

AUTHOR(S):

TITLE:

YEAR:

Publisher citation:

OpenAIR citation:

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(ISBN \_\_\_\_\_; eISBN \_\_\_\_\_; ISSN \_\_\_\_\_)

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## New benefit powers for Scotland



Pending agreement between the Scottish and UK Governments, and the completion of the relevant Parliamentary processes, Scotland is set to gain significant new powers over aspects of the social security system. In order to help Poverty Alliance members better understand what these changes are and how they may be used Paul Spicker, Emeritus Professor at Robert Gordon University, has produced this short briefing. This briefing paper is part of the process to allow Poverty Alliance members determine the priorities for our network in relation to new social security powers in the years to come.

## **Part 1: The background to the reforms**

### **The rules of the game**

#### *Rule 1: Everything is forbidden...*

The Scotland Act 1998 did not delegate any powers relating to social security benefits. Schedule 5F 'reserves' anything that might be thought of as a social security benefit:

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

These things are not devolved. The Scottish Parliament has no power to change the rules.

#### *Rule 2: ... until it is explicitly permitted*

There were exceptions in the 1998 Act for a small number of circumstances - mainly social work services, provision for disabled people and children leaving care.

This has been the starting position for every discussion of benefits since. The delegation of powers that is currently taking place works by creating exceptions to the reservations - and then it adds exceptions to the exceptions, which means that those items are reserved again. In the current Scotland Bill, there are three key exceptions to the exceptions:

*National Insurance benefits.* This is relatively straightforward: it mainly reserves pensions, but it also affects contributory JSA and ESA

*The Social Fund.* This one is puzzling, because all the remaining powers that used to be exercised under the Social Fund are in principle being transferred to the Scottish Parliament.

*Loans.* The Social Fund used to work by offering Crisis Loans, The power to make crisis loans was passed to the Scottish Parliament by a special order when the Social Fund was wound up, but the Scottish Government decided not to use the provision. It is possible that whoever wrote this was thinking that Scotland didn't need to have those powers. However, quite apart from the Scottish Welfare Fund, loans have been used in Social Work since the 1960s, and it is possible that Scottish authorities might want to use them in other circumstances in the future. This is a reduction in current powers.

*Rule 3: The Scottish Parliament has fewer powers than an English local authority.*

Local authorities are generally considered, like the Scottish Parliament, to derive their powers from central government. In England, local authorities have been given a general power to promote welfare. That made it possible for central government to hand over functions to local authorities, and this has been done in two cases: the Social Fund, which has been replaced by local welfare assistance, and Council Tax Benefit, which has been replaced by a variety of schemes.

The Scottish Parliament, by contrast, does not have general powers to promote welfare - it has only the powers enacted in the 1998 Act and subsequent legislation. When Scottish local authorities were given the power to promote welfare, the Scottish Parliament used the same wording as the English laws - but the same wording could not mean the same thing. The Scottish Parliament could not grant powers it did not itself have. The Scottish Parliament could not legally authorise local authorities to run the Scottish Welfare Fund, or Council Tax Reduction, or Discretionary Housing Payments. Only the UK Parliament had the authority to make that happen. In the case of the Social Fund, an order was passed to delegate the

necessary powers.

*Rule 4: Powers aren't everything*

The Scotland Bill is all about powers. Nothing in the Bill creates any benefit. Nothing in it will make any person on benefits directly better off, or worse off. It only makes it possible for the Scottish Parliament to take action, which currently the Parliament is not able to take. It does not prevent the UK government from continuing to provide benefits, or from developing new benefits in the same field.

There are important limitations to the new powers. Part of the arrangement proposed by the Smith Commission is a new rule, the 'no detriment' principle. This is supposed to mean that if either the Scottish parliament or the UK government takes steps which impose costs on the other administration, compensation should be paid. One of the examples given in the White Paper concerns the Vehicle Excise Duty paid by people with disabilities: if Scottish rules were to certify that more people were disabled, the Treasury would want to get the money back. Some of the things that the Scottish Government are charged for might be surprising - HMRC has recently invoiced the Scottish Government for the expense of it *not* collecting stamp duty on property sales. In theory, the same principles should cut both ways - for example, Scotland should be able to recover any benefit money that the UK decided to tax - but the tables are rigged, and that may never happen. A House of Lords committee has described the no detriment principle as a "a recipe for continuing conflict".

