

Equality and Human Rights Commission  
Research report

# Social security systems based on dignity and respect

Mark Simpson, Gráinne McKeever and Anne Marie Gray

© 2017 Equality and Human Rights Commission

Published August 2017

978-1-84206-709-3

The Equality and Human Rights Commission publishes research carried out for the Commission by commissioned researchers. The views expressed in this report are those of the authors and do not necessarily represent the views of the Commission. The Commission is publishing the report as a contribution to discussion and debate.

Please contact the Research Team for further information about other Commission research reports, or visit our website.

Post:                Research Team  
                         Equality and Human Rights Commission  
                         Arndale House  
                         The Arndale Centre  
                         Manchester M4 3AQ

Email:              [research@equalityhumanrights.com](mailto:research@equalityhumanrights.com)

Telephone:        0161 829 8100

Website:           [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

### **Access**

You can download a copy of this report in Microsoft Word and PDF formats from [www.equalityhumanrights.com](http://www.equalityhumanrights.com). If you require this publication in an alternative format, please contact the Communications Team to discuss your needs at: [correspondence@equalityhumanrights.com](mailto:correspondence@equalityhumanrights.com).

# Contents

Acknowledgements .....	5
Executive summary .....	6
Introduction.....	6
Defining dignity and respect in the context of social security systems.....	6
Delivery of social security .....	14
Protecting dignity and respect through scrutiny, oversight and review .....	15
Reviews and appeals .....	16
Conclusions .....	17
<b>1   Introduction .....</b>	<b>18</b>
<b>1.1</b> Background .....	<b>18</b>
<b>1.2</b> The new social security competences .....	<b>19</b>
<b>1.3</b> Dignity and respect in the context of social security systems .....	<b>20</b>
<b>1.4</b> Evidence base and report format.....	<b>22</b>
<b>2   Defining dignity and respect in the context of social security systems .....</b>	<b>23</b>
<b>2.1</b> Introduction.....	<b>23</b>
<b>2.2</b> Dignity and respect as a legal right.....	<b>23</b>
<b>2.3</b> European Convention on Human Rights (ECHR).....	<b>24</b>
<b>2.4</b> International Covenant on Economic, Social and Cultural Rights.....	<b>27</b>
<b>2.5</b> European Social Charter (ESC).....	<b>27</b>
<b>2.6</b> Convention on the Rights of the Child (UNCRC) .....	<b>28</b>
<b>2.7</b> Convention on the Rights of Persons with Disabilities (CRPD) .....	<b>29</b>
<b>2.8</b> Summary .....	<b>36</b>
<b>3   Embedding dignity and respect in a Scottish social security system .....</b>	<b>38</b>
<b>3.1</b> Introduction.....	<b>38</b>
<b>3.2</b> Constitutional protection of dignity and respect .....	<b>39</b>
<b>3.3</b> Protecting dignity and respect through primary legislation.....	<b>40</b>
<b>3.4</b> Summary .....	<b>50</b>

<b>4</b>   Ensuring dignity and respect in the claimant experience.....	52
<b>4.1</b> Introduction.....	52
<b>4.2</b> The devolved benefits .....	53
<b>4.3</b> Summary .....	70
<b>5</b>   Protecting dignity and respect through scrutiny, oversight and review .....	73
<b>5.1</b> Introduction.....	73
<b>5.2</b> Scrutiny and oversight .....	73
<b>5.3</b> Summary .....	83
<b>6</b>   Conclusions.....	85
<b>6.1</b> A social security system based on dignity and respect.....	85
<b>6.2</b> Dignity, respect and the new devolved benefits.....	86
<b>6.3</b> Ambition vs resources .....	87
<b>6.4</b> Concluding remarks.....	88
Bibliography .....	90
Case law.....	107
Contacts .....	109

# Acknowledgements

The authors would like to thank Neville Harris, Jim McCormick, Eleanor Deeming and Chris Oswald for their useful comments on earlier drafts of this report.

# Executive summary

## Introduction

---

The Scotland Act 2016 devolves new social security powers to the Scottish Parliament. Although its new powers are limited, accounting for only 15% of expenditure on non-pension benefits, the Scottish Government has given an ambitious set of commitments for a devolved system. “Respect for the dignity of individuals” is at the heart of this vision. Social security is recognised in international human rights law as being crucial to the protection of human dignity. While human dignity is a core concept in human rights law, it is a poorly defined one and respect has no legal definition. As a first step towards designing a social security system based on dignity and respect, then, it is necessary to establish what the two terms mean in the context of social security. The report proposes a legally-grounded definition of dignity and suggests that claimants themselves are best placed to judge whether they are treated with respect. It then goes on to discuss possible means of embedding dignity and respect as core principles underpinning social security in Scotland, ways in which the devolved powers might be used to ensure claimants are treated with dignity and respect and oversight mechanisms to ensure the emerging system develops in accordance with the principles.

## Defining dignity and respect in the context of social security systems

---

### Dignity and respect as a legal right

The LFS data were used not only to establish the relative pay of different groups but Human dignity is a core concept in human rights law, closely associated with the right to social security, but notoriously difficult to define. While respect is not defined in human rights law, it is reasonable to assume that treatment with dignity is an essential element of being treated with respect. Dignity demands protection from

inhuman living conditions, access to essential needs, autonomy and cultural participation. This implies a minimum income.

According to article 22 of the Universal Declaration of Human Rights, social security is “indispensable” to the dignity of the individual. Accordingly, the rights to social security and to an adequate standard of living are among the most relevant to the protection of dignity. These can be an inexact guide to the minimum standard of living required for the protection of dignity. Nonetheless, it is clear from article 11 of the International Covenant on Economic, Social and Cultural Rights and article 27 of the Convention on the Rights of the Child that an adequate standard of living goes beyond physical necessities for survival to include goods, services, activities and housing in keeping with the cultural expectations of a society. Articles 12, 13 and 16 of the European Social Charter set more precise minimum standards for social security benefits – an income of close to 50% of the median with family benefits of at least five per cent of the median income per child. Articles 19 and 28 of the Convention on the Rights of Persons with Disabilities add that disabled people should receive assistance with disability-related expenses and independent living.

The European Convention on Human Rights, the only human rights treaty incorporated into UK law, provides an uncertain basis for a minimum standard of living, particularly for claimants without children. The ECHR can be used to challenge discrimination in or the diminution of existing social security rights, although even here the courts are reluctant to find that Parliament exceeded its discretion to determine economic and social policy, and guarantees a right to appeal against unfavourable decisions on eligibility.

Where households including dependent children are concerned, UK law used to provide a clearer statement of a minimum acceptable income. The Welfare Reform and Work Act 2016 repealed the targets for reducing poverty set out under the Child Poverty Act 2010 but the current Child Poverty (Scotland) Bill includes provision to reinstate and strengthen these targets for Scotland.

### **Dignity and respect as subjective**

People instinctively know when they are treated with dignity and respect, and when they are not. Academic studies show that many social security claimants in the UK and internationally feel that their treatment falls some way short of dignified or respectful. The level at which benefits are paid is one important factor, with many people reporting their income is so low that meeting their essential needs becomes difficult, fairly ordinary activities like going out for a drink with friends impossible. In

many cases the greater indignity is in how claimants are portrayed by politicians, the media and the public or treated in their interactions with the system. The feeling of being treated unfairly or viewed with suspicion by case workers on permanent alert for fraud is reported as particularly demoralising. From this point of view, upholding dignity and respect is as much a matter of social attitudes, and the political and media narratives that help shape them, as one of law.

### **Embedding dignity and respect in a Scottish social security system; Constitutional protection of dignity and respect**

Human dignity is protected by the constitutions of many European countries, including Germany, Belgium and Finland. A right to social security is also commonly included in written constitutions. There is no written constitution for the UK, although the Scotland Act 1998 has been described as a 'Scottish constitution'. The Act prevents the Scottish Parliament from legislating contrary to the ECHR, but the ECHR does not include any explicit right to social security and it forms an uncertain basis for a right to a minimum income. International treaties which provide rights to social security or an adequate standard of living have not been incorporated into UK law. The UK Parliament could impose a requirement on the Scottish Parliament to comply with these international treaties but this seems unlikely to happen in the foreseeable future.

### **Protecting dignity and respect through primary legislation**

Primary legislation is therefore the best means of defining and protecting dignity and respect available to the Scottish Parliament. If access to social security and an adequate standard of living are crucial to the protection of dignity, then the incorporation of relevant provisions of human rights law into Scottish law forms a stepping stone towards a system based on dignity and respect. The UK's Human Rights Act 1998 is the strongest model for protecting these rights. A similar Act could require public authorities to ensure their actions are compatible with and courts to interpret legislation in such a way as to be compatible with social rights provisions unless prevented from doing so by primary legislation. The Scottish Parliament itself would be expected, but not obliged, to ensure legislation complies with the same set of rights.

**Recommendation: That the Scottish Government considers incorporating the European Social charter and/or International Covenant on Economic, Social**



## **and Cultural Rights into domestic legislation modelled on the Human Rights Act 1998.**

### **A charter of social security rights**

Charters of service users' rights have a mixed history in the UK. They have been praised for promoting transparency regarding citizens' rights, but criticised for lack of clarity as to whether they create any enforceable entitlements. Different models of charter are available, including a statutory document conferring rights upon the individual, a plain English restatement of existing rights or a 'soft law' instrument including some enforceable rights alongside more general statements of what good service looks like.

A charter of rights taking into account claimants' social rights, views on how they would like to interact with the system and the principles for devolved social security could help ensure users are treated with respect. The NHS Constitution for England provides a useful model for a document with legal standing in a reader-friendly format setting out the rights, responsibilities and common purpose of service users and staff. Clear consequences for breach would give any Scottish social security charter greater force.

**Recommendation: That a statutory Charter of Social Security Rights and Responsibilities is created to help ensure that the laws protecting dignity are followed. The Charter would include the principles for social security in Scotland, relevant human rights provisions and any additional rights, responsibilities or commitments agreed through consultation to apply to claimants, staff and policymakers.**

### **Building a social security system with the people of Scotland**

The right for individuals to have their voices heard on matters affecting them features in various human rights instruments. The principle that social security in Scotland should be developed *with* the people of Scotland is in keeping with this right. User involvement in the development of services is a widely held aspiration, but care must be taken to ensure that participants play a genuine role in shaping services in a way that respects their dignity and that their involvement is not merely tokenistic.

If a Scottish social security system is to be shaped by users' experiences, giving claimants the right to express their views will not be enough. Policymakers must provide an opportunity for users to express their views, listen to the views expressed

and act upon those views as appropriate. Users will require support to engage in co-production of policy alongside 'experts' and to develop and discuss their views on concepts such as dignity and respect. Best practice does not just invite comment on pre-developed proposals, but involves service users and front line staff at every step of the process, from identifying problems to proposing and implementing solutions and evaluating the changes made.

**Recommendation: That Scottish people should be involved in the development of social security policy and systems. Existing and potential users of the social security system should be encouraged and supported to advise on how the system should operate, working with the people who will be making social security policy and designing the system, and those who are responsible for making decisions on social security benefits.**

### **Ensuring dignity and respect in the claimant experience: The devolved benefits**

Statements of principles, values and rights are an important means of setting out the policy intent that will drive the use of the new social security competences. However, it is the development of the devolved benefits that will really make a difference to claimants. To protect dignity, benefits must provide an adequate level of income without excessively restrictive eligibility criteria or disproportionately severe consequences for breach of conditions. Given the emphasis on designing the new devolved system with the people of Scotland and the costs and administrative difficulties associated with the rapid transformation of all devolved benefits, recommendations in this section are not intended to form a prescriptive list for immediate implementation. Rather, a menu of options is presented with potential to increase the extent to which social security claimants are treated with dignity and respect. It is suggested that those relating to the proposed young carers' benefit, child tax credits/the child element of universal credit and performance monitoring in relation to disability benefits and employment support should be treated as the top priorities.

In terms of expenditure, disability living allowance, personal independence payment and attendance allowance are by far the largest parts of the social security system to come under devolved control. Replacement of DLA with PIP has been controversial, with up to 20% of DLA claimants are projected to lose eligibility for PIP. This is part of a wider problem with the UK's disability benefits: they are a blunt instrument for addressing disability-related costs. A benefit more adaptable to individual needs

might address this problem. IT costs could be high as DWP systems could no longer be used to administer the benefit and there would be a need for extensive involvement of disabled people in its development. More immediate improvements in the operation of existing disability benefits could be achieved through monitoring and review of the much-criticised assessment and decision making process.

**Recommendation: That the Scottish Government explore, through co-production with service users, options for greater personalisation of disability benefits.**

**Recommendation: That the assessment process for disability benefits be closely monitored and subject to an early, independent review.**

An increase in the rate of carer's allowance to a level equivalent to jobseeker's allowance and creation of a dedicated young carers' benefit are among the proposals for immediate reform of devolved benefits. A higher rate of CA is welcome, but may not go far enough to protect the dignity of carers. JSA is a short-term benefit paid at a low rate: most claims last around six months. In contrast, in almost all age groups most CA claims last at least two years. In the medium term it may be more appropriate to pay CA at the same rate as employment and support allowance for claimants in the support group, a long term benefit close to 50% higher than JSA.

The proposed young carers' benefit would reduce the short-term poverty and disadvantage experienced by young carers. It would not address – and might exacerbate – their exclusion from ordinary childhood activities and educational underachievement, which affect long term life chances. How to reconcile the young carer's need for more income with his or her right to a childhood is an ideal testing ground for the commitment to co-production of policy. Children are best placed to comment on what a right to a childhood and to dignity mean to them and young carers have an obvious contribution to make to any decision on whether a cash benefit or other forms of support is the best way to assist them.

**Recommendation: That consideration be given to a progressive increase in carer's allowance to the same level as employment and support allowance for support group claimants or an equivalent top-up to universal credit, and that this consideration is developed through co-production with carers.**

**Recommendation: That a strategy for supporting young carers through social security and/or other means be developed through co-production with young people.**

Administrative adjustments to the operation of universal credit in Scotland are taking shape in secondary legislation, including the option of fortnightly payments and direct payment of the housing element to landlords. These are designed to assist claimants in managing their income over two weeks rather a month and to avoid rent arrears. Proposals for splitting payments between joint-claimant couples can make a further contribution while protecting the autonomy of individuals who might otherwise be vulnerable to financial abuse.

