



Mullen, T. (2016) Devolution of social security. *Edinburgh Law Review*, 20(3), pp. 382-388. (doi:[10.3366/elr.2016.0372](https://doi.org/10.3366/elr.2016.0372))

This is the author's final accepted version.

There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

<http://eprints.gla.ac.uk/140735/>

Deposited on: 10 May 2017

Enlighten – Research publications by members of the University of Glasgow
<http://eprints.gla.ac.uk33640>

Devolution of Social Security

A. Introduction

Social security has been a reserved matter since devolution was implemented in 1999. The Calman Commission, reviewing the extent of devolved competences in 2009, recommended that pensions and benefits should remain a reserved matter on the basis that they were a central feature of the UK welfare state and the latter was an important constituent of the glue that held the union together.¹ But a new all-party consensus was forged by the Smith Commission which recommended the devolution of substantial aspects of social security, including competence over:

- Benefits for carers, disabled people and those who are ill (i.e. the current benefits Attendance Allowance, Carer's Allowance, Disability Living Allowance (DLA), Personal Independence Payment (PIP), Industrial Injuries Disablement Allowance and Severe Disablement Allowance);
- Benefits which currently comprise the Regulated Social Fund (i.e. Cold Weather Payment, Funeral Payment, Sure Start Maternity Grant and Winter Fuel Payment); and
- Discretionary Housing Payments.²

It recommended that the Scottish Parliament (SP) have complete autonomy in determining the structure and value of the above benefits or of any new benefits or services which might replace them. The proposals relating to Universal Credit (UC) were more complex. UC is a new income support benefit currently being rolled out across the UK which will eventually replace six existing means-tested benefits and tax credits including income support and housing benefit. Although UC will remain in general a reserved benefit the Commission recommended that the Scottish Parliament should have the power to vary the housing cost elements of UC (including power to vary the under-occupancy charge and local housing allowance rates, eligible rent, and deductions from benefits for non-dependents). It would also have power to change the frequency of UC payments, and to vary the existing UK Government plans for single household payments and for payment to landlords direct of tenants' housing costs

The Commission also recommended devolution of power to the SP to create new benefits in areas of devolved responsibility and to make discretionary payments in any area of welfare to top-up reserved benefits. Finally, it recommended devolution of all powers over support for unemployed people through the employment programmes after the existing commercial arrangements expire.³

The welfare package was by far the most significant of Smith's proposals extending substantive policy competence (as opposed to competence over finance). In purely financial terms, it devolves a substantial portion of the social security budget (approximately £2.7

¹ Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (2009).

² Report of the Smith Commission for further devolution of powers to the Scottish Parliament (2014), available at: https://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf

³ Delivery of the programmes is contracted out by the Department of Work and Pensions (DWP).

billion, or 15.3% of expenditure on hitherto reserved benefits in Scotland).⁴ It is also the devolution of a major public service potentially affecting hundreds of thousands of people. Moreover, it represents a remarkable change of heart by the pro-union parties given the position they had so recently taken in the Calman Commission. It can be explained by the need to deliver on the vow to grant extensive new powers to the Scottish Parliament made by the leaders of the Conservative, Labour and Liberal Democratic parties just before the independence referendum in September 2014.

If the Calman Commission was right about the importance of the welfare state for social solidarity, then it must be questioned whether devolution of substantial aspects of social security is compatible with maintaining the integrity of the union in the long run. However, in this note I will concentrate on the more immediate issues that arise from the devolution of powers over social security benefits by the Scotland Act 2016. I will begin with a brief explanation of the benefits provisions of the 2016 Act, then go on to discuss policy autonomy, finance, institutional change intergovernmental cooperation and appeals.