The experience of Northern Ireland raises further doubts. For most of the last century - predating the foundation of the Irish Free State - Northern Ireland has had independent control of social security policy. Part of the reason for following the pattern of the rest of the UK has been the 'parity principle', a self-denying ordinance which has been taken to mean that benefits should never be very different. Part has been the result of direct control from Westminster. The other part, however, has been financial pressure from the UK government. The Northern Irish Assembly has

recently been fined by the Treasury for failing to implement certain measures which the DWP supposes will save money. Scotland may be granted powers and not be allowed to exercise them.

### **The Smith proposals**

The Smith commission was set up to “deliver more financial, welfare and taxation powers, strengthening the Scottish Parliament within the United Kingdom.” Their proposals about benefits fall into four main groups. First, some benefits were to continue to be reserved to the UK level. These included

- all aspects of the State Pension
- Universal Credit. This implicitly includes a range of benefits which will in due course be incorporated into UC, including Jobseekers Allowance, Employment and Support Allowance and Tax Credits. Housing Benefit is a special case that will be returned to shortly.
- benefits other than Universal Credit: Bereavement Allowance, Bereavement Payment, Child Benefit, Guardian’s Allowance, Maternity Allowance, Statutory Maternity Pay, Statutory Sick Pay and Widowed Parent’s Allowance.
- the structure of the Department for Work and Pensions, including Jobcentre Plus.
- conditionality and sanctions.

The Smith Commission might have gone further. A draft of the Commission’s report was reported to have said that:

“The Scottish Parliament will have the power to vary the personal allowance, the carer element, the child element, including the disabled child addition, the childcare costs element, the limited capability for work and work-related element and work allowance of UC [universal credit], child benefit & guardian's allowance, maternity allowance, and the operations of Jobcentre Plus in Scotland, including the responsibility for designing and implementing

the policies it applies”.<sup>1</sup>

These elements were apparently vetoed by the Coalition Cabinet.

The second category consists of benefits that were to be devolved in their entirety.

They were

- Benefits related to disability: Attendance Allowance, Carer's Allowance, Disability Living Allowance (DLA), Personal Independence Payment (PIP), Industrial Injuries Disablement Allowance and Severe Disablement Allowance.
- The Regulated Social Fund: Cold Weather Payment, Funeral Payment, Sure Start Maternity Grant and Winter Fuel Payment.

These benefits can be taken to be additional to the benefits that Scotland already runs - the Scottish Welfare Fund, payments in social work and Council Tax Reduction.

Third, there were benefits and services that would be shared or managed together:

- Housing Benefit, and the housing elements of Universal Credit
- Employment provisions, including the Work Programme

Fourth, it was going to be possible to add to the benefits scheme, through 'topping up' existing benefits, and introducing other new benefits.

### **The White Paper and the Scotland Bill**

When the White Paper came out, it offered markedly less than the Smith report had promised. In the first place, it did not implement all the elements: it left out new benefits, topping up benefits and winter fuel payment. Second, those benefits were

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<sup>1</sup> G Campbell, 2014, Smith Commission 'dropped welfare proposals', BBC News, <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-30245135>, A Grice, 2014, Smith Commission: Scottish welfare powers watered down at eleventh hour, Independent, <http://www.independent.co.uk/news/uk/scottish-independence/smith-commission-scottish-welfare-controls-watered-down-at-eleventh-hour-9891752.html>

to be transferred were subject to severe, arbitrary restrictions: disability benefits were to be confined to a functional definitions of disability, employment provision was only for longer-term unemployment, carers would have to be of working age and unemployed. Third, it imposed conditions and pulled back powers that had not been part of the Smith agreement: removing existing powers over loans, reserving parts of the industrial injuries scheme, and seeking to limit the scope of powers to temporary, short term or exceptional need.

