The Scottish Parliament
Pàrlamaid na h-Alba

DEVOLUTION (FURTHER POWERS) COMMITTEE

AGENDA

20th Meeting, 2015 (Session 4)

Thursday 3 September 2015

The Committee will meet at 9.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Decision on taking business in private:** The Committee will decide whether to take items 5 and 6 in private.

2. **Scotland Bill - constitutional and equalities provisions:** The Committee will take evidence from—

   Michael Clancy, Director of Law Reform, Law Society of Scotland;

   Emma Ritch, Executive Director, Engender;

   Professor Neil Walker, Regius Professor of Public Law and the Law of Nature and Nations, University of Edinburgh;

   Talat Yaqoob, Chair and Co-Founder, Women 50:50.

3. **Scotland Bill - welfare provisions:** The Committee will take evidence from—

   John Dickie, Director, Child Poverty Action Group in Scotland;

   Nile Istephan, Vice Chair, Scottish Federation of Housing Associations;

   Bill Scott, Director of Policy, Inclusion Scotland;

   Rachel Stewart, Public Affairs Officer, Scottish Association for Mental Health.

4. **Report on parliamentary oversight of inter-governmental relations - debate** The Committee will consider whether to make a request to the Conveners Group to seek a debate in the Chamber.

5. **Scotland Bill - letter to the Secretary of State for Scotland:** The Committee will consider a draft of a letter to the Secretary of State for Scotland setting out views on amending the Scotland Bill at Report Stage.

6. **Work programme:** The Committee will review its work programme.

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The papers for this meeting are as follows—

Agenda Items 2 and 3

Written evidence submissions	DFP/S4/15/20/1

Agenda Item 2

PRIVATE PAPER	DFP/S4/15/20/2

Agenda Item 5

PRIVATE PAPER	DFP/S4/15/20/3

Agenda Item 6

PRIVATE PAPER	DFP/S4/15/20/4

Devolution (Further Powers) Committee

Written evidence submissions from today's witnesses

Introduction

1. This paper contains written submissions of evidence from today's witnesses, where provided, on the subject of the Scotland Bill (see Annex).

Action/recommendation

2. Members are invited to take these submissions into account during their questioning of the witnesses.

Clerking Team
August 2015

ANNEX

LAW SOCIETY OF SCOTLAND

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Law Reform Sub-Committees on Constitutional Law, Tax Law, Administrative Law and Licensing Law. The committees are comprised of senior and specialist lawyers (both in-house and private practice)

Where we have not commented on a clause, this indicates that we consider that it will effectively devolve competence to the Scottish Parliament in the area concerned.

This written evidence focusses on the Scotland Bill introduced into the House of Commons as amended in Committee (Bill 48) but also makes reference to the Command Paper "Scotland in the United Kingdom: An enduring settlement" (Cm 8990) and the Interim Report of the Scottish Parliament's (Further Powers) Committee.

Part 1 – Constitutional Arrangements

Clause 1 – The Scottish Parliament and the Scottish Government

The Smith Commission reported on 27 November 2014.

Pillar 1 of the Smith Agreement relates to providing a "durable but responsive constitutional settlement for the governance of Scotland". Paragraph 21 of the report concerns the permanence of the Scottish Parliament and provides that "UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions".

Clause 1(1) inserts a new subsection (1A) into Section 1 of the Scotland Act 1998. It states that "A Scottish Parliament is recognised as a permanent part of the United Kingdom's constitutional arrangements". Similar phraseology is used for the purposes of amending Section 44 of the Scotland Act 1998 which makes provision for the Scottish Government. That Section, which was amended by the Scotland Act 2012 will now have a new sub-section 1 which declares that "there shall be a Scottish Government and that a Scottish Government is recognised as a permanent part of the United Kingdom's constitutional arrangements…"

The clause does not literally implement the terms of Paragraph 21 of the Smith Report. The use of the phrase "recognised as permanent" has a different nuance from a statement that "the Scottish Parliament and Scottish Government are

permanent institutions". The difference in wording between the Smith Report and the clause is significant. The clause could be said to acknowledge or declare a matter of fact rather than provide a statement in law. The Scottish Parliament's Devolution (Further Powers) Committee is of the view that the phrase "is recognised" has the "potential to weaken the effect of the clause" para 48 – Interim Report on the Smith Commission and the UK Government's proposals (May 2015).

There are a number of observations to be made about how the Bill fits with the current theory of the sovereignty to the UK Parliament.

The classic theory of UK Parliamentary sovereignty is stated in AV Dicey's "Introduction to the Study of the Law of the Constitution" which has been subject to academic study and judicial interpretation over the years. Parliament can, in theory, make law on any subject which it pleases and there are no fundamental laws which restrict its power. Parliament cannot fetter itself for the future and cannot bind its own successor Parliaments. The "continuing" theory of Parliamentary supremacy means that Parliament possesses as Dicey stated "the right to make or unmake any law whatever". Furthermore, no person or body according to Dicey has the right to override or set aside the legislation of Parliament.

This theory reflected in the rulings of the courts presents drafting problems for any statement concerning the permanence of the Scottish Parliament or the Scottish Government. It is clearly in an effort to meet the intentions of the Smith Commission and at the same time work within the confines of the theory of the sovereignty of Parliament that the clauses have been framed in the way they have. However, even an amendment to Clause 1 would not, of itself achieve "permanence". This is because a Parliament cannot, according to the orthodox theory bind a future or successor Parliament. Accordingly, the conclusion must be that Clause 1 is designed to be, in fact, declaratory of political intention rather than an attempt to re-write the existing theory of the sovereignty of Parliament.

Permanence as a concept

Some attempts have been made to create permanent institutions by statutory arrangements:-

1. In the Treaty of Union Article XIX, enacted into law by the Union with England Act 1707 and the Union with Scotland Act 1706, it is stated that "the Court of Session… do, after the Union and notwithstanding thereof, remain in all time coming within Scotland as it is now constituted … and that the Court of Justiciary do also after the Union and notwithstanding thereof remain in all time coming within Scotland".

2. The Northern Ireland Act 1998 provides in Section 1:-

"(1) it is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) but if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a United Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland)."

These are two examples of how the Parliaments of England and Scotland and the United Kingdom Parliament have sought to make law which, in strict theory does not comply with the theory of Parliamentary sovereignty, while at the same time sets out political and legal objectives.

The Clauses are not designed to reformulate constitutional theory; therefore Clause 1 will have to be amended in order to align it more closely to the views of the Smith Commission. At the same time we need to acknowledge the theory of the sovereignty of Parliament and the limitations that theory puts on achieving, in legal terms, the intentions of the Smith Commission.

There are a number of cases, such as Ellon Street Estates v The Minister of Health [1934] 1 KB 590 and Thorburn v Sunderland City Council [2002] EWHC 195 (Admin) which adhere to the classic position but recently, in decisions such as Jackson v The Attorney General [2005] UKHL 56 and AXA General Insurance Limited and Others v The Lord Advocate and Others [2011] UKSC 46, there was some discussion about the nature of the principle of the sovereignty of the United Kingdom Parliament. In the AXA case, Lord Hope stated at Paragraph 50 "the question whether the principle of the sovereignty of the United Kingdom Parliament is absolute or may be subject to limitation in exceptional circumstances, is still under discussion".

That discussion, however, cannot take place in the context of dealing with these clauses and would require a more searching constitutional debate. We ought to acknowledge that the world is different since Dicey wrote his text and recently issues have been raised about whether Parliament can be relied upon to control an abuse of its legislative authority by the Executive. It has been observed that Parliamentary sovereignty and the rule of law are "not entirely in harmony" with each other. These clauses however are not the place to decide where the proper balance should lie.

Amendments to Clauses 1 and 2 might be by language aimed at indicating a limit on Parliament's authority to legislate on the matter or by including a conditional qualification on the legislative authority as in the case of the Northern Ireland Act 1998.

Other declaratory statements in the law, such as the Statute of Westminster 1931, the Canada Act 1982 and the Hong Kong Act 1985 are all geared to permanently relinquishing Parliamentary sovereignty for the future over former colonies or dominions. As such they are not strictly precedents but they do demonstrate that sometimes Parliament can pass what appears to be legislation which contradicts the established constitutional theory.

Similarly, EU law and the doctrine of supremacy of EU law clearly modify the orthodox theory: Factortame Ltd v Secretary of State for Transport (No.2) [1991] 1 AC 603.

These issues have been reflected on by the Devolution (Further Powers) Committee in its interim report "More Powers for the Scottish Parliament: an interim report on the Smith Commission and the UK Government's Scotland Bill and the consideration of the House of Commons in the debates in the Committee of the whole House (Hansard 15 June 2015 cols 23 – 30 and 190).

The Secretary of State, David Mundell MP said in the debate on this amendment on 15 June 2015 that he regarded "a Scottish Parliament as a prerequisite of a United Kingdom" and that he would "reflect on a number of the issues raised… relating to proposals by the Law Society of Scotland. Among these is the debate on the wording currently in Part 1, and we will certainly look at that " (Col.90).

Clause 2 – The Sewel Convention

The Sewel Convention was declared in the House of Lords during the passage of the Scotland Bill 1998 on 21 July 1998, during a debate on an amendment by Lord Mackay of Drumadoon concerning Clause 27(7) – now Section 28(7). Clause 2 inserts a new sub-section 28(8) into the Scotland Act 1998 s.28 which seeks to recognise that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

In one sense, this does place the Sewel Convention on a statutory footing as required by Paragraph 22 of the Smith Report. The clause quotes Lord Sewel's statement at Column 791 where he said that "we would expect a Convention to be established that Westminster would not normally legislate, with regard to devolved matters in Scotland, without the consent of the Scottish Parliament". As a Convention, the Sewel Convention has worked relatively well. Since the establishment of the Scottish Parliament, there appear to have been no significant problems with the operation of the Convention. It applies when UK legislation makes provision specifically designed for a devolved purpose. The Convention has been agreed in Memoranda of Understanding and by the House of Commons Procedure Committee and its practical usage is explained in Devolution Guidance Note Number 10 (DGN10).

DGN10 does not apply to incidental or consequential provisions in relation to a reserved matter. It does apply to draft bills and private members' bills. It will also apparently continue to apply to any statutory formulation of the Convention.

It is significant that DGN10 also requires the consent of the Scottish Parliament in respect of provisions of a Bill before the UK Parliament which would alter the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers (see DGN 10 at paragraphs 4(iii) and 9). It would seem, however, that Clause 2 would not apply to this latter category of provision.

The use of the word "normally" in Clause 2, whilst a direct quote from Lord Sewell creates difficulties, in what circumstances would the UK Government consider sufficiently abnormal for the convention to disapply?

The Secretary of State for Scotland, David Mundell MP rejected this amendment (then amendment 56) when it was considered in the Committee on 15 June 2015. Mr Mundell said "Currently, the Government do not normally legislate in devolved areas without the consent of the Scottish Parliament. Clause 2 sets out that practice. In doing so it puts on a statutory footing, a convention that has been consistently adhered to by successive United Kingdom Governments. I understand the desire to put beyond doubt that we will seek the consent of the Scottish Parliament when legislating on devolved matters. However, in effect, amendment 56 seeks to limit the sovereignty of this Parliament by removing the word "normally" to state that the Parliament of the United Kingdom cannot legislate with regard to devolved matters without the consent of the Scottish Parliament. In reality the amendment would contradict section 28(7) of the Scotland Act 1998… The amendment would radically alter the way in which the practice was intended to operate as envisaged by Lord Sewel" (Col.106).

The Minister makes a good point in terms of potential contradiction with Section 28(1). This amendment however gives the opportunity to explore what "normally" means and will however allow the Government to explain in what "abnormal" circumstances the UK would legislate on devolved matters without the consent of the Scottish Parliament.

The Convention at present has no legal effect in limiting the power of the UK Parliament but a breach of the Convention would have considerable political impact. It would not only be unconstitutional to disregard the Convention but that action could also have significant political and constitutional consequences. A similar Convention applying to the Southern Rhodesian Legislative Assembly was referred to in the case of Madzimbamuto v Lardner-Burke PC [1969] 1 AC 723 where a breach of the Convention would have been considered unconstitutional.

Would a breach of the Convention, formulated in the Bill be justiciable? Lord Sewel indicated in Column 791 that he expected that differences of opinion would be negotiated between the Parliaments or Governments rather than being argued in court. So, in theory, it might be litigated upon but would a court strike down UK legislation affecting a devolved area where the consent of the Scottish Parliament had not been given? Under the terms of Section 28(7) of the Scotland Act 1998, the answer to that question is probably not. However, purposive interpretation and declarations of incompatibility under the Human Rights Act 1998 as well as an enhanced sense of constitutionalism under devolution legislation indicate that when the courts consider UK legislation to be seriously flawed Parliament has considered itself bound to alter that legislation.

It may therefore be the case that the courts will be called upon to adjudicate in a declaratory way in the event of a statutory formulation of the Sewel Convention being breached. The outcome of such a case will be a matter for the court concerned.

Clause 10 – Super- majority requirement for certain legislation

We have concerns about the extent of this clause.

In our view, the protected legislation should be extended to cover parliamentary terms.The Society promoted an amendment concerning this issue at Committee Stage. The amendment number 21 was considered by the House of Commons on 15 June 2015 but was not accepted by the Government (Col 130 – 133).

This amendment (21) was debated in Committee on 13 June 2015. The Deputy Leader of the House of Commons, Dr Thérèse Coffey MP responded on behalf of the Government. Dr Coffey said "Amendments 21 and 22 in the name of the right hon. Gentleman (Mr Carmichael) go beyond the Smith Commission Agreement, which did not propose that legislation relating to the term length of the Scottish Parliament, or the date of any Scottish Parliament ordinary election, should be subject to the two thirds majority, neither did the agreement state that the Bills concerning the alteration of boundaries of constituencies, region or any equivalent electoral area for the Scottish Parliament should be covered by this requirement." (Col.133).

The issue of the application of super majority should not simply rest on the content of the Scottish Commission Agreement. There are other provisions in the bill which were not in the Agreement or which differ from the Agreement. It is necessary to apply the super majority to the parliamentary term in order to insulate this issue from political interference.

Part 2 – Tax

The provisions devolving income tax rates, assignment of VAT, Air Passenger Duty and aggregates tax will achieve the policy intention of increasing the competence of the Scottish Parliament in these areas.

Part 4 - Other legislative competence

Clause 31 – Crown Estate

The Smith Commission report recommended the devolution of the Crown Estate in Scotland to the Scottish Parliament (Recommendation 32) and that a memorandum between the Scottish and UK Governments should ensure such devolution is not detrimental to UK wide critical national infrastructure. The Bill seems to create a memorandum in statutory form and the Society's amendments are designed to highlight that under the Bill the Treasury must, make the scheme for the Crown Estate.

It is inappropriate for the Treasury to have exclusive discretion on making of the scheme and Scottish Ministers ought to be involved. Amendments were moved on 6 July 2015 (col 172) but were not accepted by the Government (col 117).

Clause 33 – Tribunals

We welcome the inclusion of this clause which is directed at tribunals dealing with reserved matters in Scotland. We however have reservations about the drafting of Clause 33, believing it does not give effect to Paragraphs 63 and 64 of the Smith

Commission Report. We believe that Clause 33 sets limitations on the transfer of responsibility for management of transferred tribunals.

Smith Commission Report - Paragraphs 63 and 64

Para 63 and 64 of Smith Commission Report set out that,

"63 All powers over the management and operation of all reserved tribunals (which includes administrative, judicial and legislative powers) will be devolved to the Scottish Parliament other than the Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission.

