

# Social security devolution: Northern Ireland and Scotland

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This briefing paper will cover the following issues:

1. How the Northern Ireland social security system has evolved and the variations between social security in Northern Ireland and Britain
2. Prioritising principles of dignity and respect in Scotland's new social security system
3. Independent scrutiny

## **1. The Northern Ireland experience of social security devolution**

Social security powers have been fully devolved to Northern Ireland since 1920. The approach to social security devolution from the outset was to maintain parity with Great Britain, as part of the unionist government's manifesto to ensure that individuals in Northern Ireland were treated the same as individuals in the rest of the UK. As the welfare state developed, Northern Ireland's ability to maintain parity was dependent on financial subventions from the UK government. These subventions have been maintained ever since, as parity has continued. The resulting symmetry between the social security systems in Britain and Northern Ireland is recognised in the Northern Ireland Act 1998, which does not prescribe parity but underlines the rationale for its continued practice.<sup>1</sup> Section 87 of the Act requires consultation on the co-ordination of policy between the relevant Ministers in Britain and Northern Ireland but the reality is that agreement on social security developments is premised on a financial imperative that reduces the scope for ideological or operational divergence. This has created a parity paradox for Northern Ireland, where the ability to exercise devolved powers is thwarted by financial reality, regardless of political consensus or disagreement on how powers should be exercised.

Some variation in policy and practice, however, has been developed over the years:

- Rules governing the eligibility of part-time students for certain benefits, which in Northern Ireland allow the definition of part-time study to be determined by the student's academic institution, compared to the 16-hour maximum rule in Britain
- The absence of council tax in Northern Ireland means there is no council tax benefit, so an equivalent benefit was created within housing benefit to help claimants pay domestic rates
- A higher rate for recovery of overpayments deducted from benefits than in Britain and an ability to override claimant consent to recover more than the statutory maximum allowance, with recovery possible from a greater range of benefits

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<sup>1</sup> Northern Ireland Act 1998, s. 87 (1): The Secretary of State and the Northern Ireland Minister having responsibility for social security shall from time to time consult one another with a view to securing that, to the extent agreed between them, the legislation to which this section applies provides single systems of social security, child support and pensions for the United Kingdom.

- More onerous residence tests for some benefits to block eligibility for claimants in the Republic of Ireland
- Procedural variations in the process of appealing social security decisions, with mandatory reconsideration a more recent addition to Northern Ireland and a different tribunal structure from Britain.

There have been some recent attempts to break free from the model of parity, most notably over the equivalent legislation for Northern Ireland to the Welfare Reform Act 2012.<sup>2</sup> While social security legislation in Northern Ireland has largely mirrored the equivalent legislation for Britain, there was more substantial political disagreement over whether the 2012 Act should be implemented in Northern Ireland. A political impasse resulted in an agreement with the UK government to pass legislative consent to Westminster to enact the Welfare Reform (Northern Ireland) Order 2015, which replicates the 2012 Act with some variations.<sup>3</sup> These agreed variations provide temporary, transitional protection, alongside some softening of the hardest edges of reform, with policy divergence focused on mitigating the impact of the social sector size criteria (“bedroom tax”) and providing additional support for carers and the disabled:

- Operational variations in UC (previously agreed with the Minister for Welfare Reform, Lord Freud) namely:
  - payment of housing cost element of UC direct to landlords;
  - greater flexibility to split UC payment between 2 parties in the household;
  - option to make fortnightly UC payments rather than monthly
- The highest level of sanction set at 18 months rather than 3 years
- Discretionary support service to replace the social fund
- Mitigation payments for the “bedroom tax”, agreed for the next four years, to protect current tenants from any reduction in their housing benefit for their existing tenancies
- Supplementary payments (as detailed in the Evason Report<sup>4</sup>) relating to disability and carers; advice and sanctions; and tax credit mitigations and UC:
  - One-year supplementary payment for carers who lose carers allowance when the person they care for does not migrate successfully from DLA to PIP
  - One-year supplementary payment for claimants who lose entitlement to contributions based ESA after 365 days, who are not entitled to income-based ESA and who have continuing medical evidence relating to fitness for work
  - DLA claimants who are unsuccessful in migrating to PIP and who are appealing the decision will continue to receive a supplementary (non-recoverable) payment until their appeal has been determined
  - Claimants who migrate from DLA to PIP where their PIP payment is more than £10 per week less than DLA will receive a one-year supplementary payment equivalent to 75 per cent of the loss

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<sup>2</sup> Welfare Reform (Northern Ireland) Order 2015, SI 2015/2006

<sup>3</sup> Northern Ireland Office, *A fresh start: the Stormont agreement and implementation plan* (2015). For discussion, see M. Simpson, “The social union after the coalition: devolution, divergence and convergence” (2016) *Journal of Social Policy* 1

<sup>4</sup> Welfare Reform Mitigations Working Group Report, available at <https://www.executiveoffice-ni.gov.uk/publications/welfare-reform-mitigations-working-group-report> [accessed 4 September 2017]

