

Scotland Bill

Child Poverty Action Group in Scotland

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

Our Vision is of a society free from child poverty where all children can enjoy their childhoods and have fair chances in life to reach their full potential. We believe that a key high level purpose of the benefits system, wherever social security powers lie, should be to eradicate and prevent future child poverty.

CPAG in Scotland's Position on the Devolution of Further Powers

1. CPAG in Scotland has not taken a position on the extent to which powers should be devolved to Scotland. Our concern is how social security powers can be used to prevent child poverty, wherever those powers lie. In seeking to inform the debate on devolution we have made the following key points.

- 'welfare powers' must be matched with adequate fiscal and economic powers
- a clear and robust delivery mechanism is needed to protect minimum entitlements across Scotland, and provide adequate oversight, accountability and administrative efficiency
- care is needed to ensure devolution is not a cover for further cuts under the guise of localisation
- newly devolved powers must be used specifically to reduce child poverty and tackle wider inequalities

2. CPAG believes that the powers contained within the Scotland Bill potentially provide real opportunities to reduce child poverty and wider socio-economic inequality in Scotland. It is worth noting, however, that the bulk of social security powers will remain reserved – as will other levers for tackling poverty, including the national minimum wage and wider economic and fiscal powers.

Contents of the Scotland Bill 2015

3. While CPAG in Scotland has no position on the extent to which powers should be devolved, we believe there are aspects of the Scotland Bill which take a narrow interpretation of the recommendations of the Smith Commission and could place unnecessary limitations on the Scottish Parliament's discretion and ability to introduce benefits which reflect the needs of people in Scotland.

Benefits for disabled people and carers

4. The Smith Commission recommended that the Scottish Parliament be given legislative control over certain benefits for disabled people, including the power to replace or amend benefits such as attendance allowance (AA), disability living

allowance (DLA) and personal independence payment (PIP). Paragraph 51 of the Commission's report stated that "*The Scottish Parliament will have complete autonomy in determining the structure and value of the benefits [devolved] or any new benefits or services which might replace them*".

5. However, clause 19 of the Scotland Bill 2015 defines a disability benefit as;

'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.'

6. CPAG in Scotland is concerned that this definition of 'disability benefit' is overly restrictive and that it may place unnecessary limitations on the kind of replacement benefit the Scottish Government could introduce. The high threshold established for the severity of the effects of an impairment ('significant') and the use of very specific examples in (a) and (b) of the definition in clause 19 could potentially deprive the Scottish Parliament of the ability to introduce a benefit providing assistance to people with very low level disabilities or, for instance, those for whom the effect of their disability is largely financial.

7. For example, a person who had incontinence at night as a result of a damaged bladder might face additional weekly costs as a result of the need to wash sheets every day and frequently replace his/her mattress. It is feasible that the Scottish Government may wish to introduce a benefit that could provide support to people in circumstances such as these, where the main effects of an impairment are financial. As currently drafted, Clause 19 would make this problematic, given its focus on 'day to day tasks' and 'significant needs (for example a need for supervision to avoid risk)' used in the definition.

8. As well as constraining the Scottish Parliament's ability to take a different approach to the design of benefits for disabled people in Scotland, this provision could potentially prevent certain groups – many of whom are currently eligible for disability benefits – from accessing devolved disability benefits. Terminally ill claimants with less than six months to live, for instance, currently have automatic eligibility to DLA or PIP but could not be given similar access to a devolved benefit (unless they could establish the impact of their condition on day-to-day activities or the need for supervision to avoid risk). Use of the phrase "*short term*" in clause 9 might also create an obstacle for terminally ill people who are not expected to live for more than a couple of months.

9. Similarly, the automatic entitlements to DLA and AA currently available to people undergoing regular dialysis, those with severe visual impairments and double amputees would only be possible to replicate or extent with a strained reading of the provision. It is arguable that the use of 'normally' in the first line of the definition allows the Scottish Parliament to legislate for all of these exceptions to the norm and

more. However, redrafting this provision could clarify the issue and avoid further doubt or confusion.

10. During the Bill's Committee Stage, the UK Government Minister of State for Employment noted that "*our approach must reflect the benefits as they stand, including, importantly, the fact that they contain exceptions both to allow entitlement and to restrict payment where necessary*". This implies the UK Government has deliberately taken a restrictive approach, whilst allowing the Scottish Parliament to legislate for exceptional circumstances. CPAG in Scotland believe a more workable approach – and one less likely to encroach on the policy discretion of the Scottish Parliament - would be to include a more broadly drafted provision which allows the Scottish Parliament to introduce its own restrictions in response to the needs of disabled people in Scotland. For this reason, CPAG in Scotland supported an amendment which sought to define a disability benefit as a benefit payable to,

"a disabled person or person with a physical or mental impairment or health condition in respect of effects or needs arising from that disability, impairment or health condition."

