny and transparency arrangements so that, whatever emerges from the revised clauses, we have much better machinery for independent and parliamentary oversight.

David Ogilvie (Chartered Institute of Housing): As far as the housing profession in Scotland—which I am here to represent—is concerned, there are several opportunities. We are not quite where we wanted to be, given what we submitted to the Smith commission. We are slightly short of a system in which we would be able to top up benefits appropriately for the Scottish context.

There is a lot of interpretation involved in the process. From our perspective on the draft clauses, the recent debate on whether there is or is not a veto is something on which we need clarity. It is vital that we clarify how the additional funding that we would wish to bring in to support the most vulnerable in Scotland would manifest itself. As we know, we are at an interesting political point, both north and south of the border. We will not have that clarity until the other side of the general election and we will have to deal with things at that point. What I have tried to highlight in our written evidence is that we do not believe that we have got much further forward in getting the clarity that we need.

There has been a process, which has been very rapid. Everyone involved should take some credit for that, but we do not yet have clarity around specific issues, such as how we would be able to afford to eliminate the bedroom tax. What are the opportunity costs that we will face in Scotland and what would the implications be at a UK level? Because the Chartered Institute of Housing is a UK body, we have a responsibility to ensure that we attend to the issue of no detriment, which is a key point. How we interpret the issue of no detriment will be vital.

The Convener: Once we have got through the general opening section, we will move directly on to the area of no detriment.

Professor Paul Spicker (Robert Gordon University): A great deal of what my colleagues have raised is important. There is a shortfall in the powers that have been suggested in the draft clauses relative to what was in the Smith agreement. There is a great deal of complexity.

We begin from a position in which all social security powers remain reserved, unless there are specific exceptions. The way in which Smith has been translated into the clauses has seen, in general terms, erosion at most points of the conditions under which transfers are possible and a limitation on certain powers, including some powers that the Scottish Parliament already has.

Beyond that, there is a fundamental mistake in the process that has been undertaken by the Scotland Office and the drafters of the clauses. They have taken the view that their task was to alter the basis of the administrative responsibility for delivering certain existing benefits, so they have drafted a clause relating to disability, which seems to them, although it is complex, to transfer responsibility for disability living allowance and attendance allowance. There are complexities within that; the clause does not quite do that, but that is the way that it is seen. However, that was not the task that the drafters were supposed to be carrying out.

09:15

The draft legislation does not create any benefits. That is not what the legislation is supposed to be about. It is supposed to be about the transfer of powers that will enable the Scottish Parliament to make decisions in the area of benefits.

Certain powers were promised and the white paper says that they are there, but they are not. There is no power to create new benefits in these areas, because the criteria on which the benefits can be distributed are being specified in the legislation. There is no power to top up reserved benefits, which, again, was in the proposals. All that there is—it is being passed off as if it were that—is a discretionary power to deliver short-term benefits in cases of immediate need, which is a power that the Scottish Parliament already has as a result of an order relating to the discretionary social fund.

We have seen a considerable shortfall, but that shortfall reflects a problem in the approach that is taken in the clauses. Whatever we do, it will be difficult to implement this material in practice. There will be political problems and financial obstacles, but what I am seeing here are legal obstacles that might mean that a lot of initiatives fail at the first hurdle.

The Convener: Gentlemen, you have laid out quite a map to guide us through the next couple of hours.

I said that we would start off with the issue of no detriment, which will allow us to get into the meat. That is what we should do now. I think that Stuart McMillan identified himself as wanting to explore that area.

Stuart McMillan (West Scotland) (SNP): I read the submissions with great interest, and what I have heard this morning very much backs up what I have read. However, I am still unclear with regard to the no-detriment issue. The Smith report is clear on what that principle is supposed to mean. The draft clauses are a bit less so, as has been highlighted by what we have heard this morning.

How workable are the no-detriment clauses in terms of ensuring that there is no detriment to either Scotland, elsewhere in the UK or—as Mr Dickie mentioned in his submission—claimants?

The Convener: It would be useful if, before answering the question, our witnesses could tell us what they think that no detriment means, because there are different definitions of it.

Richard Gass: In the Smith report, the term meant that neither the Scottish Parliament nor the Westminster Parliament would be worse off as a result of the transfer of a particular benefit. However, I think that it should be taken a step further and should mean that there should be no detriment to the individual. That would set a challenge for the Scottish Government to ensure that any change would have to be better than what was there before.

At present, while the powers are being considered and transferred, the Government is firing ahead with the migration, following reassessment, of folk on disability living allowance to personal independence payments. That proposal was made by the Westminster Government as part of a cost-saving exercise. While we are considering the matter, benefits are being revised with the ultimate aim of reducing the social security budget in that area. The question would be: at what stage do we measure the amount of money to transfer? Is it at this point in time or at the point at which the new benefit or power would transfer? I suspect that it would be the latter, by which point the budget could be significantly less than it is at present.

Professor Spicker: There are two no-detriment principles in Smith. The first is about the generic transfer of powers, where I think that it is relatively uncontroversial. The second part, however, concerns the fact that, in relation to each and every policy decision that is made, there will be a cost or price attached. The illustrations that are

given in the command paper include, for example, costs to universal credit of any alteration in the tax rates, the effect on vehicle excise duty of passporting benefits and certain things relating to employment programmes. We are talking about a great level of detail that means that virtually any policy decision will be subject to a cost review.

The area that immediately struck me in that context was universal credit. We do not know exactly what it would cost to alter universal credit, but we do know something about the costs of universal credit. According to the Cabinet Office, the estimated costs of introducing an information technology system for universal credit and administering it up to 2021 currently stand at the staggering figure of £12.845 billion. That absolutely staggering figure indicates that a lot of the expense of universal credit is still to come.

I was at a conference on Tuesday and was able to take advantage of the presence of James Wolfe, who is the deputy director of universal credit, to ask what he thought the cost implications might be of different potential changes to universal credit. His answer was that some of them are already built into the system and that, therefore, it should be possible to keep the costs relatively small. He gave the example of moving to a bi-monthly payment, for which the flexibility already exists and a major computer iteration would therefore not be required. However, he suggested that, if the Scottish Government wanted a more substantial or complex variation—for example, the front loading of payments in some directions or movement towards an irregular frequency for other reasons—that could prove to be extremely costly.

The Convener: Does anybody else want to reflect on that?

Jim McCormick: I will pick up on how the no-detriment principle is treated in relation to employment programmes. The important underlying issue is incentives. If a future Scottish work programme or a variation in the work choice programme that we have at the moment were to invest in a different way—for example, by investing more in training, childcare and a kind of social investment cycle—it might take longer to get the payback but the payback might be bigger. Therefore, it is important that we understand the relationship between the policy choices that are made in Scotland and the actual outcomes rather than the apparent, short-term outcomes.

Paragraphs 2.4.16 and 2.4.17 in the command paper talk about the need for

"a shared understanding of the evidence".

That sounds like a technical point, but I suspect that it will be extremely important in working through what we mean by no detriment. Where is the incentive for Scotland to invest more or differently in order to get a better payback? We are only in the foothills of understanding what "a shared understanding" means in the context of the relationship between policy choices and outcomes, and I suspect that, quite quickly, we will need some worked-through examples of what that might mean. Employment programmes and universal credit are two areas that jump out immediately from the draft clauses.

The Convener: I have a supplementary question on that issue. It would be fantastic to reach "a shared understanding", but that will not be an easy task. Inevitably, there will still be disagreements. If there are disagreements, how will they be resolved? Who will arbitrate and who will decide on the cost or whether detriment exists? Do you have any views on how that might best be done? My guess is that that will not be in the clauses, because such material could not be in them, but memorandums of understanding and agreements will need to be built up to allow that sort of architecture to arrive.

Jim McCormick: I understand that the joint ministerial working group on welfare met for the first time last week. There is clearly a bilateral angle involving the Scottish and UK Governments, but there will also be what Smith calls a quadrilateral element, which will involve the four nations of the UK and wider future funding settlements.