B. The Legislation

Sections 22 to 35 of the Act are intended to give effect to the Smith Commission's proposals. They add a number of further exceptions to the reservation of social security in Head F1 in Part 2 of Schedule 5 to the Scotland Act 1998 (SA) and to the reservation of job search and support in head H3. Provision is also made for other matters including the exchange of information held for social security purposes between the UK Government and the Scottish Ministers. The date(s) for the transfer of social security functions have not yet been set and it is likely that it will be a staged process. Both current and new claimants will continue to have their entitlements determined under the existing UK legislation unless and until the Scottish Parliament decides to change the rules of entitlement for any of the devolved benefits or replace any of them with a new benefit. Section 53 SA provides for the general transfer of functions (including the making of delegated legislation) so far as exercisable within devolved competence from UK Ministers to Scottish Ministers. That provision will also apply to the newly devolved powers. This is important as much of benefit law is contained in subordinate legislation and section 53 will permit the Scottish Government (SG) to make significant changes to the devolved benefits by exercising transferred powers to make subordinate legislation. Any changes to policy on devolved benefits going beyond the scope of those transferred powers will require an Act of the Scottish Parliament. In future, it may be convenient to transfer further reserved executive powers relating to benefits using section 63 SA.

C. Policy Autonomy

The Smith Commission Report is a rather terse document and does not explain the rationale for the particular package of social security powers recommended for devolution. Neither did the UK Government's response.⁵ The argument most commonly cited for devolution of both

⁴ This figure is based on expenditure in 2014/15. See Scottish Government, *Social Security for Scotland: Benefits being devolved to the Scottish Parliament* (updated February 2016), available at: <http://www.gov.scot/Resource/0049/00494409.pdf>

⁵ *Scotland in the United Kingdom: An enduring settlement* (2016), available at:

<https://www.gov.uk/government/publications/scotland-in-the-united-kingdom-an-enduring-settlement>

benefits for the ill, disabled and carers and for housing aspects of UC is the close relationship with other policy areas which are already devolved.⁶ Thus, in the case of the former, there is overlap with the social work functions of local authorities and the function of the National Health Service in Scotland. Devolution of these benefits might, therefore, give the opportunity to take a holistic view of government policy on assistance for disabled and ill persons and to come up with imaginative policy solutions as some commentators have suggested.⁷ In the case of the latter, virtually all aspects of housing including homelessness and landlord and tenant law in both private and social rented sectors are devolved and similar arguments about policy synergy have been made.⁸

Perhaps the key question is how much freedom will the SP and SG have to change social security policy and entitlements? As a matter of strict law, the degree of autonomy is substantial. First, the SP will have absolute control over the rates at which all the devolved benefits are paid. Secondly, it could change the detailed conditions of entitlement for any of the devolved benefits. Thirdly, it could replace any or all of the devolved benefits with new benefits aimed at the same needs or indeed with services rather than cash benefits.

There are some legal constraints arising from the way in which the scope of the new exceptions to the social security reservation have been defined which are of varying degrees of restrictiveness. For instance, while disability benefits are broadly defined (the major exclusion being the power to create means-tested benefits), there is rather less room for manoeuvre in relation to housing. UC, which in future will be the principal benefit supporting the housing costs of those on low incomes (having absorbed housing benefit), remains reserved. What has been devolved is a limited number of specific aspects of the current HB/UC scheme as described above. Whilst the new powers will allow the SP and SG to make significant policy choices including nullifying the effect of the ‘bedroom tax’ by setting a zero rate, the continuing reservation of UC both reduces the scope for developing policy on housing-related benefits in a way which diverges from the rest of the UK and reduces the scope for a more wide-ranging rethink of the way in which housing subsidies are delivered, linking benefit policy to other aspects of housing policy. Moreover, the exercise of some of these powers will require the SG to consult UK ministers on the practicability of the change proposed and UK Ministers can delay implementation (although not prevent it) for reasons of practicability.⁹

Further constraints may arise from the interconnectedness of the benefit system, such as ‘passporting’, i.e. where the award of one benefit leads to entitlement to another. Such linkages between different benefits create ample room for spill-over effects (which may be financial or behavioural) of Scottish policy changes on the operation of reserved benefits in Scotland and in the rest of the UK. The principles of the fiscal framework mean that either government may have to reimburse the other for policy spill-over effects that have adverse financial

⁶ See, e.g. G. Lodge & A. Trench, *Devo More And Welfare: Devolving Benefits And Policy For A Stronger Union* (2014), available at: http://www.ippr.org/files/images/media/files/publication/2014/03/Devo-more-and-welfare_Mar2014_11993.pdf?noredirect=1