The commitment to disapply the social sector size criteria ('bedroom tax') in Scotland will be of limited financial significance, given that affected claimants are already compensated through discretionary housing payments (DHPs). However, it offers greater certainty to claimants and housing associations than DHPs and consequently the recently identified problems relating to the interaction of this policy with the UK benefit cap are of some concern. Even if these can be overcome, threats to housing security remain in the continued freezing of the local housing allowance, which caps housing benefit entitlement, especially given its proposed extension to social tenants.

As the universal credit conditionality regime remains reserved, there will be no opportunity to adjust the controversial system of sanctions that can see claimants lose their benefit for up to three years for repeated failure to comply with job seeking conditions for receipt of the benefit. Administration of both devolved and reserved benefits through a Scottish social security agency would not change the law on sanctions, but might create an opportunity to improve communication with claimants, helping them comply with the conditions of entitlement and avoid a sanction. It might also be possible to develop an organisational culture that takes a more empathetic and proportionate approach to minor breaches, such as missed appointments, and less readily resorts to sanctions.

**Recommendation: That the Scottish Government consider resuming annual uprating of the local housing allowance.**

**Recommendation: That talks take place with DWP on the feasibility of administering all benefits, devolved or reserved, through a Scottish social security agency.**

The power to top up reserved benefits offers far-reaching potential to improve outcomes for claimants. The Scottish Government's commitment to child poverty reduction points to a possible early use. Restriction of eligibility for child tax credits and the child element of universal credit to two children per household from April

2017 should be an urgent area for action. The reform is projected to increase the UK's relative child poverty rate by 10% by 2020 and deepen the poverty of others. The Supreme Court's finding that the household benefit cap is contrary to the best interests of the child, protected by article 3(1) UNCRC, ensures a judicial review is all but inevitable. Choosing not to wait for this process, but using the top-up power to make good affected households' loss of income, would be a clear signal of commitment to the best interests of the child and the avoidance of measures that increase child poverty. The problems identified with the disapplication of the 'bedroom tax', with additional housing benefit entitlements potentially recovered by the Treasury due to the benefit cap, point to a need to ensure top-ups actually increase the income of eligible households. In the longer term, achievement of the Child Poverty (Scotland) Bill's targets may require further top-ups to child related benefits as the 2030 deadline approaches.

**Recommendation: That the top-up power be used to off-set the reductions of child tax credit and universal credit introduced in 2017, ensuring that top-up payments are not recovered under the household benefit cap.**

**Recommendation: That consideration is given to further, longer-term top-ups to child related benefits in support of the objectives of the Child Poverty (Scotland) Bill.**

The commitment to operate devolved employment support schemes on a voluntary basis is welcome; this will reduce Scottish claimants' exposure to sanctions, a key threat to dignity in the UK system. Further steps are required to ensure that all claimants are treated with dignity and respect. Effective support must be available to anyone who aspires to return to paid work. DWP's Work Programme has been criticised for measuring success according to criteria that encourage providers to focus their efforts on claimants who can move to employment quickly, while those with more complex needs can be written off as unlikely to return to work. Improved performance measurement should take into account entry to sustainable, good-quality employment alongside, if possible, progression in employment and achievement of the participant's own objectives. Building discussion of the claimant's wishes into the drafting of a personalised plan may help identify what the individual wants to get out of participation, and whether this is achieved.

**Recommendation: That *all* non-employed people wishing to return to the paid workforce in the future have access to employment support.**

**Recommendation: That performance indicators for employment support programmes take into account sustainability of employment and the achievement of wider claimant objectives alongside entry into employment.**

## Delivery of social security

---

Human interactions with the social security system are central to claimants' perceptions of whether they are treated with dignity and respect. Application for a benefit inevitably involves divulging personal information; certain parts of the system particularly intrude into claimants' private lives. The planned disapplication of the 'bedroom tax' in Scotland will greatly reduce the number of people required to supply very detailed information on their outgoings when applying for discretionary housing payments. Topping up child related benefits as suggested above would mean women in Scotland would not have to prove a third or subsequent child was conceived through rape in order to qualify for child tax credits or universal credit. There might also be a case for revising the ease with which information on individuals suspected of social security fraud held by public bodies and private companies can be accessed compared to other types of fraud investigations.

The complexity of social security systems is frequently identified as a barrier to individuals understanding and realising their rights. However, Australia's reforms of the 1990s show simplification can be easier to promise than to deliver. Complexity may in fact be desirable in terms of claimant outcomes, but must be balanced by access to advice services to ensure people can access the benefits to which they are entitled. While any policy changes should be preceded by a review of current advice provision, there may be merit in co-location of advice and social security services, as in Luxembourg's social welfare offices.

**Recommendation: That any plans to simplify social security rules should be secondary to ensuring the best possible outcomes for claimants.**

**Recommendation: That an independent review is carried out of the adequacy and ease of access to advice on both devolved and reserved social security in Scotland.**

## Protecting dignity and respect through scrutiny, oversight and review

---

### Scrutiny and oversight

It is down to legislators to put in place a social security system based on dignity and respect. However, the ability of parliamentarians to make sure proposed legislation meets these objectives is limited by their workload.

In social security, widespread use of secondary legislation and the extent of decision maker discretion further limit the effectiveness of legislative scrutiny. The strong record of the Scottish Parliament's Welfare Reform Committee in investigating the impact of UK welfare reform policies may be difficult for the new Social Security Committee to sustain as its workload increases under the new devolution settlement.

**Recommendation:** That the Scottish Parliament monitors the impact on committee scrutiny and member workloads of additional devolved functions.

At UK level, the scrutiny gap is partly filled by the Social Security Advisory Committee. This independent, expert body advises the Secretary of State on policy proposals and pursues an independent research agenda. Although responsibility for social security is now shared, the Scotland Act 2016 prevents the Scottish Government availing of the SSAC's expertise. A Scotland-specific expert committee will be required to fill the gap, but leaves unresolved the problem of where an expert, impartial view on the interaction of Scottish and reserved benefits will come from. An early task for any new Scottish committee will be to grapple with this challenge along with the SSAC and the two governments.

**Recommendation:** That an independent expert advisory committee on Scottish social security be established, taking account of the need to include a wide range of stakeholder expertise in the constitution of the committee.

**Recommendation:** That the Scottish Government, DWP, the UK's Social Security Advisory Committee and a new Scottish oversight committee work together to develop mechanisms for the effective oversight of the interaction of reserved and devolved social security systems.

A further means of holding the Scottish Government to account for its pledge to build a social security system based on dignity and respect involves harnessing the energy of the independence referendum for a sustained drive for social justice. Even

if – as other states have found – public education in human rights proves challenging, involvement of civil society in developing understandings of dignity and respect and ensuring they are put into practice in the social security system would be in keeping with the promise to develop policy with the people of Scotland.

**Recommendation: That co-production methods should be used for ongoing, holistic scrutiny of dignity and respect in Scottish social security.**

## Reviews and appeals

---

Even a social security system perfectly designed to promote dignity and respect requires oversight to ensure it does so in practice. Inevitably, mistakes will be made and there will be a need to challenge decision-making – and to ensure lessons are learned from successful appeals. A wide range of review mechanisms can comply with the right to a fair hearing. This means the three main processes used in Scottish social security – internal reconsideration, appeal to a tribunal and review by the Ombudsman – are all potentially compatible with the protection of dignity. Whichever method is adopted, it is important that it delivers substantive justice – the correct decision – and procedural justice – the opportunity for appellants to participate effectively in challenging decisions and uphold their rights. Given the complexity of social security law and the potentially intimidating nature of the process, this will often require access to expert advice and/or representation. Processes can be put in place to help decision makers learn from appeals, but an organisational culture that is *willing* to learn is equally important.

**Recommendation: That claimants seeking to avail of any review or appeal mechanism are signposted to independent expert advice and the Scottish Government reviews whether current access to advice is adequate.**

**Recommendation: That practices are developed to ensure feedback and learning between review and appeal processes and decision makers, including the consideration of recommendations developed by the Scottish Tribunals and Administrative Justice Advisory Committee.**

**Recommendation: That the Scottish Courts and Tribunals Service and Scottish Public Services Ombudsman report annually on how their handling of social security appeals adheres to the objective in the Tribunal Procedural Rules to deal with cases fairly and justly, and with their duties under the Human Rights**



## **Act 1998, any new statutory protection of dignity, respect and social rights or Charter of Social Security Rights and Obligations.**

Tribunals and internal reviews can rectify individual incorrect decisions. Where the challenge is to an underlying policy, judicial review will remain the appropriate mechanism. Despite the Human Rights Act 1998, judicial review has been a hard road for anyone seeking to challenge social security regulations because of the low profile of social rights in the ECHR and judges' reluctance to challenge Parliament's decisions on social policy. Embedding the ESC or ICESCR in Scottish law, as recommended above, could provide potent new weapons to ensure dignity is upheld in policy as well as individual decision making, as in Belgium and Germany amongst other states.

## **Conclusions**

---

In promising a social security system based on dignity and respect, the Scottish Government sets itself a daunting task. It must now clarify how it understands the two concepts, devise a means of embedding them as core principles for Scottish social security, assess their implications for the evolution of the devolved benefits and provide mechanisms to hold it and case workers to account in their application of the principles – in collaboration with the people of Scotland. International examples and the academic literature point to many possible means of doing so, but still leave tough decisions to be made about which methods should be adopted and which reforms prioritised. As Northern Ireland's struggles with its own post-2012 welfare reform process demonstrate, ambition to do better in social security can run afoul of financial considerations – and some of the recommendations imply significant investment. 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), it is likely to rise up the priority list. The Scottish Government must now bring forward *its* vision for an approach to social security based on dignity and respect and explain why its chosen course of action offers the best means of doing so.

# 1 | Introduction

Devolution of responsibility for parts of the social security system to Scotland represents arguably the biggest shift in responsibility for UK citizens' economic welfare since the foundation of the modern welfare state following World War 2. The Scottish Government (2016a) has pledged to establish respect for the dignity of individuals as a founding principle of an emerging devolved social security system. While this commitment will undoubtedly be welcomed by the many researchers who argue that claimants' dignity has too often been neglected in reforms of recent years (Simpson, 2015a), it has not precisely defined how it understands these principles (EHRC, 2016). Although dignity is a core term in human rights law, how it should be interpreted is unclear. This report explores what dignity and respect mean in the context of social security and proposes some steps that might be taken to deliver on the pledge to develop a Scottish system based on respect for dignity. It does so by examining human rights provisions closely linked with the protection of dignity and how users of the social security system understand dignity and respect. Examples of practice in the UK and other welfare states that Scotland might learn from or avoid are discussed and specific recommendations made for the development of policy within the new devolved powers. Broadly, it is suggested that social security claimants should have enough income to reach an acceptable standard of living and have a say in shaping the devolved system. They should not face excessively strict conditions for receipt of this support or stigmatisation for their use of the system.

## 1.1 Background

---

The roots of this project are in the 2014 referendum on Scottish independence and surrounding debate about Scotland's future. Both pro-independence and pro-union campaigns deployed arguments centred on social justice, fairness and equality and whether these could be better advanced within the UK or an independent state (Mooney and Scott, 2015). This fits with a long standing portrayal of Scotland – or, at least, its political representatives – as more social democratic, more concerned with social justice and more egalitarian than (some) other parts of the UK (Curtice and

Ormston, 2011). Social security was central to the debate. The pro-independence campaign suggested that elements of the UK government's post-2010 reforms would quickly be reversed, paving the way to a new system that would "treat people with dignity and respect" (Expert Working Group, 2014: ix).

Prior to the referendum, responsibility for social security in Great Britain rested almost entirely with the UK government.<sup>1</sup> The Welfare Reform Act 2012 transferred minor powers – to provide discretionary assistance (the Scottish Welfare Fund) and help with council tax – to devolved and local governments. Scottish local authorities used their existing power to make discretionary housing payments to protect social tenants from loss of income due to housing benefit reforms (Berry, 2014). Otherwise, the coalition government maintained the position of its Labour predecessor that it was "deeply committed" to a single social security system as part of the UK's social union (Scotland Office, 2009: 4). The referendum prompted a sudden change in tack from the main UK parties. A single opinion poll in the closing stages of the campaign suggesting that the vote might go in favour of independence was followed by the 'vow' to devolve further powers in fields including "welfare" if Scotland remained within the union (Clegg, 2014). Following the referendum, the UK Government (2015) endorsed the proposals of the Smith Commission (2014) for a set of new devolved competences.

## 1.2 The new social security competences

---

Scotland operates a 'reserved powers' model of devolution, meaning that *all* functions are devolved unless reserved to the UK government by the Scotland Act 1998. In the original settlement, social security appears as a reserved matter. Following the 2016 amendments, some elements of social security policy now fall within devolved competence. These are:

- disability, carers' and industrial injuries benefits
- payments towards maternity, funeral and energy costs
- top-ups to reserved benefits
- discretionary housing payments
- short-term or occasional discretionary and emergency assistance
- food aid to pregnant women, mothers and children
- power to create new benefits within the scope of devolved matters

---

<sup>1</sup> Social security has been a devolved matter in Northern Ireland since 1921, but the regionally administered system is almost identical to that in Great Britain

- the housing element of universal credit
- payment arrangements for universal credit
- employment support programmes for unemployed and disabled people
- top-up and discretionary payments or new devolved benefits may *not* be used to negate the suspension of a reserved benefit by DWP

The extent of devolved social security competences remains limited, accounting for about 15% of non-pension expenditure. With the exception of the housing element of universal credit, the rates and conditions for receipt of the main income replacement benefits will remain under DWP's control. Nonetheless, an ambitious vision for a devolved system has been set out. While the focus of this report is on dignity and respect, it is worth highlighting that these form part of a wider framework of principles on which devolved social security should be based (Scottish Government, 2016a: 3):

- Vision – social security is important to all of us and able to support each of us when we need it
- Principle 1 – social security is an investment in the people of Scotland
- Principle 2 – respect for the dignity of individuals is at the heart of everything we do
- Principle 3 – our processes and services will be evidence based and designed with the people of Scotland
- Principle 4 – we will strive for continuous improvement in all our policies, processes and systems, putting the user experience first
- Principle 5 – we will demonstrate that our services are efficient and value for money

These five principles are reflected (with slight tweaks to the wording) in the Social Security (Scotland) Bill, with the addition of a further two:

- Social security is itself a human right and essential to the realisation of other human rights

The Scottish Ministers have a role in ensuring that individuals are given what they are eligible to be given under the Scottish social security system

### **1.3 Dignity and respect in the context of social security systems**

---

Principle 2 emphasises “respect *for* the dignity of individuals” rather than respect as a standalone objective. However, the consultation subsequently states that claimants

should be treated with dignity *and* respect, reflecting the previous language of the Expert Working Group (2014). Consequently, the brief for the research project was to investigate options for the creation of “social security systems based on dignity and respect.” Human rights principles can be used to develop a definition of dignity in the context of social security, but respect has no such legal meaning. This does not mean the concept of respect is of no value. Both respect and dignity have an everyday meaning: individuals instinctively know when they are treated with dignity and respect, and when they are not. Research on the experiences of social security claimants, using claimants’ own words where possible, gives some insight into what it means to be treated with respect from their perspective.

