



## Social Security in Scotland

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## Impact case study (REF3)

<b>Institution:</b> Ulster University		
<b>Unit of Assessment:</b> Law (18)		
<b>Title of case study:</b> Social Security in Scotland: defining, operationalising and protecting the Social Security (Scotland) Act principles through participation, scrutiny and oversight		
<b>Period when the underpinning research was undertaken:</b> 2016 - 2019		
<b>Details of staff conducting the underpinning research from the submitting unit:</b>		
<b>Name(s):</b>	<b>Role(s) (e.g. job title):</b>	<b>Period(s) employed by submitting HEI:</b>
Professor Gráinne McKeever	Professor of Law and Social Justice	1996 - present
Dr Mark Simpson	Lecturer in Law	2016 - present
Professor Ann Marie Gray	Professor of Social Policy	1995 - present
<b>Period when the claimed impact occurred:</b> 2016 - 2020		
<b>Is this case study continued from a case study submitted in 2014?</b> N		
<p><b>1. Summary of the impact:</b>  Research at Ulster has had multiple impacts on the development of Scotland's new devolved social security system since 2016. The research shaped the Scottish Government's (SG) understanding of what dignity and respect could mean in Scotland's social security system and impacted directly on how the SG operationalised these principles (<b>Impact 1</b>). This included the use of participatory methods to co-produce a statutory Social Security Charter, which in turn generated a transformative experience for the social security claimants involved (<b>Impact 2</b>). Our research guided the Scottish Parliament's (SP) Social Security Committee scrutiny of the Social Security Bill, forming the basis for its key recommendations to the SG (<b>Impact 3</b>). This shaped the content of the Social Security (Scotland) Act 2018 on legal and political accountability mechanisms to ensure compliance with the social security principles and Charter (<b>Impact 5</b>). Legislative provisions determining how secondary legislation is made under the Act, through a unique 'super-affirmative' parliamentary procedure involving pre-legislative scrutiny by an independent statutory body, flow directly from our research (<b>Impact 4</b>). The status and purpose of this independent body was determined by the SG on the basis of our research recommendations (<b>Impact 4</b>). This new scrutiny process has in turn resulted in changes to secondary legislation that have had direct impact on social security claimants (<b>Impact 6</b>).</p>		
<p><b>2. Underpinning research:</b> The impact reported flows from the Ulster's world-leading, interdisciplinary research in social justice and human rights. The authors have acknowledged policy and academic expertise on social security and wider social policy issues under devolution, including through McKeever's appointment by the UK government to the UK's Social Security Advisory Committee (SSAC) (2014-present) and Gray's experience in influencing policy development through membership of the Joseph Rowntree Foundation Anti-Poverty Strategy Task Group (2012-16), while Simpson's research was key to his appointment (2019-present) by the SG as a founding member of the Scottish Commission on Social Security.</p> <p>This case study is underpinned by <b>two key academic publications</b> shaping the development of devolved social security in Scotland, developing a clear definition for a set of broad legislative principles and building them into policy development, operational practice, legislative process and accountability mechanisms. A third publication converts the research used to write <b>R1</b> into an academic journal article.</p> <p><b>R1, written by Simpson, McKeever and Gray</b> in 2017, was commissioned by the Equality and Human Rights Commission (EHRC) in response to the SG's stated ambition that the new social security system would be based on dignity and respect. <b>R1</b> explores legal and subjective interpretations of dignity and respect, provides a succinct and accessible overview of legal and philosophical debates surrounding the concepts and sets out how these can be reflected in social security, drawing on real-life examples. Recommendations address foundational issues for the system, from policy development (including service user capacity and participation) and</p>		

legislation, to operational delivery (organisational culture and interaction with claimants) and processes for scrutiny and accountability. The research underpinning **R1** formed the basis for **R3**, which analyses how to embed dignity and respect in the new devolved social security system.

**R2 was written by McKeever** (2016) as the Scottish and UK governments were negotiating the devolution of social security powers, one outcome of which was that the SSAC (the oversight body for UK-wide social security legislation) would not have a role in scrutinising Scottish social security legislation. **R2** identifies and evaluates potential models to fill this scrutiny gap, combining the author's experience (as a member of the SSAC) of how UK oversight works in practice, with original doctrinal analysis of why a statutory, independent expert body for devolved social security is needed. The research identifies gaps in Scottish parliamentary scrutiny and the need for additional oversight for devolved social security powers by an independent and expert statutory body.

3. **References to the research** Outputs can be supplied by Ulster University on request.