The progress of the Bill through the Commons has moderated the worst effects, making provision both for topping up benefits and for new benefits in areas of devolved responsibility. It is probably still true, however, that the Bill does not reflect the original remit or intention of the devolution process. The Scotland Office has treated the process as one where it devolved the power to run specified benefits, rather than devolving powers - indeed David Mundell, the Secretary of State, has repeatedly demanded that the Scottish Government must first present him with a programme of specific benefits they plan to introduce before the devolution of powers can be justified, a demand which misunderstands what 'powers' are.

## **Part 2: The reforms in detail**

The details in Part 2 may still be amended as the Bill proceeds through Parliament.

### **Section 20: Disability, industrial injuries and carer's benefits**

*Benefits for disability.* The first of these, disability benefits, makes it possible for the Scottish parliament to take over Attendance Allowance, Disability Living Allowance, Personal Independence Payment and Severe Disablement Allowance (though the last of these closed to new business more than ten years ago).

“Disability benefit” means a benefit which is normally payable in respect of—  
(a) 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 (for example, looking after yourself, moving around or communicating), or

(b) a significant need (for example, for attention or for supervision to avoid substantial danger to anyone) arising from impairment to a person's physical or mental condition

and for this purpose the adverse effect or need must not be short-term. ”

Section 20 uses four definitions of disability - entitlement to disability benefits, severe disablement, significant adverse effects and significant need arising from impairment.

There are some striking differences between this approach and the rules for the existing benefits, especially PIP. The first is the substitution of 'significant' for 'substantial', though at this early stage it is anyone's guess what effect this will have on future legislation or on legal decisions. The second is the failure to refer to fluctuating conditions. The third is the absence of any reference to terminal illness. It would have been much simpler to have adopted the same definition of disability used in section 29 (for employment support), which simply refers to the Equality Act 2010.

*Industrial injuries benefits.* This is a general grant of powers.

“Industrial injuries benefit” means a benefit which is normally payable in respect of—

(a) a person's having suffered personal injury caused by accident arising out of and in the course of his or her employment, or

(b) a person's having developed a disease or personal injury due to the nature of his or her employment”

However, some of the key industrial diseases - notably black lung and asbestosis - continue to be reserved.

*Carers*. The first drafts of these provision imposed several restrictions on carers' benefits, which have now been dropped. The sections says simply that a carer's benefit is:

“a benefit which is normally payable in respect of the regular and substantial provision of care by a person to ... a person to whom a disability benefit is normally payable. ”

### **Section 21: Benefits for maternity, funeral and heating expenses**

This short section creates powers related to the 'regulated Social Fund'. Neither maternity nor funeral expenses are discussed or restricted, which means that these can be taken as general powers.

Heating expenses refer only to “expenses for heating in cold weather”. This has been represented as devolution relating both to cold weather payments and to Winter Fuel Payment, but (despite the name) Winter Fuel Payment is a universal benefit, not dependent on cold weather or on heating expenses; there does not seem to be the power to introduce it.

### **Section 22: Discretionary payments: top-up of reserved benefits**

This section exempts:

“Providing financial assistance to an individual who—

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

This makes it possible to top up reserved benefits on a discretionary basis. There is a long history of 'discretion' in the benefits system, and discretionary payments do not have to be temporary or one-off payments. As a general proposition, the top up will be in addition to the reserved benefit, and unlike discretionary housing payments,

which are dealt with later, not paid as part of it.

The section goes on directly to bar payments to people who have been sanctioned. However, it goes on to say that this is “unless (a) the requirement for it also arises from some exceptional event or exceptional circumstances, and (b) the requirement for it is immediate.” Like ‘discretion’, there is a long history of ‘exceptional’ provision in benefits. “Exceptional Circumstances Additions”, for example, used to make extra weekly allowances for people who needed special diets, extra heating or more than one bath a week for medical reasons. There may then be scope to use this exception in relation to sanctions.

### **Section 23: Discretionary Housing Payments**

This section arranges for continuation of the current scheme of DHPs, which has mainly been used in Scotland to compensate for the bedroom tax.