- An automatic additional four points for PIP claimants with injuries relating to the Northern Ireland conflict, who have scored at least four points in the PIP assessment
- One-year supplementary payment for claimants who lose premiums due to moving from DLA to PIP
- Supplementary payments of up to four years for families with children who are impacted by the benefit cap, who are not covered by existing exemptions
- Additional resources to fund independent advice relating to welfare reform, including an independent helpline to assist sanctioned claimants to access hardship payments or appeals, to which claimants could be automatically referred
- A “cost of working allowance” to mitigate the forthcoming cut in working allowance for UC, with special weighting for lone parents to take account of the cost of childcare.
- A contingency fund for emergency payments for claimants suffering hardship due to the roll out of UC, where the hardship is not caused by any fault of the claimant
- Funding provision for the voluntary sector to develop new ways of assisting claimants

While the recommendations of the Working Group were accepted by the Northern Ireland Executive, not all of the measures have been implemented at this stage.

## **2. Prioritising principles of dignity and respect in Scotland’s new social security system**

There are ways to embed the principles of dignity and respect for social security within the Scottish legal system and to use these standards to consider how the Scottish social security system could be developed.<sup>5</sup>

There are already international legal obligations that enable an adherence to the concepts of dignity and respect in relation to social security, primarily:

- Universal Declaration of Human Rights, art.22
- International Covenant on Social, Economic and Cultural Rights, art.11
  - Article 9 ICESCR requires states to “recognise the right of everyone to social security.” The CESCR (2008) general comment: “central importance” of social security in guaranteeing human dignity,” to poverty alleviation and to the realisation of other rights. No minimum level of benefit is specified, but there is a “strong presumption” against retrogressive measures (the reduction of current levels of support) except in narrowly defined circumstances. Article 11: the right to an “adequate standard of living” - essential needs are not limited to those things physically necessary for survival, but include housing and food

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<sup>5</sup> For full details see Mark Simpson, Gráinne McKeever and Ann Marie Gray, *Social security systems based on dignity and respect* (2017: Equality and Human Rights Commission), at <https://www.equalityhumanrights.com/en/publication-download/social-security-systems-based-dignity-and-respect>

that meet the cultural and technological expectations of the individual's society as well as sustaining health.

- UN Convention on the Rights of the Child, art.27
- European Social Charter, art.s 12, 13 & 16 (sister doc of ECHR)
  - rights to social security (article 12), social assistance (article 13) and family protection (article 16). Social security is protection against specified social risks, while social assistance is a payment for the relief of “individual need,”. Only the first paragraph of article 12, requiring the establishment and maintenance of a system of social security, is accepted by the UK. A more definitive statement of a minimum level of benefit is provided.<sup>6</sup> Unemployment benefits specifically must be paid for a “reasonable period”. Article 13: anyone without “adequate resources” and lacking access to a social security scheme should receive “adequate assistance.”<sup>7</sup> Reasonable job seeking or training conditions may be set and the benefit may be reduced if a claimant fails to comply with these conditions, but not to the extent that he or she is no longer able to afford “means of subsistence.” Article 16 requires that families have access to adequate housing and an adequate income.
- UN Convention on the Rights of Persons with Disabilities, art.s 19 & 28
- European Convention on Human Rights, art.s 8 & 14
- Targets set under the Child Poverty Act 2010 – repealed under the Welfare Reform and Work Act 2016, with a possibility of Scotland reinstating these targets under the new Child Poverty (Scotland) Bill

The majority of these standards look beyond a minimum income covering housing and subsistence to a relative definition of poverty, relating to an individual's ability to participate in social and cultural activities. Other than the ECHR, the international treaties listed above have not been incorporated into UK law and so adherence to these legal standards in Scotland would be best protected by primary legislation for Scotland, based on a model similar to the Human Rights Act 1998 which incorporates the ECHR.

A consensual definition of what constitutes poverty in Scotland would help address the other facets of poverty which can demonise social security claimants and may be evident in political and media narratives about social security. Equally, a participative approach to policy development, implementation and evaluation will lend further legitimacy to the model of social security that is developed, taking account of the claimant perspective as well as operational needs.

#### *Individual benefits*

There are a number of potential ways in which dignity and respect might be considered in relation to individual social security benefits:

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<sup>6</sup> ECSR (2008: 89) expects claimants to receive at least 50% of the median income, with no less than 40% coming from the social security benefit. The remaining 10% can be in the form of social assistance top-ups.

<sup>7</sup> To meet the adequacy requirement, claimants' total income from all benefits and other sources must not be “manifestly below” 50% of the median.