64 Despite paragraph 63, the laws providing for the underlying reserved substantive rights and duties will continue to remain reserved (although they may be applied by the newly devolved tribunals)."

These are linked statements but Paragraph 64 is not necessarily a limitation on Paragraph 63 but an explanation of intention.

In implementing Paragraph 63 of the Smith Commission Report there must be some scope for the continued reservation of the substantive law and that that may take forms which require some limitation on the functions transferred. However limitations on the transfer should be only such as are objectively necessary and that they must not be unduly restrictive of the principle in Paragraph 63.

The Command Paper qualified the original recommendation in Paragraph 63. While it envisaged transfer being effected by Order in Council with a separate Order for each relevant Tribunal, it also suggested that each Order in Council will set out:-

a) the precise nature of the matters that will be able to be heard;
b) the specific tribunal within the devolved system that will be responsible for hearing those matters; and also
c) any limits, constraints and requirements on the exercise of the powers transferred that are necessary to ensure the continuing effective delivery of the overarching national policy.

Sub-paragraphs a), b) and c) qualify the Smith Commission recommendation.

The Command Paper (p.6.3.4) offers justification for such restrictions by reference to the need for consistency with undefined features of the reserved tribunal system. However there needs to be a more developed argument in support of any restriction on the Smith proposals.

With reference to point a) above, any restriction on the nature of the matters which may be heard would constitute a limitation on Scottish Tribunals. It could impede the development of a Scottish Tribunals system.

The restriction at point b) would limit the discretion of Scottish institutions to organise the Scottish Tribunals. Standardisation and harmonisation of practice within a unified tribunal framework are along with flexibility to adjust structures, desirable

policy outcomes, which we support, but they are more difficult to achieve with the suggested restrictions. Prescribing the tribunal to which jurisdiction is to be transferred ought to be focussed on obtaining a better outcome for users rather than a need for harmonisation.

The restriction at point c) comes closest to addressing the position of para 64 in relation to para 63 of the Smith Commission Report, and we agree with its inclusion.

The complete transfer of responsibility is needed to avoid questions as to the status of tribunals which deal with Scottish matters but which were not within the devolved responsibility of the Scottish Parliament. Without clarification in statute questions might arise as to whether such tribunals dealing with Scottish issues (while not part of the Scottish Tribunals system) were in fact part of the English legal structure.

We have the following preliminary and provisional comments on the detail of Clause 33, namely:-

a) There is no provision in the Smith Report for the exclusion of Employment Tribunals from transfer - 2A(2)(b);
b) Leave out 2A(2)(3) and (4).

We do not object to the general power in sub-section 33(5).

The Society promoted amendments to this clause which were not debated in Committee.

The Government did not accept the amendments. If the Government proceeds with the clause as it stands, it should produce a draft of the Order in Council referred to in clause 33 before proceedings begin in the House of Lords in order that MSPs, MPs, Peers and commentators know what is being legislated upon.

Clause 45 – Gaming machines on licensed betting premises

Clause 45 devolves, by way of an exception from the current reservation in Schedule 5 of the Scotland Act 1998, power to vary the number of gaming machines authorised by a betting premises licence granted by a Licensing Board in Scotland where the stake is more than £10.

We question whether this provision will give proper effect to paragraph 74 of the Smith Commission Report which stated 'The Scottish Parliament will have the power to prevent the proliferation of Fixed-Odds Betting Terminals.

We note that the exception will only permit the variation of the number of gaming machines authorised by a new betting premises licence, but does not in terms of Clause 45(6), apply to existing betting premises licences. There are differing views in the profession as to how the Scottish Parliament should exercise any of the powers devolved by this provision but there is a consensus that it is an undesirable outcome for some aspects of the Gambling Act 2005 (which is a UK statute) and aspects of any future Scottish Parliament legislation to apply to the same betting premises and that it is more desirable for law made in one legislature rather than two

to apply to the variation of the number of gaming machines authorised by a betting premises licence.

Consideration should be given to devolve competence to permit the variation of the number of gaming machines authorised by existing gaming licences.

Furthermore the Gambling Act 2005, Section 172 provides the authority for allowing various categories of gaming machines, defined in the relative regulations according to stake and prize money. Clause 45(1) excepts from the reservation the setting of the number of gaming machines where the stake is more than £10. The Scottish Parliament should be able to limit the number of machines irrespective of the value of the stake.

The Scottish Parliament Devolution (Further Powers) Committee stated in its report on the Bill: that the committee questions whether the draft clause, as currently written, gives any meaningful effect to the Smith Commission proposals in this area. The draft clause would only provide the power to restrict the number of Fixed-Odds Betting Terminals where a new betting premise licence is being sought. That Committee has some sympathy with the Law Society of Scotland submission that the clauses should be amended to include the ability to limit the number of gaming machines in both existing and new betting premises.

The Society promoted amendments to the clause which were debated in the House of Commons Committee on 6 July 2015 (cols 67 – 117). The Government did not accept the amendments.

Part 5 - Other Executive Competence

We have no comment to make.

Part 6 – Miscellaneous

We have no comment to make.

Other reforms arising from the Smith Commission process

As part of our submission to the Smith Commission we also suggested further areas where devolution could be considered.

The following areas were included in our submission and we hope can be taken into account as drafting of the Bill progresses:-

<u>Section C1: Business associations</u>

C1 the reservation of the law of business associations should be amended to enable the Scottish Parliament to legislate.

- updating the law on (unlimited) partnerships and unincorporated associations;
- creating new forms of co-operative enterprise;
- creating new forms of mutual enterprise;

- the creation of economic interest groupings (EIGs) where the EEIG form is unavailable only because the founder members do not come from more than one Member State.

Section C7: Consumer Protection

The majority of the reservations under this section are important for completion of the UK single market. It would be difficult to devolve much of this area without significant disruption to that market; however, some aspects could be devolved without upsetting the public policy objective of maintaining equal consumer redress across the UK. In particular, the regulation of estate agency could be devolved.

Head G: Regulation of the Professions
Regulation of the legal professions

There is no provision which reserves the regulation of the Scottish legal professions. Nevertheless, in the Legal Profession and Legal Aid Scotland) Act 2007, which regulates "the making of complaints about legal services", it was provided that that Act did not apply to complaints about the provision of advice, legal services or activities relating to consumer credit, insolvency practitioners, financial services or immigration.

This was because the Scottish Government took the view that the supervision of the legal profession when giving advice or providing services about these reserved matters was itself reserved and was therefore a matter for the UK Parliament to regulate.

In other words, the Scottish legal professions are regulated partly by the Scottish Government and partly by the UK Government according to what advice or services they are providing.

In Section C3 there is an exception from the reservation of Competition Law which covers the regulation of the legal profession but that exception only applies for the purposes of that section. The problem is that the provision of advice, legal services or activities relating to consumer credit, insolvency practitioners, financial services or immigration is considered to be reserved.

Irrespective of whether or not this view is correct (and other views may be held), it is suggested that the Scottish Parliament should be able to regulate all aspects of the Scottish legal professions.

Section H2: Health and safety

The Health and Safety at Work etc..Act 1974 set out the general principles for the management of health and safety at work in the United Kingdom resulting in the creation of the Health and Safety Commission (since merged with the Health and Safety Executive).

Enforcement of Health and Safety in Scotland is already practically devolved and control over Occupational Health issues, many of which are practically unique in

profile to Scotland such as offshore oil and agriculture, should now be formally devolved to Scotland.

If Health and Safety Law is devolved to Scotland, MSPs will be able to deal with Health and Safety at Work specific to Scotland through a Scottish Health and Safety Commission. Such a Commission would assist by informing practice in England and Wales on improving Health and Safety and vice versa, building on the, at present, (non-binding) concordat between the Health and Safety Executive and Scottish Government.

Devolution of Health and Safety would avoid legal uncertainty around the interpretation of s29(4) of the Scotland Act 1998 as seen in Adams and others, petitioners - 2002 Scot (D) 1/8, Kennedy and another v Lord Advocate and Scottish Ministers - 100 BMLR 158 & Imperial Tobacco Ltd v The Lord Advocate 2012 (Scot) 12/12.

The Society promoted amendments to the clause which are set out in the annex to this submission.

Section L2: Equal Opportunities

It should be debated whether discrimination law should be devolved to the Scottish Parliament. Discrimination issues closely interrelate with devolved issues recently addressed by Scottish legislation, such as incapacity, mental health and vulnerability and could benefit from detailed consideration by the Scottish Parliament. This would put the Scottish Parliament on the same footing as the Northern Ireland Assembly.

PROFESSOR NEIL WALKER, REGIUS PROFESSOR OF PUBLIC LAW AND THE LAW OF NATURE AND NATIONS, EDINBURGH LAW SCHOOL

CONSTITUTIONAL ASPECTS

1. In this short note I will concentrate on Clauses 1 and 2 of the current Scotland Bill introduced into the House of Commons, as amended in Committee (Bill 48). Much ink has already been spilled on these Clauses, and on the relationship between their wording and the original proposals of the Smith Commission. However, important questions about what is possible *in constitutional theory* and what is likely *in constitutional practice*, and about the link between theory and practice, remain unresolved

WHAT IS (IM)POSSIBLE IN CONSTITUTIONAL THEORY

2. On one reading of Clauses 1 and 2, *to the extent that these Clauses purport to change the law* they are simply attempting to do the impossible. Clause 1 seeks to make the Scottish Parliament a 'permanent part of the United Kingdom's constitutional arrangements'. But since, according to the pure theory of Parliamentary sovereignty, no Parliament can in law bind its successors, then the durability of new legislative rules, including any rule purporting to make a particular institution a permanent constitutional fixture, can never be guaranteed. For its part, Clause 2 seeks to limit the theoretically unlimited power of the UK Parliament to continue to legislate for devolved Scottish matters even in the age of the Scottish Parliament and Government by reference to (certain of) the terms of the Sewel Convention, according to which such a power should not 'normally' be exercised 'without the consent of the Scottish Parliament. Again, however, to the extent that such a vaguely qualified norm is at all effective, there can be no suggestion of a legal guarantee of permanence. This is so despite this Clause being coupled with the permanence provision in the Smith proposals as part and parcel of a 'durable' constitutional settlement (Para. 20). Granted, Clause 2 might still be of some assistance to the Courts in interpreting the limits of a later UK statute dealing with Scottish matters where the intent of the statutory words is unclear, but where the words of the later UK statute are clear, then Clause 2 offers no legal protection against override.

WHAT IS LIKELY IN CONSTITUTIONAL PRACTICE

3. This leaves the Post-Smith legislator – and any critic of the post-Smith legislator – in a dilemma. If the theoretically impossible cannot be achieved, what is the point of these Clauses? Arguably, they might achieve one of two results, or possibly some combination of two results. On the one hand, the purpose of the Clauses may be *symbolic or declaratory* – intended for political rather than legal effect. On the other hand, their purpose may be to produce a set of *procedural disciplines* intended to achieve in practice certain legal consequences that are approximate to or otherwise conducive to the quality of permanence that is unachievable in theory. Neither of these purposes is unproblematic or uncontroversial. Additional problems arise if some combination of them is sought.

SYMBOLIC PROVISIONS

4. There are some examples of legislative provisions in UK constitutional history that purport to limit or qualify the power of Parliament to repeal or amend its own earlier rules, and which to that extent can be said to be legally impossible and so, as a matter of strict law, redundant; or at the very least, to be of very unclear legal effect and dependent for their full effectiveness on a 'legal revolution' by which our superior Courts would turn aside centuries of doctrine and, instead, determine to qualify the pure doctrine of Parliamentary sovereignty by honouring certain fundamental commitments even in the face of the clearest contrary intent of a later Parliament (According to some opinion, the early seeds of revolution may already have been sewn in cases such as Jackson v The Attorney General [2005] UKHL 65 and AXA General Insurance v The Lord Advocate [2011] UKSC 46, but the Courts by and large remain committed to the pure doctrine). Arguably, for example, the Statute of Westminster 1931 (paving the way for the independence of the British empire's previously self-governing dominions), the European Communities Act 1972 (regulating the terms of British membership of the EU) and the Northern Ireland Act 1998 (committing to the possibility of the people of Northern Ireland deciding to leave the United Kingdom), all contain provisions which are at least in part only symbolic and declaratory, since their fullest legal meaning would imply the capacity of the relevant Parliaments of 1931, 1972 or 1998 to bind their successors.

5. So Clauses 1 and 2 would not be entirely without precedent if, incapable of having legal effects as a matter of legal theory, their true intention was instead symbolic and declaratory. And there is much evidence to indicate that this is indeed their purpose. In the first place, the use of the distancing language -'is recognized' - in both Clauses in the specification of their intended purpose, even though the Smith Commission itself made no such qualification, strongly suggests this. The Clauses as they stand do not embody operative normative rules; rather they acknowledge, and in so doing seem to endorse external claims or aspirations (i.e. the permanence of the Scottish Parliament and the durable strength of the Sewel Convention) over which they do not assert independent legal-normative power. Those who have criticised the use of the language of 'recognition' as a weakening of Parliamentary commitment to implement Smith might reflect that it is instead merely a candid acknowledgment that Parliamentary commitment here *can* only be symbolic, and is perhaps more powerfully symbolic to the extent that it is clearly claimed to be such.

6. In the second place, this conclusion is strengthened when we consider what many commentators have claimed to be the UK's peculiarly 'political constitution'. According to that view, the fact that the top constitutional rules of the British constitution are political rather than strictly legal is strength rather than a weakness. The strongest commitments in a Parliamentary democracy operating within an unwritten constitutional tradition are arguably precisely those that are the result of political agreement; particularly so if, as in the present case of the standing of the Scottish Parliament and Government, these agreements have been popularly endorsed in a referendum. On this view, the symbolic commitments of Clauses 1 and 2 vividly express where real power lies in the British constitution.

7. In the third place, this conclusion is yet further reinforced for Clause 2 when we consider its content in more detail. Clause 2 explicitly refers to a convention of the constitution, namely the Sewel Convention. Conventions are a vital, if highly stylized, part of the political constitution. They are non-legal practices which have grown up through the agreement of all parties and which at a certain point become explicitly recognised as having binding status. So Clause 2 is really a form of 'recognition of a pre-existing recognition' – so to speak, and for those who would endorse the idea of a political constitution, all the more powerful for that.

8. Yet this view clearly does not find universal favour. For some, the better guarantee of constitutional rules is always legal – justiciable and enforceable through the Courts – rather than political. In addition, it may be viewed as counter-intuitive, and as confusing to the wider public audience - perhaps even misleading, that commitments contained in a legal text do not possess binding legal effects. And more broadly, political language, typically more general and expansive, sometimes fits awkwardly into a more formal legal framework. What, for example, can the term 'normally' – acceptable enough as part of the broad terms of the Sewel Convention - contribute to a a legal text with its usual expectations of greater precision? Perhaps more seriously, what are we to make of the failure to include in Clause 2 the second limb of the Sewel convention, according to which the Westminster Parliament should not legislate to vary the extent of devolved powers of the Scottish Parliament and Ministers without the consent of the Scottish Parliament? This omission may be of limited impact if articulated and recorded elsewhere in the constitutional arena as a statement of the Sewel Convention. Made in the relatively solemn framework of a legal text, it may take on a more significant meaning.