Benefits for Carers

11. The power to create a new benefit to replace carer's allowance is also unnecessarily narrow. Clause 19(4) currently states that the power to provide such a benefit only extends to people who are "*16 or over, not in full-time education, and not gainfully employed*". This drafting limits the Scottish Government's policy making discretion and prevents it from designing a benefit for carers balancing caring commitments with part time work or study.

12. There is a need for these restrictions to be addressed if the Scottish Parliament is to have sufficient flexibility to create benefits which are adequately responsive to the needs and changing circumstances of disabled people and carers in Scotland and which minimise barriers to progression through work and education.

13. Responding to the specific caring and studying issue during the Committee stage of the Bill's passage, the Minister of State for Employment noted that students are traditionally supported through loans and grants". However, whilst the Scottish Parliament could legislate for grants to student carers alongside a benefit to replace carer's allowance, this would introduce needless complexity into the social security system.

The Creation of New Benefits

13. Paragraph 54 of the Smith Commission's report states that, "*The Scottish Parliament will have new powers to create new benefits in areas of devolved responsibility.*" This power is notably absent from the Scotland Bill, which only confers an ability to create new benefits where *welfare* powers have been devolved. Thus while new *disability* benefits might be created (as a result of clause 19 of the Bill), new benefits relating to health or education could not.

14. The UK Minister for Employment noted during the Bill's Committee Stage that the UK Government had never interpreted para 54 of the Smith Commission Report as

intending to extend the range of areas in which the Scottish Parliament can create new benefits. Rather, the UK Government interpreted the recommendation as restating the fact that the Scottish Parliament would have the power to legislate in those areas where social security powers were being expressly devolved. The Minister went on to state that, “*Undermining the social security reservation in that way would simply limit the power of the UK Parliament when introducing new welfare benefits or making changes to existing reserved benefits in the future.*”ⁱⁱⁱ”

15. While we acknowledge that devolving a power to create new benefits in any area would not guarantee the alleviation of, or a reduction in, child poverty; such a measure would provide the Scottish Parliament with an opportunity to directly augment the income of families by, for example, creating new health related benefits for families with children. We would therefore urge the Committee to seek further clarity on the intention behind paragraph 54 of the Smith Commission Report and to take any steps possible to give that intention legislative effect.

Discretionary Housing Payments – Receipt of Housing Benefit or Universal Credit

16. Discretionary Housing Payments (DHPs) are extra payments that can be made to claimants in receipt of housing benefit or universal credit who need further assistance to cover their rent.

17. Clause 22 devolves powers over DHPs to the Scottish Parliament, allowing it to set eligibility criteria and limits on the amount spent on DHPs. As is currently the case, the power to make DHPs will only extend to those who are already in receipt of reserved benefits to help towards their rent, and who appear to require further financial assistance to meet housing costs.

18. We believe the requirement that applicants be in receipt of housing benefit or universal credit should be removed. This would enable the Scottish Government to use DHPs to completely mitigate the impact of the bedroom tax. Currently, those who lose entitlement to housing benefit as a result of the bedroom tax (see example A below) are also precluded from accessing DHPs. This means that the bedroom tax will continue to affect tenants in Scotland and the Scottish Government will be unable to fully mitigate its effect.

Example: Anna works 25 hours and earns £194 net per week. She lives in a two bedroom flat in the social rented sector. Her rent is £87 a week. In the past, once her earnings had been taken into account she would have been entitled to £11.67 per week housing benefit. However, the bedroom tax means that her rent (for the purpose of a housing benefit calculation) is reduced by 14% to £74.82. Once her earnings are taken into account, she is now entitled to £0.00 housing benefit. As she is not eligible for housing benefit she is not entitled to access discretionary housing payments.

Discretionary Housing Payment – Sanction or Suspension

19. CPAG is also concerned that the Scotland Bill introduces a reservation not present in the draft clauses. Clause 22 precludes those who would otherwise be eligible from accessing discretionary housing payments if their need “*arises from*

reduction, non-payability or suspension of a reserved benefit as a result of an individual's conduct (for example, non-compliance with work-related requirements relating to the benefit) unless (a) the requirement for it also arises from some exceptional event or exceptional circumstances, and (b) the requirement for it is immediate."