Inevitably, there will need to be last-resort ways of resolving tension and conflict and, ultimately, there will need to be appeals. However, in the interim, the best solution will be to work through what the proposals could mean in practice in half a dozen key areas in which either powers are being wholly devolved or an administrative power is coming, so there is a concurrent power shared. We need both Governments and Parliaments to work through those examples early so that we have a clear sense of where we might be going if different choices are made. Ultimately, it comes down to where the costs and benefits of different choices lie. Even if the evidence is contested in future, we will need to have robust procedures in place, and we need to do some of that design in advance.

Duncan McNeil (Greenock and Inverclyde) (Lab): Does that take us back to your initial, very important point about intergovernmental working and the models that are out there? Given the broad general principle of no detriment, people will not be acting wilfully to cause a problem here or there. However, there are models in federal set-ups and elsewhere. We had some evidence on that from the Canadians, who described a series of mechanisms that they have in place, including intergovernmental councils of ministers, whereby they see through important disputes or

discussions. Do you agree that none of the issues is insurmountable?

Jim McCormick: I suspect that your expert adviser will be best placed to comment on that, but you are absolutely right. We are moving towards what outsiders might call a quasi-federal system. It is very asymmetric, and we need to take the next step in maturing the settlement. That requires not just more formal mechanisms but much better day-to-day relationships between Governments and Parliaments. Evidence will be published soon by different bodies on how that works in relation to, for example, employment programmes in Canada, Germany and other federal systems, and I am sure that there will be evidence in other areas as well.

Professor Spicker: I would question whether we are talking in any sense about a federal system. A federation is usually understood as reserving powers to the lower body. What we are seeing is asymmetric in a different direction. Substantial power is reserved to the UK Government and in particular to the Treasury.

In the case of Northern Ireland, there is currently a dispute about the failure of the Assembly to pass certain legislation that the Treasury and the Department for Work and Pensions think it ought to pass. In effect, it is being charged for its failure to make deemed savings. The deemed savings include, for example, £105 million from personal independence payments. It is questionable whether there are any such savings to be made, but that has not stopped the deductions and the monthly charges relating to those presumed savings.

If we have a situation where finance comes from the UK Government and it determines what the prospective budget will be, it will be in a position to control how much is done and indeed what is done. We should remember that Northern Ireland has, in legislative terms, full authority over all its benefits.

Duncan McNeil: Is that an argument against the block grant and Barnett? Other systems do not call it Barnett, but they call it social transfer. Is what you have said a challenge against that sort of system? How do we overcome the problem where there is a block grant and Barnett or social transfer between the centre and regions or countries? How do we address the problem? I think that the committee would like to know that. We could then make some suggestions in our report.

Professor Spicker: I have to put my hands up and confess that I do not have a clue how to do it. That is quite beyond my expertise. I am looking in the direction of your adviser, hoping that perhaps she can help. I genuinely do not know how to get round that particular problem.

The Convener: Stuart McMillan has a supplementary question, and then Tavish Scott wants to come in.

09:30

Stuart McMillan: Mr McCormick, you mentioned policy areas where there has already been an element of devolution. I would suggest, with respect, that welfare is not the same as energy policy. As we have heard this morning, welfare policy is a lot more complicated than energy policy. I accept that the two Governments could look at what is already in operation, but they could not automatically transfer over the working arrangements to the likes of welfare policy.

I will also highlight the cost. Professor Spicker mentioned the cost of an IT system of £12.84 billion. The introduction of an IT system is never easy or cheap and there are invariably overruns. Given what has been suggested this morning and what is in the draft clauses, how confident are any of the witnesses that there would be no detriment to Scotland as a result of a new IT system being introduced and rolled out?

Richard Gass: I would have no confidence whatsoever. The point has been made that Government IT projects come in over budget and behind timescale, so I would have no confidence that a new IT system would ensure that there was no detriment.

The Convener: Both Governments are capable of having IT systems that run over cost, so the key question is how transparent the system is for procurement and what agreement is reached about how the costs can be appropriately divided between the UK Government and the Scottish Government. I assume that that comes back to what Jim McCormick said about the shared understanding of what is going on in any system for resolving disagreement. I see nods, so I take that as a yes.

Tavish Scott (Shetland Islands) (LD): I will go back to Mr McCormick's point on the joint arrangements that are needed between the two Governments. For obvious reasons, most of those will be formalised after the election. The Smith report is very robust on that and it is fair to say that that is because John Swinney and Michael Moore knew the issue inside out.

Mr McCormick mentioned the quad and that there has already been, or there is to be, a joint ministerial meeting on social security. All those things are already happening, which is entirely positive and a good thing, but there is no scrutiny of that in the Scottish Parliament and I know for a fact that there is none at Westminster. Does Mr McCormick think that there should be?

Jim McCormick: You are right. The Smith report was very clear about looking at arrangements that have been put in place for the Scottish rate of income tax and Her Majesty's Revenue and Customs. The chapter on fiscal issues is clear about the need for parliamentary and independent scrutiny, and there is no reason why that should not transfer over to all the draft clauses, including the social security ones.

To pick up David Ogilvie's point, it is understandable that we will not see much in the way of further detail before the election, but it is more concerning that the draft clauses do not say more about the arrangements or process that we need to put in place to get to much more robust scrutiny in the pre-legislative phase, during legislation and once we get into regulations being made.

The Social Security Advisory Committee currently has a remit for the DWP and the Department for Social Development in Northern Ireland in relation to secondary legislation on welfare and pensions, and it can give advice to ministers, whether that advice is asked for or proactively given. It also has the power to undertake independent work on areas of concern. Our hope is that, emerging from the joint ministerial group on welfare, both Governments will actively consider how such an arrangement can be put in place through SSAC or others to ensure that Scottish parliamentary scrutiny and the capacity for scrutiny outside the Parliament are improved.

Tavish Scott: Could this committee do a reasonable piece of work on that parliamentary scrutiny? It is part of the equation that, after all, should naturally go to a parliamentary committee to consider.

Jim McCormick: Absolutely. The Presiding Officer's generic role in improving scrutiny is mentioned in the Smith report and the draft clauses. It is not obvious what the timescale for that kind of work would be. I suggest that a bit more urgency is required to bring it into sharper parliamentary focus sooner rather than later. You have made an important point.

Professor Spicker: On the general strategy as it relates to benefits, some benefits interact and are interdependent and it becomes extremely difficult to make any alteration to those benefits without having consequential effects on other parts of the system. Currently, we can see that clearly in relation to housing benefit, and it will be the case in relation to universal credit. Potentially, it could even be the case in relation to existing benefits such as council tax reduction.

However, not all benefits are like that. Most of the benefits that are foreseen in the clauses are non-contributory, stand-alone benefits that do not need to interact with other benefits. In those cases, there is scope for action. Provided that benefits are not means tested, you can give small or relatively small amounts of money without affecting other entitlements elsewhere. All you need to negotiate is the principle that those things are treated on a stand-alone basis. That can be done with some benefits but not others. It will not work in relation to the current discussions about housing costs. That is regrettable, because we could have moved to a position where we separated out elements of housing costs, but that is not on the current agenda. The more that we can do of that, the less reliant we will be on really difficult and complex negotiations with unpredictable and uncertain outcomes for claimants.

The Convener: One area where there is a fair bit of interaction with other benefits is DLA and PIP. Potentially, if Scotland did something different from the rest of the United Kingdom in that area, the intergovernmental arrangements that Tavish Scott was talking about would need to be pretty strong.

John Dickie: That is right. DLA and PIP act as a passport to, for example, the employment and support allowance for students. Any replacement benefit in Scotland could potentially mean that more people would be entitled to those benefits, which would have an impact on the potential passporting to the still reserved benefit—ESA. Those interactions would have cost consequences for reserved benefit expenditure, depending on what passporting arrangements there were. We want to protect those passporting arrangements so that people do not lose out when they become entitled to the Scottish benefit but continue to have the mechanism for accessing benefits that are still reserved but which provide important support for them.

