

The proposed draft clauses on welfare



Submission to the Devolution (Further Powers) Committee

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1. This paper covers five main issues:

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

The powers of the Scottish Parliament relating to benefits

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

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

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

- (a) who qualify by reason of old age, survivorship, disability, sickness, incapacity, injury, unemployment, maternity or the care of children or others needing care,
- (b) who qualify by reason of low income, or
- (c) in relation to their housing costs or liabilities for local taxes.”

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

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

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

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

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

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

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

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

The "no detriment" principle

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

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

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

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

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

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

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

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

more successful in practice.

The clauses in detail

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

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

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

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

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

Clause 17: Benefits for maternity, funeral and heating expenses

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

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

Clause 18: Discretionary payments

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

19. These are not the discretionary powers promised by Smith. The Smith Commission proposed that "The Scottish Parliament will also have new powers to make discretionary payments in any area of welfare without the need to obtain prior permission from DWP." The White Paper comments that

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

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

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

clarification, but what it means in essence is that powers previously granted to the Scottish Parliament are being clawed back.

Clause 19: Discretionary housing payments

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

Clauses 20 and 21: Universal Credit

22. Smith recommends in relation to Universal Credit that

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

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

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

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

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

the proportionate cost of such alterations is likely to be prohibitive. The complexity and expense of proposing any alteration to Universal Credit make it uncertain that such alterations can ever happen.

Clause 22: Employment support

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

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

Implementing changes

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

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

Translating the Smith Commission into practice

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

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

31. The Smith Commission also suggested that there would be provision to allow topping up of

existing benefits. I think from Smith's para 54 that it was intended that such a top-up for other benefits would operate through a discretionary payment, but there is no general mechanism to allow for it. The main precedent for topping up benefit has been Housing Benefit, but that benefit is locally administered. I expressed doubts in my submission to Smith as to how far 'topping up' could be done in practice: "Wherever delivery is the responsibility of a UK-wide agency it will be necessary for the operating service first to distinguish potential claimants with Scottish entitlements, and next to offer distinct rates or calculations for those claims. The mechanisms do not exist to make this possible." There is provision in clause 19 to top up benefits for housing, limited to topping up to existing levels of entitlement, but that is all; it is not open to the Scottish Parliament to make other reserved benefits more generous.

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

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

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

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