Social security is recognised in human rights law as being “of central importance in guaranteeing human dignity” (CESCR, 2008). A definition, then, must in part be based on the right to social security, protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Social Charter (ESC). Neither of these treaties is directly enforceable in the UK, and neither contains a precise definition of dignity. Attention must therefore turn to the wider human rights landscape, notably the European Convention on Human Rights (ECHR), which does form part of domestic law.<sup>2</sup> Again, a precise definition is absent, but dignity is recognised as the “very essence” of the Convention (*Pretty v UK* [2002]). It will be argued that protection of dignity requires a minimum standard of living including the ability to meet one’s essential needs, a measure of autonomy and some level of cultural participation. A certain level of income is necessary for each of these. It is impossible to definitively state *what* level of income is in keeping with a dignified standard of living, but a range of options are set out in chapter 2. Empirical studies find claimants also link dignity and respect with a minimum income, but human interactions with and how people feel they are treated by those who run the social security system – from the Secretary of State to Jobcentre Plus staff – are also important (Patrick, 2014; Edmiston and Humpage, 2016).

---

<sup>2</sup> While the status of the ECHR will not be affected by withdrawal from the European Union, the Conservative Party (2014) entered the 2015 general election with a commitment to repeal the Human Rights Act 1998, which incorporates the Convention into UK law. Current indications are that this project is on hold until completion of the ‘Brexit’ process (Hansard, 2017). The party’s most recent manifesto indicated that it would “consider our human rights legal framework when the process of leaving the EU concludes” (Conservative Party, 2017: 37)

## 1.4 Evidence base and report format

---

This report has been compiled through desk-based research, drawing on the authors' previous work in relevant fields. This covers social security devolution (Birrell and Gray, 2014; Simpson, 2015b; 2017), human rights and social security (Simpson, 2015a), social rights (McKeever and Ní Aoláin, 2004; Simpson, 2015c), administrative justice (McKeever, 2010; 2013), the governance of social policy (Birrell and Gray, 2016; McKeever, 2016) and experiences of poverty (Gray and Carragher, 2007). Findings also draw on legal judgments, the reports of international human rights bodies and academic literature. The research was entirely desk-based and raised no significant ethical issues.

The report presents the authors' analysis of these sources, their conclusions and recommendations. Chapter 2 focuses on definitions of dignity and respect in the context of social security, drawing on the legal sources and claimants' experiences. Subsequent chapters examine ways in which dignity and respect have been, or could be, embedded in social security systems in the UK and internationally. Recommendations are made for how Scotland might seek to do so in the exercise of its new powers. This includes ways of establishing dignity and respect as core principles of Scottish social security (chapter 3), their reflection in the development of new devolved benefits (chapter 4) and their protection through scrutiny of policymaking and review of decisions (chapter 5). Examples of good (and sometimes bad) practice from the UK and other countries are highlighted along with academic discussion of what good practice might look like. Each section includes specific recommendations for the Scottish Government to consider as it pursues its ambition of a social security system based on dignity and respect.

## 2 | Defining dignity and respect in the context of social security systems

### 2.1 Introduction

---

The first step towards a social security system based on the principles of dignity and respect must be to define the two concepts. Dignity is a much-used term in human rights law, yet a notoriously ill-defined one (Dupre, 2009). Nonetheless, international human rights law and domestic law strongly suggest that dignity requires a minimum standard of living for the claimant and his or her household, absence of discrimination and rights to a fair hearing. Some uncertainty remains about *what* minimum standard of living is required, but again some (conflicting) indications are available from proposed Scottish legislation, UK law, international law and social research. Respect has no such legal definition – but neither is dignity a solely legal concept. Research with social security claimants allows their views on what it means to be treated with dignity and respect to emerge. If a legal solution is required to protect dignity in accordance with human rights law, a *cultural* change may be just as important to ensuring social security claimants feel they are treated with dignity and respect.

### 2.2 Dignity and respect as a legal right

---

Dignity is a core concept in human rights law, appearing in article 6 of the Declaration of the Rights of Man and the Citizen (1789) and the preamble to the Universal Declaration of Human Rights (UDHR, 1948). However, dignity appears less often as a right in itself (article 1 CFR is one example), than as a wider concept whose protection is the object of all human rights. A more cynical view holds that dignity “features so prominently in the international human rights instruments because it is wide enough to mean nothing” and consequently cannot be considered a genuine right (Friedman, 2016: 390; O’Mahony, 2012). The term ‘respect’, when it appears in the human rights literature, tends to be used in the context of respect for

human rights rather than the individual. However, in the ordinary meaning of both words, it seems reasonable to assume that treating a person with dignity is a necessary element of treating him or her with respect.

It is clear that social security has a contribution to make to the protection of dignity. The UDHR identifies social security as one of the social and economic rights “indispensable” to dignity; the CESCR (2008) general comment on the right to social security agrees that “the right to social security is of central importance in guaranteeing human dignity.” It plays this role not only by supporting a minimum standard of living, but by enabling the effective realisation of other rights. Many authors note that opportunities for political participation and access to the legal system can be limited for people with fewer financial resources (King and Waldron, 1988; Lister, 2005; Merrick, 2017). This section draws on various human rights instruments to propose some criteria that a social security system based on dignity and respect should meet.

### 2.3 European Convention on Human Rights (ECHR)

---

The ECHR forms a logical starting point as the only international human rights agreement to be unambiguously enforceable in the Scottish courts. The Human Rights Act 1998 requires public authorities in the UK to act in accordance with the ECHR rights unless prevented from doing so by Act of Parliament. Courts must interpret legislation and apply the common law in accordance with the ECHR unless it is impossible to do so. If UK legislation *cannot* be read in such a way as to be compatible with the ECHR, the court must issue a declaration of incompatibility, although the affected legislation remains in force unless changed by Parliament. In the case of devolved legislation, under the Scotland Act 1998 the Scottish Parliament lacks competence to legislate contrary to the ECHR; incompatible legislation is therefore invalid (*Salvesen v Riddell* [2013]).

The main focus of the ECHR is on civil and political rights, although it is also used in defence of social and economic rights. Shields (2014: 2) notes that a number of its rights, notably the right to private and family life (article 8), “can be violated through extreme poverty.” Article 8 does *not* confer any absolute right to cash benefits upon adults or set any minimum standards for social security, but may imply a right to financial support for children (*Anufrijeva v London Borough of Southwark* [2003]). Protocol 1, article 1 (P1-1) protects the peaceful enjoyment of one’s possessions and



is again closely linked with social security: any existing entitlement to a benefit is a possession protected by P1-1.

Again, though, the article has nothing to say about the minimum level of social security provision a state should make available. In practice, then, article 8 and P1-1 are most useful as a means of challenging reduction of or interference with an existing benefit entitlement or (in conjunction with article 14) any discriminatory effects of social security regulations. Article 6 (the right to a fair hearing) sets some procedural requirements that will be relevant to any challenge to a decision on social security entitlement, whether on human rights or other grounds. Article 3, which protects people from inhuman or degrading treatment, is an alternative source of an implied right to a minimum standard of living, although a very low one.

The word “dignity” is mentioned only in protocol 13 to the ECHR, concerning the abolition of capital punishment. Nonetheless, the European Court of Human Rights (ECtHR) recognises the protection of human dignity as the “very essence” of the Convention (*Pretty v UK* [2002]). McCrudden (2008) argues that the protection of dignity requires protection from inhuman and degrading living conditions, the ability to access essential needs, autonomy and protection of cultural identity. McCrudden bases each of these rights on article 3 or 8. With the possible exception of protection from inhuman and degrading treatment, which can be achieved through charitable assistance (*R (Limbuella) v Secretary of State for the Home Department* [2005]), each is also intimately linked to access to social security. Meeting one’s essential needs, the ability to make autonomous choices and possibly cultural participation (although education and other free activities will go some way towards fulfilling this right) all depend on a minimum level of income. Indeed, according to relative definitions of poverty, social and cultural participation are themselves essential needs (DWP, 2003).

What, legally speaking, constitute essential needs is less clear. Challenges to social security law and practice based on the ECHR have tended to focus on the reduction of or tightening of conditions for access to existing entitlements rather identifying than a minimum acceptable level. A rather minimal definition can be drawn from s95 of the Immigration and Asylum Act 1999, which provides for support for asylum seekers to ensure access to “essential needs.” The Asylum Support Regulations 2000 clarify that these consist of rent, local taxes, utility bills, furniture, food, clothing, travel to appointments, a means of contacting the emergency services and the education and socialisation of children. In *R (Refugee Action) v Secretary of State for the Home Department* [2014], it was held that household cleaning products, nappies, formula milk, certain non-prescription medication and a minimum of social

participation are also essentials, and that communication with family and legal representatives and writing materials *may* be. The income required to ensure access to these items is not clear, but the weekly allowance prior to the judicial review – £36.62 for a single adult, £43.94 for a lone parent or £72.50 for a couple with additions for children, babies or pregnancy, on top of the provision of furnished accommodation with council tax and utility bills paid – was held to be *inadequate*. Further, in *R(A) v National Asylum Support Service* [2004] it was recognised that essential needs include, where appropriate, any additional support required as a result of disability. German law similarly provides that asylum seekers must receive specified essentials (food, clothing, housing, housing maintenance, energy), or equivalent income in cash or vouchers, plus a monthly cash allowance to cover “personal needs,” plus additional assistance during pregnancy and such discretionary benefits as may be “indispensable in the individual case” (Gesetz zur Neuregelung der Leistungen an Asylbewerber des 30. Juni 1993).

Some of the other human rights agreements to be discussed suggest a higher income is required. This is also true of the Child Poverty Bill currently before the Scottish Parliament, which proposes the reinstatement in Scotland of the former UK child poverty targets.<sup>3</sup> Under these, no more than a small minority of children should live in households in which:

- income is below 60% of the median in the present year
- income is below 60% of the median in 2010-11 (adjusted for inflation)
- income is below 70% of the median and the household cannot afford the essential goods and services on the official measure of material deprivation
- income has been below 60% of the median for three of the last four years

Social research to identify what goods and services are widely accepted as essential to a normal lifestyle in modern society suggests that an adequate standard of living requires a higher income yet – above 80% of the median for households including children (Davis *et al.*, 2016). Living in remote parts of Scotland means is associated with further increases in living costs compared to a major UK urban centre – up to 25% more for a couple with two children in a remote rural town, or 32% in an island settlement (Hirsch *et al.*, 2013).

---

<sup>3</sup> In some respects the proposed Scottish targets are more demanding: the proposed acceptable level of persistent poverty is set at a lower level (five per cent of children, compared to seven per cent under the Child Poverty Act 2010) and poverty levels will be measured after housing costs, when they tend to be higher – see Scottish Government (2016b)

## 2.4 International Covenant on Economic, Social and Cultural Rights (ICESCR)

---

The remaining human rights instruments to be discussed have not been incorporated into UK law, and therefore are not enforceable in the domestic courts. However, the UK does accept their provisions as legally binding obligations and they can be used by courts to shape their interpretation of the ECHR rights. They must therefore be taken into account in any attempt to establish a social security system in which the protection of dignity is a primary objective.

Article 9 ICESCR requires states to “recognise the right of everyone to social security.” The CESCR (2008) general comment stresses the “central importance” of social security in guaranteeing human dignity,” to poverty alleviation and to the realisation of other rights, notably rights to family support, disability services and health promotion. Universal coverage should be available against specified social risks including healthcare needs, sickness, old age, unemployment, employment injury, family and child support, maternity, disability and bereavement. 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. The right to an “adequate standard of living” in article 11 suggests that the question of what constitute essential needs and the level of income required to access these is also of relevance to article 9. It is clear that essential needs are not limited to those things physically necessary for survival, but include housing and food that meet the cultural and technological expectations of the individual’s society as well as sustaining health. The cost of social and cultural participation is also argued to form part of an adequate standard of living (World Bank, 1990; CESCR, 1991; CESCR, 1999).

## 2.5 European Social Charter (ESC)

---

The ESC is the sister document of the ECHR, with an explicit focus on social and economic rights, including rights to social security (article 12), social assistance (article 13) and family protection (article 16). Social security refers to specific schemes offering protection against specified social risks, while social assistance is a payment for the relief of “individual need,” however caused (Committee of Independent Experts, 1996). The UK social security system includes both social security and social assistance benefits. Protection against specified risks is provided

by schemes including child benefit (care of children) and personal independence payment (disability), while universal credit is a general social assistance benefit for the relief of need.

Only the first paragraph of article 12, requiring the establishment and maintenance of a system of social security, is accepted by the UK. This has much overlap with the requirements of article 9 ICESCR, including protection of a “significant percentage” of the population against healthcare costs, sickness, unemployment, old age, employment injury, family benefit and maternity. A more definitive statement of a minimum level of benefit is provided. 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. Unemployment benefits specifically must be paid for a “reasonable period” and include an initial period in which the claimant can refuse employment not matching his or her skills or experience.