20. This potentially excludes people who have been sanctioned or had their benefits suspended due to perceived non-compliance with conditions attached to a reserved benefit from accessing DHPs. This is a particular concern for housing benefit claimants whose restricted entitlement already fails to meet their rent, and who are then left destitute by a JSA or ESA sanction. This is likely to be a particular danger for claimants who are particularly vulnerable because of, for example, mental health problems and who may struggle to manage the processes necessary to make a successful claim for ESA.

Discretionary Payments and Assistance

22. Clause 23 of the Scotland Bill would devolve the power to make payments to households with short term needs in order to avoid risk to their wellbeing. It would also allow grants to be made to those who might otherwise be in prison, hospital, a residential care establishment or other institution, or homeless or otherwise living an unsettled way of life, and who appear to require the assistance to establish or maintain a settled home.

23. Similar powers have already been devolved to the Scottish Parliament through the Scotland Act 1998 (Modification of Schedule 5) (No. 2) Order 2013. These powers enabled the Scottish Government to establish the interim Scottish welfare fund (SWF) (which administers crisis grants and community care grants) and gave the Scottish Parliament competency to pass the Welfare Funds (Scotland) Act 2015 which gives the SWF legislative underpinning.

24. Our main concern in relation to clause 23 is that Exception 8 is narrowly drafted and does not include 'families under exceptional pressure' amongst the categories of person potentially eligible for 'occasional financial or other assistance'. This group is currently eligible for community care grants under the interim SWF and were also eligible for grants from the predecessor Social Fund administered by the DWP. Failure to refer to this group in the Scotland Bill 2015, and put beyond doubt the protection of families under exceptional pressure as a priority group in their own right, could put the health and wellbeing of some of Scotland's most vulnerable families at serious risk.

25. During Committee Stage the Minister of State for Employment assured Parliament that *"the clause will not limit the Scottish Parliament's existing competence and will not prevent the making of discretionary payments to people in families under exceptional pressure"^{iv}.*

26. CPAG is concerned that this statement fails to get to the heart of this issues. CPAG in Scotland is not concerned about current powers being encroached on. Rather we believe that existing powers of the Scottish Parliament must be extended to ensure that families under exceptional pressure will be eligible for awards. The Scottish Minister for Housing and Welfare committed to pursuing this issue with the

Scotland Office in a statement before the Scottish Parliament in March 2015^v. We urge the Committee to seek further clarification and assurances on this issue from the UK Government.

27. Clause 23 also states that powers will not include the ability to make a payment, “*where the requirement for it arises from reduction, non-payability or suspension of a benefit as a result of an individual’s conduct*” unless his/her needs **also** arise from an exceptional event or circumstances and the need is immediate. It is arguable that this provision restricts eligibility for crisis grants from the Scottish welfare fund. Under current guidance, applicants must already show that their wellbeing is at risk as a result of exceptional events or circumstances – but it does not matter if the cause of the crisis is the imposition of a sanction. However, even if the Scottish Government do not interpret the clause as imposing this restriction it is also worrying for the strong message it sends, which could easily be misinterpreted by members of the public and local authority decision makers to the detriment of very vulnerable individuals.

28. We are concerned that clause 23 will result in the needs of vulnerable people going unmet not only in relation to sanctions, but also in other areas where ‘conduct’ is an issue. It is well documented, for instance, that people with mental health problems struggle to manage the processes necessary to make a successful claim to employment and support allowance and have benefit stopped through failing to return forms or attend medicals.

Employment Support

29. Clause 26 of the Scotland Bill contains powers which would devolve employment support programmes such as Work Programme and Work Choice to the Scottish Government. This could allow for initiatives to be developed that are more suited to the local labour market, local skills and local employers. This could potentially help to minimise the imposition of arbitrary and inappropriate job-seeking tasks that can undermine claimants’ efforts to move into work and increase the individual’s chance of being sanctioned.

30. It is important to note that while the draft clauses devolve delivery of employment programmes, their impact on clients would still be affected by UK Government policy in relation to conditionality, including when sanctions are applicable and what conditions must be met by jobseekers.

General and administrative concerns

31. In addition to the substantive powers highlighted above, the following general aspects of the devolution of welfare powers must be taken into account at every stage in the process of transferring powers and implementing new systems and benefits. These considerations can be summarised as follows:

- It is vital that in devolving aspects of the social security system claimants and their families are not disadvantaged as a result of administrative difficulties stemming from the transfer of powers. The importance of this issue cannot be overestimated. Existing and extremely common difficulties include poor information sharing between and within agencies (such as the DWP and local

authorities), correspondence going missing or not being registered and staff error. Of all the cases received through CPAG in Scotland's early warning system, just under half relate to administrative error, maladministration or delay. Similarly, research conducted by CPAG, Oxfam and the Trussell Trust found that for between half and two-thirds of the people using food banks, the immediate income crisis was linked to the operation of the benefits system (with problems including waiting for benefit payments, sanctions, or reduction in disability benefits) or tax credit payments^{vi}.

