



CAS submission to the Devolution (Further Powers) Committee: Implementing the Smith Agreement – The UK Government’s Scotland Bill August 2015

Citizens Advice Scotland (CAS), our 61 member Citizen Advice Bureaux (CAB), the Citizen Advice consumer service, and the Extra Help Unit, form Scotland’s largest independent advice network. Advice provided by our service is free, independent, confidential, impartial and available to everyone. Our self-help website Adviceguide provides information on rights and helps people solve their problems.

We are champions for both citizens and consumers and in 2013/14 the Citizens Advice Service in Scotland helped over **330,000 clients** in Scotland and dealt with **over one million issues** overall. In addition, the Scottish zone of our self-help website Adviceguide received approximately **4.2 million** unique page views. In 2013/14, our citizens advice bureaux recorded a financial gain for clients of over **£125 million**.

Summary

Citizens Advice Scotland recommends:

- The Bill is amended to include provision for the Scottish Parliament to create **new benefits in areas that are not reserved**.
- Clause 19 should be amended to ensure that all disabled people are covered by the definition and eligible for support from devolved **disability benefits**.
- Clause 19 should be amended to remove restrictions on paying **carers benefits** to all carers, including those who are under 16, in full-time education or in employment.
- Clause 23 is amended to remove unnecessary restrictions that may limit the Scottish Parliament’s current ability to make **Scottish Welfare Fund payments to individuals subject to a benefit sanction**.
- Clauses 24 and 25 are amended to remove the requirement for the Scottish Government to secure the Secretary of State’s agreement before using devolved **administrative powers over Universal Credit**.
- Clause 26 is amended to ensure all **employment programmes** are devolved, including those lasting less than a year, and the Access To Work scheme.
- The Bill is amended to incorporate the alternative clause 33 proposed by the Scottish Government ensuring all powers over the **management and operation of all reserved tribunals** will be devolved to the Scottish Parliament.
- Reserved tribunals identified by the Smith Commission should be fully devolved with no residual control retained by Westminster
- Jurisdictional issues about the definition of a ‘Scottish case’ must be resolved

Introduction

Whilst there are a number of areas of the Scotland Bill that fully meet the word and spirit of the Smith Agreement, Citizens Advice Scotland (CAS) believes that, as currently drafted, there are a number of sections of the Bill relating to social security and tribunals that do not appear to meet its intent. CAS is concerned that without changes being made there are clear risks of detriment to CAB clients, who sought advice on 207,875 new benefits issues in 2013/14 and who have been subject to recent changes to reserved tribunals which have had a marked and detrimental effect on consumers in Scotland.

The power to create new benefits in areas of devolved responsibility

Paragraph 54 of the Smith Commission Report stated 'The Scottish Parliament will have new powers to create new benefits in areas of devolved responsibility.' This is entirely absent from the Bill. When the draft clauses were published, CAS was particularly critical of this omission, as our interpretation of Smith was that the Scottish Government could craft its own social security system outside of Universal Credit, taking into account the needs of Scotland in areas such as education, health and transport, complementing its ability to top up reserved benefits included in the Bill.

CAS recommends that the Bill is amended to include provision for the Scottish Parliament to create new benefits in areas that are not reserved.

Definition of disability benefit (clause 19)

The Smith Commission Report (paragraph 49) provided that the Scottish Parliament should have powers over 'benefits for carers, disabled people and those who are ill'. Paragraph 51 of the Report stated that the Scottish Parliament 'will have complete autonomy in determining the structure and value [of these benefits] or any new benefits or services which might replace them'.

As currently drafted, clause 19 of the Bill defines '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'.

This definition of disability benefit, as well as the use of examples in clauses 19(a) and 19(b), is unnecessarily restrictive and could limit the autonomy that the Scottish Parliament has over the kind of replacement benefit it can introduce.