PROCEDURAL DISCIPLINES

9. For these reasons, critics of the constitutional provisions in Smith and the Scotland Bill, including some who contributed to this Committee's earlier 'Interim Report on the Smith Commission and the UK Government's Proposals', have argued for a more legally detailed approach to the two key Clauses. On this view, even if the UK Parliament cannot bind its future self in so many words to make the Scottish institutions permanent, it is possible by creative drafting to achieve equivalent effects, or at least to provide some measure of legal direction of its preferred outcomes. So, for example, greater procedural specification of the durable character of the Scottish Parliament, if not its permanence, could be achieved by the requirement for its abolition of a super-majority at Westminster, or of the consent of both UK and Scottish Parliaments, or, as the present Committee itself suggested, of a majority of the Scottish electorate voting in a referendum (see Para. 50). Similarly, the legal effect of the Sewel Convention might be strengthened if the 'normally' qualification was omitted, or if the second limb of the Convention was included, or, as the Committee also recommended in its previous Report, if the wider procedure that has developed for the consultation and consent of the two Parliaments in the context of the invocation of the Convention were to be elaborated in statutory form (see Para. 61)

10. There are also difficulties associated with this approach. On one view, the value of a convention over a formal legal rule lies not just in its arguably greater political resonance, but also in its inherent flexibility. If its legal meaning were

required to be frozen and rendered more precise, that flexibility might be lost, and contentious questions that might be negotiable in practice would instead be forced onto a more confrontational agenda.

CONCLUSION

11. Perhaps the ideal solution would be to try to combine the symbolism of the 'political constitutional' statement with the procedural discipline of a more legalistic approach. Yet it is not clear whether that mutually complementary objective is achievable. We have seen how the language of 'recognition', or of the 'normally' qualification, though arguably symbolically powerful and candid in acknowledgement of the importance of the political rather than the legal pact, sits uncomfortably with a more detailed legalistic approach. More generally, it is not clear how far, as a matter of constitutional theory and clear presentation of constitutional purpose, the two approaches can be combined. What are either 'the people' as the primary audience, or our superior courts as a key secondary audience, to make of provisions that combine ringing declarations of promises that may be legally impossible to keep with detailed procedural rules that impose potentially justiciable 'manner and form' checks on future legislative discretion? Perhaps transparency of purpose and predictability of effect would be better served if a clear legislative choice were made between the two types of approach.

ENGENDER SCOTLAND

INTRODUCTION

Engender welcomes the Devolution Committee's focus on the contents of the Scotland Bill (the Bill), and the opportunity to submit our views. We have monitored the progression of the legislation from the publication of the draft clauses and UK government command paper, and due to undue speed, lack of transparency and lack of scrutiny, there have been limited avenues to raise our concerns.

We have advocated for a process of devolution that allows for democratic engagement with Scottish civil society from the outset. We have done so on the basis that consultation with those affected by the changes is essential to arrive at sustainable and effective arrangements, as well as to build on the participatory politics that triggered the devolution of further powers. The debate on the division of power and responsibility between Holyrood and Westminster cannot just be a constitutional abstraction. The powers that are transferred will have the potential to change the lives of people in Scotland. We have argued for a participatory process from a gender equality perspective, setting out how the Scotland Bill *could* signal progress for the realisation of women's rights.[1] New powers could be used to tackle women's extreme inequality within the social security system, to strengthen equalities legislation, to abolish employment tribunal fees, and to create a progressive abortion law for Scotland.

A key opportunity to ensure that any new legislation drives progressive change, by embedding human rights, equality, gender-sensitivity and democratic participation as key principles within the devolution process, has been missed. However, opportunities remain to improve the Bill during the remainder of the Scotland Bill's passage onto the statute book.

We are therefore calling on the Devolution committee to encourage the UK and Scottish Governments, wherever possible to consider the imperatives of reducing economic and social inequality within final negotiations. Critically, this includes equality for women, and for disabled people and other minority groups. This briefing takes on two tasks. It sets out how amended clauses that relate to social security, equality law, and abortion could be used to tackle gender inequality in Scotland. It also points to areas where the intention of the Smith Commission Agreement has not been delivered by the Scotland Bill. Some of these shortcomings are related to process, and we identify where we think that an abbreviated process has caused weaknesses that could be remedied to better support people who access benefits in Scotland.

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[1] Engender (2014) *Engender submission to the Smith Commission*
Engender (2015) *A statement to the Joint Ministerial Working Group on Welfare*

1. SOCIAL SECURITY

Women are twice as reliant on social security as men, because of gender inequality. Welfare reform is therefore having an egregiously disproportionate impact on women's access to resources, security and safety. Between 2010 and 2014, 85% of the £26 billion worth of cuts announced by the UK Coalition government came from women's incomes.[2] Given this context, there are clear opportunities to design a more equitable system that moves towards gender equality in access to economic resources within a transfer of powers. We therefore advocated for full devolution of social security to the Scottish Parliament, in line with 83% of over 1000 participants in our Smith Commission survey.[3]

The complicated division of responsibility for social security between Westminster and Holyrood that has emerged presents a number of challenges. Effectively addressing issues of systemic inequality necessitates a holistic approach, and the piecemeal devolution contained within the Smith recommendations undermines this. Scope for progressive change for women is now limited by the lack of coherence between reserved and devolved powers, particularly with regard to the sanctions and conditionality regime, Housing Benefit and Child Benefit.

In the context of the Scotland Bill, we are therefore calling for the most expansive approach possible, to provide space for a divergent approach based on equality, dignity and human rights in Scotland. Flexibility will be vital in enabling the Scottish Parliament to create an integrated system, alongside devolved policy areas and services. The potential for maximum policy discretion underpins all of the recommendations that we make below.

1.1 Clause 19: Disability, industrial injuries and carer's benefits

1.1.1 Benefits for disabled people

Disabled women are greatly impacted by changes to benefits and tax credits, and are amongst the very hardest hit by welfare reform. They are much less likely to be in full-time employment than non-disabled people, and many have caring responsibilities of their own. This is reflected in the fact that disabled men experience a pay gap of 11% compared with non-disabled men, whilst for disabled women this is doubled at 22%.[4]

The current clause 19 defines 'disability' in a narrow way that disallows the introduction of benefits for people with particular conditions, including mental health issues and less visible disabilities, and places time restrictions on eligibility criteria. This would unnecessarily constrain the Scottish Parliament from designing new benefits to best meet the needs of all groups of disabled people, in line with devolved services in Scotland. Rather, it would effectively transfer the power to rebadge the same benefits, and to increase the level within the confines of the overall settlement.

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[2] Engender (2015) *A widening gap: women and welfare reform*
[3] Engender (2014) *Engender submission to the Smith Commission*
[4] Inclusion Scotland (2013) *Women in work MSP briefing*

It would also undermine the potential to create a better system for disabled women, who are amongst those most in need of support.

- **We are calling for the restrictive definition of disability in clause 19 of the Scotland Bill to be replaced with the definition used in the Equality Act 2010.**[5]

1.1.2 Benefits for carers

Around 60% of unpaid carers are women, women are twice as likely to claim carer's allowance as men, and are twice as likely to give up paid work in order to care. Carers are also impacted by cuts to benefits for disabled people, as linked entitlements are lost despite circumstances remaining unchanged.

Clause 19 also sets out a narrow definition of those eligible for a devolved carers' benefit, stipulating that this would apply only to carers aged 16 or over, who are not in full-time education and not employed. Given the gendered profile of unpaid care, these restrictions would undermine the opportunity for the Scottish Parliament to tackle women's economic inequality through a distinct approach to carers' benefits that recognised women's caring roles and supported women to balance paid and unpaid work.

- **We are calling for the restrictions on eligibility for carers' benefit to be removed from clause 19 of the Scotland Bill.**[6]

1.2 Clause 21: Discretionary payments: top-up of reserved benefits

The powers to create new benefits in areas of devolved responsibility and to make discretionary payments with regard to reserved benefits hold great potential to mitigate the discrimination faced by women within the social security system. Many devolved policy areas that relate to social security are critical in terms of gender equality, including employability, social care, delivery of childcare, housing and violence against women. Disabled, black and minority ethnic, refugee and older women, lone mothers and carers are all particularly at risk of harm as a result of the UK Government's cuts to public spending.[7] Meanwhile, links between women's poverty and child poverty are widely recognised. The ability to increase women's disposable income in a targeted way would be manifestly beneficial to those most disadvantaged by economic 'shocks' and the austerity agenda.

The restrictions placed on these powers within the Scotland Bill, however, fundamentally differ from the recommendation made by the Smith Commission that "[t]he Scottish Parliament will have new powers to create new benefits in areas of devolved responsibility." This undermines the potential of new powers to prevent women from reaching the point of extreme need at which they would be eligible for this limited form of short-term support. It also undermines potential for increased

[5] Previously tabled amendments 112 and 128 address this.
[6] Previously tabled amendment 48 addresses this.
[7] Engender (2015) *A widening gap: women and welfare reform*

coherence in Scotland's policy approach to gender equality and progress against its broad range of commitments on gender issues.

- **We are calling for clause 21 to be redrafted to allow the creation of new benefits in devolved areas, and to remove restrictions on the 'topping up' of benefits.**[8]

1.3 Clauses 22: Discretionary Housing Payments

Women experiencing domestic abuse face considerable barriers when trying to leave an abusive partner. Access to safe housing is crucial for women at risk of abuse due to low income, a lack of independent resources, immigration status and homelessness. Domestic abuse is the fourth most common reason given for homeless application in Scotland, and research shows financial abuse is part of 89% of women's experience of domestic abuse.[9]

This has been exacerbated by welfare reform. Thousands of carers are losing an average of £105 per week in housing benefit as a result of the benefits cap,[10] and 49% of households subjected to the benefits cap are headed by single parents with children under five.[11] The 'bedroom tax' has resulted in a loss of housing benefit for many women and accessing replacement DHPs continues to cause uncertainty and anxiety for women trying to move to safety. Changes to the benefit entitlement of EU migrants mean that many women separating from abusive partners can no longer claim housing benefit.

Clause 22 stipulates that eligibility for DHPs is contingent on receipt of housing benefit and restricts access for those who have been sanctioned. This does not fulfil the intention of the Smith Agreement. Women must have consistent access to safe accommodation, regardless of their entitlement to housing benefit or perceived non-compliance with conditionality for reserved benefits. This is especially important in the context of the huge cuts to housing support for women set out above.

- **We are calling for restrictions over eligibility for Discretionary Housing Payments in clause 22 to be removed from the Scotland Bill.**[12]

1.4 Clause 23: Discretionary payments and assistance

As outlined above, women are impacted hugely by cuts to social security and public services as a result of their caring roles for children, and relatives who are disabled, elderly or have long-term health conditions. Lone parents in particular are being pushed deeper into poverty and experiencing poor mental and physical health as a

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[8] Previously tabled NC31 addresses this.

[9] Refuge (2008) *What's yours is mine: The different forms of economic abuse and its impact on women*

[10] Carers UK (2014) *Caring and Family Finances Inquiry*

[11] DWP (2015) *Benefit Cap Quarterly Statistics: GB households capped to May 2015*

[12] Previously tabled amendments 116, 117 and 129 would remove some of these restrictions.

result of welfare reforms and uncertainty over measures that have yet to be introduced.

The current clause 24 prescribes extremely narrow parameters for the short-term assistance it devolves to the Scottish Parliament. This discretionary assistance is similar to community care grants within the Scottish Welfare Fund (SWF), which is an extremely valuable resource for lone parents, women escaping domestic abuse, refugee women and other women on extremely low incomes. Including 'families under exceptional pressure' as criteria for eligibility, in line with the interim SWF and the previous DWP Social Fund, would widen access for different groups of vulnerable women and their children. As above, clause 23 excludes people who have been sanctioned from accessing support. We know that many women have had their income stopped as a result of issues outwith their control, such as access to childcare, and see no reason for this restriction to be included in primary legislation. The stipulation that discretionary payments must support 'individuals', would also limit the scope to support systemically marginalised groups, such as lone parents, refugees, or unpaid carers.

- **We are calling for restrictions under clause 23 to be removed and for Exception 8 to be extended to include 'families under exceptional pressure' under.**[13]

1.5 Clause 25: Universal Credit: persons to whom, and time when paid

The power to vary the administration of Universal Credit (UC) holds potential to better support women with little or no financial independence. This includes many women who are living with domestic abuse. Access to financial support and safe housing are crucial for these women and their safety is undermined by the single, monthly household payment under the Universal Credit regime.[14]

Clause 25 allows the Scottish Parliament to vary the current arrangements under UC to allow more frequent payment of benefits to both adult members of a household. The Scottish Government has committed to address these concerns over women's financial dependency once it has the power to do so. If control over these administrative issues was removed from the Scotland Bill and expedited as a priority to the Scottish Parliament, then access to resources and physical safety for women in danger could be achieved more quickly in Scotland.

If clause 25 remains in primary legislation, we would continue to have concerns over the issue of approval for any changes by the UK Secretary of State. Despite assurances from the UK Government that this does not amount to a 'veto', we have concerns about timescales, and that access to resources and physical safety for women in danger could be delayed due to complex constitutional processes (as has been experienced in Wales and Northern Ireland).[15]

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[13] Previously tabled amendments 130 and 131 address this.
[14] Scottish Women's Aid (2014) *Briefing paper on welfare reform and refuge accommodation*
[15] Political and Constitutional Reform Committee, Oral evidence, 2 Feb 2015 (Questions 260, 261)

- **We are calling for clause 25 to be removed from the Scotland Bill and for power over the administration of Universal Credit to be devolved via a section 30 order.**
- **Failing this, we are calling for greater clarity over the form of mandated approval of any changes by the UK Secretary of State.**

1.6 Clause 26: Employment support

Many groups of women are far from the labour market. This includes women who are returning to work after providing support to sick or disabled relatives or after taking extended leave to care for children. However, despite the stated aim of employability programmes to help those further from the labour market, women are being let down by the current system, as programmes fail to take account of and remove the barriers which prevent or restrict women's labour market participation.

The power over employment support offers potential to better support unpaid carers, lone parents, women experiencing domestic abuse, disabled, older and refugee women, in line with specific obstacles they face in accessing paid work. It also offers potential to mitigate the gendered patterns of skills acquisition that lead to occupational segregation and see women clustered in low-paid, insecure jobs. At present, employment programmes ignore these factors when pairing jobseekers with mandatory work activity, serving to further entrench them and to perpetuate the gender pay gap.

The current clause 26 includes restrictions that undermine the potential for power over employability programmes to be tailored in line with the support needs of different groups of women. The Smith Commission Agreement did not stipulate a limited form of support for those facing long-term unemployment that must last for a year. The anomalously excluded Access to Work scheme should also be devolved to the Scottish Parliament to increase the possibility of holistic support for disabled people. Nor should support be restricted to people on reserved benefits, but be extended to those who qualify for newly devolved benefits, many of whom will be in need of tailored employment support.

- **We are calling for restrictions in clause 26 on the form of employment support the Scottish Parliament could provide to be removed.**[16]

2. EQUALITY LAW

The transfer of responsibility for equalities legislation has the potential to enable gender equality in Scotland, in a range of ways. The capacity to challenge the actions of employers within an independent adjudication system is a key workplace right with clear gendered implications. The gender pay gap could be partly addressed with tools such as mandatory equal pay audits. Parliamentary quotas and temporary special measures are employed to great effect worldwide to increase the female representation rate.

[16] Previously tabled amendments 114, 120, 121 and 122 address this.