Rob Gibson (Caithness, Sutherland and Ross) (SNP): You have come up against the problem of the definitions of disability and of a disabled person, as well as of a carer. Perhaps the intergovernmental discussions that were mentioned earlier might be the appropriate mechanism for addressing that problem. However, are the definitions within the clauses as they are currently drafted a problem for the Scottish Parliament's legislative autonomy? I see people nodding.

Richard Gass: Yes, the definitions are definitely a problem. The definition of a carer excludes full-time students or those in employment, so we could not decide, for example, to have a carers allowance in Scotland that could be paid to folk who are in employment.

With carers allowance, there is an additional element to means-tested benefit; there is a carers premium within all the means-tested benefits and within universal credit. If we were to introduce a more generous carers allowance in terms of eligibility criteria, we could potentially increase the number of Scottish residents who would be entitled to extra universal credit, which is not really what is intended by the devolved powers. On the other hand, if we did not change the eligibility criteria but increased the rate at which the carers allowance was paid, the carers allowance would be treated as income for those other benefits, so increasing entitlement could have a clawback from the reserved benefits.

Rob Gibson: What would be the most effective way to avoid the risk of confusion over the terms and the situation in which people are penalised in that way?

Richard Gass: The unnecessary restriction on the definition of carer would need to be relaxed, and something else would need to be introduced. Smith made the point that anything that the Scottish Parliament chooses to introduce should be a net gain to the individual. In order for that to happen, there would need to be some recognition by the Westminster Government that the additional elements that were put in place were to be disregarded in relation to means testing.

Professor Spicker: You are right to draw attention to the difficulty relating to disability in the clauses. There are two different definitions of a disabled person in the clauses. Clause 16 is the one that presents the most worry because it is a home-made definition that will have unpredictable effects that we cannot deal with.

In talking about many of the problems that Richard Gass is referring to, we need to be aware that there will always be those issues when it comes to designing specific benefits. However, the clause is not there to design a specific benefit; it is there to define the powers of the Scottish Parliament and then, from there, there will be scope to design a benefit—or not.

I am rather concerned that the extremely strange definition of disability does not include certain groups that would have been fairly automatically included in other definitions, such as people with terminal cancer, multiple sclerosis or fluctuating conditions. That would be easy to deal with in legislative terms if the same phrase that is used in clause 22 was used in clause 16.

There is not a major problem about the drafting, but what is it that the UK Government has done with this particular clause? Why has it been done that way? It seems that it has wished to carry forward the current criteria for DLA and attendance allowance rather than to create the opportunity for the Scottish Parliament to define benefits within that area of responsibility, which was the declared intention.

Rob Gibson: Following on—

The Convener: I will let John Dickie come in first.

John Dickie: I agree with what Paul Spicker said about the definitions of disability constraining the possibilities. Even more than that, the clause as it is currently framed does not allow for the payment of a PIP/DLA replacement in Scotland to those who are terminally ill if there is no current impairment to their capability. It took a separate section of the Welfare Reform Act 2012 to allow for payment of PIP/DLA to terminally ill claimants. As the clauses are currently framed, the capability is not there to enable that in Scotland. There is a gap—there is a clear problem that needs to be resolved.

The Convener: Jim, I sense that you want to say something.

Jim McCormick: This is possibly going a bit beyond the boundary of the precise clauses. As a principle, it should concern us that we have these quite rigid definitions that refer to being under 16, working age and retirement age, when much of that is quite fluid. One of the big problems in all welfare systems is the jagged edges that are experienced by claimants when they transition from one age category to another.

It may be the case in future that a Scottish Government and Parliament would wish to smooth out some of those jagged edges and those transitions, such as when children go on to adult services and benefits. The definitions that we have here are more restrictive than we have perhaps seen in the past. It should be a concern that they might clash with a potential future direction of travel of smoothing and improving the experience for claimants, especially as claimants move from one category to another.

Rob Gibson: I have a substantive question about clause 16. People in receipt of DLA/PIP are often automatically entitled to a range of other benefits and tax credits, some of which will remain reserved. Will that interaction between devolved and reserved entitlements make it difficult, in practice, to design policy differently in Scotland—to remove those jagged edges that Jim McCormick has just talked about, for example?

09:45

Jim McCormick: I will give an example from the employment field. Other colleagues might want to talk about disability.

It strikes me that a revised work programme could help people at risk of long-term unemployment and disabled people into work and could support them in staying in work. Under the proposals, we might end up in a situation in which future public service providers in Scotland—which might be third sector providers—would be accountable to the Scottish Parliament for their financial performance and their programme performance but would still have to apply a conditionality system and a sanctions regime to those programmes.

As well as creating problems for claimants, that would create strange incentives for providers—it would create incentives for gaming and false reporting. That is a particularly jagged edge, because one thing that we know about the current social security system and the welfare reforms is that a tougher sanctions system has caused a great deal of difficulty for some of the most vulnerable people in our society. That jagged edge around conditionality is a particular cause for concern.

The Convener: I want to bring this part of the discussion to an end, after which Alex Johnstone will ask about wider universal credit issues.

As I understand the Smith recommendations, it is expected that, when extra payments are made, people will make a net gain. From what I have heard, that is the understanding of the majority of the panel, too. It does not seem to me that such a provision is among the draft clauses. Do you think that that needs to be put on a statutory footing? At some point, we will need to make some recommendations. Do you think that it should be put in statute that, when extra payments are made, people can expect a net gain? I do not know how difficult it would be to draw up such a provision.

Professor Spicker: The difficulty with that is that, if you can only increase benefits and you cannot alter them, you cannot generate money to do things differently in other respects. In the future, there might be cases in which the Scottish Parliament wants to review the balance of funding between, on one side, personal care and self-directed support and, on the other, the payment of cash benefits. It might well reasonably decide that it wants that balance to be different, but it will have prevented itself from changing that balance.

The Convener: That is a fair point.

Lewis Macdonald (North East Scotland) (Lab): It will be complex to put some of what we are talking about into statute.

An issue was raised about definitions of carer and definitions of disabled person. I presume that those could easily be amended, unless there would be unforeseen consequential effects that I cannot immediately identify. Is that correct?

John Dickie: That is the point that I was going to make. Some specific amendments will need to be made if we are not to restrict and reduce the support that is available to claimants in Scotland.

An example that we have not mentioned is the way in which discretionary payments have been described in the draft clauses. We already have powers that enable the Scottish welfare fund to make payments. The way in which the relevant draft clause is set out limits the basis on which those payments could be made. The ability of people who have been sanctioned or who have lost benefit through issues to do with conduct—which could include someone with a mental health problem not filling in a form or failing to respond—to access support through the Scottish welfare fund would be more limited as a result of the way in which the clause is drafted. That needs to be revisited.

Therefore, the provision of additional support aside, there are areas that need to be revisited to ensure that the existing levels of support that are available can be maintained.

Richard Gass: The definition of a carer is such that they must provide regular and substantial care but not be in full-time employment or in education.

At present, the Government says that at least 35 hours of care a week must be provided. There would be nothing to prevent Scotland from setting the level at 17 hours a week or from allowing carers allowance to be paid to more than one person. However, the consequence is that entitlement to carers allowance is a passport to an increased element of a reserved benefit, and that brings us back to the issue of no detriment.

The Convener: We are back to the beginning of the process and the discussion of no detriment.

Alex Johnstone (North East Scotland) (Con): We have touched on the issue of universal credit a few times during the discussion. I want to poke about on the subject a wee bit more.

My first question is fairly simple. We have had the initial roll-out of universal credit, there was a pilot in Scotland in Inverness, and we are now progressing with that, but is there any evidence so far to indicate the degree of flexibility that may exist in delivery arrangements for universal credit?