**R1 M Simpson, G McKeever and AM Gray, *Social security systems based on dignity and respect*** (2017) Equality & Human Rights Commission: Glasgow (110pp). **R1** was principally supported by a GBP8,155 award from the Commission following competitive tender (2017-18) but drew also on (i) an award of GBP3,600 from the European consortium on European Commission (DG EMPL) (2016); and (ii) a confidential report commissioned by the Northern Ireland Human Rights Commission (2012: GBP5,000). The EHRC award included provision for peer review by Professor Neville Harris (University of Manchester) and Dr Jim McCormick (Joseph Rowntree Foundation) prior to publication of **R1**, as well as review by EHRC staff. **R1** has been praised by the SP's Social Security Committee clerk as being an authoritative source whose citation in other submissions to the Committee "*moved these submissions from opinion into argument*" (**C3**) and by SG officials for its clarity: "*[t]his accessibility along with examples of where similar policy and legislative issues have been considered in other jurisdictions is always of great value to policymakers.*" (**C1**)

**R2 G McKeever, "Legislative scrutiny, co-ordination and the Social Security Advisory Committee: from system coherence to Scottish devolution"** (2016) *Journal of Social Security Law* 23 (3): 126-149. This research has been through a double-blind peer-review process and was used as the reference point to shape the advice on scrutiny that was requested by the SG from Scotland's Disability and Carers Benefits Expert Advisory Group (DACBEAG), as confirmed by **C2**: "*[Professor McKeever's] research directly shaped the nature of legislative scrutiny that DACBEAG advised the Minister to adopt.*"

**R3 M Simpson, G McKeever and AM Gray, 'From principles to practice: social security in the Scottish laboratory of democracy'** (2019) 26(1) *Journal of Social Security Law* 13. This is an abridged version of the research published in **R1**, focused on embedding dignity and respect in the Scottish social security system, with additional reflections on subsequent developments in Scottish social security. It has also been through a double-blind peer-review process.

#### 4. Details of the impact:

Social security powers were devolved to Scotland for the first time by the Scotland Act 2016, which followed the 2014 referendum on Scottish independence. Our research has provided the SG with a road map for developing the new social security system.

##### Impact 1: Understanding and operationalising dignity and respect

The overarching challenge faced by the SG was to create a completely new social security system built on principles of dignity and respect. While there was broad political endorsement of these principles, initially there was a lack of understanding about what they meant and a consequential risk that no consensus would develop. Our research impacted directly on how these principles were defined and understood. This impact flows from **R1**, which put a boundary around what dignity and respect can and cannot mean – procedurally, operationally and legally. The EHRC, which commissioned **R1**, acted as the mobiliser for the research, giving key SG officials pre-publication copies to provide concrete, practical guidance on what dignity and respect meant in law, and facilitating a workshop between the researchers and SG officials. As SG officials have stated, "*[R1] has played a crucial role in informing the development of key aspects of Scotland's new devolved social security system ... The Government relied heavily on the report as it sought to devise ways of putting the announced principles into practice alongside the wider commitment to a rights-based approach to social security.*" (**C1**) The report's guidance was incorporated into

SG officials' recommendations to the Minister for Social Security from the outset, directly influencing her recommendations to the SG and SP on how the social security system should be developed, which the SG and SP each then endorsed (**C1**, **C6** and **C7**).

### Impact 2: Creating the Social Security Charter

**R1** established that a co-production method to create the Social Security Charter was integral to ensuring dignity and respect. **C1** confirms that **R1** was key to securing Ministerial support for this approach, which in turn had significant positive impacts on the social security claimants involved in the process. The SG officials who developed the Charter confirm they drew heavily on the report, evidenced by "*a significant cross-over from the ... report with the processes and approach that we used to co-produce the Charter and the content of the Charter ... [R1] placed strong emphasis on the characteristics of meaningful, as opposed to tokenistic, co-production. This was persuasive in securing Ministerial approval for a relatively time- and resource-intensive process of developing a safe, supportive environment in which participants could develop both trust in the process ... and the skills and knowledge required for the task.*" (**C1**) This was a highly innovative policy-making model, unique within the UK, that was politically contentious at first but ultimately secured unanimous parliamentary approval: in the final SP debate on the Bill a successful opposition amendment was put forward that such " 'meaningful co-production should be an exemplar' that informs how public services are reformed in future." (**C9**). The impact of co-production on claimant participants was substantial: "*Session after session, we'd see our words, fears and hopes take form. I can point to bits in the Charter which were my words. I will never be able to describe how important it is to us to be listened to, ... to be respected and believed ... people came out crying, because it was the first time ... that we'd been believed.*" (**C10**). The Charter is now a core element of "organisation cultural creation" within Social Security Scotland, embedded into public service delivery and used as a recruitment/training tool for its staff (**C1**).

### Impact 3: Parliamentary scrutiny of the Social Security Bill

Both **R1** and **R2** were instrumental in allowing the SP Social Security Committee to scrutinise the Social Security Bill effectively and advocate amendments that now form part of the Social Security (Scotland) Act 2018.