Article 13 requires that anyone without “adequate resources” and lacking access to a social security scheme should receive “adequate assistance.” To meet the adequacy requirement, claimants’ total income from all benefits and other sources must not be “manifestly below” 50% of the median. 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.” The article 13 right extends to lawful migrants from other ESC contracting states, free from any condition regarding duration of residence (ECSR, 2008).

Article 16 requires that families have access to adequate housing and an adequate income (calculated with reference to the median and adjusted in line with inflation), and that the views of families should be taken into account in the development of family policy. The ECSR tends to find states comply with the article if they offer family benefits of at least five per cent of the median income per child.

## **2.6 Convention on the Rights of the Child (UNCRC)**

---

The UNCRC confers rights upon children and upon the family as (according to the preamble) the “natural environment for the growth and well-being of... children.” Its status in UK law is ambiguous and varies depending on location. Part 1 of the Children and Young People (Scotland) Act requires Scottish Ministers to consider and, “if they consider it appropriate,” take steps to “secure better or further effect... of

the UNCRC requirements.” Under s1 of the Rights of Children and Young People (Wales) Measure 2011, Welsh Ministers are required to have “due regard” to the Convention in *all* their actions. In England and Northern Ireland, only article 3(1) is incorporated into domestic law, and only in certain contexts, for example immigration, health, criminal justice, social services and adoption. Despite this ambiguity, some judges in *R (SG) v Secretary of State for Work and Pensions* [2015] were prepared to consider the compatibility of UK social security regulations with article 3(1). To date, though, the majority position remains that the UNCRC is not directly enforceable in the domestic courts.

Article 3(1) requires that in any action concerning children’s welfare, the best interests of the child must be a primary consideration – a principle reiterated in respect of disabled children by article 7 CRPD. The interests of the child (determined on a case-by-case basis) do not have to be *the* decisive or primary consideration, but must be “appropriately integrated and consistently applied” in the policy- or decision making process (CRC, 2013). This means that other policy objectives can also be primary considerations, and may outweigh the interests of the child in shaping the final decision. The best interests of the child are closely related to the right to respect for family life; the relevance of article 3(1) to interference with the right in article 8 ECHR is discussed below.

Articles 26 and 27 are also relevant to assessing the adequacy of social security. These recognise, respectively, the child’s right to benefit from social security and to an adequate standard of living for “physical, mental, spiritual, moral and social development.” Harris (2000) notes that, again, parallels can be drawn between relative definitions of poverty and this vision of an acceptable standard of living encompassing all things needed for development into an adult “fully prepared to live an individual life in society.” While primary responsibility for child development rests with parents and other carers, the state must take “appropriate measures to assist” through “material assistance and support programmes,” presumably including social security. Article 12, under which the child’s views should be taken into account in matters affecting him or her, suggests children themselves have a role to play in defining their essential needs.

## **2.7 Convention on the Rights of Persons with Disabilities (CRPD)**

---

Protection of “the rights and dignities of persons with disabilities” is the stated purpose of CRPD. Article 28 guarantees disabled people the right to an adequate

standard of living and to access social security, including assistance with disability-related expenses. This article should be read in conjunction with article 19, which requires states to recognise and work to fulfil the right of disabled people to “live in” and enjoy “full inclusion and participation in the community.” Income will be one, although not the only, important factor in enabling individuals to fully participate in their communities.

### **2.7.1 The common law**

Explicit references to the concept of dignity were rare in the UK courts prior to the Human Rights Act 1998. However, the prospect of repeal of the Act has led to a recent upsurge in interest in the possibility of its substitution with a “renaissance of common law rights” (Bowen, 2016) Even if the *term* dignity would relatively recently have been greeted with “embarrassed silence” in the UK courtroom, Friedman (2016: 391, 394) argues that certain common law rights are crucial to its protection. Foremost among these is access to justice – “the right to be heard, the duty to give reasons, open justice, natural justice, and equality before the law.” It is further suggested that freedom from destitution, “unnecessary violation of personal autonomy” and “automatic unequal treatment” are “rights are so basic as to be unnecessary to resort to the ECHR” for their protection. This analysis forms a possible common law basis for a minimum set of rights on which a social security system that treats its users with dignity should be based, in which a minimum standard of living again plays a role.

### **2.7.2 Upholding dignity in social security**

The right of review or appeal is crucial to ensuring that rights on paper are enjoyed in practice. Article 6 ECHR and article 14 of the International Covenant on Civil and Political Rights guarantee individuals the right to a hearing before an impartial tribunal when there is a dispute about their rights or obligations. More narrowly, article 13 ESC provides for an “effective right of appeal” following any unfavourable decision about the award or continued payment of a social assistance benefit (ECSR, 2008). Since the ESC and ICESCR do not form part of UK law, citizens cannot directly challenge a decision or a regulation on the grounds of non-compliance with the right to social security. A judicial review *can* be brought for alleged non-compliance with the ECHR rights, and decisions on individual eligibility can be challenged before a tribunal (often after internal reconsideration by the decision making authority).

Although social security entitlements are protected to an extent by article 8 and P1-1 ECHR, the Convention does not specifically provide for a minimum level of social security. It does provide a means of challenging a decision that reduces or interferes with an individual's existing rights. Since neither article 8 nor P1-1 is an absolute right, interference is permitted as long as it is aimed at achieving a legitimate objective, provided for by law and there is a relationship of proportionality between the objective pursued and the interference with the right. The European Court of Human Rights is traditionally reluctant to interfere with states' discretion to decide their own economic and social policy, and the UK courts similarly recognise that Parliament has a relatively free hand in this area. Therefore, once a legitimate objective of economic or social policy has been established, any interference with the right will normally only be unlawful if it is "manifestly without reasonable foundation." Reducing public spending, promoting job seeking and promoting 'fairness' (as defined by Parliament) are recognised in *R (SG) v Secretary of State for Work and Pensions* [2015] as legitimate aims capable of justifying reduction of social security entitlements.

At the level of the individual decision, P1-1 reinforces the position that a social security entitlement should not be reduced, suspended or terminated without a fair hearing (*Hentrich v France* [1994]). An assessment of whether a hearing *is* fair will take into account many of the requirements of article 6. These include the right to understand the reasons for the decision, the opportunity to prepare a challenge and to participate in the hearing, having received legal assistance if desired. If a benefit is suspended or reduced, for example as a result of breach of the conditions for its award, this should not prevent the claimant accessing his or her "means of subsistence" (article 13 ESC), nor force children to face negative consequences as a result of their parents' actions (article 2(2) UNCRC).

### 2.7.3 Discrimination

The principle that no one should face discrimination in the enjoyment of their human rights is shared by all the treaties mentioned. In addition, specific treaties aim to eliminate discrimination on the basis of race and gender. Discrimination on the basis of specified characteristics (age, disability, gender reassignment, marriage or civil partnership, race, religion or belief, sex and sexual orientation) is also prohibited by part 2 of the UK's Equality Act 2010.

Article 14 ECHR, article 2(2) ICESCR and article 2(1) UNCRC each prohibit discrimination in the enjoyment of the rights conferred by the treaty on the basis of a long and non-exhaustive list of characteristics. The preamble to ESC refers only to

discrimination on the basis of “race, colour, sex, religion, political opinion, national extraction or social origin.” CRPD is most concerned with the prevention of discrimination against people with disabilities, described as “a violation of the inherent dignity and worth of the human person.” However, the Convention also highlights that disability-related disadvantage can be compounded by discrimination based on other characteristics. In practice, not all types of discrimination are treated alike. Gender-based discrimination is taken particularly seriously in international law, forming the focus of article 3 ICESCR, article 6 CRPD and an entire treaty – the Convention for the Elimination of all forms of Discrimination Against Women. Both CEDAW and the International Convention on the Elimination of all forms of Racial Discrimination specifically prohibit discrimination in access to social security. As a rule, characteristics about which the individual is recognised to have no choice, such as gender, race, disability or sexual orientation, are treated as “suspect grounds” for discrimination, which can only be justified by “very weighty reasons.” A court can be expected to take a less firm stance against discrimination based on something under the control of the individual, for example between married and cohabiting couples (*EB v France* [2008]).

The non-discrimination provision in article 14 ECHR can only be used in conjunction with one of the other rights conferred by the treaty. Social security cases normally involve article 8, P1-1 or often both. Interference with these rights can be justified if it is in accordance with the law, in pursuit of a legitimate objective and proportionate to the legitimate objective pursued. Discrimination in the enjoyment of these rights can therefore be justified on the same grounds, with the legislature’s wide discretion in economic and social policy equally applicable. Discrimination in pursuit of a legitimate objective, then, will only be unlawful if “manifestly without reasonable foundation.” This creates a problem for cases concerning discrimination against women (which must normally be justified by a very weighty reason) in their social rights (normally justified unless manifestly without reasonable foundation). Whether the irresistible force or the immovable object should prevail has not been satisfactorily resolved: in *R (SG) v Secretary of State for Work and Pensions* [2015], Lord Reed cites a previous judgment by Lady Hale as authority for the proposition that the manifestly without reasonable foundation test takes precedence, yet Lady Hale appears to take the opposite position.

#### **2.7.4 Dignity and respect as subjective**

People instinctively know when they are treated with dignity and respect and, perhaps more readily, when they are not. Views may be shaped by the standard of



living claimants enjoy, the conditions associated with receipt of a benefit, how the decision making process works, how claimants feel they are viewed by society or simply by interactions with individual staff members. The experience panels being established by the Scottish Government and welfare rights organisations will be well placed to advise on what dignified and respectful treatment looks like from the claimant's perspective. However, it is useful to refer to recent academic studies that suggest many social security claimants in the UK and internationally feel that their treatment falls some way short of dignified. At the same time, the subjective view of dignity and respect may be quite an *individual* view. For example, a training scheme or advice from a case worker on job seeking may seem useful to one claimant, patronising to another and dehumanising to a third.

### **2.7.5 An acceptable standard of living**

The first conclusion to be drawn from the research is that a life in dignity requires a certain income and standard of living. Successive research reports find claimants feel they are not “entitled to a quality of life” (Edmiston, 2017). Patrick's (2014: 710-3) interviewees describe themselves “just existing,” or “living... like a pigeon... you're just there pick pick pick, and that's it.” Women in particular describe surviving on toast so that their children can get a proper meal and expectations can be lowered to the extent that one interviewee claims to be doing “all right” despite regularly having to drink sour milk and eat mouldy bread. All too often, “simply providing for yourself” becomes a “luxury” (Edmiston and Humpage, 2016).

While inability to afford life's essentials is a recurring concern, the psychological and social effects of poverty are often the greatest threats to dignity. It might be possible to access physical essentials through a food bank or thanks to the goodwill of family and friends, but doing so “doesn't make you feel very good about yourself” (Dwyer *et al*, 2016). In her account of a period as a volunteer-researcher in a foodbank, Garthwaite (2016: 135) recalls that “the most difficult part” of the experience “was sitting opposite someone who felt embarrassed at walking through the doors of the foodbank,” with many users also ashamed of the state of their hair, clothing or teeth as a result of poverty. The “embarrassing” experience of being unable to “do the things that you want to do,” like go out for a drink with friends, and lack of access to credit were further evidence to some of their status as second-class citizens (Patrick, 2016: 252; Gray and Carragher, 2007: 9; Edmiston and Humpage, 2016).

### **2.7.6 Portrayal as a ‘scrounger’**

Research indicates that many people who come into contact with the social security system feel they are automatically treated as lesser members of society as a result. Research shows that this message often comes from political parties and spokespersons. Jensen and Tyler (2015: 470) suggest that political leaders internationally (along with the media) have deliberately worked to create “disgust” towards claimants so as to build support for a less generous, more disciplinary welfare state (see also Wiggan, 2012). This “valorisation of paid employment” and “vilification and stigmatisation of benefit claimants” reduces solidarity with the poor and unemployed, colouring conversations in the pub, on the bus, on social media and even with family members, until “it’s all over Facebook... like you’re summat they stood on” (Patrick, 2014: 706; 2016: 251).

Edmiston and Humpage’s (2016) research participants observe the irony of wealthy, powerful individuals passing judgement on and seeking to micromanage the lives of some of the poorest members of society. “What,” asks one interviewee, “would [the New Zealand prime minister] know about poverty with \$40 million in his hand?” Others argue that although they may not be in paid employment, they make a valuable contribution to society through parenting or voluntary work. However, a significant group reports that parenting and volunteering are increasingly undervalued, that the system pushes them into work that “doesn’t agree with my ethics” or even fail to take up support to which they are entitled because of stigma (Finn and Goodship, 2014). While there is some evidence that the “anti-welfare narrative” is less central to the political narrative in the devolved parts of the UK, it is less clear that public opinion is any more sympathetic towards the unemployed poor (Simpson, 2017).

### **2.7.7 Interaction with the social security system**

Negative portrayals of social security claimants not only form part of political rhetoric and everyday conversation, but have been found to have a real impact on interactions with the staff who administer the system. Research participants report being treated with suspicion or disbelief when making an application, undergoing an assessment or producing evidence of compliance with conditions for receipt of benefit. Claimants are one moment portrayed as cunning, calculating individuals, “streetwise enough to be able to play the system to their advantage” despite its complexity (McKeever, 2012: 471), the next as feckless, treated “like rubbish 'cause we are on benefits” (Patrick 2016: 248). Accordingly, it becomes acceptable to “talk down to,” “humiliate” or “belittle” claimants (Edmiston, 2017; Edmiston and

Humpage, 2016), necessary to police their activities through intrusive interviewing about their medical history and relationships, monitoring of online job searches or a heavy security presence in social security offices (Harris, 2014a; Wright and Stewart, 2016). Verbal confrontation with frontline staff is one possible outcome (Dwyer *et al*, 2016).

Such views of claimants colour interactions in social security offices *and* affect outcomes. Case worker discretion inevitably plays a role in whether a benefit is awarded or suspended or an investigation into a claimant's conduct launched. This is reflected in significant regional or local variation in the number of sanctions imposed (Kenway *et al*, 2015). Office or organisational culture, the political narrative, wider public mood and individual perceptions of claimants have been found to influence how this discretion is exercised. A "guilty until you prove your innocence" mentality (Simpson, 2016: 158), a perception that there are targets for the imposition of sanctions (Couling, 2013), that being "at the top of the list" in terms of sanction statistics is desirable (Caswell and Høybye-Mortensen, 2015: 40) or that all claimants are essentially "undeserving" (Altreiter and Leibetseder, 2015) increases the likelihood of an adverse decision. Although decisions can be challenged, there is evidence that many claimants with a potentially good case do not appeal because they cannot face what they expect to be a lengthy process with little prospect of success (Wright and Stewart, 2016). Ironically, 'deserving' claimants of incapacity-related benefits face their own problem of being written off as unlikely to ever return to paid work, and consequently denied access to employment support programmes that might help them to do so (Rees *et al*, 2013).