Richard Gass: Our experience of universal credit is that the number of claimants has been so small that there is nothing to learn at this stage. Our colleagues in Inverness have not reported any particular problems to Rights Advice Scotland, which suggests that there are no major problems. We know that there have not been many referrals to the local authority for support to initiate a claim.

The initial roll-out was for young, single claimants who have no children or housing costs. Those are the easy ones, and traditionally that is a client group that does not tend to come to advice services. It is still early days.

David Ogilvie: I should just underline the point that Richard Gass has just made. For our purposes, it is really too early and the numbers are too small. The major thing that we are focusing on is the fact that it looks like the IT system that is being operated in the pilots is not scalable. That is the latest information that I have.

That issue links to the point that Paul Spicker made earlier about the significant cost of setting up an IT system. Whatever we get, we will have to bear in mind that there will be a significant number of years between now and when powers over the area are effectively and finally devolved to the Scottish Parliament. Unless there is a significant change in direction at UK Government level on the issue, we will have some form of universal credit. It will be interesting to observe how quickly the roll-out can proceed if what is coming forward to us in terms of anecdotal evidence about the IT system proves to be the case.

We are not anticipating, from the numbers involved in the first two tranches of roll-out in Scotland, that significant presumptions can be made about how well the roll-out will progress.

Jim McCormick: At the start of this week, to coincide with the next roll-out of universal credit, which will happen in 10 local authorities in Scotland by the end of June, the DWP published its first public analysis of the impacts on four jobcentres in the north-west of England—not Inverness, but the jobcentres that have been running universal credit for longest—for some claims on universal credit. That analysis showed modest positive impacts: for example, claimants spending an extra day per month in paid employment and a net increase of £10 a month income. Those are small early signs of small net impacts.

Mr Johnstone's point about flexibility is interesting because there is provision for alternative payment arrangements. At any point, claimants can—if they know that they can do this—apply for a different payment arrangement, such as a different frequency, or for their housing costs to be paid directly to the landlord.

In some circumstances, this has been seen as a minority pursuit or a last resort arrangement. However, we know that 20 per cent of workers overall are paid more frequently than monthly and that of the lowest-paid people in society—those earning under £10,000—up to half are paid more frequently than monthly; they are paid weekly or fortnightly. Perhaps alternative payment arrangement flexibilities should be seen as a permanent feature of universal credit and something that will allow households to budget in a way that suits them best. The principle of choice is really important alongside flexibility for payment arrangements for universal credit.

John Dickie: Just to pick up on that, the infrastructure is important for the policy responsibility that is being devolved to Scotland in clause 21 for how payments are made. In theory, the system has been designed to allow for that anyway, so there should not be huge issues in applying a different policy approach to direct payments, payments to the main carer and more frequent payments. It is also important to note that there is no legislative barrier even now to the UK Government and the Scottish Government agreeing to provide a more wide-ranging flexibility on those matters.

Alex Johnstone: But as we heard from Paul Spicker's account of the conversation that he had earlier in the week, small variations may not have much of a cost but substantial variations and significant policy variations over time could have a very substantial cost in terms of delivery.

John Dickie: The infrastructure should be designed to allow such variations to happen anyway, so it is not clear to us why scaling up would have huge additional costs or barriers.

Alex Johnstone: Looking specifically at the housing element of universal credit, many people who currently get housing benefit are passported on to that benefit by virtue of being entitled to one of the other benefits that have been rolled up into universal credit. Do you see that relationship being a problem as we go forward?

David Ogilvie: That is a difficult one. There are some relationships, which we outlined in our written evidence, around tapers that we would be concerned about. If the housing costs of universal credit are going to be isolated and dealt with differently, we will want an assurance that the improved tapers that are on offer with universal credit do not end up being withered away or made less advantageous to people on universal credit. That is part of the interrelationships between Scottish devolved policy and universal credit implementation that we always look at, but it is a key point that we will have to consider.

The Convener: Lewis Macdonald has a point on the housing issue.

Lewis Macdonald: I am interested in exploring what we have just heard about the housing element of universal credit going forward. Given the obvious challenge, but assuming a successful implementation of an arrangement whereby the housing element is devolved only in Scotland, I am interested in panel members' views on how they

envisage that working as part of a larger benefit provision that is the same across the UK.

Richard Gass: I do not think that the intention is to devolve the housing element; it is more about allowing the Scottish Parliament to have control over topping up or allowing a slightly higher amount. Therefore, there could be more generous figures for non-debt reductions, the allowing of an eligible rent that is above the 30th percentile, or a reflecting of the bedroom tax situation. However, that would still be part of universal credit. As I read the Smith commission's proposal, it is that the extra costs incurred would be passed back to the Scottish Parliament for it to meet them.

Lewis Macdonald: I have been looking at the clauses, and clause 19 seems to address the issue of discretionary housing payments in relation to, for example, the bedroom tax, but clauses 20 and 21 address the housing element more widely and imply at least the possibility of a different policy approach. However, I am not sure whether that is right.

David Ogilvie: We expressed our worry about the issue in our written evidence. It is great to have the ability to top up or to tailor policy from the Scottish Parliament's perspective to deal with issues such as the bedroom tax, but we must still recognise the fact that we are operating within a limited budget. The opportunity costs involved in executing that policy decision would therefore be of significance concern to not just the CIH but the entire housing sector.

I have come before various committees of the Parliament and been asked what else I would cut. I sure as heck would not wish to see a further squeeze on, for example, housing subsidy, because we need to increase the housing supply. That is possibly a false dichotomy, but it is one of the issues that we want to test the water with.

The Convener: Does Jim McCormick want to reflect on that?

10:00

Jim McCormick: I want to build on David Ogilvie's point and make a link to a different aspect of the clauses, the Smith commission and the Scotland Act 2012 that I think is important.

If we think 10 or 20 years ahead, one objective in Scotland might be to do a better job than we have done in the past of controlling housing costs. That is about expanding the supply of affordable housing in all tenures and not just social housing. At present, in the interests of controlling the subsidy, we have to control housing costs ex ante, through housing benefit. When additional borrowing powers and bond issuing powers come to Scotland, if, for example, we prioritise the expansion of affordable housing supply, that will put us on a different long-term trajectory on housing costs that have to be picked up through welfare provision, and it could potentially put Scotland in a more affordable and sustainable place.

Compared with the UK as a whole, we are in such a place now, but to maintain that in future it is important to make the linkage to other parts of the Smith agreement and the clauses, particularly in relation to capital expenditure.

The Convener: I think that Mark McDonald is interested in the area that we are beginning to get into on top-up expenditure and better support for individuals. We have heard it suggested a number of times that we could improve things by topping up or helping people in certain ways, but such things all have costs. How we deal with that is the interesting issue. Am I right that you are interested in that, Mark?

Mark McDonald (Aberdeen Donside) (SNP): Yes. I appreciate that we are considering the welfare clauses, but there are interactions with other issues and there is a question about coherence. Looking at the suite of powers that are proposed in the draft clauses, do the witnesses feel that there is sufficient financial flexibility to allow the Scottish Government to take a different approach and to fund that, in welfare areas that will become its responsibility?

Professor Spicker: There is insufficient flexibility in two ways. The first is that the general reservation of all benefits limits the capacity of the Scottish Government or Scottish Parliament to think about different ways of subsidising the activity of individuals: it is possible to offer benefits only within the narrowly constrained framework that the clauses specifically allow for. That is a clear difficulty. For example, within the proposed arrangements, it would not be possible to do one of the things that the Smith commission envisaged, which was to allow a deliberate supplement to a reserved benefit. That is one of the large restrictions on flexibility.

The other restriction is that while such powers do not exist and, in particular, while there is no power to create new or alternative benefits that function according to different criteria, we will have the rather strange position in which the reservations under the Scotland Act 1998 lead to rather more restriction on the Scottish Government than applies to English local authorities through the power to promote welfare.