### **Section 24. Discretionary payments and assistance**

This section mainly covers the area of the Scottish Welfare Fund:

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

The second part of the section allows for ‘occasional’ help to those who have been, or might be, in “in prison, hospital, a residential care establishment or other institution ... homeless or otherwise living an unsettled way of life”.

### **Section 25: Welfare foods**

This covers the existing schemes for milk and vitamins allowed for expectant mothers and those with young children.

## **Section 26: Power to create other new benefits**

This is a general power to create new benefits in areas which are already in the powers of the Scottish Parliament - for example, health, education and law - so long as the benefits are not already reserved.

As in section 22, there is specific provision to stop the Scottish Parliament using this clause to take steps about sanctions - and the same quirk in the wording, which could mean that the clause does not work in the way that the DWP expects.

## **Section 27: Universal credit: costs of claimants who rent accommodation**

## **Section 28: Universal credit: persons to whom, and time when, paid**

All amendments to rules on Universal Credit have to be done in cooperation with the DWP, and are subject to the limitations of the computer systems being used for UC.

Provisions relating the Housing Benefit will only last as long as HB lasts, and as people are gradually enrolled in Universal Credit there needs to be some equivalent provision to protect them. Section 28 will make it possible to negotiate payments to landlords.

In principle it may be possible to vary the very long waiting period for UC.

## **Section 29: Employment support**

This section makes it possible to provide employment support for disabled persons, and for people at risk of long term unemployment where the programme lasts for at least a year. The reasoning behind the restriction to long-term programmes is not clear. It may be possible to circumvent the restriction by using section 22 top-ups to purchase shorter-term employment provision for those receiving reserved benefits.

Other general provisions, about Universal Credit and information sharing, are mainly intended to clarify legal niceties.

## **The summary of exceptions**

In its current form the Scotland Bill proposes 10 classes of exception to the Scotland Act:

1. Disability benefits and Industrial Injuries Benefits
2. Carers' benefits
3. Social work services (existing exceptions, including provision for social welfare, disability and child care)
4. Maternity, funeral or heating expenses
5. Topping up reserved benefits
6. Discretionary Housing Payments
7. Short-term needs (the Scottish Welfare Fund)
8. Leaving care, prison or hospital
9. Welfare foods
10. New benefits in devolved areas.

There is no general power of welfare.

## **Part 3: What happens next**

The provisions in the Scotland Bill only make it possible for the Scottish Parliament to legislate in this area. They do not stop the UK government from doing anything they might otherwise have done. If the Scottish Government decides not to use some of these powers, the UK schemes will continue in their present form until the UK government decides to change them. While it seems unlikely that the UK government will wish to continue offering short-term maternity and funeral provision, Universal Credit or employment support are closely linked to national policies and are likely to be maintained by default.

The Scottish Government is currently preparing to treat the Bill as an administrative transfer of responsibility for a range of specific benefits. They have still to decide who will be responsible for this administration and whether there will be a national

agency. Whatever the formal arrangements, there can be expected to be gradual changes in benefits in both England and Scotland, and over time differences will develop in rules and administrative practice.

## **What the Scottish Parliament can do**

In a time of deep cuts, there is pressure to protect benefits - to keep things as they are. The kind of thing that the Scottish Government can think about might include:

- changing the administration
  - create a fast-track process for judicial review, giving claimants better redress
  - provide PO Boxes for claimants
  - offer computer access
- changing procedures
  - accept medical certificates relating to disability and sickness
  - create short-term employment courses to give people useful qualifications (e.g. for food and hygiene, construction or driving)
- changing unfair rules
  - mobility support for older people
  - shortening the waiting time for Universal Credit
  - defining the 'exceptional' circumstances that might relieve sanctions
- offering services rather than benefits
  - reduce funeral costs by making land available
  - restoring housing subsidies
  - free school meals
- laying the foundation for a new system
  - a Scottish Child Benefit
  - a Citizens Pension
  - reintroduce Severe Disablement Allowance
  - no fault compensation for accidents

Most reforms will be expensive, because unless extra money goes in, it will not be possible to make anyone better off without making someone else worse off.

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