Communication problems can also leave claimants feeling they have been treated with a lack of respect. This issue is particularly prominent in literature on sanctions. Claimants commonly report that they failed to comply with the conditions for receipt of a benefit because they did not understand those conditions, did not know why a sanction had been imposed or only discovered that a benefit *had* been stopped when unable to withdraw money from an ATM (Oakley, 2014). Following the imposition of a sanction, studies have found most claimants were not even told they had the option of applying for a hardship payment (Adler, 2016). These specific criticisms of the sanctions regime are arguably reflective of a wider problem of failure to make claimants aware of their responsibilities or of the reasons for decisions on eligibility for a benefit (see Gray and Carragher, 2007; McKeever, 2009).

## 2.8 Summary

---

Making a commitment to base a social security system on the principles of dignity and respect is commendable; actually doing so is no easy task. Dignity may be a core concept in human rights law, but it is ultimately ill-defined; to search for a legal definition of respect is futile. ICESCR is clear that upholding dignity requires an adequate, functioning social security system, but it is less clear what characteristics the system should have in order to play this role. The social rights treaties are in agreement that social security system should protect against the key social risks of healthcare costs, sickness or incapacity, unemployment, old age, employment injury, raising children and maternity; ICESCR adds disability and bereavement. On its own or in combination with social assistance benefits, the system should provide universal coverage against these risks as well as contributing to poverty alleviation by providing for a minimum standard of living. The limited extent of Scotland's new devolved powers means it is only responsible for protection against some of the social risks mentioned; others remain within the remit of the UK Government.

Identifying a minimum acceptable standard of living is arguably the toughest challenge in setting a benchmark for dignity in social security. At the lower end of the scale, income sufficient to pay for the resources recognised as bare essentials in immigration and asylum law might be said to tick two of McCrudden's boxes by offering protection from inhuman or degrading living conditions and guaranteeing access to essential needs. Whether the individual would have sufficient disposable income for any meaningful autonomy or cultural participation is less clear. The ESC suggests that 50% of equivalised median income is the minimum acceptable level, and if the Child Poverty (Scotland) Bill becomes law it might be argued that the best interests of the child demand an income higher than its poverty lines. At the top end of the scale, but lacking any legal force, the minimum income standard suggests that the appropriate minimum income for a household with dependent children is above 80% of the median. Whichever of these standards is adopted, disabled people are likely to require additional resources to meet disability-related expenses.

If dignity is interpreted as the foundation of all human rights, then it follows logically that its protection requires that all the rights in all the instruments examined must be upheld. However, a number of provisions are particularly relevant to social security, in addition to those associated with a minimum standard of living. Policy and its implementation should not discriminate between social groups, particularly on the basis of characteristics outside their control. The best interests of the child should be a primary consideration in the development and application of policy, bearing in mind

that the child has a right to benefit from social security, to an adequate standard of living and not to suffer because of the actions of his or her parents. There must be a right of appeal against any interference with or reduction of a social security right, whether at the individual level or across all claimants. Finally, reliance on social security should not result in any erosion of the individual's other rights.

As noted, there is no legal definition of respect, but it seems logical to argue that treatment with dignity is a necessary element of being treated with respect. Claimants' experiences of the system and of the wider political atmosphere also offer useful insight into what respect means to *them*. Again, ability to meet the survival needs of the whole family *and* still have a little money for some social contact and to look after one's appearance forms part of the equation. But how claimants are portrayed by influential people in politics and the media, and how this in turn shapes their interactions with social security bureaucracies and their treatment by society as a whole, is equally important. If dignity is a legal issue, respect seems dependent on social attitudes and elite narratives that are shaped to a greater extent by politics and the media than by law.

## 3 | Embedding dignity and respect in a Scottish social security system

### 3.1 Introduction

---

Scotland's new social security powers flow from the 2014 referendum on independence (see chapter 1). This process and the 2016 referendum on the UK's membership of the European Union have given Scottish politicians an opportunity to portray themselves as more egalitarian, more internationalist, more concerned with social justice than their Westminster counterparts. The linked aspirations to base a devolved social security system on dignity and respect and to incorporate more of the international human rights framework into Scottish law are closely linked to this 'Scottish ideology' (Mooney and Scott, 2015; EHRC, 2015).

In a sovereign state with a written constitution, arguably the highest form of protection that can be given to dignity, social security rights and other rights is through a constitutional guarantee. Constitutional protection is less relevant to Scotland at present as the only way to place a binding commitment on the Scottish Parliament in respect of dignity and social security would be through an Act of the UK Parliament. Various options for doing so exist within the limits of devolved competences. The Social Security (Scotland) Bill sets out the seven Scottish social security principles listed in chapter 1 and mandates the drafting of a Scottish social security charter which should "reflect" the principles. Alongside such means of high-level principle-setting sit processes for developing a system that respects the dignity of its users, notably by involving them in the design of policy and delivery mechanisms. This chapter examines examples of all three approaches, making recommendations for how they might be applied in the development of a Scottish social security system based on dignity and respect.

## 3.2 Constitutional protection of dignity and respect

---

Human dignity is “invoked as a foundational principle” in the constitutions of “at least fifteen European countries” and has been described as a fundamental element of democracy itself in the UK (O’Mahony, 2012: 551; *Ghaidan* [2004]). European constitutions also frequently feature a right to social security on the part of the individual (Spain) or a duty to provide social security on the part of the state (Netherlands) (see Ewing, 1999). In Belgium and Finland, the constitution links protection of dignity to, respectively, a right to social security and a guarantee of “basic subsistence.” Germany’s Basic Law contains no right to social security, but provisions on the protection of dignity and the ‘social’ nature of the state have been interpreted by the Federal Constitutional Court as implying minimum standards of economic welfare (Winkler and Mahler, 2013).

The Scotland Act 1998 is the closest thing to a ‘Scottish constitution’, describing how the devolved institutions work, setting the limits of their powers and effectively establishing the ECHR as a Scottish Bill of Rights. In doing so, it goes some way towards protecting dignity and rights in respect of social security entitlements by preventing the Scottish Parliament from passing legislation that contravenes the ECHR rights. However, as discussed in chapter 2, the ECHR articles most relevant to social security – articles 3, 8 and protocol 1, article 1 – provide little clarity about a minimum acceptable standard of living or level of benefits. Impetus for the enhancement of social security rights compared to the current UK system is therefore likely to flow from them. The 1998 Act also allows the Secretary of State to prevent a Bill passed at Holyrood going forward for Royal Assent if its provisions breach the UK’s wider obligations under international law, including the social rights treaties. In a period when “the UK Parliament is... rolling back rather than increasing its protection of [social] rights” (Shields, 2014: 3) it seems unlikely that the Secretary of State would intervene to ensure they are better protected in Scotland. Only the UK Parliament could legislate to place the social rights treaties on an equal footing with the ECHR, enabling their enforcement in the domestic courts and preventing the devolved legislatures from acting contrary to their provisions. The report of the Commission on a UK Bill of Rights (2012) makes clear that there are no current plans to do so. Constitutional means, then, are not readily available for embedding dignity and respect in the devolved social security system and alternative approaches must be considered.

### 3.3 Protecting dignity and respect through primary legislation

---

In states where dignity is constitutionally protected, it is unsurprising that this principle should be reflected in the social security legislation. For example, the German legislation states that the purpose of jobseeker's benefit and social assistance is to enable access to the means necessary for "a life in keeping with human dignity" (Sozialgesetzbuch II s1; XII s1). Even where protection of dignity is not enshrined in the constitution, there is scope for the incorporation of dignity into social security legislation, or wider protection of dignity and social rights through a dedicated Act.

An example of the former approach, currently being pursued in Scotland, comes from Belgium. Prior to the amendment of the constitution to include protection of dignity, legislation (loi organique du 8 juillet 1976) established provision of the means necessary for a life in keeping with human dignity as the primary purpose of social assistance. A 1972 Royal Commission and consultees on a current consolidating Bill have argued that New Zealand should formally establish dignity and poverty reduction as the key principle and purpose of social security in the legislation (Caritas Aotearoa, 2016; Beneficiary Advisory Service, 2016). To date, no such clause has been inserted into the Bill. Advocates of provisions in Australia's Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination) Act 2010 extending the use of compulsory budget management for claimants deemed unable to otherwise ensure their benefit payments are used for "priority needs" have argued that promoting human dignity is one of their key objectives even if the phrase is *not* used in the legislation. Whether dignity is in fact protected is hotly contested (Billings, 2011). Unless protection is written into legislation, dignity is reduced to political rhetoric – the weakness of the Scotland Office's (2009) suggestion that the UK, Scottish, Northern Irish and Welsh governments make a joint declaration of the common social rights and responsibilities of citizens. Even writing the objectives of protecting dignity and treating claimants with respect into legislation does not necessarily solve the problem of how these key principles should be interpreted.

The second approach, of protecting rights through dedicated legislation, is already used in various forms in the UK and would be in keeping with the First Minister's stated aspiration to enhance the status of social rights agreements in domestic law (Scottish Parliament, 2016). McCall (2016) argues that social rights are better protected through wholesale incorporation into domestic law than by isolated references in specific pieces of legislation. This is particularly true of protection of



dignity, which can *only* be defined by reference to other rights. The strongest UK-level approach is that of the Human Rights Act 1998. Unlike the Scotland Act 1998's strict limitation of the Scottish Parliament's legislative competence, this does not prevent Parliament legislating contrary to the ECHR. Rather, public authorities must act in a way compatible with the ECHR rights, unless prevented from doing so by Scottish or UK primary legislation; courts must interpret legislation in accordance with the same rights if it is possible to do so or make a declaration of incompatibility if it is not. Similar duties in respect of, for example, the ESC could be placed on public authorities acting under or courts applying Scottish devolved legislation. As part of the Council of Europe human rights architecture, the ESC arguably forms a more logical candidate than the ICESCR for incorporation into domestic law alongside the ECHR, its sister treaty, and has the added advantage of providing clearer guidance on minimum standards for social security. The social rights conferred would have a lower status than the ECHR, as the Scottish Parliament would not be prevented from legislating contrary to them, but their standing in Scotland would be comparable to that of the ECHR at UK level (see Boyle, 2015).

Alternative, though weaker, approaches to the incorporation of human rights standards into domestic law are taken in Scotland and Wales in respect of the UNCRC. Under the Children and Young People (Scotland) Act 2014, Scottish Ministers must consider and, if they think it appropriate, take "steps... which would or might secure better or further effect... of the UNCRC requirements." Other public authorities must report on what steps they take to do so within their area of responsibility. This model gives Ministers considerable discretion as to what steps they feel ought to be taken. A different approach again is taken by the Rights of Children and Young People (Wales) Measure 2011, which requires that Welsh Ministers have "due regard" to the requirements of the UNCRC. This has considerable overlap with section 149 of the Equality Act 2010, under which public authorities must have "due regard to the need to... eliminate discrimination [and] advance equality of opportunity" on behalf of members of protected groups. This duty is "more robust in terms of the scope of judicial scrutiny" (McCall, 2016: 3) than the Scottish approach to the UNCRC: children's rights or the advancement of equality of opportunity *must* be taken into account in policymaking and implementation. While there are currently no reported cases using the 2011 Measure, the courts can and do assess whether the advancement of equality of opportunity has been afforded "the regard that is appropriate in all the circumstances" by public bodies in their decision making process (*R (Baker) v Secretary of State for Communities and Local Government* [2008]). This means giving full, rigorous and open minded consideration to the impact on equality of

opportunity “before and at the time that” a policy decision is made (*R (Brown) v Secretary of State for Work and Pensions* [2008]). However, the duty has its limitations in that ultimately there is no enforceable obligation to make progress towards the advancement of equality of opportunity. Consequently, although a duty of due regard in respect of dignity, the ESC or the ICESCR would mean greater prominence in policy development and decision making, compared to the Human Rights Act model there would be less certainty that claimants would actually be treated with dignity or that social rights would be better protected.

### **Embedding the protection of dignity in Scottish law**

Human dignity is an overarching concept in human rights law. Protecting dignity means respecting and fulfilling a range of human rights, particularly rights to a minimum standard of living, autonomy and cultural participation. Social security is crucial to the fulfilment of these rights. The European Social Charter and International Covenant on Economic, Social and Cultural Rights protect rights to social security, social assistance and an adequate standard of living at international level. The UK has agreed to be bound by both treaties, but neither forms part of UK law.

The European Convention on Human Rights *is* part of UK law, but is weaker in its protection of social rights. Dignity will be better protected if one or both of the social rights treaties can be incorporated into Scottish law in the same way that the ECHR forms part of UK law. This example assumes the ESC is chosen. Incorporation would mean that:

- The Scottish Parliament would be expected, but not obliged, to ensure its legislation complies with the ESC rights
- A Minister introducing legislation to the Scottish Parliament would have to declare whether he or she believes the Bill is compatible with the ESC
- Public authorities would be obliged to ensure their actions are compatible with the ESC unless primary legislation forces them to act in a way that is incompatible
- People in Scotland could appeal to the Scottish courts if they believe a piece of legislation or an act or decision by a Minister or public authority contravenes their rights under the ESC
- Courts would interpret legislation in such a way as to be compatible with the ESC unless its wording makes this impossible; in this case, a declaration of incompatibility would be made, but the legislation would remain valid
- When interpreting the ESC rights, courts would take into account the case law and conclusions of the European Committee of Social Rights; while not absolutely binding on the Scottish courts, a consistent approach by the ECSR would be strongly persuasive.