Mark McDonald: To expand the question slightly, let us assume a best-case scenario in which we can, through amendment, deal with some of the issues that the witnesses have identified and get the proposals back to a purer

version of what the Smith commission appeared to suggest. Even in that context, would sufficient financial muscle be afforded to Scotland through the other powers that are coming—tax-raising powers and powers on income generation and wealth creation—to allow a different approach to be taken? If the ability to create new benefits was provided as a result of amendment, those benefits would need to be funded. Is there sufficient flexibility for the Scottish Government to take decisions that would raise income in order to allow it to make such decisions, or do we risk having powers come to Scotland that cannot, in effect, be used?

John Dickie: That is a reasonable concern to raise, and it is one that we flagged up at the start of the process. We need to be careful about seeing welfare and social security in isolation and about thinking that having control over those, but without having wider fiscal and economic powers, will in itself allow us to tackle some of the poverty and inequality issues that we face. The reality is that the bulk of the social security powers will remain at Westminster, as will wider fiscal and economic powers.

The package that is proposed, even as the clauses are framed, presents real opportunities—however restricted—to do things differently in Scotland. It will, though, pose real challenges in terms of public support and political will to use those powers to make the necessary investments. For instance, we could take a different approach to maternity expenses, we could improve the level of support that is available through a replacement for the maternity grant, and we could restore payments of maternity support to second and subsequent children. Those are real ways in which we could put money into the pockets of families here in Scotland—ways that are not available to us just now—so I hope that Parliament would look for ways to find the resources to take that approach and to make further progress on tackling child poverty.

There are other areas in which we are keen to address the inadequacy of current benefit levels, but there are also different approaches that could be taken to how people are assessed for benefits—especially disability benefits. The need for reform is partly about the inadequacy of those benefits, but it is also partly about the current process for claiming them, which is complicated. It also often feels demeaning, and actually damages people's health and adds a barrier to those that they already face. A minimising of the requirement for medical evidence, where there is already clear medical evidence about a person's disability or ill health, could be enough to ensure that they are entitled to benefit. Limiting of assessment of chronic or degenerative conditions would also remove the requirement for people to go through assessment processes where it is clear that they have long-standing degenerative or chronic conditions that should automatically entitle them to whatever replaces PIP in a devolved context.

We also need to ensure that we have adequately qualified people undertaking assessments and making decisions, so that they have a real understanding of disabled people's conditions and can look at the situation from their perspective. Those things could be done to improve the quality of support, and not necessarily at huge additional cost. The package is restrictive—it is absolutely right that the clauses are being interpreted in the context of its being a limited package—but there are opportunities to do things differently and to improve levels of support for individuals and families in Scotland.

Professor Spicker: I endorse what John Dickie said about what is possible, but it seems to me that more ought to be possible. I would like briefly to examine Mark McDonald's initial premise, which is that the clauses could be amended. What would we wish to see? It ought to be possible for a Scottish Government or Parliament, within its areas of devolved responsibility, to say that it wishes to change the balance between housing subsidies and housing benefits, or that it should be possible to change the balance between the amounts it gives in relation to personal care and the benefits that are available for people on personal care. As things stand, I cannot see any way of doing that within the constraints of the existing clauses. In negotiating new terms, those are fairly basic to local integration of services.

Mark McDonald: My final question is about the cap that has been applied to welfare spending. How do you see that interacting with devolution of welfare powers—in particular, with the role that the Treasury might have if, for example, decisions were taken about additional benefits expenditure that could affect the total benefits spend?

Richard Gass: The clauses do not touch the benefit cap. The Smith report mentioned that there should be variation in a benefit cap to ensure that any extra money that was paid would end up in the person's pocket. That provision does not seem to be in the clauses, unless I have missed something.

Mark McDonald: The potential for a decision that is made in Scotland to impact on universal credit or other benefits has been highlighted to the committee. There could be an interaction with the welfare cap that might lead the Treasury to use what Professor Heald described as "retaliatory instruments" in relation to tax—a veto, in essence, on decisions.

Professor Spicker: The welfare cap is far more symbolic than it is substantive. Very few people

have been affected in the UK and fewer people have been affected in Scotland. If it was a question only of financial implications, it would not be difficult to bear, simply because so few people are touched by the cap. I confess that I have met one person in Scotland who is affected by the benefit cap, but there are not many of them around. That is because the cap is based on a false premise, which is that benefits are extraordinarily generous. I am afraid that claimants' common experience is that benefits are anything but generous.

The Convener: Paul Spicker could do us a favour here and explain the difference between the benefit cap and the welfare cap, because there is a difference.

Mark McDonald: I think that a cap has been applied to overall welfare spend, as opposed to a cap on individual benefit entitlement. That is where I was going with my question, rather than to individual entitlements, which for obvious reasons have received publicity because it suits a certain agenda to suggest that there are people who receive thousands and thousands of pounds in benefit. The more pressing issue for us is the welfare cap, which is designed to limit overall welfare expenditure.

John Dickie: I understand that the Smith recommendation was that there should be flexibility to take account of any additional spend so that the benefit cap would not act to the detriment of additional expenditure to support individuals in Scotland. Others may remember that more clearly. That is not covered in the clauses. Is this linked to the issue of no detriment?

The Convener: Jim McCormick wants to contribute.

Jim McCormick: I will—but only if I have the search and find function on the PDF version of the command paper.

Clause 2.4.11 says:

"In relation to the welfare cap, the UK government intends to remove welfare programmes devolved to the Scottish Parliament from the UK welfare cap, so that the Secretary of State for Work and Pensions would not be accountable to the UK Parliament for controlling Scottish Government expenditure on these devolved programmes."

That seems to be clear enough. That is in the fiscal settlement section, rather than the welfare section. On the benefits cap, the command paper talks about accepting the principle of offsetting and disregarding, but it also talks about looking at it on "a case-by-case basis."

There is possible slippiness in the language as we move from the annually managed expenditure welfare cap—which is what I think Mark McDonald is talking about. As we go down into the welfare section we see that it looks at the benefits cap at household level, which is slightly different.

Mark McDonald: With the clause that you mentioned, there is the potential for interaction between the benefits that would become the Scottish Government's responsibility and the benefits that would remain reserved. There could be a cross-border impact and I am not entirely sure that the clause deals with that. Although the Secretary of State for Work and Pensions would not be responsible for decisions that we take here, if those decisions had a knock-on effect on, for example, universal credit, the secretary of state would have responsibility for that. Perhaps some bottoming-out of exactly what that clause is talking about is needed.

Jim McCormick: All roads lead back to the no-detriment principle, I suspect, which is couched so broadly that it is feasible that the kind of interaction on universal credit that we are talking about would be precisely in that category and could be seen as a trigger for some kind of transfer payment.

10:15

The Convener: Alison Johnstone has a supplementary question. I will then move on to Stewart Maxwell, who has questions on discretionary payments.

Alison Johnstone (Lothian) (Green): My question follows on from my colleague Mark McDonald's questions about possible amendments to the draft clauses. Am I right in thinking that the major concerns are about the way in which the original recommendations have been written into the draft clauses, rather than about the original recommendations themselves? It seems that more is possible within the spirit of the recommendations than is possible within the draft clauses.

Professor Spicker: Yes—I agree with that whole-heartedly. There has been a process of translation, which is obviously necessary, but there has also been a process of attrition, whereby certain powers seem to have been clawed back. It is uncertain how much that is the result of deliberate drafting or of awkward drafting.

For example, I point to the reservation of loans in clause 17(3). The Scottish Parliament currently has the power to make loans. It chose not to do so in relation to the Scottish welfare fund, but the power exists in relation to social work payments. The clause is rather awkwardly worded, so I am not sure whether it says what it seems to say, but it seems to imply that, as loans will be an exception to the exception, loans will be reserved and Scotland will therefore lose a power that it currently has. It is always difficult to tell with such things, because they have to go through a legal

process, they have to be arbitrated and they have to go through courts. However, on the face of it, it looks as if a power is being lost for no visible reason. That is an example of how the translation can trip us up and take us off in the wrong direction.