⁷ See, e.g. Kirstein Rummery, “Devolving Care” available at: <http://www.centreonconstitutionalchange.ac.uk/blog/devolving-care>

⁸ See, e.g. Mark Stephens et al, *The Devolution of Housing Benefit: Rebalancing Housing Subsidies in Scotland* (2015), available at: http://scotland.shelter.org.uk/professional_resources/policy_library/policy_library_folder/the_devolution_of_housing_benefit_and_social_security_rebalancing_housing_subsidies_in_scotland

⁹ Scotland Act 2016, ss 29 & 30.

consequences for the other.¹⁰ This potential extra cost may constrain policy choices. This point is discussed further below

D. Financing devolved social security

The principal practical constraint on developing social security policy will be finance. When the social security powers are first devolved, the block grant to the SG will be increased by an amount equivalent to the level of benefit expenditure by the UK Government in Scotland on the relevant benefits in the preceding financial year and by an amount representing the costs of administering those benefits in Scotland. However, the decision on how much to spend on benefits will be for the SG. If expenditure were to be increased, that could be financed by transferring funds from other parts of the Scottish budget or by raising taxes, primarily income tax, or a combination of both.

However, budgeting for social security will present serious challenges. The amount added to the block grant should be roughly adequate to cover the devolved benefits at the time that powers are transferred but there is no guarantee that it will do so in future even if the devolved institutions do not seek to change those benefits. This is because, according to the fiscal framework, adjustments to the benefits element of the block grant will in future be made according to the Barnett formula. This means that Scotland's social security budget will be vulnerable both to the possibility of a reduction in benefits spending in England and Wales (and UK government's forward plans to 2020 do assume further cuts in benefit spending) as well as the risk that spending per head in Scotland on the relevant needs rises faster than in the rest of the UK – a particular problem given that the proportion of Scotland's population that is elderly (the major recipients of devolved benefits)¹¹ will, on current trends, increase at a faster rate than that of the rest of the UK.¹²

Thus, unless the SG is willing to increase taxation – which seems unlikely given the relatively conservative fiscal approach the SNP has adopted to date – it may find it difficult to maintain, let alone increase social security expenditure, by increasing the rates for existing benefits, extending eligibility to more people or introducing new benefits.

There is a particular issue with policy spill-over effects. The two governments have agreed that there will be a transfer of funds from one to the other in respect of any financial effects that will directly and mechanically exist as a result of a policy change. Therefore, if the SG were to extend entitlement to a devolved benefit which acts as a passport to a reserved benefit that would trigger greater expenditure on reserved benefits in Scotland and require a transfer from the Scottish Budget to the DWP's budget. Purely behavioural effects will not trigger

¹⁰ The agreement between the Scottish Government and the United Kingdom Government on the Scottish Government's fiscal framework (February 2016) available at: <https://www.gov.uk/government/publications/the-agreement-between-the-scottish-government-and-the-united-kingdom-government-on-the-scottish-governments-fiscal-framework>

¹¹ D Bell, "Who will be affected by Scotland's new welfare powers?" available at:

http://centreonconstitutionalchange.ac.uk/sites/default/files/papers/welfarepowers_davidbell.pdf

¹² See, e.g. D Bell, written evidence for the Welfare Reform Committee's inquiry into *The Future Delivery of Social Security in Scotland*, 6th Report, 2015 (Session 4), available at:

<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/94823.aspx#annex>

transfers but exceptionally they may be taken into account where they are demonstrated to be material and both governments agree to do so.¹³

E. Institutional Change in Scotland

Welfare devolution requires institutional change for both the SG and SP. The SG will have to acquire a policy development capacity in an area in which ministers and civil servants in Scotland inevitably have little prior experience, and which is notoriously complex. An adequate policy unit will require a substantial number of officials to be allocated to the task (ideally at least some officials from the DWP) and it would also be desirable the SG to set up structures for receiving external advice, perhaps an equivalent to the UK Social Security Advisory Committee.¹⁴ Developments of this type are already underway.¹⁵