**Recommendation: That the Scottish Government considers incorporating the European Social charter and/or International Covenant on Economic, Social**

## **and Cultural Rights into domestic legislation modelled on the Human Rights Act 1998.**

### **3.3.1 A charter of social security rights**

While writing principles into legislation and the publication of a claimant charter appear as alternatives in *A new future*, the two are not mutually exclusive. Nor is the concept of a statement of service users' rights new to the UK, the 1991 Citizen's Charter having encouraged their use across the public services. However, such documents can take many forms and the legacy of the Citizen's Charter demonstrates the urgent need for clarity about the role and legal status of any charter of social security rights. Although praised by the Select Committee on Public Administration (2008: 10) for promoting transparency and dismantling "deference" towards service providers, the Charter suffered from confusion as to whether its objectives were "tangible entitlements... or mere aspirations." It will also be necessary to consider whether any future charter of social security rights should be limited in its scope to claimants or extend to staff.

A standalone charter could take on the role envisaged above for the European Social Charter, setting out a list of fundamental principles with which social security legislation and practice would be expected to comply. To play this role, the charter and its core contents would have to be established by legislation. This approach is taken in the Code of the District of Columbia (title 4), under which children's homes and fostering services must issue a statement of rights and responsibilities in "readily understandable language" including a minimum set of rights specified by statute. Alternatively, the charter could simply consist of a plain English statement of the claimant's existing rights and responsibilities, similar to the Child Welfare Information Gateway's (2014; 2016) summaries of relevant areas of law across the United States. No additional rights or responsibilities would be conferred, but there would be value in ensuring claimants know what they can expect, and what is expected of them, in their dealings with the social security system. The Social Security (Scotland) Bill appears to imply a social security charter based on this second model – as the accompanying policy memorandum indicates, simply a "more accessible" way of conveying the "key information" from the legislation, including the principles. Somewhere in between sits a third form of charter as a 'soft law' instrument that seeks to explain what claimants' rights mean in practice and sets out some minimum standards for interactions with the system, which might help add weight to the legally vague concept of respect. The NHS Constitution for England is an example of this model: the Health Act 2009 requires organisations and individuals providing health

services to “have regard” to its provisions in their work. At least this sort of requirement should apply to any charter setting standards for how claimants should be treated. The Scottish Government could go further and specify consequences for agencies or redress for claimants when their treatment falls short of the expected standards, perhaps alongside negative consequences for claimants’ behaviour towards staff.

Although *A new future* specifically envisages a *claimant* charter, the Bill indicates that the social security charter will be wider in its scope. The EHRC’s (2016) response to the consultation proposes an “inclusive charter” setting out the rights and responsibilities of both users and those involved in the administration of the system. This could help develop a *common* purpose of ensuring everyone’s dignity is respected, in place of the adversarial relationship perceived to exist between claimants and staff in parts of the UK system (Wright and Stewart, 2016). The wording of the Bill appears to imply a clearer focus on responsibilities than rights – section 2(2) states that the charter will set out “what should be expected” of Ministers, both when developing policy and when exercising functions in the social security system (which presumably includes frontline decision makers acting in the place of the Minister), as well as applicants and claimants.

A final consideration in respect of a charter of social security rights, one that the Bill addresses with less clarity, is its content. In line with the Select Committee’s (2008) guidelines on best practice for the development of statements of public service entitlements and the principle that services should be designed with the people of Scotland, it is only right that this should only be finalised following consultation with claimants, staff, stakeholders and the wider public. However, it is possible to identify a number of possible points for inclusion. First, as the Bill indicates, there should be a restatement of the seven core principles, accompanied with a short, plain English summary: that social security is an investment in people, respect for dignity, evidence-based services designed with the people of Scotland, continuous improvement with the user experience put first and efficiency/value for money. If respect for the dignity of individuals is understood as implying respect for the various human rights provisions associated with the protection of human dignity, there may be merit emphasising that the additional principle in the Bill reflects a commitment to these, and perhaps to the objectives of the Child Poverty (Scotland) Bill.

Parliamentary debate on a proposed Claimants’ Charter to accompany the Welfare Reform Act 2009 (the amendment was not adopted) provides a possible list of claimant-centric rights and responsibilities for inclusion (Hansard, 2009). These include commitments that claimants should be “treated with dignity and respect,” not

“be forced to live below the poverty line” and receive “high-quality, individually tailored” employment support. Further provisions relate to transparency, access to advice and payment at the national minimum wage for any compulsory activity for which it would be “reasonable” to expect remuneration. The debate drew suggestions for further provisions that would help staff fulfil their role, such as a duty on claimants not to be abusive and to promptly provide all relevant information. Claimants would have received a copy of the envisaged charter along with a written summary of the conditions for their benefit claim and the penalties for breach. The NHS Constitution for England, whose reader-friendly format, non-technical language and broad focus make it a good model for any future charter, augments patients’ legally binding rights and responsibilities with a set of non-justiciable service commitments, staff rights and responsibilities in relation to both patients and their employer and more general guidance to staff on good practice in their interaction with patients and colleagues.

A claimant charter not specifically grounded in human rights principles would be vulnerable to shifts in political priorities, undermining its potential to set the long term agenda for the development of a Scottish social security system. Possible measures to insulate a charter from short-term changes of political mood include placing responsibility for its content in the hands of an arms-length body (as with the Scottish Outdoor Access Code), a ten-year review process involving service users and staff (NHS Constitution for England) or a requirement for widespread public and expert consultation (NHS Scotland Charter of Patient Rights and Responsibilities).

Recommendation: That a statutory Charter of Social Security Rights and Responsibilities is created to help ensure that the laws protecting dignity are followed. The Charter would include the principles for social security in Scotland, relevant human rights provisions and any additional rights, responsibilities or commitments agreed through consultation to apply to claimants, staff and policymakers.

### **3.3.2 Building a social security system with the people of Scotland**

The right for individuals to have their voices heard on matters affecting them features in human rights instruments including articles 19 and 21 UDHR and is reflected in two of the five PANEL principles for a human rights-based approach (participation and empowerment – see SHRC, 2016). The principle that social security in Scotland should be developed *with* the people of Scotland is in keeping with this right. Nevertheless, what effective citizen involvement in the design and delivery of public services looks like is uncertain – at worst, citizens may simply be left to fill gaps in

statutory provision (Ewert and Avers, 2014; Fotaki, 2015). Further, there is often a gap between an individual's right to have his or her voice heard and the mechanism to enable that voice to be given effect, or the ability of the individual to voice his or her views. In recognition of this gap, various models of participation have been developed to ensure that the individual's voice is heard and to distinguish between tokenistic and meaningful forms of engagement (Tisdall, 2017). These models, ranging from Arnstein's (1969) seminal model of political participation, through to Hart's (1992) model of child participation (1992) and McKeever's (2013) model of legal participation, provide a tool to evaluate and improve the embedding of dignity in the policy- and decision-making process.

Article 12 UNCRC, which establishes the right of children to have a 'voice' in decisions affecting them, has had relatively little influence on social security practice in the UK (Harris, 2000). Nonetheless, the article provides an illustration of how this right can be protected through a participative approach. Lundy's (2007) research makes clear that children's participation in decision-making requires additional elements beyond voice to be considered, namely 'space, audience and influence'. While voice requires that children are able to *express* their views, space requires that children are given the *opportunity* to express those views; audience requires that the child's view must be *listened* to; and influence requires that the child's view must be *acted* upon, as appropriate. Similarly, designing a social security system with the people of Scotland requires a co-production approach that does not merely treat citizens as consumers of services, but enables service users and the public to play a meaningful role in the design, delivery, governance and assessment of policies and services (Durose and Richardson, 2015).

Lundy and McEvoy (2011) adopt a number of strategies to build children's capacity, working with adults as co-researchers, to engage with complex issues, lending space, audience and influence to their voices. Their research found that exposure to a range of perspectives on issues concerning them helped the children to engage with and reflect on complex issues, leading to increased confidence to participate in the research, helping to develop findings and analysis from the point of view of children.

The co-production approach can be applied to other individuals and groups whose voices can inform research and policy developments in social security; the CRPD committee (2015) has urged the Czech Republic to revise its system of disability benefits with "genuine participation" from disabled people. By mobilising the expertise of, and encouraging constructive dialogue between, service users and frontline staff, opportunities for improvement can be identified that might not

otherwise come to the attention of senior management or policymakers. Only when policymaking becomes a shared endeavour, so that users and frontline staff play a genuine role in shaping policy and are not simply asked to comment on a proposal that has already been substantially worked out, does genuine co-production occur (Bovaird *et al*, 2016). Attention must be paid to the depth of user involvement: systemic and cultural hurdles to genuine, transformative co-production can be difficult to overcome, leading to a risk that users will be consulted in a tokenistic way. Nonetheless, where this can be done, the approach can act as a pivot for the cultural shift towards putting dignity at the heart of the social security system. Capacity building will be required on both sides. Users must be able to develop and articulate their perspectives on how a devolved social security system might best meet their needs. Policymakers must appreciate how the potential policy solutions might impact claimants and how public bodies do business. All participants must have sufficient understanding of the meaning of dignity and related human rights requirements to ensure dignity and respect are mainstreamed into this important part of the policy development process (see McKeever and Ní Aoláin, 2004).

A final challenge relates to the aspiration to design a new approach to social security with *the people* of Scotland, and not merely a self-selecting group of claimants and staff. Adults, like children, differ in their ability to articulate their needs and their confidence in taking the place of the 'expert', leading to a risk that policy will be shaped by the most articulate, the best-organised or simply those with the time and English language skills to get involved (Ewert and Avers, 2014; Thijssen and van Dooren, 2016). Capacity building can help overcome this concern once people are involved, but recruitment processes will have to develop means of engaging those who might be at risk of exclusion. The relevance of an issue to the individual and to his or her immediate social group or locale is among the most important reasons why people are motivated to engage with co-production initiatives (van Eijk and Steen, 2016). **Consequently, the voice of non-claimants and less confident claimant groups may not be heard and even the expertise of relatively recent claimants may be lost if they feel the issue has become less salient to them.** Once involved, people are more likely to *stay* involved with co-production if they feel they are having an impact, so to sustain buy-in it will be important to ensure that people's views are not only taken seriously, but are seen to be taken seriously and that co-production processes do not become part of institutionally defined procedures.



## Designing policy with the people of Scotland: voice, space, audience and influence

A right for members of the public to shape the services on which they depend is about more than mere freedom to express opinions and goes far beyond the opportunity to be consulted on a pre-formed policy idea. For adults as for children, the citizen's **voice** will only have a genuine impact on policy if policymakers provide a **space** for views to be expressed, act as a willing **audience** and are prepared to be **influenced** by what they hear (see Lundy, 2007; Lundy and McEvoy, 2011)

Even when space is in principle available for citizens' voice to be heard, people vary in their level of knowledge, competence and ability to express their views. A risk of co-production methods is that services end up being shaped by groups who are more articulate, better connected and have the time, skills and motivation to get involved. Although the right to a voice also entails the right *not* to take part in the development of services and policy, this must be a matter of choice, not the result of barriers or lack of confidence. Capacity-building can be undertaken to ensure that current or potential users of the social security system from a range of backgrounds feel able to express an opinion on how the system should work *and* are able to make a useful contribution.

The overhaul of support services for autistic children in the Italian region of Lombardy between 2005 and 2011 is a good example of co-production in action. The outdated nature of the existing service was brought to the attention of the regional authorities by users, prompting the decision to involve users in designing and implementing improvements. Phase one involved the families of one in five autistic children in Lombardy and service managers in a research project to identify support needs. After publication of the findings, phase two saw two local authorities pilot the co-design of new services with families, the voluntary sector, schools and health services. Being closely involved in the care of their children, families were then involved in the *co-delivery* of services in a way that might be less practical in the case of social security. Finally, families and service users' associations played a central role in the evaluation phase, including dissemination of findings. After initial scepticism on the part of many families in the early stages of the co-design phase, the experiment came to be viewed as "the benchmark for the reform of the whole welfare services policy." (Sicilia *et al*, 2016: 22)

**Recommendation: That Scottish people should be involved in the development of social security policy and systems. Existing and potential users of the social security system should be encouraged and supported to advise on how the system should operate, working with the people who will be making social security policy and designing the system, and those who are responsible for making decisions on social security benefits.**

### 3.4 Summary

---

Establishing dignity and respect as foundational principles of social security in Scotland will make it more likely that devolved systems and policies will develop so as to ensure claimants are in fact treated with dignity and respect. The close link between dignity and the ability to live a life in which access to one's essential needs, autonomy and participation are guaranteed means a more prominent role for social rights in Scottish law has an important contribution to make. Although genuine constitutional protection of rights is not in the gift of the Scottish Parliament, models exist for enhancing the legal status of social rights through primary legislation. A charter of social security rights should be viewed as complementary to this step, providing an opportunity to explain citizens' rights and responsibilities in respect of social security, and those of staff, in plain English (or another language where appropriate), whether these flow from human rights law or social security legislation. This could sit alongside a wider set of commitments, which should preferably be legally enforceable, designed to ensure the system meets the needs of claimants and produces a healthy working environment for staff.

As chapter 2 emphasises, dignity is not just a legal concept but is inseparable from the individual's perception of what it means to enjoy an acceptable standard of living and be treated with respect by others. Legal sources have little to say about this interpretation of dignity and academic research can offer only an incomplete insight. Developing systems and policy with the Scottish people – particularly those who use and run the social security system – is not only in keeping with the principles set out in *A new future*, but arguably the only way to ensure policymakers and administrators take proper account of this subjective definition of dignity and respect. This means not simply consulting on an already-formed policy proposal, or even asking consultees what their ideal social security system would look like, but a sustained approach to capacity- and relationship-building that over time can produce informed views harnessing the expertise of users and frontline staff. If this kind of co-production is to play a genuinely central role in the development of the new Scottish

approach to social security, this precludes being prescriptive about what the emerging system should look like. Nonetheless, some observations must be made about how the principles of dignity and respect might begin to shape the level of benefits paid, the associated conditions and wider functioning of the system. These form the focus of chapter 4.