2.1 Clause 32: Equal Opportunities

2.1.1 Gender quotas

Women are underrepresented at all levels of political and public life in Scotland. At Holyrood, the female representation rate is only 36% and fewer than 25% of local councillors are women. There are four public boards with no female representation, and 10% of public boards have less than 20% of women sitting on them.[17] Evidence from around the world shows that diverse political representation better meets the needs of societies and there is a correlation between greater parliamentary gender balance and the political profile of women's rights issues and social policy more broadly. [18]

The current clause 32 does not adequately reflect the Smith Commission Agreement that devolved competence over gender quotas should not be limited to public boards. The debate over public boards has taken prominence throughout the process of further devolution because it was already a live issue in Scotland. The Scottish Government consulted over the introduction of gender quotas for public boards in June 2014, and subsequently entered into dialogue with the UK Government over a section 30 order to devolve necessary competence to the Scottish Parliament. The same logic should be applied to all levels of public representation in Scotland.

Furthermore, the current clause 32 is extremely unclear. Since the initial draft clauses and UK command paper were published in January 2014, Engender has sought clarity over what it enables the Scottish Parliament to do, in light of the way that equalities is currently reserved. Discussions with experts in equalities law have not produced a clear answer, so we believe that redrafting is required to ensure clarity.

- **We are calling for clause 32 to be redrafted in order to clearly devolve the power to introduce gender quotas for public boards, as well as temporary special measures relating to all protected characteristics.**

2.1.2 Full devolution of equality law

Engender called for full devolution of equality law and regulation in our submission to the Smith Commission. This was supported by 70% of over 1000 people who completed our public survey. It would enable better scrutiny of equalities practice that is more sensitive to Scotland's distinct public sector architecture, by enabling the creation of a Scottish equalities regulator. It would enable better links between equalities policy and devolved domains, for example by allowing the creation of time-limited gender balancing measures in renewable energy-related frameworks of the modern apprenticeship programme.

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[17] Scottish Government (2014) *Women on board: Quality in diversity, Scottish Government on the Introduction of Gender Quotas on Public Boards*

[18] International Institute for Democracy and Electoral Assistance (2005) *Women in Parliament: Beyond Numbers*; OSCE Office for Democratic Institutions and Human Rights (2011) *Gender equality in elected office: A six-step action plan*

Full control over equality law would allow for a coherent approach that allowed Scotland competence to introduce measures such as mandatory pay audits, which have formed part of the aspirations for the current Fair Work agenda, as well as decoupling our public sector equality duty from UK measures.

- **We are calling for clause 32 to be redrafted in order to devolve full competence over equality law and regulation to the Scottish Parliament.**[19]

2.2 Clause 33: Tribunals

The right to challenge the actions of employers within an independent adjudication system is a key workplace right with clear gendered implications. Unfair dismissal or discrimination against pregnant women and women in certain age brackets, for instance, has been a significant and well-documented barrier to gender equal employment practices. In July 2013, the UK government introduced fees of up to £1200 for individuals to access employment tribunals. Equal pay and discrimination cases have some of the highest upfront costs and the number of claims has dropped dramatically as a result. Figures show that sex discrimination cases fell by 91% in 2014.[20]

The Scottish Government has indicated that it would scrap fees for employment tribunals, and the Smith Commission recommended that all powers over the management and operation of reserved tribunals be devolved to the Scottish Parliament. However, the UK command paper and Scotland Bill do not clearly reflect this. The specific functions of employment tribunals that are to be devolved will be set out in an Order of Council.

- **We are calling for clause 33 to clarify that administration of employment tribunals, including the power to set fees, will be devolved to the Scottish Parliament**.

3. ABORTION

Engender sees the potential for the devolution of power and responsibility around abortion to Scotland to afford a more progressive law. Both pro-choice and anti-choice organisations have identified weaknesses with the 1967 Abortion Act that is currently in effect.

However, abortion is a politically polarising issue around the world, and we are aware of international experience that suggests that nations infrequently revisit abortion legislation, that legislative processes attract significant amounts of international scrutiny and resources, and that myths around reproductive healthcare are widespread. We also note that Scotland currently has no organisation working specifically on reproductive health and rights, and that there is no current public discourse around abortion in Scotland. For these reasons, Engender and other women's and human rights organisations are keen to see as much time as possible

[19] Previously tabled amendment 138 addresses this.
[20] Ministry of Justice https://www.gov.uk/government/collections/tribunals-statistics

for civil society to build capacity to engage in the discussion about how women's reproductive health and rights should be realised in Scotland if abortion is devolved.

The original Smith Agreement suggested that all parties were committed to the devolution of abortion, but that this would not happen as part of the Scotland Bill.

4. THE PROCESS

Engender has significant concerns with the extreme speed, lack of scrutiny and lack of transparency that have characterised the passage of the Scotland Bill. This is in keeping with the timescales involved in the production and publication of both the Smith Commission Agreement, and UK Government command paper and initial draft clauses of the Bill.

We have called for a process of devolution that allows for democratic engagement with Scottish civil society from the outset. Along with nineteen other organisations, we argued that progressive change for women could be driven by embedding human rights, gender equality and inclusion as key principles within the new legislation.[21] We have consistently raised the fact that such an approach would not only benefit women, but the broad gender equality agenda that both governments are committed to progressing. These opportunities have been missed. A less rushed process would have allowed for fuller consultation, negotiation and scrutiny. We believe it would have led to a fairer, more robust and more legitimate outcome.

There have been limited attempts by the Scotland Office and the Scottish Government to consult with civil society in Scotland, but incongruously the Joint Ministerial Working Group on Welfare has worked behind closed doors. Given the complexity of the social security agreement in particular, and the practical and technical risks involved in the transfer of operations, this is regrettable. There are frontline services and advice organisations in Scotland with deep expertise on welfare rights, and better consultation could help to identify unintended consequences and operational difficulties as a result of devolving only some aspects of social security. Ultimately this could have a profound impact on people at risk of harm.

At Westminster, the lack of meaningful scrutiny at committee stage represents another missed opportunity to incorporate a wider set of views. The Committee of the whole House process does not allow for the submission of oral and written evidence from wider stakeholders. Debate amongst committee members is replaced by scripted speeches followed by votes along party lines. All substantive amendments tabled on welfare benefits, employment support and equal opportunities were voted down, despite having received the backing of not only almost all of Scotland's MPs, but also many third sector organisations that work with people directly affected by the changes, on anti-poverty, equalities and welfare rights issues. This represents a democratic deficit for Scotland. The process has served political interests and worked to a political timetable, including the UK General Election, rather than those whose lives will be affected.

[21] Engender (2015) *A widening gap: women and welfare reform*

CONCLUSION

The Scotland Bill is inconsistent in a number of crucial ways, which undermines the potential of new powers to be engaged in support of women and other marginalised groups of people in Scotland. Firstly, as set out in full above, the Bill does not fully deliver the spirit and substance of the Smith Commission Agreement. Notably absent is the ability to create new benefits that relate to devolved areas of competence and to introduce gender quotas, for public boards, but also more widely.

In terms of social security, many clauses are unnecessarily restrictive and prescribe a degree of policy direction that we would not expect to see within the transfer of powers. This will significantly limit the Scottish Parliament in any attempts to design an empowering, more progressive system that challenges the dominant 'welfare' agenda in the UK. In light of the extraordinary gender bias at the heart of the UK system, this means that an opportunity to tackle ways that social security undermines gender equality is slipping by. These narrow parameters also undermine the Scottish Parliament's ability to adopt a holistic approach that is integrated with devolved services and takes account of stakeholders' views.

In terms of equal opportunities, experts in equality law say that clause 19 of Scotland Bill is still unclear. We are therefore calling for clarity about what the clause should enable the Scottish Parliament to do, in terms of gender quotas and employment tribunals, and for the clause to be redrafted accordingly. We believe that the full devolution of equality law and regulation would be optimal, to increase flexibility within Scotland's distinct public sector architecture and coherence with related devolved policy areas.

We are grateful to the committee for seeking the views of Scottish civil society, on a process that has been characterised by the lack of opportunities to provide meaningful input. We urge the committee to raise these concerns with both governments wherever possible.

ABOUT US

Engender is Scotland's gender equality organisation. For more than 20 years we have worked across Scotland on feminist policy, advocacy, and activism. We make women's inequality visible, and bring women together to make change happen.

WOMEN 50:50 CAMPAIGN SCOTLAND

Who we are:

Women 5050 is a campaigning group established in September 2014. We are a cross party group with representation from the Scottish Labour Party, The SNP and The Scottish Green Party on our steering group, as well as a number of feminist activists and women's organisations.

The purpose of Women 5050, is to campaign for fair representation of women in the Scottish Parliament, in councils and on public boards. We believe that whilst voluntary mechanisms of gender balancing have made some progress, this progress has been too slow. We are campaigning for legislation to be introduced which would require political parties to field at least 50% women candidates in Scottish Parliament and Local Authority elections.

We welcome the opportunity to contribute to the collation of evidence by the Devolution Committee.

Political Representation:

As a single issue campaign, our focus on the Scotland Bill is the devolution of measures relating to quotas and gender balancing of public representation. Currently, there are 36% women in the Scottish Parliament, *down from 40% in 1999* [1]. There are 24% women in councils across Scotland and 35% women on public boards. Four public boards have no women represented on them and 10% have fewer than 20% women members [2].

Whilst gender and women's social justice has become prominent feature of Scottish politics, there is a need for the narrative to be matched with action.
The United Nation's report into women's representation found that out of the 59 countries where elections had been held in 2011, 17 countries used quotas. Women's representation in these countries was 11% higher than those failing to use positive measures [3]. Almost 60% of parliaments across the world use some form of quota mechanism to enable more women to enter politics and readdress the imbalance in representation of women [4]. Indeed, the 1981 United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) Bill recommended quotas and special measures allowing countries to take action on the underrepresentation of women.

Evidence has repeatedly shown that the presence of women in parliament has a positive "role model" effect on encouraging women to become politically engaged and can have a positive effect on leading new policy debates and pushing gender equality further up the political agenda [5].

Clause 32 – Equalities

In the original Smith Commission agreement, it was stated that the ability to introduce gender quotas to public boards (and beyond) would be devolved to the

Scottish Parliament. The current reading of the Scotland Bill does not accurately reflect this original agreement. Our reading of the Smith Commission agreement was to enable Scotland to take a decision on moving beyond voluntary quotas and introducing compulsory gender quotas to public boards. We believe that the Scotland Bill should more accurately and clearly reflect the original agreements regarding quotas on public board, and must go a step further by fully devolving the ability to introduce quotas for women (and protected characteristics) across all public representation (public boards, the Scottish Parliament and local authorities). We believe it is imperative to devolve this ability to enable Scotland to have a full debate on its implementation and take action on women's underrepresentation. The Equality Act 2010 already allows for temporary special measures for parties to implement all women shortlists until 2030. We believe that a strengthened extension of this should be devolved, allowing for the Scottish Parliament to introduce legislation for gender quota, without contravening equalities legislation We are calling for Clause 32 to clearly include the full devolution of the ability to introduce and legislate on gender quotas (and of protected characteristics) across all levels of public representation.

1. Democratic Audit (September 2013)
2. Scottish Government; Women on Board (April 2014)
3. UN Report on Women Political Representation (March 2012)
4. Quota Project – Country by Country Overview
5. Lovenduski, J & Norris, P (2003). Westminster Women; The Politics of Presence

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

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

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

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

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*".

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*.'

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.

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.

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.

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.

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*[i]*".* 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

The power to create a new benefit to replace carer's allowance is also un-necessarily 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.

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.

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[ii] . 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

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.

The UK Minster 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 Minster 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]"

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

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.

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.

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

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*."

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

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.

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.

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.

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]."

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.

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.

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

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.

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

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

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.

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

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.

SCOTTISH FEDERATION OF HOUSING ASSOCIATIONS

1. Purpose of Submission

1.1. The SFHA welcomes the invitation from the Devolution (Further Powers) Committee to submit written evidence on the Scotland Bill as amended in Committee.

1.2. This submission follows our previous evidence to the Devolution (Further Powers) Committee on 15th January and 6th March 2015 outlining the SFHA's response to both the Smith Commission and Draft Clauses.

1.3. Today's submission is focused on the SFHA's reaction to the Scotland Bill as amended in Committee, and emphasises our key areas of concern relating to welfare, energy and fiscal powers.

1.4. At the time of writing we are aware that the Secretary of State is reflecting on a range of proposed amendments. We anticipate the possibility of further changes ahead.

2. Who we are

2.1. The SFHA exists to lead, represent and support housing associations and co-operatives throughout Scotland. There were 160 Registered Social Landlords (RSLs) across Scotland at the start of 2014. Their housing provision ranges across general and specialist need with around 280,000 homes, and over 5,000 places in supported accommodation. They currently add to new supply of housing, mainly for rent to people in need and at rents below market levels.

2.2. SFHA is the national voice of housing associations and co-operatives. Our role is to assist and support them to meet a diverse range of housing need, to provide high quality genuinely affordable housing and to develop sustainable communities. To this end, we wish to see Scotland develop a well-functioning housing system that is able to make a significant and effective contribution to tackling poverty, inequality and deprivation across Scotland.

2.3. Currently over 61% of all rental income of housing associations and co-operatives is sourced from Housing Benefit, making the changes proposed by the Smith Commission vital to the interests of our members.

3. The Smith Commission and the Scotland Bill

3.1. The SFHA argued for the devolution of further powers to the Scottish Parliament encompassing all of the social security system (excluding pensions), further energy powers and increased borrowing and fiscal powers to enable the Scottish Parliament to fund policies that can deliver a well-functioning housing system. Please see Annex A for the logic of this position.

3.2. Despite calling on the Smith Commission to devolve a broader package of social security powers, we recognise that the Scotland Bill can provide meaningful opportunity to enable social landlords to support and transform the lives of tenants across Scotland. However, following analysis of the Bill the SFHA concludes that some sections in relation to welfare, energy and fiscal powers have not fully met the spirit or substance outlined in the Smith Commission.

4. Universal Credit

4.1. The SFHA welcomes the devolution of the housing element of Universal Credit to the Scottish Parliament outlined in Clause 24 and in Paragraph 44 in Smith. The powers to be devolved will enable Scottish Ministers to vary housing costs, including varying the 'Bedroom Tax' and deductions for non-dependents, as well as gaining the administrative power to pay landlords directly.

4.2. We commend Clause 25 enabling Scottish Ministers to regulate to whom (in a household), and how frequently Universal Credit payments will be made.

4.3. It is not yet clear however, whether the administrative powers to vary the frequency of payments could facilitate earlier, and more frequent, payments to the claimant without waiting periods.

4.4. The present arrangements for Housing Benefit permit any rent support payable to be paid direct to the landlord. The SFHA urges that Universal Credit claimants should have a choice to how their housing payments will be delivered, maintaining continuity with the present system for housing association tenants.

4.5. The SFHA calls for the administrative powers in relation to welfare to be devolved effectively as soon as possible minimising any unnecessary delays.

5. Inter-governmental Relations regarding Social Security

5.1. The SFHA recognises the essential need for positive interaction and co-operation between the Scottish and UK Parliaments, as well as welcoming the role of the Joint Ministerial Working Group on Welfare, we favour the references to inter-governmental relations contained in the Scotland Bill. Our points broadly align with inter-governmental relations recommendations from the Calman Commission. All areas of the Bill should be considered to maximise co-operation between the two Parliaments and governments. See Annex C for excerpts from the Calman Commission.

5.2. The SFHA positively views the requirement for inter-governmental co-operation, consultation and agreement between Scottish Ministers and the Secretary of State in regards to Universal Credit outlined in Clause 24 and 25. We recognise this to be implementation of Smith Paragraph 28, 29 and 48. See Annex B for comparison of the Smith Agreement and the Scotland Bill.