**R1** had a transformative impact on the Committee's understanding of how to operationalise human rights principles: "*going beyond the abstract concepts of dignity and respect to articulate how these principles could work in practice was essential in enabling Committee members to get to grips with the framework of the Bill ... detailing the sorts of things the Committee should be looking for, speaking to the SG about, and the sorts of questions it ought to be asking ...*" (**C3**). The Committee Clerk also confirmed that "**R1** was cited in other submissions to the Committee and was regarded as the authoritative background that moved these submissions from opinion into argument." (**C3**)

Direct impact comes from **R2** and McKeever's oral evidence on this to the Committee (**C4**), as confirmed by the Committee Clerk (**C3**): "*McKeever's research and evidence set out very clearly what the rationale would be for having an independent scrutiny body for Scotland, as well as providing further evidence on the recommendations on embedding dignity and respect in the new social security system. This evidence was extremely powerful. It set out all of the issues, set out why they were important and was extremely persuasive in enabling the Committee to understand the issues and reach a unanimous view on recommending an independent scrutiny body. The persuasive recommendation for an independent body protected in statute put forward by McKeever to the Committee was the turning point and it was a recommendation that none of the members demurred from. Consequently, the recommendations in the Social Security Committee Stage 1 Report that an independent statutory scrutiny body should be set up came directly as a result of McKeever's research and evidence.*"

The Committee's Stage 1 Report on the Bill (**C5**) states: "*Professor McKeever provided the Committee with her paper for the Journal of Social Security Law, which sets out ... options for this [scrutiny body]. The Committee draws the Minister's attention to this work.*" (para.102) Its recommendation mirrors McKeever's: "*The Committee supports the creation of a Scottish Social Security Advisory Committee with a role similar to the UK Social Security Advisory Committee and an initial focus on assessing the draft regulations produced under the Bill.*" (recommendation 9) The Committee Clerk confirms that "*The Minister engaged directly with the Committee's*

*recommendations which were informative for her and resulted in the Scottish Parliament agreeing to establish a new independent statutory scrutiny body for Scotland.” (C3) The Committee’s call for the creation of an expert scrutiny body prompted the Minister to seek advice on the subject from the Disability and Carers Benefits Expert Advisory Group (DACBEAG), an independent group established by the SG to advise on policy and practice options for disability and carers’ benefits. The outcome of this is described at **Impact 4**.*

#### **Impact 4: Creating the Scottish Commission on Social Security and the super-affirmative scrutiny process**

**R2** identified the challenges facing the SP and SG in developing highly technical social security legislation due to them not having access to the independent expertise of the UK SSAC. The creation and role of a new independent, expert body (the Scottish Commission on Social Security) for the scrutiny of social security policy and draft secondary legislation in light of the social security principles, Charter and human rights obligations, was a direct impact of **R2**.

DACBEAG, which was tasked by the Minister to give advice and recommendations on the scrutiny of the Scottish social security system, acted as the mobiliser for **R2**. It disseminated the research to members of a workshop it facilitated between McKeever, SG officials and other stakeholders, which in turn produced a report to Minister for Social Security on scrutiny (**C2**), informing its recommendations which were then accepted by the SG (**C6** and **C7**) and SP (**C3**).

**R2** impacted directly on scrutiny recommendations by DACBEAG: *“Our final report closely reflects Professor McKeever’s research, in terms of the role, purpose and principles of scrutiny; the key characteristics of a scrutiny body including its independence from government ... Professor McKeever’s research was instrumental in the development of our recommendations, and consequently in our advice to the Minister through our report: her research directly shaped the nature of legislative scrutiny that DACBEAG advised the Minister to adopt.” (C2)*

In turn, DACBEAG’s recommendations on independent scrutiny with a super-affirmative parliamentary procedure were adopted by the SG, as confirmed by SG officials: *“The legislative basis for the Scottish Commission on Social Security and the creation of the super-affirmative parliamentary procedure for social security legislation was added to the [Social Security] Bill by Government amendments at Stage 2 (amendments 15, 16, 118 and 131), based on the recommendations of [DACBEAG].” (C1)* The Minister is also on record stating that: *“The amendments the Government has brought forward do what the Committee called for in its ... Report. They establish a process akin to that which operates at Westminster, with an independent expert body feeding in to the scrutiny process” (C6) ... “Amendments no. 15-17 ... respond directly to the recommendations made by the Social Security Committee and ... DACBEAG. [A]mendment no.s 55 and 56 ... [introduce] ... a super-affirmative procedure to regulations.” (C7)*. These amendments became sections 21-22 and Schedule 1, Social Security (Scotland) Act 2018, establishing the Scottish Commission on Social Security (SCoSS), and section 97 establishing the super-affirmative procedure, under which social security Regulations can only be made after a draft has been referred to SCoSS. Our research therefore changed how the SG and SP make law.