- Eligibility for one benefit (such as DLA or PIP) is often used as a 'passport' for access to another (such as employment and support allowance or universal credit for full-time students). Difficulties may arise where a 'passporting' benefit (such as DLA/PIP) is devolved, while the other (such as the disabled child element of universal credit) is not. This could result in a situation whereby the Scottish Government changes eligibility criteria for one benefit, thereby increasing entitlement to a second, administered by the UK Government. There is a need for the UK and Scottish Government to identify all relevant passported benefits and ensure that working agreements and information sharing arrangements are in place.
- There is a need to ensure that individuals are aware of how their existing claims will be affected by the devolution of social security powers to Scotland. There has been great uncertainty over the last few years for many people in receipt of benefits (particularly sickness and disability benefits) as eligibility criteria and procedures for accessing benefits have changed repeatedly. It is therefore important that, where possible, claimants are not subject to even more uncertainty and financial insecurity.
- Devolution of policy responsibility needs to be accompanied by clear proposals for the delivery infrastructure required to ensure minimum standards of entitlement are protected across Scotland with adequate accountability and oversight. In the long term CPAG believes this is likely to be best achieved through establishment of a national Scottish benefits agency. A delivery agreement with the DWP is also an option, providing continuity during the transition period, but might restrict opportunities for policy divergence in the future. The other alternative, delivery by local authorities carries real risks, including the erosion of national standards of delivery, a lack of transparency and an increasingly confusing landscape for claimants.

Areas where further clarification may be required

Top-up Benefits

32. Clause 21 of the Scotland Bill enables the Scottish Government to make discretionary 'top-up' payments to "individuals" who "appear to require financial assistance" and who are in receipt of a reserved benefit, so long as it is for the purpose for which the original benefit is intended. CPAG believe there is need for clarification in relation to several aspects of this clause. Firstly, paragraph 159 of the Bill's explanatory notes state that this discretionary power can be used to provide 'top-ups' on an individual, case by case basis or by way of an on-going entitlement to all – or a defined group of - benefit claimants. We are pleased that this clarification

has been provided but believe Clause 21 could be amended to ensure that the government's intention is clearly expressed in the legislation itself. Otherwise there is a risk that clause 21 could be interpreted as allowing 'top-up' payments to be made only on a case by case basis, and requiring an assessment of a claimant's need for financial assistance. Neither of these requirements were mentioned anywhere in the Smith Commission's recommendations.

33. CPAG also believe there is a need for clarification as to the definition of the term 'benefit'. No such definition is included and the Bill which creates uncertainty as to whether the Scottish Parliament's 'top up' power can be used to augment HMRC-administered tax credits and benefits for children as well as those benefits currently administered by the DWP. The Smith Commission agreement was similarly unclear on this point.

Policy impacting on the effect of sanctions

34. The Smith Commission Report makes very little mention of sanctions policy. The only reference is made in paragraph 46, which states that "*Conditionality and sanctions within UC will remain reserved.*" Despite this, the Scotland Bill places numerous restrictions on the Scottish Parliament's discretion to make payments where it might have a knock-on impact - either intended or unintended – on the effect of sanctions policy in Scotland (see for example paragraphs 20 and 27 above in relation to discretionary housing payments and the Scottish welfare fund). This arguably goes beyond the proposals made by the Smith Commission and imposes unnecessary restrictions on the discretion of the Scottish Parliament which were not clear from the Commission's report.

ⁱ Hansard 30 Jun 2015 : Column 1362, Priti Patel, Minister of State for Employment

ⁱⁱ Hansard **30 Jun 2015 : Column 1363** Priti Patel, Minister of State for Employment

ⁱⁱⁱ Hansard 30 Jun 2015 : Column 1366, Priti Patel, Minister of State for Employment

^{iv} Hansard 30 Jun 2015 : Column 1365, Priti Patel, Minister of State for Employment

^v Stage 3 debate on the Welfare Funds (Scotland) Act, 3rd March 2015,

<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9811>

^{vi} Emergency Use Only Report - <http://www.trusselltrust.org/resources/documents/Press/ES-Foodbank-Report.pdf>