5.3. Consultation for the practicality of implementing the regulation will enable a smooth transition to when these powers will be devolved, and build a long-term positive relationship between the Parliaments.

5.4. The SFHA is in favour of the housing element regulations being subject to the negative procedure per Clause 24 Subsection 6.

5.5. We welcome Clause 29 on the regulation of information-sharing between the Secretary of State and the Scottish Ministers for the purpose of a relevant Scottish social security function.

6. Other Welfare Matters

6.1. A key concern is that paragraph 54 of the Smith Commission has not been fully translated to the Scotland Bill due to restrictions placed around both introducing new benefits and powers to top-up benefits. Please refer to Annex B. The SFHA supports New Clause 31 (which was negatived on division) and recommends another amendment be tabled to replicate this. Please see Annex D to view relevant tabled amendments.

6.2. Due to this, the Scottish Parliament will not have “complete autonomy” as described in Paragraph 51 of Smith, to determine the structure and value of devolved benefits, such as Discretionary Housing Payments, which are incremental to housing. This shifts the powers to be devolved from actual powers to the administration of Discretionary Housing Payments due to the tight eligibility of these payments preventing extension to those not entitled to Housing Benefit (including those recently excluded in the Summer Budget) or undergoing sanctions. We support proposed amendments 129 and 116 to remove these restrictions. See Annex D.

6.3. The SFHA is concerned about the inconsistent definition of disability employed in Clause 19 and 22. We urge an amendment to change the definition in Clause 19 to refer to the definition used in the Equality Act 2010. See Annex B.

6.4. The SFHA seeks further clarification surrounding the benefit cap in relation to Paragraph 56 of Smith. See Annex B.

7. Energy

7.1. The SFHA recognises the need for the Scottish Parliament to have increased powers relating to energy, particularly in relation to fuel poverty which is especially prevailing in remote and rural areas of Scotland.

7.2. The SFHA is concerned about the change in wording between the Smith Agreement Paragraph 49 and Clause 20 of the Scotland Bill in relation to Winter Fuel Payment; this can be viewed in Annex B. This discrepancy in wording does not carry the same meaning, and thus does not ensure that the Winter Fuel Payment will be devolved, and as such, the Scottish Parliament could not change eligibility of payments. We encourage an amendment be tabled to clarify this point.

7.3. The Scotland Bill makes provision for fuel poverty support schemes to be transferred to Scottish Ministers in Clause 50 following the recommendation in Paragraph 68 in Smith. For this, any proposals must be agreed with the UK Government, which reflects the recommendation in the Smith Agreement and the need for inter-governmental relations. However, unlike Clause 24 and 25, Clause 50 does not contain a caveat that "such agreement is not to be unreasonably withheld". The SFHA calls for this to be amended to ensure inter-governmental co-operation.

7.4. The proposal to devolve Energy Company Obligations (ECO) to Scotland contained in the Scotland Bill is, broadly, to be welcomed. ECO is the main source of funding for energy efficiency measures for social housing, dealing with particular issues such as the high proportion of Scotland's homes off the gas grid, the challenge of stone, mixed tenure tenements, and the higher proportion of homes requiring solid wall insulation.

7.5. One concern is that Scotland has previously won more than its share of ECO, in large part due to the Scottish Government schemes helping to lever in ECO funding. If Scotland were to receive its pro-rata share of ECO, but had very limited powers to vary how ECO was spent, then the opportunity to provide funding to address off-gas properties and stone tenements could be lost. Further detail is required to explain how this will work in practice.

8. Fiscal Concerns

8.1. The SFHA recognises that to make best use of the devolved powers the Scottish Parliament will require increased borrowing and fiscal powers to fund these policies and we welcome the increased powers over taxation and VAT outlined in the Scotland Bill to enable this.

8.2. We urge the inclusion of a fiscal framework in regards to borrowing powers in the Scotland Bill as outlined in paragraphs 52 and 95 in Smith. We recommend this should devolve maximum powers to ensure the Scottish Parliament can balance priorities with resources.

8.3. The SFHA welcomes the 'no detriment' principle set out in paragraph 96 of the Smith Commission outlining that neither government should be adversely affected following the outcome of the Scotland Bill.

8.4. The SFHA recommends that the 'no detriment' principle be extended to claimants who should not suffer any negative impacts in relation to welfare powers being devolved including delays and administrative errors.

8.5. The SFHA had previously called for the roll-out of Universal Credit to be suspended until the anticipated Scotland Act devolved power in this area. Please see Annex E and F for this correspondence.

8.6. Furthermore, the SFHA calls for the examination of the costs of devolution relative to the benefits of devolving a power to extend the 'no detriment' principle to claimants across Scotland.

9. Conclusion

9.1. The SFHA broadly supports the proposed devolution of powers relating to social security and energy.

9.2. The SFHA urges for a continuation of strong commitment to inter-governmental relations, particularly in concurrent areas of jurisdiction.

Endnotes: Calman Commission, Serving Scotland Better: Scotland and the United Kingdom in the 21st Century Final Report. June 2009

Annex A: Logic of SFHA Position on the Social Housing System
Annex B: Comparisons of the Smith Agreement and the Scotland Bill as amended in Committee
Annex C: Excerpts from the Calman Commission
Annex D: Relevant Proposed Amendments from the Committee Stage of the Scotland Bill
Annex E: Letter to Iain Duncan Smith from Civic Scotland re Universal Credit
Annex F: Response from DWP to Open Letter 10.2.15

Annex A – The Logic of SFHA's Position on Social Housing System

On the basis of the best available figures, over 61% of all rental income of housing associations and co-operatives is sourced from Housing Benefit. The majority of tenants are eligible for rent support currently in the form of Housing Benefit. Almost all tenants mandate Housing Benefit payments received from DWP direct to their landlord. This funds associations' rental income, which in turn funds the repayment of capital borrowing (existing and new), management services and repairs and maintenance necessary to meet modern energy efficiency standards, which in turn helps to address fuel poverty. Housing legislation and strategy in Scotland has been governed by the Scottish Parliament since 1998, when housing policy was formally devolved, with the notable exception of Housing Benefit which remains controlled from Westminster and has grown in significance.

For SFHA and its members the future of rent support for tenants, in the form of Housing Benefit, is therefore an issue of the utmost strategic importance, underpinning the annual financing of 11% of all housing in Scotland. Tenants understand this and share our concerns around the current devolution of housing, and the further complexities that could be created with the devolution of further powers, as recommended in the Smith Agreement.

Since devolution handed powers over housing to Holyrood, Housing Benefit has grown in significance across Great Britain as rents have risen, and as more and more tenants need support to pay rents. This has the unintended consequence that the balance of control over housing funding has been shifting back towards Westminster. As Housing Benefit costs overall have risen, the annual value of rent support (reserved to Westminster) is almost twice the value of annual housing investment (devolved to the Scottish Parliament)

According to the Institute of Fiscal Studies, the lack of alignment in powers (and policies) means that the beneficial effects of capital investment by the Scottish Government accrue to the Westminster Government in the form of lower Housing Benefit payments. The converse situation could also apply where less capital investment in affordable housing by the Scottish Government pushes up the Westminster Government's Housing Benefit expenditure.[22] We are keen to see an allocation of powers which allows coherent, coordinated policy positions to be adopted around housing issues within the same jurisdiction.

SFHA has argued for devolution of Housing Benefit since housing was first proposed to be formally devolved to the new Scottish Parliament, and while Housing Benefit was a relatively small budget. That position was confirmed in our response to the Calman Commission in 2009. Calman recommended that the UK Government should consult the Scottish Government if it was proposing changes to Housing Benefit. This was not adopted by the UK Government[23] and the practice around the reform of welfare has not honoured the principle of consultation.

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[22] Philips, David, (July 2013), Institute of Fiscal Studies Briefing Note, Government spending on benefits and state pensions in Scotland: current patterns and future issues, p27. Available at http://www.ifs.org.uk/bns/bn139.pdf (accessed 20th October 2014)

[23] The Calman Commission's Recommendation 5.19 stated that "There should be scope for Scottish Ministers, with the agreement of the Scottish Parliament, to propose changes to the Housing Benefit and Council Tax Benefit systems (as they apply in Scotland) when these are connected to devolved policy changes, and for the UK Government – if it agrees – to make those changes by suitable regulation."

The coalition Government's proposals in 2010 which became the Welfare Reform Act[24], cut across the powers on housing devolved to the Scottish Parliament. The only concession to concerns in the Scottish Parliament about welfare reform have been moves, coming into effect 6th November 2014, to permit the Scottish Parliament to raise the cap on mitigation funding for those adversely affected by the changes.

1.7. We reviewed our position in 2012, co-commissioning research from Professors Gibb and Stephens, who concluded in 2012 that devolving Housing Benefit on its own would not be safe because of the interconnections with other areas of welfare and social policy.[25] At that time it was argued that social security needed to be devolved in its entirety. We note that this has become the position of the Scottish Government.

1.8. More recently the IPPR has published proposals which suggest that social security should not be devolved in full and that HB should be devolved on its own.[26] This resonates with proposals from Labour and the Conservatives which the Commission is considering, and with which we disagree.

1.9. On the basis of due consideration of the arguments above, the SFHA argued to the Smith Commission in favour of devolving social security to the Scottish Parliament. This would have allowed the Scottish Parliament to exercise full authority over budgets, priorities, systems in line with the legal framework of tenancy rights, best use of stock, demand, and related to local strategies in relation to fuel poverty, regeneration and investment. Full devolution would have meant that those who need support from social security would benefit from an aligned system with single administration of a range of benefits that intersect.

1.10. We and our members are committed to making the best use of the systems and powers in use.

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[24] DWP (November 2010), "Universal Credit: welfare that works". Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/48897/universal-credit-full-document.pdf (accessed 27th October 2014)

[25] Gibb, Kenneth and Stephens, Mark (2012), SFHA / CIHS Discussion Paper Devolving Housing Benefit. Available at http://www.sfha.co.uk/sfha/publications/cihssfha-discussion-paper-devolving-housing-benefit (accessed 20th October 2014)

[26] Institute for Public Policy Research (March 2014), Devo More and Welfare – Devolving benefits and Policy for a Stronger Union. Available at http://www.ippr.org/assets/media/images/media/files/publication/2014/03/Devo-more-and-welfare_Mar2014_11993.pdf (accessed 28th October 2014)

Annex B: Comparisons of the Smith Agreement and the Scotland Bill as amended in Committee

This annex examines paragraphs of the Smith Commission Report published on 27th November 2014 and clauses of the Scotland Bill as amended in Committee on 7th July 2015. This aims to facilitate comparison between the recommended powers to be devolved in Smith and powers outlined in the Scotland Bill enabling identification of which clauses meet the spirit and substance of Smith and those which may require further steps to be taken, or revision.

10. Inter-governmental Machinery

Whilst there are no direct clauses relating to inter-governmental machinery, it may be conferred by the following Clauses below.

Paragraph	Smith Agreement	Related Sections of the Scotland Bill (as amended in Committee)
28	The parties believe that the current inter-governmental machinery between the Scottish and UK Governments, including the Joint Ministerial Committee (JMC) structures, must be reformed as a matter of urgency and scaled up significantly to reflect the scope of the agreement arrived at by the parties. The views of the other devolved administrations will need to be taken fully into account in the design of the quadrilateral elements of that revised machinery.	**Clause 24 Subsection (5) and (6) – In reference to Universal credit: costs of claimants who rent accommodation** (4)The Scottish Ministers may not exercise the function of making regulations to which this section applies unless— (a)they have consulted the Secretary of State about the practicability of implementing the regulations, and (b)the Secretary of State has given his or her agreement as to when any change made by the regulations is to start to have effect, such agreement not to be unreasonably withheld. (5)The Secretary of State may not exercise the function of making regulations to which this section applies in or as regards Scotland unless he or she has consulted the Scottish Ministers. **Clause 25 Subsection (4) and (5) – In reference to Universal credit: persons**
29	In parallel, formal processes should be developed for the Scottish Parliament and UK Parliament to collaborate more regularly in areas of joint interest in holding respective Governments to account.	
30	30. Those reformed inter-governmental arrangements will: (1) include the development of a new and overarching	

	Memorandum of Understanding (MoU) between the UK Government and devolved administrations. In addition to the subjects included in the current MoU, the revised MoU would: (a) lay out details of the new bilateral governance arrangements which will be required to oversee the implementation and operation of the tax and welfare powers to be devolved by way of this agreement. Those revised arrangements will also need to be consistent with the fiscal framework to be developed further to paragraph 95 of this agreement. (b) provide for additional sub-committees within the strengthened JMC structure beyond the current sub-committees. New sub-committees could include, but need not be limited to, policy areas such as home affairs; rural policy, agriculture & fisheries; or social security/welfare. (2) be underpinned by much stronger and more transparent parliamentary scrutiny, including: (a) the laying of reports before respective Parliaments on the implementation and effective operation of the revised MoU. (b) the pro-active reporting to respective Parliaments of, for example, the conclusions of Joint Ministerial Committee, Joint Exchequer Committee and other inter-administration bilateral meetings established	**to whom, and time when, paid** (4)The Secretary of State may not exercise the function of making regulations to which this section applies in or as regards Scotland unless he or she has consulted the Scottish Ministers. (5)Where regulations are made by the Scottish Ministers by virtue of subsection (1)— (a)sections 189(3) and 190 of the Social Security Administration Act 1992 do not apply, and (b)the regulations are subject to the negative procedure (see section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010). **Clause 29 - Information-sharing** (1) Information held by the Secretary of State for the purpose of a social security function may be supplied by the Secretary of State to the Scottish Ministers for use for the purpose of a relevant Scottish social security function. (2) Where information is supplied to the Scottish Ministers under subsection (1) for use for any purpose, they may use it for any other purposes for which information held by them for that purpose may be used. (3) Information held by the Scottish Ministers for the purpose of a relevant Scottish social security function may be supplied by them to the Secretary of State for use for the purpose of a social security function. (4) Where information is supplied to the Secretary of State under subsection (3) for use for any purpose, the Secretary of State may use it for any other purposes for which information held by him or her for that purpose may be used.

	under the terms of this agreement. (3) provide for more effective and workable mechanisms to resolve interadministration disputes in a timely and constructive fashion with a provision for well-functioning arbitration processes as a last resort.	

11. Universal Credit

The paragraphs from Smith are translated across in the Clauses below.