## 4 | Ensuring dignity and respect in the claimant experience

### 4.1 Introduction

---

The fourth of the Scottish Government's principles for devolved social security promises "continuous improvement" in policies and systems, "putting the user experience first." This objective is clearly in keeping with the aspiration to a system based on dignity and respect. It also aligns with the principle of the progressive realisation of, and avoidance of retrogression in, social rights in article 2(1) ICESCR as well as the requirement to "endeavour to raise progressively the system of social security to a higher level" in article 12(3) ESC.<sup>4</sup>

Statements of principles, values and rights are an important means of setting out the policy intent that will drive the use of the new social security competences. However, for claimants and the advice sector workers who support them, "the end result is all that matters" (Flanigan, 2015: 3). Claimant experiences and outcomes are shaped to a great extent by the standard of living supported by the social security system, the conditions to be fulfilled in exchange for benefit and how reasonable or helpful these conditions are. As chapter 2 makes clear, their perceptions of whether they are treated with dignity and respect are also influenced by their interactions with the system and the people charged with its operation.

The expectations raised by political claims of how much better a Scottish system *could* be will be meaningless if they are not reflected in the user experience. The risk of disappointment created by the limited extent of devolved powers means it will be politically important that the principles are seen to be put into action where control *is* devolved. This chapter considers examples of good and bad practice in the adequacy of benefits paid and the conditions for their receipt, as well as in the frontline delivery of social security. Recommendations on how benefits and processes might be designed to ensure respect for the dignity of claimants in

---

<sup>4</sup> Contracting states are not required to be bound by all ESC provisions and the UK does not accept article 12(3)

Scotland take into account the extent of devolved competences in the 2016 settlement.

## 4.2 The devolved benefits

---

Although human rights law associates the protection of dignity with access to a minimum standard of living, it is difficult to make a definitive statement of what that minimum standard of living should be. The ICESCR in particular imposes no uniform set of obligations, but requires state parties to progressively realise the rights conferred to the maximum extent allowed by their available resources. Articles 12, 13 and 16 ESC do provide somewhat clearer guidance on minimum levels of social protection. Social security benefits should not be less than 40% of the equivalised median income, family benefits equivalent to at least five per cent of median income per child, with total income from all social security and social assistance benefits not “manifestly” lower than 50% of the median (ECSR, 2013; 2015). Coverage requirements are less clear, but the ECSR will generally look for close to universal eligibility for social assistance and family benefits (*European Federation of National Organisations Working with the Homeless v Netherlands* [2015]). Proposals to revive and update the former UK targets for child poverty reduction in the Child Poverty (Scotland) Bill may provide a further indication of a minimum standard of living for households including dependent children. Achievement of the targets will require that few children live in houses with less than 60% of the median income (in the current year or three of the last four years), less than 60% of the inflation-adjusted median for 2010-11 or with a low income and lacking access to the goods and services in the official test for material deprivation. Where a member of a claimant household has a disability, comparison with the median is less likely to result in a useful assessment of income adequacy due to the additional costs associated with disability (Stapleton *et al*, 2008; CRPD, 2016a).

In assessing whether social security protects the dignity of claimants, conditions for access to benefits are just as important as the level at which they are paid. Excessive contribution requirements, limited duration of eligibility and tight age, residency or citizenship requirements have all been found to result in non-compliance with ESC standards (ECSR, 2013; *European Federation of National Organisations Working with the Homeless v Netherlands* [2015]). Job seeking requirements or compulsory participation in training and other employment-related activities raise particular questions about impact on claimant dignity. It is well

established that there are no inherent human rights breaches associated with such programmes (*R (Reilly) v Secretary of State for Work and Pensions* [2013]; *European Roma Rights Centre v Bulgaria* [2009]). Nonetheless, compulsory job seeking and welfare-to-work schemes represent an interference with the autonomy of the claimant and must therefore be proportionate if they are to be in keeping with the protection of dignity. For the ECSR (2013), the key questions in this assessment of proportionality concern how soon such requirements kick in, what the claimant is expected to do and the severity of the consequences of non-compliance.

Particular concerns exist around the consequences of non-compliance with conditions for the receipt of a benefit. While it is acceptable in human rights terms to reduce benefit payments when applicable conditions are breached, under article 13 ESC access to “means of subsistence” must still be guaranteed. In many states, including the UK, it is far from clear that such a guarantee exists (Simpson, 2015a; ECSR, 2013). The proportionality of measures with a negative effect on claimants can also be assessed with reference to whether the intended outcome is likely to be achieved, an approach adopted by Lady Hale in *R (SG) v Secretary of State for Work and Pensions* [2015]. A sanction imposed with a view to ensuring claimants send their children to school will not be justifiable if it is unlikely to make a genuine contribution to reducing truancy (*European Committee for Home-based Priority Action for the Child and the Family v France* [2013]). On this basis, the proportionality of sanctions for non-participation in the UK’s Work Programme can be questioned given the serious concerns raised about its contribution to employability (Committee of Public Accounts, 2014; Work and Pensions Committee, 2016).

The following subsections examine issues relating to the main devolved benefits with potential to impact on dignity. While some recommendations are made for how Scottish policymakers might begin to engage with these matters, the aspiration to developing a devolved system *with* claimants and the people of Scotland means the ultimate solution is in many cases to be found through the co-production process indicated in chapter 3. Implementation of all the recommendations in the short term would be expensive and administratively complex. However, it is possible to identify a number of areas for immediate action. Those relating to the proposed young carers’ benefit, the child element of universal credit and performance monitoring in relation to disability benefits and employment support should be treated as top priorities.

### 4.2.1 Disability benefits

In terms of cost, the main disability benefits – disability living allowance, personal independence payment and attendance allowance – are by far the largest parts of the social security system to come under devolved control. Collectively, these accounted for £2.1 billion of expenditure in 2014-15; the other devolved benefits only £600 million (Scottish Government, 2016a). The impact on disabled people was one of the most controversial aspects of the UK coalition government's welfare reform programme, prompting street protests and a critical report by the CRPD committee (2016b). While this is in keeping with criticism of the impact of post-2008 austerity measures on disabled people internationally (CRPD, 2016c), concern about the operation of disability and incapacity benefits in the UK – notably the process by which eligibility is assessed – goes back much further (McKeever, 2014).

A key reason for the controversy that has surrounded PIP is the loss of eligibility associated with its introduction, with 20% of DLA claimants projected to be ineligible for PIP (Harris, 2014b). That a tightening of the criteria can lead to such a large number of claimants losing entitlement is symptomatic of a wider problem with the UK's disability benefits: they are a blunt instrument for addressing the problem of disability-related costs. Articles 19 and 28 CRPD require that disabled people are supported to live independently and that social security include assistance with disability-related expenses. With only two mobility-rated and two care-related rates of PIP there is limited scope for responding to the complexities of personal circumstances. Besides the nature and extent of their disability, the extra costs people incur may be affected by variation in the free support provided by the local authority or according to age (Learner, 2013; BBC News, 2017). Greater responsiveness to individual need might be more in keeping with article 28 and respect individuals' dignity to a greater extent than a cliff-edge loss of eligibility for those with less serious conditions and a ceiling on entitlement for the most severely disabled (see Rummery and McAngus, 2015).

Precision, however, can come into conflict with simplicity and administrative convenience; the courts recognise that a balance needs to be struck (*Re McLaughlin's application for judicial review* [2016]; Wass, 2015). Any aspiration to greater flexibility would have to be balanced against the impact on cost and administration. Clearly, redesign of disability benefits along these lines would have budgetary implications. Without knowledge of the criteria that might be applied to assess eligibility at the individual level, it is impossible to predict what the impact would be on the total benefit payable, even whether this would increase or decrease, or whether the assessment process would be more difficult or expensive to

implement. It *can* be predicted that payment and administration of a highly personalised benefit would create difficulties for any Scottish Government hoping to continue to use shared IT systems with DWP. Recent research found policymakers in Northern Ireland sceptical about the affordability of significant departures from the coalition government's reforms were more concerned about the cost of commissioning IT infrastructure for new regional benefits than about the direct costs of paying certain benefits at a higher rate (Simpson, 2016).

Such radical reform would therefore be a long term project. Devolution has potential to yield more immediate improvements in the operation of the existing benefits. Unequal ability to access benefits where there is, or may be, a legal right is a clear threat to dignity for affected individuals. Certain groups – notably those with fluctuating or mental health conditions – have found it much harder than others to establish their eligibility for incapacity-related benefits. The same is likely to be true of disability benefits (McKeever, 2014; SSAC, 2017). It is noteworthy that in the early years following the introduction of ESA, decision making in Northern Ireland, where mental health conditions are relatively common, was found to be of a higher standard than in Great Britain (Harrington, 2011). This may in part have reflected the fact that assessments were carried out in the public sector until 2011, rather than contracted out as in Great Britain – a point of view the Scottish Government (2017a) may share in light of its recent announcement that private companies will not be involved in assessing applicants. However, the crucial factor in Northern Ireland appears to have been that the Social Security Agency decision maker did in fact act as the decision maker, and not simply 'rubber stamp' the assessor's recommendation. A substantial body of research is now available on ESA and PIP assessments and decision making; this should be carefully considered by the Scottish government before any significant changes to disability benefits are proposed. The Northern Ireland Assembly Committee for Social Development (2013) advocated that monthly performance monitoring and annual review of providers of PIP assessments. Even if the process is not contracted out in Scotland, this kind of scrutiny would be desirable.

**Recommendation: That the Scottish Government explores, through co-production with service users, options for greater personalisation of disability benefits.**

**Recommendation: That the assessment process for disability benefits be closely monitored and subject to an early, independent review.**



#### 4.2.2 Carers' benefits

An increase in the rate of carer's allowance to a level equivalent to jobseeker's allowance is one of the few concrete proposals for immediate reform of a devolved benefit (initially to be applied as a supplementary payment under article 47 of the Social Security (Scotland) Bill).

While this change is welcome, it is possible to question whether it goes far enough to protect the dignity of full time carers. At its new level, the allowance will remain too low for compliance with article 12 ESC. This problem is more serious for carers than for jobseekers, as theirs is a long term benefit. Whereas 60% of JSA claims last around six months, in all age groups except under-25s more than 50% of carer's allowance claims last at least two years, in line with the typical duration of an ESA (work-related activity group) claim. From age 40 upwards the most common duration of claim is over five years (Low *et al*, 2015; Citizens Advice, 2015). Even at this proposed higher rate, then, the low level of the allowance exposes full-time carers to a risk of persistent poverty. For a benefit of this duration, it is arguable that the support group of ESA is a more appropriate comparator than JSA. Such a change would have a considerable cost implication – in August 2015, 66,000 people in Scotland were in receipt of carer's allowance with a further 45,000 thought to be eligible (Georghiou and Berthier, 2016). At least some of the 45,000 not currently receiving the benefit would be likely to claim if its level were to increase by almost 50%. Any increase above that currently envisaged, then, would probably take place incrementally and could target low income carers through implementation as a top-up to universal credit rather than increasing carer's allowance itself. Any decision should be preceded by work with carers to determine whether a higher cash benefit would be the most beneficial investment from their point of view; alternative options might include increased funding for respite care or new initiatives to support job retention.

The Scottish Government has also indicated its intention to create a dedicated young carers' benefit. Young carers are a particularly vulnerable social group and any increased support is to be welcomed. However, it is not clear that a cash benefit is the best option for ensuring they are treated with dignity and respect. Being a young carer is associated with poverty and disadvantage in the short term, which a cash benefit would undoubtedly help to address, but also with exclusion from ordinary childhood activities and educational underachievement, affecting longer term life chances (Dearden and Becker, 2000; Hounsell, 2013). The impact of caring is felt across various domains of child rights protected under the UNCRC (see Davey and Lundy, 2011) and helping young carers to enjoy as normal a childhood as possible is

a practice principle for professionals working with them (ADASS and ADCS, 2011). The positive impact of a young carers' benefit on present income might come at the price of entrenching the caring role, resulting in lifelong disadvantage. Investment in respite care or other services might have a more beneficial impact on young carers' future life chances, but leave poverty unaddressed in the here and now.

### **Co-producing support for young carers**

Lundy's (2007) co-production model has particular value in relation to the proposed Young Carer's Allowance. In keeping with article 12 UNCRC, young carers have the right to influence the decisions made on how they are supported within the social security system. Being a young carer could have implications for the rights to development (articles 6, 29 and 32), cultural participation (articles 13 and 31), association with others (article 15), family life (article 16), health (article 24), an adequate standard of living (article 27) and play or leisure (article 31). Children have a right to benefit from social security (article 26) and this may be one means of addressing the disadvantage young carers face – but a cash benefit is not necessarily the only or best way of doing so.

Co-production could be used to enhance the rights of young carers beyond financial support. Research conducted with young carers has identified the ways in which caring can impact on their rights across a range of UNCRC articles and identifies a need for more integrated support (Surrey YCF, 2015; Children's Society, 2015). A co-production approach to a holistic assessment of young carers needs, through for example their greater involvement in care assessment and planning processes for the person they care for, could be transformative. Depending on the outcome of the process, improvements to support services may emerge as complementary to, or a higher priority than, a new cash benefit.

The challenge of reconciling these competing objectives means the young carers' benefit can be a key testing ground for the commitment to develop policy with the people affected. Striking an appropriate balance between the child's 'right' to be free from the onerous responsibilities of caring against pragmatic steps to alleviate the reality of poverty experienced by children and young people already discharging a caring role cannot be achieved without the involvement of young carers themselves. Only by engaging young people, and particularly young carers, as co-researchers can policymakers develop an understanding of how children and young people view a notional right to a childhood and what dignity means to them. They are the experts in what they need, just as the families of disabled children in Italy were best placed

to identify what support they required (Sicilia *et al*, 2016). Ways in which young carers' rights might be protected, and specifically whether they would regard a cash benefit as appropriate, would then emerge from this process.

**Recommendation: That consideration be given to a progressive increase in carer's allowance to the same level as employment and support allowance for support group claimants or an equivalent top-up to universal credit, and that this consideration is developed through co-production with carers.**

**Recommendation: That a strategy for supporting young carers through social security and/or other means be developed through co-production with young people.**

#### 4.2.3 Universal credit

While control of the main income replacement benefits remains for the most part reserved to Westminster, the Scotland Act 2016 transfers limited powers in respect of universal credit. S30 allows Scottish Ministers to alter the "persons to whom, and time when" universal credit payments are made compared to the DWP approach. The Universal Credit (Claims and Payments) (Scotland) Regulations 2017 give claimants the option of receiving twice-monthly payments and of having the housing element of the benefit paid directly to their landlord. In England and Wales, the benefit will be paid monthly, with the housing element paid to the claimant.