There are several examples of that sort when we run through the draft clauses. For example, I think—although I do not know—that winter fuel payments will not be possible under the draft clauses. The white paper says that those payments will be possible, but the form of words that legitimated winter fuel payments has been removed. Is that deliberate? I cannot tell you. Will that actually be the effect? Again, I cannot say with any confidence whether it will. I think that that problem runs all the way through the clauses that are in front of us.

Alison Johnstone: Do you have any advice for the committee on how to mitigate the narrowing impact that the written translation has had?

Professor Spicker: I think that, in many ways, the ideal would be to have reworded altogether section F1 of head F of schedule 5 to the Scotland Act 1998, which begins by saying that benefits are all reserved. If there was instead a list of the benefits that were reserved, that would remove many of the doubts—the list would be additional to certain necessary exceptions. While there is a starting legal presumption that Scotland is not able to do these things, there will be initial legal barriers.

Remember, too, that the clauses are only about powers; they are not about benefits. Subsequent decisions will still have to be taken in Parliament about whether relevant benefits should be brought in in the terms that are being proposed.

Lewis Macdonald: You talked previously about areas where it is possible to make relatively straightforward amendments to clauses. For clarity, is it correct to say that what you describe would be a fundamental rewrite of the entire section on welfare?

Professor Spicker: I am sorry. Can you repeat the question?

Lewis Macdonald: What you have described in response to Alison Johnstone was not a straightforward amendment to a clause; it was a complete rewrite of an entire section.

Professor Spicker: It would not necessarily be a complete rewrite; it would be a rewriting of the opening to head F of schedule 5 to the 1998 act.

Lewis Macdonald: On which everything else depends.

Professor Spicker: Everything else would be altered by such a rewrite.

John Dickie: Just to add to that, there are specific clauses and restrictions that we could deal with. I am not making the case one way or the other, but I think that some of the restrictions around PIP for terminally ill people and discretionary payments under what is currently the Scottish welfare fund could be amended fairly straightforwardly so that we do not get a switch with regard to restricting payments. Clause 18 would now require there to be an exceptional event or circumstance before a grant could be paid. At the moment, it is required that there be a risk to wellbeing, but the requirement for there to be an exceptional event or circumstance could be removed quite straightforwardly so that, at least, we would not restrict still more powers in relation to the Scottish welfare fund.

Professor Spicker: It is perhaps important to recognise that there are examples of some changes being made in the opposite direction. In the case of universal credit, Smith proposed that there should be the power to alter frequency of payments. What the draft clauses suggest is a power to alter the timing of payments. Those two things are not equivalent. Timing is rather broader than frequency, and it could, for example, affect when the first payment is made, at least in principle.

Jim McCormick: On that point, the Social Security Advisory Committee has recently submitted to the Secretary of State for Work and Pensions our concerns that result from our consultation on proposed waiting days in relation to universal credit, which would have the effect of a five-week to six-week delay before the first payment is made. If the important point that Paul Spicker has helpfully flagged up gives an opportunity to Scotland to consider the timing of the first payment—in other words, to alter waiting days—that would have a significant material impact at the start of a universal credit claim. Of course, that assumes that that possibility is not closed down at the redrafting stage.

The Convener: So, when we are rewriting all the clauses, we had better hold on to that one.

Jim McCormick: Yes. Perhaps we should not have raised that. [*Laughter*.]

Stewart Maxwell (West Scotland) (SNP): John Dickie has referred a couple of times to clause 18, with regard to discretionary payments in particular.

The Smith commission recommendations talked about

"new powers to make discretionary payments in any area of welfare".

Does the extension of the provision to make discretionary payments, as set out in clause 18,

provide additional powers in this area? Earlier, Paul Spicker seemed to suggest that it did not.

Professor Spicker: I think that it does not. Clause 18 lays out powers that were included in a previous section 32 order relative to the social fund. It does so in substantially the same wording, with a slight loss of power in relative terms.

There is a confusion in the white paper about what it means for a payment to be discretionary. Essentially, a payment is discretionary if there is an administrative or governmental decision and it is not, therefore, subject to entitlements or rules that would limit it from being made in the way that it is being made. I think that the drafters of the clauses have used the term "discretion" to refer only to individual discretion for short-term payments. That is a very special sort of benefit.

Those with long memories might remember the supplementary benefits commission, which delivered extensive welfare provision on a discretionary—that is, a non-entitled—basis. When the Smith commission said that Scotland should have discretionary powers, I assumed that it meant powers of that sort.

John Dickie: I think that that is how those powers were widely understood when people read the Smith recommendations, and the clauses clearly do not give effect to that broader power to be able to, for example, top up reserved benefits in Scotland.

Stewart Maxwell: I have a follow-on question about the definition of discretionary. I have read your paper, Professor Spicker, and I would assume discretionary to mean what you have described—in effect, that a decision can be taken outwith entitlement and that ministers can decide whether such a payment could be paid, as opposed to what is in the draft clauses, which seems to be about allowing short-term payments in specific circumstances.

John Dickie's paper also refers to clause 18 and says that the ability to make a payment will not apply

"unless the need result from an exceptional event or circumstances."

It seems that the payment should be made only for very specific reasons.

Professor Spicker: Let us take a small example of why a Government would introduce a discretionary payment as a top-up or reserved benefit: the Christmas bonus. That is the sort of thing that you do not necessarily want to make into an entitlement, or want to keep going as an entitlement, but it is something that a Government may, in certain circumstances, want to do.

Stewart Maxwell: Is there a legal definition of discretionary payments that only includes

"a payment to meet a short term need to avoid risk to the well-being of an individual"

as the UK command paper suggests? Is that an accepted definition?

Professor Spicker: Not in the literature that I am aware of. I think that the key definition of discretion in most of the literature follows K C Davis's "Discretionary Justice: A Preliminary Inquiry", which argues that discretion refers to lacunae in systems of legal rules where supplementary rules are then effectively made. It is that rather than the particular point to which you refer.

Clearly, the Scottish welfare fund is a discretionary benefit of a particular type. It is one example of discretion, but discretion can run much wider than that.

Stewart Maxwell: I return to the Child Poverty Action Group submission, from which I quoted earlier with reference to clause 18:

"unless the need result from an exceptional event or circumstances."

Will you explain further what your concerns are in that area?

John Dickie: The key issue is that, with the current powers that the Scottish welfare fund operates under, it is possible for people to access crisis grants, for example, even if they have lost reserved UK benefits as a result of being sanctioned, as long as there is a risk to their wellbeing. Being sanctioned is not an automatic bar to their accessing the support. That is important because, in some cases, people have been sanctioned and left with no money and the Scottish welfare fund has been crucial in supporting them.

It looks as though clause 18 restricts that further by saying that there needs to be an additional exceptional event or circumstance. Clearly, that could act as a bar to the scope in which Scottish welfare fund payments could be made if someone has been sanctioned in relation to a UK benefit. Even further than that, and not just in relation to someone having their benefits sanctioned, the draft refers to benefit being lost as a result of the claimant's conduct. That could mean someone losing benefit because they have failed to return a form or filled in the form wrongly. That sometimes happens to people with mental health problems, learning difficulties and literacy issues. That could be described as a conduct issue. It would be a serious blow for people in such situations not to have access to the Scottish welfare fund under the new discretionary payment powers. Does that clarify what the restriction is?

Professor Spicker: I would be inclined to say that almost any experienced welfare rights officer could drive a coach and horses through the phrases that John Dickie has been talking about. That is part of the problem. This should not be subject to legal arguments in particular contexts where it is uncertain for claimants and where back-up and support is relied on.

We have seen what has happened with exceptional circumstances in the past. I can remember when we used to have to claim that it was an exceptional circumstance if someone needed more than one bath a week. That was within the rules. Having said that, there is experience of Government starting off with inappropriate definitions and gradually putting under the hammer those definitions until they no longer have the same shape. We should not be starting there.