Paragraph	Smith Agreement	Related Sections of the Scotland Bill as Amended in Committee
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	**Clause 24 - Universal credit: costs of claimants who rent accommodation** (1) A function of making regulations to which this section applies, so far as it is exercisable by the Secretary of State in or as regards Scotland, is exercisable by the Scottish Ministers concurrently with the Secretary of State. (2) This section applies to— (a) regulations under section 11(4) of the Welfare Reform Act 2012 (determination and calculation of housing cost element), so far as relating to any liability of a claimant in respect of accommodation which the claimant rents, and (b) regulations under section 5(1)(p) of the Social Security Administration Act 1992 (payments to another person on behalf of the beneficiary), so far as relating to the payment of an amount of universal credit in respect of any such liability. (3) For the purposes of this section— (a) a claimant "rents" accommodation if he or she is liable to make rent payments (with or without other payments) in respect of it, and (b) "rent payments" has the meaning given from time to time by paragraph 2 of Schedule 1 to the Universal Credit Regulations 2013 (S.I. 2013/376). (4) The Scottish Ministers may not exercise the function of making regulations to which this section applies unless— (a) they have consulted the Secretary of State about the practicability of implementing the regulations, and (b) the Secretary of State has given his or her agreement as to when any change made by the regulations is to start to have effect, such agreement not to be unreasonably withheld. (5) The Secretary of State may not exercise the function of making regulations to which this section
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.	
48	Joint arrangements for the oversight of DWP development and delivery of UC, similar to those established with HM Revenue and Customs (HMRC) in relation to the Scottish rate of Income Tax, should be established by the UK and Scottish Governments.	

		applies in or as regards Scotland unless he or she has consulted the Scottish Ministers. (6) Where regulations are made by the Scottish Ministers by virtue of subsection (1)— (a) section 43 of the Welfare Reform Act 2012 (in the case of regulations referred to in subsection (2)(a)) and sections 189(3) and 190 of the Social Security Administration Act 1992 (in the case of regulations referred to in subsection (2)(b)) do not apply, and (b) the regulations are subject to the negative procedure (see section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010). **Clause 25 - Universal credit: persons to whom, and time when, paid** (1) A function of making regulations to which this section applies, so far as it is exercisable by the Secretary of State in or as regards Scotland, is exercisable by the Scottish Ministers concurrently with the Secretary of State. (2) This section applies to regulations under section 5(1)(i) of the Social Security Administration Act 1992, so far as relating to the person to whom, or the time when, universal credit is to be paid. (3) The Scottish Ministers may not exercise the function of making regulations to which this section applies unless— (a) they have consulted the Secretary of State about the practicability of implementing the regulations, and (b) the Secretary of State has given his or her agreement as to when any change made by the regulations is to start to have effect, such agreement not to be unreasonably withheld. (4) The Secretary of State may not exercise the function of making regulations to which this section applies in or as regards Scotland unless he or she has consulted the Scottish Ministers. (5) Where regulations are made by the Scottish Ministers by virtue of subsection (1)—

		(a) sections 189(3) and 190 of the Social Security Administration Act 1992 do not apply, and (b) the regulations are subject to the negative procedure (see section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010).

12. Other Welfare

These paragraphs are met to varying degrees by the scattered clauses outlined below. Key discrepancies lie between paragraph 51 and 51 of Smith and restrictions placed upon devolved discretionary payments in Clauses 21 and 22 and the narrow definition used in Clause 19.

Paragraph	Smith Agreement	Abridged Related Sections of the Scotland Bill (as amended in Committee)
49	Powers over the following benefits in Scotland will be devolved to the Scottish Parliament: (1) Benefits for carers, disabled people and those who are ill: Attendance Allowance, Carer's Allowance, Disability Living Allowance (DLA), Personal Independence Payment (PIP), Industrial Injuries Disablement Allowance and Severe Disablement Allowance. (2) Benefits which currently comprise the Regulated Social Fund: Cold Weather Payment, Funeral Payment, Sure Start Maternity Grant and Winter Fuel Payment. Heads of Agreement: Pillar 2 Delivering prosperity, a healthy economy, jobs, and social justice Heads of Agreement: Pillar 2 18 The Smith Commission Heads of Agreement: Pillar 2 19 (3) Discretionary Housing Payments.	**Clause 19 Disability, industrial injuries and carer's benefits** (1) In Part 2 of Schedule 5 to the Scotland Act 1998, Section F1 (social security schemes) is amended as follows. (2) In the Exceptions, before the paragraph beginning "The subject-matter of Part II of the Social Work (Scotland) Act 1968" insert— "Exception 1 Any of the following benefits— (a) disability benefits, other than severe disablement benefit or industrial injuries benefits, (b) severe disablement benefit, so far as payable in respect of a relevant person, and (c) industrial injuries benefits, so far as relating to relevant employment or to participation in training for relevant employment; but this exception does not except a benefit which is, or which is an element of, an excluded benefit. **Clause 19 (4) - Definition of Disability Benefit** "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

51	The Scottish Parliament will have complete autonomy in determining the structure and value of the benefits at paragraph 49 or any new benefits or services which might replace them. For these benefits, it would be for the Scottish Parliament whether to agree a delivery partnership with DWP or to set up separate Scottish arrangements.	(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. **Clause 20 - Benefits for maternity, funeral and heating expenses** (1) In Part 2 of Schedule 5 to the Scotland Act 1998, Section F1 is amended as follows. (2) In the Exceptions, after exception 3 (see section 19(3) above) insert— "Exception 4 Providing financial assistance for the purposes of meeting— (a) maternity expenses, (b) funeral expenses, or (c) expenses for heating in cold weather." (3) In the Exceptions, for the words from "But the following are not excepted" to "Act 2000 (discretionary housing payments)." substitute— "Exclusions from exceptions 1 to 8 Nothing in exceptions 1 to 8 is to be read as excepting— (a) the National Insurance Fund, (b) the Social Fund, or (c) the provision by a Minister of the Crown of assistance by way of loan for the purpose of meeting, or helping to meet, an intermittent expense." (4) In the Interpretation provision, omit the words from "Paragraph 5(1) of Part 3 of this Schedule" to "it is to be treated as if it were."
54	The Scottish Parliament will have new powers to create new benefits in areas of devolved responsibility, in line with the funding principles set out in paragraph 95. 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. In addition it may seek agreement from DWP for the Department to deliver those discretionary payments on behalf of the Scottish Government. All administration and programme costs directly associated with the exercise of this power (either as a result of changes to existing systems or the introduction of new systems) will be met by the Scottish Government in line with the funding principles set out in paragraph 95.	

		Clause 21 Top-up of Reserved Benefits In Section F1 of Part 2 of Schedule 5 to the Scotland Act 1998, in the Exceptions, Scotland Bill Part 3 — Welfare benefits and employment support 24 after exception 4 (see section 20 above) insert— “Exception 5 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 exception does not except discretionary financial assistance in a reserved benefit. This exception also does not except providing financial assistance to meet or help to meet housing costs (as to which, see exception 6). This exception also does not except providing financial assistance where the requirement for it 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. For the purposes of this exception “reserved benefit” means a benefit which is to any extent a reserved matter.” **Clause 22 Discretionary housing payments** In Section F1 of Part 2 of Schedule 5 to the Scotland Act 1998, in the Exceptions, after exception 5 (see section 21 above) insert— “Exception 6 Providing financial assistance to an individual who—

		(a) is entitled to— (i) housing benefit, or (ii) any other reserved benefit payable in respect of a liability to make rent payments, and (b) appears to require financial assistance, in addition to any amount the individual receives by way of housing benefit or such other reserved benefit, to meet or help to meet housing costs. This exception does not except discretionary financial assistance in a reserved benefit. This exception also does not except providing financial assistance to an individual on a regular basis in respect of accommodation where the assistance exceeds— (a) in a case where the individual is entitled to housing benefit, the total amount of the payments in respect of which housing benefit is payable less any charges for which housing benefit is not payable in the individual's case, and (b) in a case where the individual is entitled to any other reserved benefit, the maximum amount that the individual could receive by way of that benefit in respect of that accommodation. This exception also does not except providing financial assistance where the requirement for it 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. For the purposes of this exception— "rent payments"— (a) has the meaning given from time to time by paragraph 2 of Schedule 1 to the Universal Credit Regulations 2013 (S.I. 2013/376) or any re-enactment of that paragraph, or (b) if at any time universal credit ceases to be payable to anyone, has the meaning given by that paragraph or any re-enactment of that paragraph immediately before that time; "reserved benefit" means a benefit which is to any extent a reserved matter."
55	Any new benefits or discretionary payments introduced by the Scottish Parliament must	The Scotland Bill does not provide an outline of how this will work in practice.

	provide additional income for a recipient and not result in an automatic offsetting reduction in their entitlement to other benefits or post-tax earnings if in employment.	
56	The UK Government's Benefit Cap will also be adjusted to accommodate any additional benefit payments that the Scottish Parliament provides.	The Scotland Bill does not refer to the benefit cap or how this will work in practice.

13. Energy

The following paragraphs from the Smith Agreement are met to varying degrees as displayed below. A key concern is the explicit recommendation of Winter Fuel Payment in paragraph 49 from Smith and the subsequent wording of Clause 20 referring to 'expenses for heating in cold weather'.

Paragraph	The Smith Agreement	Abridged Related Sections of the Scotland Bill (as amended in Committee)
49	Powers over the following benefits in Scotland will be devolved to the Scottish Parliament: (2) Benefits which currently comprise the Regulated Social Fund: Cold Weather Payment, Funeral Payment, Sure Start Maternity Grant and Winter Fuel Payment.	**Clause 20 - Benefits for maternity, funeral and heating expenses** (1) In Part 2 of Schedule 5 to the Scotland Act 1998, Section F1 is amended as follows. (2) In the Exceptions, after exception 3 (see section 19(3) above) insert— "Exception 4 Providing financial assistance for the purposes of meeting— (a) maternity expenses, (b) funeral expenses, or (c) expenses for heating in cold weather."
68	Powers to determine how supplier obligations in relation to energy efficiency and fuel poverty, such as the Energy Company Obligation and Warm Home Discount, are designed and implemented in Scotland will be devolved. Responsibility for setting the way the money is raised (the scale, costs and apportionment of the obligations as well as the obligated parties) will remain reserved. This provision will be	**Clause 50 - Fuel poverty: support schemes** (1) The Energy Act 2010 is amended as follows. (2) In section 9 (schemes for reducing fuel poverty) after subsection (1) insert— "(1A) In relation to Scotland, that is subject to section 14A (power of the Scottish Ministers to make schemes)." (3) After section 14 (regulations under Part 2: procedure) insert— **"14A Power of the Scottish Ministers to make schemes under this Part** (1) The power by regulations under section 9 to make one or more schemes in relation to Scotland is exercisable by

	implemented in a way that is not to the detriment of the rest of the UK or to the UK's international obligations and commitments on energy efficiency and climate change.	the Scottish Ministers and not, except as provided by this section, by the Secretary of State. (2) For the purposes of the exercise of that power by the Scottish Ministers, this Part applies— (a) as if references to the Secretary of State in sections 9, 10 and 14(1), (3) and (4) were references to the Scottish Ministers; (b) with the omission in section 9 of subsections (4), (9)(a), (c)(i), (v) and (vi) and (11); (c) as if in section 10(7) "Parliament" were "the Scottish Parliament". (3) The power of the Scottish Ministers under section 9 does not include power to make provision in relation to the subject matter of sections 88 to 90 of the Energy Act 2008 (smart meters). (4) The Scottish Ministers may not make regulations under section 9 unless— (a) they have consulted the Secretary of State about the proposed regulations, and (b) the Secretary of State has agreed to the regulations being made. (5) Subsection (1) does not prevent the Secretary of State making a support scheme in relation to Scotland under section 9, or varying or revoking regulations made by the Scottish Ministers under that section,— (a) with the agreement of the Scottish Ministers, or (b) without their agreement, if subsection (6), (8) or (10) applies. (6) This subsection applies if— (a) a scheme in relation to England and Wales has been made, or the Secretary of State intends to make such a scheme, and (b) the Secretary of State is satisfied, after consulting the Scottish Ministers, that, to ensure that a scheme in relation to Scotland is made with a corresponding scheme period, it is necessary for the Secretary of State to exercise the power under section 9 to make such a scheme. (7) In paragraph (b) of subsection (6) a "corresponding scheme period" means a scheme period beginning and

		ending at the same time as that specified or to be specified in the scheme mentioned in paragraph (a). (8) This subsection applies if it appears to the Secretary of State that a support scheme made in relation to Scotland is, alone or in conjunction with a scheme made or to be made in relation to England and Wales, likely to— (a) cause detriment to the United Kingdom, or (b) adversely affect the ability of the United Kingdom to comply with an international agreement or arrangement in relation to climate change or energy efficiency, and the Scottish Ministers have failed to comply with a request made to them by the Secretary of State to make modifications specified by the Secretary of State. (9) In determining for the purposes of subsection (8), whether detriment is likely to be caused to the United Kingdom, considerations that the Secretary of State may take into account include the costs imposed on suppliers by virtue of schemes made, or to be made, by the Secretary of State and the Scottish Ministers under section 9. (10) This subsection applies if— (a) the Secretary of State makes or intends to make changes to a support scheme which would result in a significant change in the costs incurred by suppliers in complying with the scheme, and (b) the Scottish Ministers have failed to comply with a request made to them by the Secretary of State to make modifications specified by the Secretary of State. (11) A request by the Secretary of State to the Scottish Ministers for the purposes of subsection (8) or (10)— (a) must be in writing; (b) must specify only modifications that appear to the Secretary of State to be necessary to prevent the effect mentioned in subsection (8)(a) or (b), or (as the case may be) to be necessary or expedient in view of the effect mentioned in subsection(10)(a); (c) must specify the time within which the modifications are to be made, which must not be less than 2 months from the date of the request. (12) Where the Secretary of State makes a scheme in accordance with subsection (5), section 14(5) does not prevent the Secretary of State, by regulations under section 9, revoking any scheme made by the Scottish Ministers

		so far as it is inconsistent with the scheme made by the Secretary of State." (4) Section 31 (orders and regulations) is amended as follows. (5) After subsection (1) insert— "(1A) Subsection (1) does not apply to regulations made by the Scottish Ministers (see section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010: functions exercisable by Scottish statutory instrument)." (6) After subsection (4) insert— "(4A) Regulations made by the Scottish Ministers under section 9 are subject to the affirmative procedure (see section 29 of the Interpretative and Legislative Reform (Scotland) Act 2010)." (7) In subsection (6) after "Regulations" insert "made by the Secretary of State". (8) After subsection (6) insert— "(6A) Regulations made by the Scottish Ministers may impose obligations or confer functions on a person (including the Scottish Ministers)." (9) Where an amendment made by this section imposes a requirement to consult or to obtain consent, the requirement may be satisfied by consultation undertaken or consent obtained before this section comes into force.

14. Fiscal Powers

There are no direct Clauses in the Scotland Bill outlining additional borrowing powers as recommended in the Smith Commission.