#### **Impact 5: A framework for accountability**

There was a need to identify a process that would give effect to the legislative commitment to dignity and respect in the new devolved social security system. **R1** advocated mainstreaming dignity and respect into the policy and legislative processes from the outset, rather than relying exclusively on individuals challenging government action retrospectively through judicial review in court. This pre-emptive approach enables a focus on systemic statutory protection for dignity and respect. **C1** confirms that this influenced the SG’s approach to ensuring accountability for this and the other social security principles. In her evidence to the SP Social Security Committee, setting out the government’s intention to go beyond the protections to dignity and respect offered through judicial review, the Minister stated (**C11**) *“Ulster University’s report [was] very helpful”* in highlighting the limitations of reliance on litigation alone to ensure adherence to the commitment to dignity and respect. SG officials confirm: *“[o]ne of the most persuasive contributions of the report was to [make] clear the distinction between individual and systemic redress, which the SG took directly from the report ... The key impact here was that, in a very real way, the report guided the Scottish Government towards the development of the infrastructure through which the principles would be mainstreamed in policymaking ...” (C1)*. Amendments were made to the Social Security

(Scotland) Act 2018 to ensure the accountability of the SG to the courts in upholding the commitment to dignity and respect: section 2 of the Act allows the legislative principles to be considered by the courts and section 19 allows the Charter to be considered by the courts. The impact has also made the SG politically accountable for upholding the Charter principles, through both Parliamentary scrutiny and additionally by SCoSS as the independent and expert statutory scrutiny body (Impact 4).

#### **Impact 6: Impact on social security claimants**

By August 2019, Scotland's new social security system had delivered GBP52.8m of benefits to approximately 217,000 people. By 2020 award payments had reached GBP386.7m, with approximately 1.4 million people expected to receive payments every year, at a further cost of GBP3.44bn, once all devolved benefits are implemented (Audit Scotland). Much of the implementing legislation for these awards benefited from scrutiny by SCoSS in accordance with the super-affirmative process which has brought about substantive legislative amendments to avoid unintended adverse consequences for claimants. These include (C8):

- Changing the qualifying period and definition of caring in the Carer's Assistance (Young Carer Grants) (Scotland) Regulations 2019;
- Amendment of provisions on eligibility criteria and determinations without application in the Scottish Child Payment (Scotland) Regulations 2020;
- Changes to wording in the Disability Assistance for Children and Young People (Scotland) Regulations 2020 with a view to ensuring the continuing applicability of Child Disability Living Allowance case law following introduction of the new devolved benefit.

These impacts can be traced back to **R2**, which shaped the creation of SCoSS.

#### **5. Sources to corroborate the impact:**

**C1** Testimonial from SG policy officials, Legislation and Operational Policy Unit, Social Security Directorate, Scottish Government and Operational Policy Team, Social Security Scotland (impact of R1 on SG officials and their advice to the Minister for Social Security covering meaningful participation, co-production of Charter, redress mechanisms to expand political and legal accountability for the Charter's principles and creation of new organisational culture)

**C2** Disability and Carers Benefits Expert Advisory Group working group report (pp10-11) and Chair's testimonial (impact of R2 on Group's recommendations to Minister for Social Security)

**C3** Testimonial from the Social Security Committee Clerk (impact of R1 in enabling Committee members to understand how dignity and respect could be operationalised, what to consider in its scrutiny of the Bill and impact of R2 on its recommendation on a scrutiny body)

**C4** Social Security Committee, Official Report and Scottish Parliament TV, 14/09/2017 (record of Professor Gráinne McKeever's oral evidence on R1 and R2 to the Committee)

**C5** SP Social Security Committee Stage 1 report on the Social Security (Scotland) Bill (citation and recommendation of R2 and its recommendation to set up a statutory scrutiny body)

**C6** SG policy paper for Social Security Committee, 12/02/2018 (acceptance by Minister for Social Security of the recommendation to establish a statutorily independent scrutiny body in line with R2, C2 and C5)

**C7** Letter from Scottish Minister for Social Security to the Social Security Committee, 17/01/2018 (acceptance by the Minister for Social Security of the recommendation to establish a statutorily independent scrutiny body in line with R2, C2 and C5, and details of SG amendment to the Bill to achieve this)

**C8** Annual report of the Scottish Commission on Social Security (SCoSS) (highlights key changes to draft social security Regulations resulting from SCoSS's recommendations)

**C9** SP Official Report, Meeting of the Parliament, 02/10/2018, col.28 (Opposition amendment to Social Security (Scotland) Bill), to embed co-production as best practice)

**C10** SP Official Report, Social Security Committee, 31/01/2019, col.3 (reporting claimant testimonial on the co-production process)

**C11** SP Official Report, Social Security Committee, 2/11/2017, col.15 (Minister for Social Security's explanation to the Committee why R1 was useful)