10:30

John Dickie: It is important to ensure that we are certainly not doing anything that adds further restriction to the powers to provide discretionary payments under the Scottish welfare fund.

Stewart Maxwell: This is part of my confusion. I am trying to be objective. Clause 18 seems to take us a step back slightly from where we are currently, rather than a step forward, which was my understanding of what Smith was trying to refer to in this area.

The Convener: I saw people reacting to the point that was made about the more restrictive nature of the clause that you are talking about, but that reaction will not be on the record. I ask somebody to put something on the record, so that we know; I saw people nodding their heads in response to what Stewart Maxwell said.

John Dickie: Yes. That is our understanding.

Professor Spicker: Yes.

Duncan McNeil: Can I get a wee bit of clarity? Most of us around the table are dealing with language in an area that we do not normally deal with in our case load, so we are behind the curve. At this stage, I am unaware what the eligibility criteria are. I know that people have come to me and my colleagues and said that they cannot get a crisis grant because they have not met the eligibility criteria—it is not a matter of just walking in and getting it. What is the substantive difference between the language that Stewart Maxwell has referred to and the current eligibility criteria to get a crisis loan?

John Dickie: At the moment, people need to demonstrate that there is a risk to their wellbeing if they are not able to access that grant.

Duncan McNeil: So it is as simple as that.

John Dickie: Yes—they need to show that there is a risk to their wellbeing, which is fairly broad. For example, it might be that people cannot buy any food or are unable to pay their electricity. To then add that there must also have been some exceptional event or circumstance over and above there being a risk to their wellbeing—

Duncan McNeil: That exceptional event could be a sanction.

John Dickie: This is actually about restricting eligibility where a sanction has been imposed.

The Convener: So, it is an exceptional event and the issue—

John Dickie: It is where a sanction has been imposed and the person does not have any money because of a sanction having been imposed—

Duncan McNeil: None of us here wants to make it any tougher for people to get help in that crisis situation, but I want to know—given the discussion that we will have after this meeting—whether this is a substantive issue or not.

John Dickie: We would argue that it is a substantive issue. I do not want to overplay it, given the scale of some of the other issues that we are discussing, but the language restricts—

Duncan McNeil: This could be a problem. I just do not get it at this stage.

John Dickie: Absolutely. The difference between being able to demonstrate a risk to wellbeing and the additional requirement that there is an exceptional event—

The Convener: So it is an exceptional event and a risk to wellbeing.

Professor Spicker: There is always a problem in introducing new vocabulary in welfare rights. The effect of that is to create uncertainty about entitlement and it gives us a period in which that has to be negotiated and argued. There are a number of precedents about exceptionality. I can remember taking cases about when torn trousers were considered exceptional and when they were considered to be the result of normal wear and tear. We really do not want to be going down this road, because for claimants—

Duncan McNeil: Absolutely. I am trying to get at whether this is an area in which the committee needs to seek more clarity, or whether we need to come to a judgment—as we were doing a moment ago—that this is a bad thing. We do not know and the clarity is not there. That is another future discussion.

David Ogilvie: I will try to move the discussion on a bit. Clearly, a perspective is emerging that

the framework that is being offered, which has been arrived at through the negotiation process, seems, as others have said, to be a step back. We wish to see a welfare system that supports a better housing system. I would have grave concerns about the impact on people in crisis in rural areas, who are unable to get access to a crisis payment and are left in a destitute situation. That is not a situation that supports in any way a well-functioning housing system. Given that the Scottish Parliament already has powers over housing policy, you need to have the powers to support the housing system through the benefits system. Although I have to admit that I had not spotted this issue yet, it sounds like one on which we need further substantive clarification.

Stewart Maxwell: That is where I was trying to get to. On the face of it, it looks as though we are in danger of introducing additional barriers. For clarification, convener, I see all the panel nodding and we are in agreement that that is what is happening. That causes me concern; I thought that the Smith commission recommendations were pretty clear on that point but the clauses seem to have made it less clear.

I want to go back to the original quotation that I made from the Smith commission recommendation on

"new powers to make discretionary payments in any area of welfare".

Does clause 18 meet the Smith commission's recommendation to permit discretionary payments in any area of welfare?

John Dickie: No.

Professor Spicker: No.

Jim McCormick: No, it does not.

Stewart Maxwell: We seem to have universal agreement on that one.

Lewis Macdonald: I want to follow up on the issue of discretionary housing payments. There are specific eligibility restrictions in the clauses and I am particularly interested in the view of the housing providers or housing profession on those. Those restrictions, for example, prevent the use of housing benefit to meet service charges and so on, and given people's care needs, that could be quite a significant restriction.

Are the clauses unduly restrictive? Do they reflect the intent of the Smith commission? How will they work in practice?

David Ogilvie: I admit that I have not got to the point where I have a set line on the eligibility criteria. We need to do more work in-house to scope that. I am unable to answer the question just now, but I can come back to the committee with a written submission after we have done that work.

Lewis Macdonald: That would be very helpful.

The Convener: Thank you, David; that is a useful offer.

John Dickie: The new clause does not give power to enable local authorities to make discretionary housing payments to individuals who are not in receipt of housing benefit. Because of the way in which the underoccupancy charge—the bedroom tax—is applied at the moment, some claimants, particularly those who are in work and receiving a relatively small amount of housing benefit, lose all that benefit, which essentially means that they are not entitled to a discretionary housing payment. In effect, as the clauses are currently drafted, we could not fully mitigate the impact of the bedroom tax through discretionary housing payments, given that some people will not be entitled to such payments because they have lost all their housing benefit as a result of the bedroom tax. That is an effect of the clauses and something for the committee to be aware of.

Lewis Macdonald: The way in which you have described it suggests that we are talking about small sums for a small number of people, but presumably, again, it would be a relatively straightforward thing to adjust in the drafting of the clauses.

John Dickie: I would have thought so. It is a small amount for a small number of people, but it is an important amount for them.

Lewis Macdonald: It is important to those individuals.

John Dickie: Absolutely.

The Convener: The last area to explore is employment support.

Linda Fabiani (East Kilbride) (SNP): I am interested in a few things in relation to employment support in general. The Smith agreement calls for devolution of

"all powers over support for unemployed people"

provided through contracted programmes—or the work programme, as we call it—but the draft clauses seem to talk about something very different. They talk about

"persons ... who are at risk of long-term unemployment"

and disabled persons, and about the assistance being for at least a year.

I am interested to hear your broad view on the difference between what was proposed in the Smith agreement and what the draft clauses have come up with.

Come on, Jim—get that search facility working.

Jim McCormick: It is interesting that the Smith commission talked about what we currently call the work programme and work choices—they are not the only programmes, but they are the main ones for the clients whom we are talking about—and, as we discussed earlier, perhaps before Linda Fabiani arrived, the jagged edge around conditionality—

Linda Fabiani: Yes, that is where I came in.

Jim McCormick: That aspect needs to be revisited. On the point about 12 months, anyone would understand the intent behind the requirement or expectation that support would be available for at least 12 months, but there are cases in which people with the right kind of support—for example, pre-employment training, childcare or transport support—can thrive in work without a full year of support. Although it sounds odd to say this, I would like to see flexibility in that area to allow, where sufficient progress has been made and it is agreed by the individual and the provider, support to be refocused on those people who might need rather longer than 12 months.

We know that one problem with the work programme in particular is the very poor performance for people with fluctuating conditions, some older people and those in rural areas; some of those people need longer support, which means more expensive support. In the context of being able to make different choices within fixed budgets, alternative choices can quickly become expensive and having the flexibility to move resources around such programmes strikes me as an important principle.

Linda Fabiani: That would tie in with the thought from the Smith commission that powers would be devolved over programmes for the unemployed in general, whereas the draft clauses seem to apply only to the long-term programmes that run for more than a year and so on. Does anyone have information to say how much that restricts the original intention of the Smith commission and what effect that could have, for example, on shorter-term employment programmes and the rest of the system? It seems to me that it will be terribly piecemeal and it will be difficult to build cohesion and an overall picture of how we are dealing with services for the unemployed in general.