As well as limiting the Scottish Parliament's ability to take a different approach to the design of benefits for disabled people in Scotland, this clause could potentially prevent certain people – many of whom are currently eligible for disability benefits – from accessing devolved disability benefits. For example, terminally ill claimants with less than six months to live are automatically eligible for DLA or PIP. The current definition of disability benefit in clause 19 would mean that such claimants would not be eligible, unless they could establish the impact of their condition on day-to-day activities or a significant need.

CAS recommends that clause 19 should be amended to ensure that all disabled people are covered by the definition and eligible for support from devolved disability benefits.

Definition of carer (clause 19)

The definition of carer in clause 19 is unnecessarily restrictive. It limits the definition of a carer to someone who is aged 16 or over, not in full-time education, not gainfully employed, and looking after a disabled person in receipt of a disability benefit. This definition reflects the existing criteria for Carer's Allowance. The clause as currently drafted would therefore limit any future development, for example, to support young carers or those who wish to study while undertaking a caring role. The clause should be amended to ensure that the Scottish Parliament is able to develop its own definition of a carer and therefore exercise full autonomy over the benefit being devolved as envisaged by Smith.

CAS recommends that clause 19 should be amended to remove restrictions on paying carers benefits to all carers, including those who are under 16, in full-time education or in employment.

Sanctions and the Scottish Welfare Fund (clause 23)

Clause 23 devolves the power to make payments to people to meet a short-term need in order to avoid a risk to their well-being. It also allows grants to be made to those who have been or might otherwise be in prison, hospital, a residential care establishment or other institution, homeless or otherwise living an unsettled way of life, who appear to require 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) and the Scottish Parliament to pass the Welfare Funds (Scotland) Act 2015, which gives the SWF a permanent statutory basis.

We are concerned that clause 23 adds a restriction to the existing devolved powers to exclude individuals who are subject to a benefit sanction, unless the requirement

for it arises from ‘some exceptional event or exceptional circumstances and the requirement is immediate.’

This provision would therefore significantly limit the ability of the Scottish Government to continue to provide assistance through the SWF to people who have had their benefit payments suspended or sanctioned. Current guidance explicitly clarifies that they should be able to apply for help “in the same way as any other applicant”¹. This is of particular concern given the harm caused by an increasingly punitive sanctions regime, which often puts people into crisis.

CAS recommends that clause 23 is amended to remove unnecessary restrictions that may limit the Scottish Parliament’s current ability to make Scottish Welfare Fund payments to individuals subject to a benefit sanction.

Universal Credit administrative ‘vetoes’ (clauses 24 and 25)

The Bill as introduced contains a so-called ‘veto’ over the Scottish Government’s devolved power to make regulations on certain areas of Universal Credit. Whilst CAS recognises the practical need for joint working where the Scottish Government has power to make regulations in this area but the UK Government is responsible for ensuring that those regulations are carried out in practice, as drafted the process does not appear to be equitable, does not appear to be consistent with the Sewel Convention and may have the effect of causing the same stand-off and claimant confusion as if no process were outlined in the clauses.

Whilst the intention appears that the timing of any changes needs to be subject to negotiation on what is practically possible to do, there is scope for wide interpretation of the circumstances in which it might be considered ‘reasonable’ for the Secretary of State to withhold their agreement to the Scottish Government utilising its devolved power to make regulations in this area. Differing priorities between the Governments could cause this to be a major area of contention in the future.

CAS believes the Bill should be amended to ensure that the Scottish Government can exercise its devolved function, whilst at the same time ensuring that practical considerations are reflected in the legislation.

CAS recommends that clauses 24 and 25 are amended to remove the requirement for the Scottish Government to secure the Secretary of State’s agreement before using devolved administrative powers over Universal Credit.

Restrictions to employment programmes (clause 26)

The Smith Commission Report (paragraph 57) provided that the Scottish Parliament should have powers over **all** employment programmes currently contracted by the DWP. However, clause 26 of the Bill restricts the powers devolved to employment support programmes that last at least a year. It is unclear why this restriction has been included; the Bill as drafted would appear to only devolve the Work Programme

¹ The Scottish Welfare Fund Guidance (paragraph 6.9)

and Work Choice, which is inconsistent with Smith. Clause 26 as currently drafted also does not clearly devolve powers over the Access to Work scheme.