The SG will also have to establish a system of administration. The two principal options were to agree with the UK Government that the DWP would administer the devolved benefits on the SG's behalf, or to set up a new Scottish social security agency. The SG has opted for the latter which will be directly accountable to Scottish Ministers who are in turn accountable to the SP. The SG has also reacted to claims that a cultural shift in governmental attitudes to claimants is required,¹⁶ by promising that the new organisation will treat claimants with dignity and respect.¹⁷

In parallel with new policy and administrative structures, the SP will need to ensure that it can adequately perform its constitutional functions of legislation and scrutiny of the executive. A social security committee has been established for the 5th session of the Scottish Parliament with a remit to consider and report on matters relating to social security falling within the responsibility of the Cabinet Secretary for Communities, Social Security and Equalities. It will be the subject committee for legislation and other purposes. Significant preparatory work has been done by the Scottish Welfare Reform Committee and its 2015 report, *The Future Delivery of Social Security in Scotland*¹⁸ has helped to make social security a significant focus of interest within the SP.

F. Intergovernmental Co-ordination

Because of the number and complexity of linkages between different parts of the system, devolution of social security will create a real need for inter-governmental co-operation. Policy co-ordination will be required to minimise adverse spill-over effects, whether financial or behavioural, and to comply with the 'no-detriment' principle set out by the Smith Commission.¹⁹ There will also be a need for intergovernmental co-ordination of administration given that many persons will be claiming both reserved and devolved benefits at the same time and also the likelihood of some housing aspects of UC being varied.

¹³ See Fiscal Framework, above note 10.

¹⁴ Before the referendum, the SG set up the Expert Working Group on Welfare which provided analysis and recommendations on the SG's plans for social security benefits in the event of independence. See *Re-thinking Welfare: Fair, Personal and Simple* (2015), available at: <http://www.gov.scot/Publications/2014/06/7760>

¹⁵ Scottish Government, *Creating a Fairer Scotland: A New Future for Social Security in Scotland* (2016) available at: <http://www.gov.scot/Topics/People/fairerscotland/future-powers/Publications/Future>

¹⁶ See *The Future Delivery of Social Security in Scotland*, note 13 above.

¹⁷ *Creating a Fairer Scotland*, note 15 above.

¹⁸ See note 14 above.

¹⁹ See S. Eden, this volume

In recognition of this inter-dependence, the machinery for inter-governmental co-operation has been enhanced. A new Joint Ministerial Working Group on Welfare has been set up, which is intended to be the principal mechanism for co-ordination at ministerial level, and the DWP has also set up an implementation programme team responsible for working with the Scottish Government on the implementation of the new powers.²⁰ Finally, the Fiscal Framework sets out a new dispute resolution mechanism covering all disputes arising from direct and behaviour spill-over effects and other disputes related to the fiscal framework such as calculation of block grant adjustments.

G. Appeals

It has long been a principle of UK social security administration that claimants should have the right to appeal an adverse decision to an independent tribunal. Currently, appeals lie to the Social Entitlement Chamber of the First-tier tribunal (following a mandatory reconsideration of the decision by the DWP). The separate provision in section 39 of the 2016 Act devolving all powers over the management and operation of the reserved tribunals in Scotland means that the Scottish Courts and Tribunal Service (SCTS) will take over the staff and operations of HM Courts and Tribunals Service in Scotland. Thus the SG will in future be able to change at least some operational aspects of the tribunal system for social security appeals although it is not yet clear how far that will go.²¹

H. Conclusion

Devolution of social security is a significant extension of the functional competence of devolved governance in Scotland. But the successful development and implementation of a distinct Scottish approach to social security faces many challenges. Even if the political will to make substantial change exists, financial constraints derived from the structure of devolution financing, administrative structures and disputes between the two governments all have the potential to be significant obstacles.

Tom Mullen
University of Glasgow

²⁰ HL Hansard, 29th February 2016, cols 682-683.

²¹ C. Gill & T. Mullen, "Scottish Tribunals: Smith Commission Proposes Major Transfer of Jurisdiction to Scotland", available at: <https://ukaji.org/2015/02/18/analysis-scottish-tribunals-smith-commission-proposes-major-transfer-of-jurisdiction-to-scotland/>