Paragraph	The Smith Agreement	Abridged Related Sections of the Scotland Bill (as amended in Committee)
30	Those reformed inter-governmental arrangements will: (1) include the development of a new and overarching Memorandum of Understanding (MoU) between the UK Government and devolved	

	administrations. In addition to the subjects included in the current MoU, the revised MoU would: (a) lay out details of the new bilateral governance arrangements which will be required to oversee the implementation and operation of the tax and welfare powers to be devolved by way of this agreement. Those revised arrangements will also need to be consistent with the fiscal framework to be developed further to paragraph 95 of this agreement.	
95	Scotland's fiscal framework encompasses a number of elements including the funding of the Scottish budget, planning, management and scrutiny of public revenues and spending, the manner in which the block grant is adjusted to accommodate further devolution, the operation of borrowing powers and cash reserve, fiscal rules, and independent fiscal institutions. The parties agree that the Scottish and UK Governments should incorporate the following aspects into Scotland's fiscal and funding framework. **(1)** Barnett Formula: the block grant from the UK Government to Scotland will continue to be determined via the operation of the Barnett Formula. **(2)** Economic Responsibility: the revised funding framework should result in the devolved Scottish budget benefiting in full from policy decisions by the Scottish Government that increase revenues or reduce expenditure, and the devolved Scottish budget bearing the full costs of policy decisions that reduce revenues or increase expenditure. **(3)** No detriment as a result of the decision to devolve further power: the Scottish and UK Governments' budgets should be no larger or smaller simply as a result of the initial transfer of tax and/or spending powers, before considering how these are used. **a)** This means that the initial devolution and assignment of tax receipts should be accompanied by a reduction in the block grant equivalent to the revenue forgone by the UK Government, and that future growth in the reduction to the block grant should be indexed appropriately. **b)** Likewise, the initial devolution of further spending powers should be accompanied by an increase in the block grant equivalent to the existing **c)** The future growth in the addition to the block grant should be indexed appropriately. **(4)** No detriment as a result of UK Government or Scottish Government policy decisions post-devolution **(a)** 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 should be a shared understanding of the evidence to support any adjustments. **(b)** Changes to taxes in the rest of the UK, for which responsibility in Scotland has been devolved, should only affect public spending in the rest of the UK. Changes to devolved taxes in Scotland should only affect public spending in Scotland. **(5)** Borrowing Powers: to reflect the additional economic risks, including volatility of tax revenues, that the Scottish Government will have to manage when further financial responsibilities are devolved, Scotland's fiscal framework should provide sufficient, additional borrowing powers to ensure budgetary stability and provide safeguards to smooth Scottish public spending in the event of economic shocks, consistent with a sustainable overall UK fiscal framework. The Scottish Government should also have sufficient borrowing powers to support capital investment, consistent with a sustainable overall UK fiscal framework. The Scottish and UK Governments should consider the merits of undertaking such capital borrowing via a prudential borrowing regime consistent with a sustainable overall UK framework. **(a)** The Scottish Government's borrowing powers should be agreed by the Scottish and UK Governments, and their operation should be kept under review in conjunction with agreement on the mechanism to adjust the block grant to accommodate the transfer of taxation and spending powers. **(b)** Borrowing powers should be set within an overall Scottish fiscal framework and subject to fiscal rules agreed by the Scottish and	

	UK Governments based on clear economic principles, supporting evidence and thorough assessment of the relevant economic situation. **(6)** Implementable and Sustainable: once a revised funding framework has been agreed, its effective operation should not require frequent ongoing negotiation. However, the arrangements should be reviewed periodically to ensure that they continue to be seen as fair, transparent and effective. **(7)** Independent Fiscal Scrutiny: the Scottish Parliament should seek to expand and strengthen the independent scrutiny of Scotland's public finances in recognition of the additional variability and uncertainty that further tax and spending devolution will introduce into the budgeting process. **(8)** UK Economic Shocks: the UK Government should continue to manage risks and economic shocks that affect the whole of the UK. The fiscal framework should therefore ensure that the UK Government retains the levers to do that, and that the automatic stabilisers continue to work across the UK. The UK Parliament would continue to have a reserved power to levy an additional UK-wide tax if it felt it was in the UK national interest. (9) Implementation: the Scottish and UK Governments should jointly work via the Joint Exchequer Committee to agree a revised fiscal and funding framework for Scotland based on the above principles. The two governments should provide updates to the Scottish and UK Parliaments, including through the laying of annual update reports, setting out the changes agreed to Scotland's fiscal framework.	

Annex C : Excerpts from the Calman Commission: Serving Scotland Better: Scotland and the United Kingdom in the 21st Century | Final Report – June 2009

This is included in the SFHA's submission to the Devolution Committee (August 2015) as intergovernmental relations are essential to facilitate the devolution of powers from the UK Parliament to the Scottish Parliament outlined in the Scotland Bill. This is particularly stark for welfare powers under concurrent jurisdiction between the two Parliaments, where mutual respect must be entrenched to ensure a smooth transition and ongoing relationship to safeguard against detriment to either Parliament or claimant.

1. RECOMMENDATION 4.1: In all circumstances there should be mutual respect between the Parliaments and the Governments, and this should be the guiding principle in their relations.

2. RECOMMENDATION 4.2: As a demonstration of respect for the legislative competence of the Scottish Parliament, the UK Parliament should strengthen the Sewel Convention by entrenching it in the standing orders of each House.

3. RECOMMENDATION 4.3: The UK Parliament and Scottish Parliament should have mechanisms to communicate with each other:

   a. There should be detailed communication about legislative consent motions (LCMs), and in particular if a Bill subject to an LCM is amended such that it is outside the scope of the LCM.

   b. A mechanism should exist for each Parliament to submit views to the other, perhaps by passing a motion where appropriate.

4. RECOMMENDATION 4.4: The UK Parliament should end its self-denying ordinance of not debating devolved matters as they affect Scotland, and the House of Commons should establish a regular "state of Scotland" debate.

5. RECOMMENDATION 4.5: A standing joint liaison committee of the UK Parliament and Scottish Parliament should be established to oversee relations and to consider the establishment of subject-specific ad hoc joint committees.

6. RECOMMENDATION 4.6: Committees of the UK and Scottish Parliaments should be able to work together and any barriers to this should be removed.

   a. Any barriers to the invitation of members of committees of one Parliament joining a meeting of a committee of the other Parliament in a non-voting capacity in specified circumstances should be removed.

   b. Any barriers to committees in either Parliament being able to share information, or hold joint evidence sessions, on areas of mutual interest, should be removed.

   c. Mechanisms should be developed for committees of each Parliament to share between them evidence submitted to related inquiries.

7. RECOMMENDATION 4.7: To champion and recognise the importance of interaction between the Parliaments and Governments:

a. UK and Scottish Government Ministers should commit to respond positively to requests to appear before committees of the others' Parliament.

b. The UK Government Cabinet Minister with responsibility for Scotland (currently the Secretary of State for Scotland) should be invited to appear annually before a Scottish Parliament committee comprised of all committee conveners, and the First Minister should be invited to appear annually before the House of Commons Scottish Affairs Committee.

8. RECOMMENDATION 4.8: Shortly after the Queen's Speech the Secretary of State for Scotland (or appropriate UK Government Cabinet Minister), should be invited to appear before the Scottish Parliament to discuss the legislative programme and respond to questions in a subsequent debate. Similarly, after the Scottish Government's legislative programme is announced the First Minister should be invited to appear before the Scottish Affairs Committee to outline how Scottish Government legislation interacts with reserved matters.

9. RECOMMENDATION 4.9: Where legislation interacts with both reserved and devolved matters there should be continued cooperation:

a. For any UK Parliament Bill which engages the Sewel Convention on a matter of substance, consideration should be given to including one or more Scottish MPs on the Public Bill Committee, who should then be invited, as appropriate, to meet the Scottish Parliament committee scrutinising the legislative consent memorandum.

b. A Scottish Minister should as appropriate be asked to give evidence to the UK Parliament committee examining Orders made under the Scotland Act.

10. RECOMMENDATION 4.10: Either the Scottish Parliament or either House of the UK Parliament should be able, when it has considered an issue where its responsibilities interact with the other Parliament's, to pass a motion seeking a response from the UK or Scottish Government. The relevant Government in each case should then be expected to respond as it would to a committee of its own Parliament.

11. RECOMMENDATION 4.11: There should be a greater degree of practical recognition between the Parliaments, acknowledging that it is a proper function of members of either Parliament to visit and attend meetings of relevance at the other; and their administrative arrangements should reflect this.

12. RECOMMENDATION 4.12: The Joint Ministerial Committee (JMC) machinery should be enhanced in the following ways:

a. The primary focus should be on championing and ensuring close working and cooperation rather than dispute resolution (though it will be a forum to consider the latter as well).

b. There should be an expanded range of areas for discussion to provide greater opportunities for cooperation and the development of joint interests.

c. There should be scope to allow issues to be discussed at the appropriate level including the resolution of areas of disagreement at the lowest possible level.

13. RECOMMENDATION 4.13: The JMC should remain the top level, and meet in plenary at least annually, but most importantly to a longstanding timetable. In addition:

a. JMC(D) and JMC(E) should continue in much the same form, but with more regular meetings and to a longstanding timetable. There should be an additional JMC(Finance) which subsumes the role of the Finance Quadrilateral.

b. Sitting below the JMC(D), JMC(E) and JMC(F) meetings should be a senior officials level meeting, JMC(O).

14. RECOMMENDATION 4.14: Where inter-governmental ministerial meetings are held to discuss the overall UK position in relation to devolved policy areas, the relevant Secretary of State should generally chair these meetings on behalf of the overall UK interest, with another relevant UK Minister representing the policy interests of the UK Government in relation to those parts of the UK where the policy is not devolved.

15. RECOMMENDATION 4.15: A new legislative procedure should be established to allow the Scottish Parliament to seek the consent of the UK Parliament to legislate in reserved areas where there is an interaction with the exercise of devolved powers

Annex D: List of Amendments from the Committee Stage

These proposed amendments have been included in the SFHA's submission to display how the Scotland Bill could be amended to meet the full spirit and substance of the Smith Commission.

New Clause 31 **Negatived on Division**

Ian Murray, Wayne David, Kate Green, Angus Robertson, Mike Weir, Dr Eilidh Whiteford, Stewart Hosie, Michelle Thomson, Natalie McGarry

To move the following Clause— "New benefits In Section F1 of Part 2 of Schedule 5 to the Scotland Act 1998, in the Exceptions, after exception 8 (see section 23 above) insert—

"Exception 9 A benefit not in existence at the relevant date provided entitlement to or the purpose of the benefit is different from entitlement to or the purpose of any benefit that is—

(a) in existence at the relevant date,

(b) payable by or on behalf of a Minister of the Crown, and

(c) otherwise a reserved benefit. For the purpose of this exception— "the relevant date" means the date of introduction into Parliament of the Bill that becomes the Scotland Act 2015;

"reserved benefit" means a benefit which is to any extent a reserved matter."

This new clause was tabled to widen the circumstance that the Scottish Parliament can create new benefits as recommended by the Smith Commission.

Amendment 129 **Not Called**

Mr Graham Allen

Clause 22, page 24, line 27, leave out from "who" to "appears" in line 32.

This amendment was tabled to enable the Scottish Parliament to provide discretionary housing payments to individuals past the restrictions outlined in Clause 22 Exception 6 requiring entitlement to Housing Benefit. This aimed to provide discretionary housing payments to those who lose entitlement to any Housing Benefit as a result of the under-occupancy charge are precluded from accessing discretionary housing payments.

Amendment 116 **Not Called**

Angus Robertson, Mike Weir, Dr Eilidh Whiteford, Stewart Hosie, Michelle Thomson, Natalie McGarry

Clause 22, page 24, leave out lines 36 to 48

This amendment aimed to remove restrictions to those who could receive this benefit, including extending this benefit to individuals undergoing sanctions.

ANNEX E : LETTER TO IAIN DUNCAN SMITH FROM MARY TAYLOR

Dear Mr Duncan Smith

Civic Scotland Call to Suspend the Roll-Out of Universal Credit in Scotland

We – the undersigned – are writing with a united voice from across Civic Scotland to call on the UK Government to immediately suspend the further implementation of Universal Credit in Scotland until the process of legislating for new powers for the Scottish Parliament is complete.

We know from the Smith Agreement that the bill for further powers that is currently being drafted will include significant new welfare powers. The detail of how these powers will interact with the Universal Credit system will be complex and require careful consideration and planning. The legislation around welfare is complex and is regularly being adapted: since the enactment of the Welfare Reform Act 2012, there have already been over 40 Statutory Instruments passed by Westminster to bring into force many of its provisions.

Any system of welfare has to be safe and secure. Driving through Universal Credit in Scotland at this stage will create unnecessary administrative complication in an already complex process.

The sensible way to roll-out Universal Credit in Scotland is to do it once, when the Scotland-specific elements have been carefully planned and incorporated into it. This would avoid wasting precious time and scarce resources, and would protect vulnerable people in our society from bureaucratic change that could wreak havoc.

A key recommendation of the Smith Commission was to significantly improve intergovernmental working between Westminster and Holyrood, this is a golden opportunity to do just that.

So we ask you to act immediately to suspend the next phase of the roll-out of Universal Credit in Scotland, before it is scheduled to start in February.

Our diverse, united voices demonstrate that our call is not about politics. It is about protecting the most vulnerable people in our society and creating an effective, robust new system for delivering welfare. Our call is about responsible, effective governance.

We would welcome the opportunity for dialogue with you on this important matter.

Yours sincerely,

ANNEX F: RESPONSE FROM DWP

Dear Ms Taylor

Civic Scotland Call to Suspend the Roll-Out of Universal Credit in Scotland

Thank you for your letter to the Secretary of State for Work and Pensions of 11 January. As the Senior Responsible Owner for Universal Credit, he has asked me to reply on his behalf.

We have carefully considered your request to suspend the implementation of Universal Credit in Scotland. Ministers have concluded that it would not be in the best interests of Scotland to do so. Moreover we believe the system is "safe and secure". Universal Credit has already been rolled out across the whole of the North West of England and there is no evidence that this has happened in a way that disadvantaged claimants.

In fact quite the opposite has occurred. It is early days yet but the results from the first people, who have claimed Universal Credit, in comparison to their Jobseeker's Allowance counterparts, show they are doing more to search for work, applied for more jobs, moving into work quicker and staying in work longer.

Any suspension of roll-out to Scotland would deny some of the poorest people in so

Scotland would not want. It would certainly not be in the best interests of Scotland or indeed the rest of the United Kingdom to do so.

It appears that there may be some misconceptions and misunderstandings about the true nature of Universal Credit. Moreover the exercise of the Smith Agreement powers will need some careful reflection as Universal Credit abolishes the old, separate systems of tax credits and benefits. The impacts on work incentives and the smooth operation of the system as it supports people into work will need to be carefully thought through so that the people of Scotland are not disadvantaged compared to the rest of Great Britain.

Ultimately, of course, these decisions on how to use the flexibilities set out in the Smith Commission report and the Command Paper are wholly for the Scottish Government to determine. My Ministers are keen though to support this debate in any way that might be deemed in Scotland as helpful. They have therefore directed me to offer to hold a one-day conference in Scotland with those who co-signed your letter, and other interested parties, to review the evidence that is emerging from the North West of England on the actual experience of Universal Credit and seek to address any misconceptions or misunderstandings.

If you would find this helpful I think it should be possible to set up an event in March. Please do let me know if this initiative would be welcomed by the SFHA and co-signatories. A copy of this letter goes to all of those who signed yours.

Yours Sincerely

Neil Couling

Director General, Universal Credit

INCLUSION SCOTLAND

1. Introduction

1.1. Inclusion Scotland is a network of disabled peoples' organisations (DPOs) and individual disabled people. Our main aim is to draw attention to the physical, social, economic, cultural and attitudinal barriers that affect disabled people's everyday lives and to encourage a wider understanding of those issues throughout Scotland.

1.2. In our evidence to the Committee on the Draft Legislative Clauses, Inclusion Scotland raised a number of concerns about the extent to which the draft clauses failed to implement in full the Smith Commission proposals, in particular on Welfare and Employability. We note that these concerns were reflected in the Committee's report.

1.3. Regrettably, the Scotland Bill has largely failed to address the concerns raised by ourselves or the Committee.

1.4. Inclusion Scotland, along with a number of Third Sector partners, will be seeking amendments to the Bill as it progresses through the UK Parliament. This Written Evidence highlights some of the areas where we are seeking amendments. The Committee may also wish to note the detailed written evidence Inclusion Scotland has submitted to the Welfare Reform Committee on The Future Delivery of Social Security in Scotland.

2. Clause 19: Benefits for Disabled People

2.1. The Smith Commission proposed that "Benefits for carers, disabled people and those who are ill, including Attendance Allowance, Carer's Allowance, Disability Living Allowance (DLA), Personal Independence Payment (PIP), Industrial Injuries Disablement Allowance and Severe Disablement Allowance", should be devolved and that that the Scottish parliament will have "complete autonomy in determining the structure and value of the [devolved] benefits or any new benefits or services that might replace them".