### Disability and Carers

- Disability benefits (DLA/AA/PIP) and the (long term and potentially expensive) option of personalising disability benefits, with a shorter term option to keep the UK-wide disability benefits programme under evaluation with a view to developing mitigations.
- Carers benefits – raising the level of Carers Allowance to the support group payment for ESA rather than the lower rate of JSA, to reflect the average 2-year claim period for CA and the need to protect the dignity of carers. Co-producing the solution to the problem of supporting young carers in the way that provides them with the best form of assistance, rather than focusing the solution on the creation of a Young Carers Allowance to provide some financial recognition of their contribution.

### Universal Credit

- Universal Credit flexibilities around fortnightly payments, split payments between couples and direct payments to landlords can assist with the management of individual finances.

### Housing

- Dis-applying the social sector size criteria (“bedroom tax”) will bring financial certainty to claimants but looks likely to impact on the benefit cap and may require intergovernmental agreement to reconcile this clash.
- An annual uprating of the LHA may assist in raising the level of housing benefit to meet the level of rent.

### Top-up payments

- Topping up reserved benefit payments, particularly in relation to the two-child limit in child tax credits and UC (child element), ensuring these are not recovered under the UK benefit cap and bearing in mind the potential need to have further, long-term top-up payments to meet the targets in the Child Poverty (Scotland) Bill

### Administration & delivery

- Creating a Scottish social security agency to administer devolved and reserved benefits to enable cultural shifts in sanctioning behaviour and better communications with claimants to help avoid sanctionable behaviour
- Devolved employment support schemes could be offered to all claimants wishing to return to work and working directly with individual claimants to create, and evaluate, return-to-work plans, taking account of sustainability of employment
- Benefit simplification should not come at the expense of delivering the best outcomes for claimants
- Independent advice and support can be vital for claimants so an independent review of the adequacy and access to advice services for devolved and reserved benefits would be helpful, including in relation to support for challenging departmental decisions.

Some of the recommendations will involve long-term planning and investment and there will need to be an understanding of what the government’s priorities are to determine which recommendations are taken forward. We suggest that the determination of priorities should take account of where a recommendation has low cost implications, is particularly important

to the protection of dignity or contributes to another policy imperative (such as child poverty reduction).

### 3. Independent scrutiny

Parliamentary ability to scrutinise draft social security legislation will be limited, and while the Welfare Reform Committee had a strong record in investigating the impact of welfare reforms the capacity of the Social Security Committee to maintain this level of work in the face of an increased volume of secondary legislation needs to be considered. Scrutiny will be required for two main reasons:

- (i) The workings of social security come from the secondary legislation and there will be a need to ensure that principles of dignity and respect are maintained, as well as ensuring that the draft legislation can deliver the policy intent without any unintended consequences. Parliament can reject or approve secondary legislation but not amend it, and secondary legislation increasingly gives wide discretionary powers to decision makers, so there is a clear scrutiny gap for an independent, statutory committee to enhance parliamentary scrutiny and hold the executive to account. The Social Security Advisory Committee provides independent oversight of draft social security legislation for the UK, including Northern Ireland, but it will have no authority to scrutinise devolved Scottish social security legislation. It uses its oversight function to contribute to the checks and balances of constitutional scrutiny, adding value in particular to the work of the Work and Pensions Committee, the Secondary Legislation Scrutiny Committee, and that of individual MPs and Peers, and enables changes to be made to secondary legislation before it is laid in Parliament.
- (ii) The Scottish social security system will have to work in tandem with the UK social security system, and there will need to understand the interaction of the two systems that will now bring the complexity of geographical circumstances to an already complex system of assessing need. This will help avoid the collateral damage that an absence of joined-up working can create. The question of whether there should be an oversight body to review the interaction of devolved and reserved social security provision is framed by the need for coherence: the individual parts of these interconnecting social security systems must work together for claimants throughout the UK to avoid adverse, unintended consequences

The creation of a statutory committee within the Social Security Bill is relatively straightforward, but there will need to be consideration given to how a new advisory committee would assess not just devolved Scottish benefits but their interaction with reserved benefits.<sup>8</sup> Given that the UK government has rejected the proposal for the Social

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<sup>8</sup> For discussion see Gráinne 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, available at <http://uir.ulster.ac.uk/36060/1/Social%20Security%20Oversight%20JSSL%202016.pdf>.

Security Advisory Committee to review devolved Scottish legislation three broad options present themselves as possibilities for bridging the oversight gap between devolved and reserved benefits:

1. Create a Memorandum of Understanding to enable the SSAC to discharge non-statutory functions including advice to the Scottish government and the new Scottish advisory committee. The reciprocal version of this arrangement would extend to the new Scottish advisory committee being able to advise the UK government and the SSAC. There are likely to be political objections from both governments to this arrangement.
2. Have common or overlapping membership between the SSAC and the new Scottish advisory committee. There may be political obstacles relating to who would have final authority on the appointment of these common members.
3. Relying on an informal relationship between the SSAC and the new Scottish advisory committee to share information, experience and insight, through reciprocal visits and good co-operation.

The choice of model is limited but the need for joint oversight remains so that claimants in Scotland do not suffer adverse, unintended consequences arising from systems that are not working together.