Professor Spicker: I do not have a clear picture of that and I am as puzzled by the clause as you are. I note that it includes skills training as well, and it seems to me that much skills training might be short term. The idea that there should any restriction on skills training is deeply puzzling. I do not understand why the restriction was thought to be appropriate.

Again, I must emphasise that this is not a provision that is legislating for employment support—it is a provision that gives the Scottish Parliament the power to make decisions. Why restrict those decisions in such a way? I cannot begin to fathom it.

Linda Fabiani: That takes us on to a question about your paper. In paragraph 26, you say that

"the UK government will retain 'the ability to make mandatory referrals to Scottish Government programmes'",

and you speculate about the implication of that for the Scottish Government. Will you expand on that?

Professor Spicker: I wrote:

"That seems to imply that the Scottish Government will have the duty to provide programmes in these terms, and to meet the expense."

If the referrals are mandatory and if the UK Government retains the ability to make mandatory referrals, I do not think that the Scottish Parliament is being given the option to decline. That is not in the clauses but in the white paper. How that would operate takes us back to the business of intergovernmental working. I am puzzled as to where the authority is thought to lie.

Linda Fabiani: So that needs to be explored.

My next question is for the Child Poverty Action Group. In your submission, you mentioned the interplay between employment programmes, conditionality and sanctions. Will you expand on that?

10:45

John Dickie: I was simply making the point that, as far as working-age benefits are concerned, the current reserved conditionality and sanctions regime, which is undermining people's attempts to move into work and towards the labour market, will still apply. That comes back to Jim McCormick's point about the jagged edge between what we in Scotland might want to do differently in devolved employment programmes and the requirement for those programmes to work within a reserved benefits regime that too often imposes arbitrary conditions or conditions that are not helpful in supporting people to move into work and which imposes damaging sanctions on them when they fail to meet those conditions.

Even under the current proposals, there will be real opportunities to do things differently, to ensure that employment support in Scotland is more suited to the local labour market and more appropriate to the childcare and other support that are available to enable parents, for example, to move back into work and—I hope—to reduce the number of inappropriate or arbitrary tasks that

people have to undertake to meet the benefit requirements. However, there will be a limit to that, because the benefits regime will be as it is now—unless, of course, we manage to get it changed in the way that we want.

Linda Fabiani: I also have concerns about what are termed the service providers of the work programme. Unless we were mandatorily told otherwise, we could have the work programme being run by the Scottish Government—in other words, the service providers would be paid by the Scottish Government and would be responsible to it—but the sanctions regime would remain with the DWP. As a result, there would be interaction and responsibility issues for the service provider. How would that work?

Jim McCormick: There are conflicting incentives that, as I have suggested, might result in gaming, false reporting and so on if we are not careful. As Paul Spicker and John Dickie have said, the UK Government will broadly retain the power to mandate unemployed people at a certain point in their jobseekers allowance or ESA claim to take part in Scottish Government programmes. There is therefore quite a lot of space beyond that mandatory referral to design various activities; the clauses talk about various techniques and tools that can be used. The clauses contain clear restrictions that could cause detriment to claimants, participants and providers, but there is nevertheless space in Scotland to reframe conditionality.

Conditionality is not and should never be simply about penalties and sanctions; it should also be about the incentives that people can draw down by taking part and meeting the condition to participate. Those incentives might include better training, better childcare, more support for transport and so on. If Scotland is to invest in such means of improving outcomes, the incentives—in other words, the savings—for doing so should be very clear.

That boundary still has to be negotiated. However, I note that the DWP pilots all sorts of flexibilities across the UK—although not very often in Scotland—and there is no reason why there could not be a negotiation to give Scotland more flexibility in that space, even within the important restrictions that the clauses impose.

Linda Fabiani: You commented on incentivising. I am certainly no expert on this, but I understand that work programme providers get paid by results. The interaction between getting paid by whoever is paying the provider on the basis of results, which I presume means getting people into work, and the obligation to report to the DWP under the conditionality and sanctions regime raises difficult issues.

Jim McCormick: On the issue of results, the Scottish Government and the Parliament will be responsible for designing and commissioning the programmes as well as for performance and financial reporting, which gives some leverage to reshape the terms on which people take part and on which providers run activity in this space. One could draw the split between reserved and devolved powers in different ways; the clauses suggest a certain way of doing that.

My purely personal—not organisational—view is that what matters is coherence for the claimant and the provider. Ideally, responsibility for Jobcentre Plus functions as they apply to mandated claimants should be part of the accountability framework. In fact, that would be a modest shift, because the bulk of expenditure in that area goes not on long-term unemployed claimants but elsewhere. That might or might not be possible in the future but, ideally, coherence and smoothness for the participant and the right set of incentives for the provider should be at the heart of this form of devolution.

Linda Fabiani: That brings us right back to where I started. If we are talking not about all services for the unemployed but about being restricted to services for the long-term unemployed or those who have been unemployed for more than a year, that will take away from flexibility, cohesion and the ability to deal with the whole issue in terms of the overall structure of the nation as well as the individual.

Jim McCormick: I hesitate to say this, given that you were one of the architects of the Smith report—

Linda Fabiani: That does not mean that I agreed with everything.

Jim McCormick: Fair enough. My reading of paragraph 57 of the Smith report is that the intention was for Scotland to take over responsibility for the mandated programmes. In fact, Scottish organisations and local authorities already run various employment support, employability and back-to-work schemes for people before they reach the point at which they are mandated.

This is a next step forward for Scotland. There are risks and jagged edges, some of which I hope can be smoothed out, but there are also opportunities for integration that we have not seen previously.

The Convener: Have you taken that far enough, Linda?

Linda Fabiani: I just want to finish by addressing certain noises off saying that I signed off the Smith report. That involved a negotiation, and I point out that the Labour group

representatives also signed off the report. I ask those members to go back and ask their party to join me in making this better and getting back to the spirit of the Smith agreement.

Professor Spicker: On the discussion that we have just had, I think that it is important not to see the clause in question through the prism of the work programme. Employment programmes change like the sands of the desert and we cannot expect the same structure, management rules and processes to be in place two, five or 10 years from now. However, there is supposed to be an enduring power for Scotland to make its own decisions in such areas, whatever those decisions might subsequently be. As a result, we should not get too bogged down in the structure. What troubles me about the clause is that it is trying to do that.

Duncan McNeil: Convener, can I ask a local government question?

The Convener: I think that we have got time, so on you go.

Duncan McNeil: With regard to the complexities and challenges that we face, a lot of talk has resulted from Smith about devolving the work programme to a lower level of government. How does that play into the discussion?

The Convener: That comes back to Paul Spicker's point about giving Scotland the powers and Scotland then deciding how to use them. Does anyone want to reflect on Duncan McNeil's question?

Professor Spicker: This is entirely about the powers of the Scottish Parliament, not the UK Parliament, which can claim at any point that it has concomitant and concurrent powers, that this is about shared competence and that there is nothing to stop it running parallel systems. The DWP is actively attempting to do that with the local support services framework in certain areas where there is a substantial overlap with the Scottish Parliament's competences. The issue also needs to be part of the intergovernmental agreement, but the question is whether Scotland is to have any areas of exclusive competence.

The Convener: That takes us into a completely different discussion, but it is probably good to end with that big question mark hanging over us.

We have covered quite a breadth of information and have gone into some areas quite deeply. I am grateful to our witnesses for coming along and giving us their expertise. Their evidence will help us to reach some conclusions over the next month.

That ends the public part of the meeting. At our next meeting, on 26 February, the committee will take evidence from a range of experts on borrowing powers. We now move into private session, and I ask those who are not members of or associated with the committee to vacate the room.

10:55

Meeting continued in private until 11:25.

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