2.2. Devolution of disability benefits in theory gives the Scottish Parliament the ability to a design a new system of support for disabled people that is focussed on supporting independent living and meeting the additional costs of daily living faced by disabled people. Potentially, this could see better co-ordination of disability benefits, social care funding, self-directed support, the proposed Scottish Independent Living Fund and support for employment, education or training.

2.3. However, the Scotland Bill as presently drafted restricts the autonomy of the Scottish Parliament to create a new disability benefits system, based on empowering disabled people to lead active lives and promoting their right to independent living, by defining the new powers in terms of existing disability benefits and a restrictive definition of who is entitled to claim these benefits.

2.4. Inclusion Scotland would like to see the Scotland Bill amended to reflect the intention of the Smith Commission to give the Scottish Parliament complete autonomy over how the powers over disability benefits can be used.

3. Clause 19: Benefits for Carers

3.1. The Smith Commission recommended the full devolution of Carer's Allowance. However the Scotland Bill sets out entitlement criteria which would restrict the payment of any future or reformed carers benefit to those who are "16 or over, not in full time education, and not gainfully employed".

3.2. Inclusion Scotland considers that it should be for the Scottish Parliament to determine who is eligible to claim carer's allowance. In particular, The Scotland Bill as presently drafted would unnecessarily restrict the Scottish Parliament's ability to develop future employability policy which might, for example, seek to support carers undertaking training or further education in order to return to employment.

4. Clause 21: Discretionary payments: top-up of reserved benefits

4.1. The Smith Commission recommended "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". This includes the power to top up reserved benefits, and Smith did not propose any conditions or limitations to this power.

4.2. Whilst the powers proposed in the Bill go further than those included in the Draft Clauses, there remains a restriction preventing the Scottish Parliament from providing financial assistance where "the requirement for it arises from reduction, non-payability or suspension of a reserved benefit as a result of an individual's conduct" (ie a sanction).

4.3. Inclusion Scotland believes that the current sanctions regime is unjust and impacts disproportionately and unfairly on disabled people, particularly those with a mental health issue. Clause 21 should therefore be amended to remove this restriction, which is inconsistent with the Smith Commission proposals.

5. Clause 22: Discretionary Housing Payments

5.1. The Smith Commission proposed that the Scottish Parliament would have complete autonomy over Discretionary Housing Payments. However, the Scotland Bill restricts this autonomy by limiting eligibility to those in receipt of Housing benefit or Universal Credit.

5.2. One, presumably unintended, side-effect of the Under-Occupation Penalty (Bedroom Tax) is that there are some people with an underlying entitlement to Housing Benefit who then lose it because of the penalty imposed. These tenants would then be denied a DHP. Given that 80% of the Scottish Households affected by the Under Occupation Penalty contain a disabled

person this restriction on eligibility to DHPs is bound to have a disproportionate impact on disabled tenants and carers.

5.3. The Scotland Bill will also prevent DHPs being paid where the need arises as a result of a benefit sanction. Again, as at 4.3 above, this will have a disproportionate effect on disabled people who have been unjustly sanctioned, and may lead to them losing their homes.

5.4. Inclusion Scotland believes Clause 22 should be amended to remove these restrictions and bring it in line with the Smith Commission proposals.

6. Clause 23: Discretionary Payments and Assistance

6.1. Clause 23 will devolve the power to make discretionary payments to households with short term needs and also make grants to households who require assistance to establish or maintain a settled home. Similar powers having already been devolved to the Scottish Parliament through the Scotland Act 1998 (Modification of Schedule 5) (No. 2) Order 2013.

6.2. Clause 23, as currently drafted, does not include “families under exceptional pressure” amongst those eligible for assistance. Whilst this group were eligible for assistance under the predecessor Social Fund arrangements and are currently eligible for community care grants from the interim Scottish Welfare Fund, some doubts arose during passage of the Welfare Funds (Scotland) Act as to whether it was competent to include “families under exception pressure” under the terms of the current Section 30 Order.

6.3. Inclusion Scotland believes that Clause 23 should be amended to include” families under exceptional pressure” to put this beyond doubt.

6.4. Inclusion Scotland also believes that Clause 23 should be amended to remove the restriction that would prevent the Scottish Welfare Fund making payments to those who have been sanctioned or failed to meet the conditions attached to a reserved benefit. These are new restrictions being placed on already devolved powers (as the Scottish Welfare Fund currently allows discretionary payments to those who have been sanctioned) and are not in line with the Smith Commission recommendations.

7. Clause 26: Employment support

7.1. The Smith Commission proposes that “The Scottish Parliament will have all powers over support for unemployed people through the employment programmes currently contracted by DWP”.

7.2. Inclusion Scotland welcomes the new powers to assist disabled persons to select, obtain and retain employment contained in Clause 26. Latest figures show that the employment rate for disabled people in Scotland has fallen to

40.8%, compared to 74.4% for working age population as a whole[27]. The new powers present an opportunity to integrate support for employment with other support for disabled people to provide a comprehensive package to disabled people to assist into sustainable employment and close the inequality in the employment rate.

7.3. However, Inclusion Scotland believes that the present wording of Clause 26 places unnecessary restrictions on who can be assisted and for how long. For example it is known that one of the key groups to suffer consistent poverty are those who circulate in and out of low paid work. Such people need tailored interventions to increase their skills/qualifications and increase their chances of securing well-paid work. Yet the current wording would deny them support as only the long-term unemployed entering a programme for a minimum of one year could be assisted.

7.4. Inclusion Scotland would also like to see Clause 26 amended to include the Access to Work Scheme (AtW). Take-up of AtW in Scotland is low and it only supports a tiny proportion of working age disabled people (just over 2%) to access and maintain employment. AtW can help pay for practical support and adaptations to support disabled people to start work or to stay in work if they acquire an impairment, or if an existing condition deteriorates.

8. Clause 33: Tribunals

8.1. In July 2013, the UK Government introduced fees of up to £950 for Employment Tribunal hearings, payable by applicants. This is in addition to a fee for issuing the claim, of up to £250. Disability discrimination applications are subject to the highest fees (that is the full £1200) because of their legal complexity and the likely length of hearings.

8.2. There has been a substantial drop in Employment Tribunal applications for disability discrimination since Tribunal fees were introduced. There was a 54% reduction in applications under disability discrimination (from 1801 to 818) after the introduction of the fees. The EHRC thinks that tribunal fees have had a disproportionate impact on the access to justice of disabled people breaching their UN Convention on the Rights of Disabled People (UNCRPD) rights.

8.3. The Smith Commission proposed that “All powers over the management and operation of all reserved tribunals (which includes administrative, judicial and legislative powers) will be devolved to the Scottish Parliament other than the Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission.”

8.4. Inclusion Scotland believes that access to justice is a fundamental Human Right, and we hope that the Scottish Parliament will be able to use the new powers to address the financial barriers caused by increased fees, However, we are concerned that Clause 33 proposes to transfer these powers tribunal by

[27] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406369/labour-force-survey-disabled-people.pdf and http://www.gov.scot/Resource/0047/00471945.pdf

tribunal using Orders in Council, as this may allow the UK Government to delay transferring powers over Employment Appeals Tribunals, or restricting the freedom of the Scottish Parliament to set its own fee structure. This would be against the spirit of the Smith Commission.

9. Conclusion

9.1. Inclusion Scotland remains concerned that the Scotland Bill as currently drafted does not implement the Smith Commission in full, particularly in the areas of Disability Benefits, Employability Schemes and Tribunals, and we will continue to work with partner organisations to seek amendments to The Scotland Bill as it progresses through the UK Parliament.

SCOTTISH ASSOCIATION OF MENTAL HEALTH

Introduction

SAMH is Scotland's largest mental health charity and is dedicated to mental health and well-being for all. SAMH has experience and expertise in the delivery of employment programmes across Scotland, including Work Choice, Individual Placement and Support and the Work Programme; we have successfully helped many people with mental health problems into sustainable work. As a service provider and campaigning organisation, we also advocate for those who are too unwell to work, recently highlighting the interaction between poverty, deprivation and mental health[28].

Response to the Smith Agreement

SAMH restricted our response to the Smith Commission to matters relating to welfare and employment. We proposed that responsibility for employment and sickness/disability-related benefits and back-to-work support should be devolved to the Scottish Parliament, along with those benefits that closely relate to areas that are already devolved.

In summary, we proposed that the following programmes and benefits be devolved to the Scottish Parliament, for the reasons outlined.

- **Work Programme and Work Choice**
  - *Devolving the Work Programme but not Work Choice would seriously disadvantage disabled people in Scotland.*

- **Access to Work**
  - *This valuable but underused fund would have better results if aligned with Self-Directed Support, and should remain linked with equalities powers.*

- **Jobcentre Plus**
  - *The well-received Christie Commission recommended the devolution of job search and support services to allow a focus on preventing, not alleviating, social problems.*

- **Employment and Support Allowance**
  - *This vital but badly designed benefit must remain aligned with the Work Programme and Work Choice, and would have more impact if better integrated into Scottish employment and welfare policy*

- **Attendance Allowance, Personal Independence Payment and Housing Benefit**
  - *Housing policy is devolved to Scotland so it makes sense to devolve Housing Benefit. Several parties have proposed devolving Attendance*

[28] SAMH, Worried Sick 2014
http://www.samh.org.uk/media/432022/samh_worried_sick_poverty_and_mental_health.pdf

Allowance: it is illogical to do so without also devolving Personal Independence Payment.

We currently work with DWP, NHS and local authorities in providing employability services, and as such our proposals to Smith sought a more integrated and supportive process for securing welfare benefits and employability support for people with mental health problems. One in four people in Scotland will experience a mental health problem each year[29], with increased prevalence in more deprived communities[30]. The total social and economic cost of mental health problems each year is estimated at £10.7 billion[31]. Currently, UK and Scottish Government policies and actions on employability and support for those who cannot work are not well coordinated. The Christie Commission concluded that "the interface between reserved and devolved policies on employability (i.e. job search and support services) has compromised the achievement of positive outcomes"[32].

SAMH was pleased when it was announced that Work Choice as well as the Work Programme would also be devolved to Scotland; and that disability benefits would be transferred to Scotland. However, we were disappointed that other complementary aspects of welfare and employability were not included in the Bill, and that the efforts by SNP and Labour MPs at Committee stage to amend the Bill were unsuccessful.

Views on the Scotland Bill

SAMH had welcomed the statement on employment provision by the Smith Agreement, as follows:

"The Scottish Parliament will have all powers over support for unemployed people through the employment programmes currently contracted by DWP (which are presently delivered mainly, but not exclusively, through the Work Programme and Work Choice) on expiry of the current commercial arrangements. The Scottish Parliament will have the power to decide how it operates these core employment support services."

We welcomed the inclusion of Work Choice as well as Work Programme, but we were disappointed that other programmes, such as Access to Work, were not included in the Scotland Bill. We believe that it is a missed opportunity not to transfer this programme. The Scotland Bill devolves disability benefits; the specialist disability employment programme; and additional powers to the Scottish Parliament on equalities. Yet the programme which supports disabled people to retain employment is not included, which is counter to the direction of travel within the Scotland Bill, and arguably, Smith's intentions. This may be an oversight, and we hope that this will be amended at report stage. Linking Access to Work with people who join Work Choice would make the transition to employment more successful, both from the employee

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[29] Well? What do you think? The fourth national Scottish survey of public attitudes to mental wellbeing and mental health problems, Scottish Government, 2008 and Common mental disorders - a bio-social model, Goldberg, D. & Huxley, P. 1992)

[30] GPs at the Deep End. Mental Health Issues in the Deep End, 2014

[31] SAMH, What's it Worth Now? 2011

[32] Christie Commission on the Future Delivery of Public Services, 2011 http://www.scotland.gov.uk/Resource/Doc/352649/0118638.pdf

and the employer perspective. The administration of Access to Work has been criticised by the UK Parliament House of Commons Work and Pensions Select Committee as overly centralised, and it is clear that this would present an ongoing barrier to people with disabilities in Scotland if it remains reserved.

The Smith Report stated that JobCentre Plus and Universal Credit would remain reserved, and as such, the Scotland Bill does not deviate from the report; these decisions were disappointing, and SAMH remains concerned at the piecemeal nature of devolution, and the potential conflict between UK and Scottish Government's views on social security and employability.

By devolving the employment programmes for individuals who have been long term unemployed, or for those with disabilities, yet continuing to reserve the entry requirements for these programmes with DWP, SAMH notes that the Scottish Government could end up effectively administering DWP programmes without accessing real powers to transform them; further, we are seriously concerned about the impact such welfare programmes are having on individuals with mental health problems, leaving them further away from the workplace due to stress and ill health; this could have the knock-on effect of making the delivery of employment programmes more difficult.

The Employment Programmes are a key part of the transition into work; the preceding element is the provision of support for people who are too unwell to work. These programmes must be coordinated and complementary if they are to be successful. SAMH has long argued that the Work Capability Assessment for Employment and Support Allowance is inadequate in determining the fitness for work of individuals with mental health problems. Employability programmes will be less effective at placing people in work if the people who are placed on these programmes have been misidentified as being fit for work, or fit for work-related activity. Indeed, only 3% of the 200,000 ESA claimants on the work programme have found lasting work (at least 3 months)[33]. This contrasts with the greater success of Work Choice (36% of individuals with a severe and enduring mental health problem moved into employment)[34].

Responsibility for running the Work Programme and Work Choice or replacing them with alternatives will be devolved to the Scottish Government in 2017. So we now have the opportunity to develop better approaches to employability for people with mental health problems in Scotland. We know that the more specialist Individual Placement and Support (IPS) programme, currently funded by some Scottish Health Boards, is even more effective than DWP programmes at supporting people with severe and enduring mental health problems into employment. The Scottish Government must ensure that IPS is included in its disability employability programme, so that it becomes the default approach for people with mental health problems: saving potentially substantial sums on welfare, health and social care expenditure.

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[33] House of Commons, Hansard. House of Commons Written Answers 9 December 2013 December 2013

[34] Department of Work and Pensions Work Choice Official Statistics August 2014

But our concerns about the welfare system remain. In the first 6 months of 2013 58% (6 out of 10) ESA claimants hit by sanctions were vulnerable people with a mental health condition or learning difficulty, an increase from 35% of sanctioned claimants in 2009[35]. This will lead to ill health and increased poverty, and place unwell individuals even further from the workforce.

We ask the question, how will the UK and Scottish Governments work together to best serve individuals with mental health problems, who represent the largest group of people too unwell to currently work, if the test is wrong and there is no appetite within the UK Government to make it better; and if the overall ethos of social security is penalty-driven rather than supportive?

Views on the Parliamentary process

SAMH has briefed MPs at Second Reading and during the Committee stage. We are concerned that much of the debate took place before the UK Government's emergency budget, given that there will be implications to the funding of many services; and that the fast nature of the Committee stage did not allow for many opposition amendments to be debated.

The Scotland Bill may also be seen in the context of other UK Government plans on welfare. The UK Government's Welfare Reform and Work Bill had its second reading on 20 July 2015; SAMH rejects many aspects of the Bill as cruel and counterproductive. People in the Work Related Activity Group have been found by DWP process to be too unwell to work, yet this legislation proposes that they are treated as the equivalent of jobseekers, by reducing their ESA support to the same level of JSA. Such a reduction is despite the additional costs that they may face due to their illness. Again, such changes are going to make the implementation of employability in Scotland a great deal harder for the Scottish Government, and much more painful for the individuals who have had their benefits cut.

We will continue to lobby for improvements in the Bill at subsequent stages of the Parliamentary process.

[35] UK Government Freedom of Information request 2014-79 March 2014

ENDNOTES

[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