CAS recommends that clause 26 is amended to ensure all employment programmes are devolved, including those lasting less than a year, and the Access To Work scheme.

Tribunals (clause 33)

Citizens Advice Scotland considers that clause 33 does not reflect the recommendation made by the Smith Commission that all powers over the management and operation of all reserved tribunals (which includes administrative, legislative and judicial functions) will be devolved to the Scottish Parliament.²

Citizens Advice Scotland is concerned that as the Bill stands, power over all aspects of tribunals will continue to be subject to any change imposed by the Westminster government and in effect, devolution is undermined. The current Bill risks ongoing uncertainty for tribunal users and those who advise them.

Outline of Provisions

Currently, there are two categories of tribunal in Scotland – reserved tribunals and Scottish Tribunals. Scottish Tribunals are subject to the control of the Scottish Parliament in every aspect of their function and operation from rules of procedure to the appointment of their judges.

While clause 33, s2A(1) does make the transfer of functions in relation to Scottish cases, this is qualified by s2A(6)(a) which reserves to Westminster the power to:

- modify the function of a tribunal,
- impose conditions or restrictions (including conditions or restrictions relating to the composition or rules of procedure, or its staff or accommodation), and
- specify the categories of case included in the transfer

Power of the most fundamental aspects of tribunals will be subject to uncertain residual control: true devolution is not facilitated which means the devolved tribunals cannot fully become Scottish Tribunals.

The drafting of this clause has the effect of enabling Westminster to make changes at any time by Order in Council: a process by which legislation is drafted by a Government Department, approved by the Privy Council and signed by the Monarch. The definition of a ‘Scottish case’ would also be made by this process.

Implications

Recent changes to reserved tribunals have had a marked and detrimental effect on consumers in Scotland, despite calls from the Scottish Government and Parliament

² With the exception of the Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission. Recommendation 63.

that these changes should not happen. After the introduction of substantial fees³ in Employment Tribunals, there was a 79% decline in the number of cases lodged in Scotland for the period January to March 2014 compared to the same period in 2012.

The introduction of mandatory reconsideration in DWP processes has had a similar effect on the number of appeals to the Social Security and Child Support Tribunal. This process brings with it significant access to justice issues – not least the fact that the DWP are under no time limit to make a decision thus preventing appeal to an independent decision maker for, often, prolonged periods of time.

The consequence of clause 33 in the Scotland Bill is that any future changes such as this could not be vetoed by the Scottish Parliament. In real terms this could mean that if, for example:

- Westminster were to introduce fees for the Social Security and Child Support Tribunal then Scotland would have no choice but to introduce the same and, additionally, fees could be made to apply to any equivalent tribunal set up in respect of devolved social security powers.
- The power to set fees in Employment Tribunal cases could remain within the control of Westminster.
- If it was decided that there were too many rural tribunal venues then a decision could be taken on a UK basis to restrict the number of venues, regardless of the consequences for Scottish consumers.

The best situation for Scotland would be devolution where there is a clean break from Westminster influence. This Bill does not allow that to happen as there will be constant uncertainty over what changes Westminster might make.

Citizens Advice Scotland fully supports the alternative clause 33 proposed by the Scottish Government⁴ and recommends the Bill is amended to incorporate this.

CAS believes that the reserved tribunals identified by the Smith Commission should be fully devolved with no residual control retained by Westminster

Jurisdictional issues about the definition of a 'Scottish case' must be resolved

³ The total costs for going to full hearing are: Type A claims (including unpaid wages) £390 and Type B claims (including unfair dismissal and discrimination claims) £1,200.

⁴ Scottish Government response to the Interim Report from the Devolution (Further Powers) Committee on the Smith Commission and the UK Government's proposals, p. 46-47