These differences of approach highlight that autonomy and access to one's essential needs, both elements of a right to a life in dignity, can come into conflict. DWP (2010) argues that receiving monthly payments and paying one's own rent are essential if claimants are to "manage their financial affairs in a manner that best reflects the demands of modern life." If it might be argued that receipt of all of one's income on a monthly basis respects and builds *autonomy*, welfare rights organisations warn that the difficulty of stretching a low income across a month could lead to many claimants experiencing difficulty meeting their *essential needs* and falling into arrears on their rent (Public Bill Committee, 2011; Committee for Social Development, 2013). Making fortnightly payments and direct payment to landlords a matter of choice is perhaps the best way of reconciling these objectives. Autonomy and essential needs are more closely aligned on the issue of payments to joint-claimant couples. In both Northern Ireland and Scotland it has been warned that in an abusive relationship joint payment could enable one member of the couple to financially control the other (see Sharp-Jeffs, 2015), or that that the single payment

could be made to someone for whom “providing for the needs of children” is not a top priority (Committee for Social Development, 2013; Minister for Social Development, 2013; Scottish Government, 2017b). A suggested amendment requiring either the splitting of payments between joint-claim couples or payment by default to the main carer when there are dependent children was not ultimately pursued in Northern Ireland. However, the Department was asked to ensure the interests of women and children were protected in the criteria determining when split payments can be made and the Scottish Government’s commitment to investigate the feasibility of making split payments by default is to be welcomed.

Devolved competence also extends to the housing element of universal credit. Here, the Scottish Government (2016: 82) has given a clear commitment to “abolish the bedroom tax,” so that social tenants in receipt of the housing element are not penalised for under-occupation. Affected claimants in Scotland are already eligible to be compensated through discretionary housing payments. This change will therefore have little financial impact, but does offer greater certainty compared to a benefit that is by definition *discretionary* and not guaranteed in the long term (Flanigan, 2015). Formal abandonment of the social sector size criteria would protect tenants from arrears and protect housing association finances. This would address some of the concerns about retrogression in the right to housing – a component of the right to an adequate standard of living in article 11 ICESCR – raised by the UN Special Rapporteur (Rolnik, 2013). However, the Secretary of State for Work and Pensions has stated that any additional payments of universal credit to mitigate the impact of the social sector size criteria will be subject to the benefit cap. This creates an administrative obstacle to the objective of increasing claimant confidence (Scottish Affairs Committee, 2017). Further threats to the affordability of housing to claimants remain, not least the continued decline of the local housing allowance. This was set at the cheapest 30% of rents in a broad rental market area under the coalition, but is now lower as it has not increased in line with inflation. With the LHA to remain frozen until 2020 and proposals in place to extend it to the social sector (HM Treasury, 2015), further steps may be required to ensure housing security for claimants.

The reserved status of the other features of universal credit – along with jobseeker’s allowance and employment and support allowance – means Scotland has little opportunity to alter the conditions associated with out-of-work benefits and cannot adjust the sanctions regime for non-compliance. Nor can top-up payments be used to negate the impact of a sanction. This will undoubtedly have come as a disappointment to the many Scottish policymakers who have been highly critical of

what they see as little more than a policy of vindictiveness against claimants (Welfare Reform Committee, 2014a).

Given the concerns that exist around whether a policy apparently “deliberately designed to reduce people... to complete destitution” can ever be compatible with respect for dignity (Webster, 2014; Simpson, 2015a), the commitments given in respect of devolved employment support programmes (see below) must be welcomed.

Northern Ireland’s much lower sanctioning rate despite its very similar social security system<sup>5</sup> points to a further way in which it might be possible to influence the use of sanctions in Scotland. Decisions can be shaped by attitudes as well as regulations (Altreiter and Leibetseder, 2015) and devolved policymakers have argued that DWP’s organisational culture promotes liberal use of sanctions in a way that the Northern Ireland Social Security Agency does not. If reserved benefits were administered through a Scottish social security agency, the opportunity would exist to create a working environment in which a ‘trigger-happy’ attitude to sanctioning, in the words of a Scottish civil servant, “is not rewarded” (Simpson, 2016: 204). Improved communication with claimants might reduce the risk of breach of conditions in the first place, or reduce the number of referrals for sanctioning when there was a good reason for the breach. Such differences of approach would be harder to achieve if the reserved benefits remain centrally administered, but a different political and societal attitude towards social security claimants – which a charter of rights might help construct – could still have some impact on sanctioning decisions.

**Recommendation: That the Scottish Government consider resuming annual uprating of the local housing allowance.**

**Recommendation: That talks take place with DWP on the feasibility of administering all benefits, devolved or reserved, through a Scottish social security agency.**

---

<sup>5</sup> In Great Britain, 605,595 JSA sanctions were imposed in 2014, compared to an average quarterly claimant count of 1,976,150. A total of 142,711 higher level sanctions were imposed from 22 June 2012 to the end of 2014, so that on average the number imposed in a 12 month period would be 65,867. In Northern Ireland, 8,215 sanctions, including 617 higher level sanctions, were imposed between April 2013 and March 2014, compared to a claimant count of 63,000 in the first quarter of 2014. As a proportion of quarterly claimant count, the sanctioning rate for the periods examined is 13% in Northern Ireland and 31% in Great Britain. See DWP, 2015; ONS, 2015a; Minister for Social Development, 2015a; Minister for Social Development, 2015b.

#### 4.2.4 Top-ups to reserved benefits

The power to top up reserved benefits offers far-reaching potential to improve outcomes for claimants. To have a major impact on inequality, to lift all claimants above the poverty line or even to top up benefits to the levels required by articles 12 and 13 ESC would be an extremely expensive undertaking. However, the Scottish government's continued commitment to child poverty reduction points to a possible use for the top-up power. Paid employment is recognised by all governments in the UK as the best and most sustainable route out of poverty. Yet the reductions of child poverty achieved under New Labour governments are closely associated with a "quiet redistribution" through more generous child-related benefits (Lister, 2001). Increased parental employment alone would never have been enough to achieve the targets in the Child Poverty Act 2010 and post-2010 social security cuts have been reflected in new increases in poverty (Reed and Portes, 2014; Hood and Waters, 2017). The recent restriction of eligibility for the child element of universal credit to two children per household is projected to increase the UK's relative child poverty rate by 10% (266,000 children) by 2020 (Ghelani and Tonutti, 2017) and will inevitably deepen the poverty of other households already below the threshold. This should be an urgent area for action by a Scottish Government that has emphasised its commitment to reducing child poverty.

Articles 3(1), 26 and 27 UNCRC and article 16 ESC point towards growing up in poverty being incompatible with the best interests of the child and the dignity of the child due to the risk of being condemned to a lifelong, even intergenerational, "cycle of disadvantage" (DSS, 1999: 5). The future First Minister identified the impact on child poverty as one of the worst aspects of the UK coalition government's "pernicious welfare reforms" and a key argument for greater autonomy in social security (Scottish Government, 2014: 3). Again, to supplement the incomes of (at 2013-14 poverty rates) 24% of all Scottish households with children (National Statistics, 2015) would be a costly measure and, with 13 years before the new deadline for achievement of the child poverty targets, perhaps not one that need be undertaken immediately. More urgent attention must be paid to changes to child tax credits and the child element of universal credit under s14 of the Welfare Reform and Work Act 2016 that limit both benefits to two children per household. DWP's victory over the applicants contesting the legality of the household benefit cap in *R (SG) v Secretary of State for Work and Pensions* [2015] was narrow, and a majority of the Supreme Court held that the policy ran contrary to article 3(1) UNCRC. A legal challenge to this more widespread reduction of the incomes of claimant households, impacting disproportionately on larger families, therefore seems inevitable (Harris,

2015a). By choosing not to wait for this (probably lengthy) process but instead to use its top-up power to make good the loss of income experienced by affected households, the Scottish government could give a strong signal of its commitment to the best interests of the child and, if not to child poverty reduction, then at least to avoiding measures that actively increase and deepen child poverty.

While in principle top-up payments at devolved level are outside the scope of the household benefit cap (HM Government 2015), difficulties with the disapplication in Scotland of the size criteria for social tenants in receipt of the housing element of universal credit (discussed above) suggest there is a risk that delivery on this recommendation may be operationally difficult.

The desirability of the top-up is undiminished, but there might be merit in delaying its introduction until a mechanism can be agreed to ensure the payment can be made without immediately being recovered by DWP from families whose income exceeds the cap as a result. Any future income supplements introduced using the top-up power should be subject to the same proviso; there would be little point in spending money from the Scottish budget if much of it did not actually end up in claimants' pockets.

### **Fighting child poverty: the top-up power**

The ability to top up reserved benefits offers the greatest potential for the Scottish Parliament to use its new social security powers to alleviate poverty. Extra payments can be made to recipients of a reserved benefit for “one of the purposes for which the benefit is being provided” (Scotland Act 2016 s24). The purposes of universal credit and child tax credits include assistance with costs associated with “responsibility for children and young persons” (Welfare Reform Act 2012 s10).

Traditionally, child-related benefits in the UK increased with each additional child in the household. This relationship is being eroded by the household benefit cap and changes to child-related benefits. The family element of child tax credit will not be paid to households in which a first child is born after April 2017 (£545 per year at the 2017-18 rate) and most third or subsequent children born after this time will be ineligible for the child element of child tax credit or universal credit (£2,780 per year).

The Treasury and DWP (2015: 7) claim the reform will “enhance the life chances of children.” However, the UK Supreme Court has held that the household benefit cap contravenes the state’s duty to treat the best interests of children as a primary consideration when making decisions affecting child welfare (*R (SG) v Secretary of State for Work and Pensions* [2015]). Reduction of these child-related benefits raises similar concerns. By pushing an additional 266,000 children into poverty and deepening the poverty of a further 256,000 by 2020 (Ghelani and Tonutti, 2017), the policy also undermines the prospects of achieving the targets of the Child Poverty (Scotland) Bill.

Using the top-up power to compensate affected claimants would prevent this increase and deepening of child poverty, protecting the interests of children and supporting progress towards the child poverty targets. Based on current UK birth rates and share of the total population, around 8,500 new births per year in Scotland are likely to be ineligible for the child element, and potentially within the scope of any top-up payment.

**Recommendation: That the top-up power be used to off-set the reductions of child tax credit and universal credit introduced in 2017, ensuring that top-up payments are not recovered under the household benefit cap.**



**Recommendation: That consideration is given to further, longer-term top-ups to child related benefits in support of the objectives of the Child Poverty (Scotland) Bill.**

#### **4.2.5 Employment support**

The near-uniformity across the UK of social security benefits prior to 2012 was not reflected in the related policy field of employment support. Northern Ireland has long operated its own welfare-to-work programmes – currently ‘Steps 2 Success’ – while in Great Britain national schemes have been complemented by localised initiatives, such as Scotland’s Employability Fund. Given the extensive criticisms of DWP’s Work Programme (Committee of Public Accounts, 2014), the Scottish Government will undoubtedly see devolution as an opportunity to do better.

There are obvious pragmatic grounds for wanting employment support schemes to achieve their goal of helping claimants into work. Most people will be financially better off in paid employment,<sup>6</sup> the social and personal benefits are widely recognised (Lister, 2003) and there is potential to reduce expenditure on (mainly reserved) benefits. However, there are further reasons why employment support schemes – participation in which is currently mandatory for many claimants – need to be *effective* to protect dignity. It can be argued that it is an affront to dignity to require people to take part in schemes if they are “worse than doing nothing” in terms of claimants’ employment prospects, as has been claimed of the Work Programme’s impact on certain claimant groups (Swinford, 2013). Equally, if payment by results incentivises providers to focus their efforts on claimants who need the least intensive support to get back to work (Rees *et al*, 2013), those with more complex needs who are effectively written off as unlikely to return to employment are hardly treated with respect. It is to be welcomed that dignity and respect have been established as foundational principles of employment support in Scotland, underpinning an aspiration to a “flexible, tailored, ‘whole-person’ approach,” adaptable to local labour market conditions and responsive to those with more complex needs (Scottish Government, 2016c).

The realisation of these objectives may require differences in approach compared to the Work Programme. Given Scotland’s previous scepticism about private provision

---

<sup>6</sup> 98% of UK children living in households in receipt of jobseeker’s allowance and 89% of those in households in receipt of income support were in the bottom two quintiles of the income distribution (after housing costs) in 2013-14, compared to 23% of those in households not in receipt of any of the main income replacement or disability benefits – see Shale *et al*, 2015

of welfare services (McEwen, 2005), it is perhaps surprising that delivery of the devolved scheme is being contracted out, in common with the Work Programme and Steps 2 Success (Social Security Committee, 2017). However, *who* delivers the programme is probably less important than *how* it is delivered in terms of claimant dignity. In this respect, the Ministerial commitment that participation will be voluntary, with no sanctions applied to benefits for not taking part, immediately enhances the autonomy of claimants while removing a serious threat to their ability to meet their essential needs. Evaluations of previous employability schemes suggest voluntary participation can be at least as effective as compulsion in helping claimants back to work (Harker, 2006). If this proves to be the case in comparisons of the Work Programme with a new Scottish approach, the repercussions for how employment support is delivered could be UK-wide. The approach to gauging effectiveness will need to be carefully considered, especially if payment is by results, to avoid creating incentives for ‘parking’ more demanding claimants and ‘creaming’ those who are easier to help (Soss *et al*, 2013). This might imply the use of *outcome* rather than *output* targets, so that success is not measured by the number of claimants entering employment or coming off benefits, but by entry to good quality, sustainable and/or well-paid employment, earnings progression or impact on participants’ quality of life. While the latter could be difficult to measure, the Scandinavian model of building discussion of the claimant’s wishes into the drafting of a personalised plan, applying the co-production ideal on the front line, may point to a means of identifying what the individual wants to get out of participation, and whether this is achieved (van Aerschoot, 2011). Providers must be rewarded for delivering services of genuine benefit to users, not given opportunities to ‘game’ the system in ways that allow them to meet targets without necessarily achieving the objectives of policy (Wallace, 2013).

**Recommendation: That *all* non-employed people wishing to return to the paid workforce in the future have access to employment support.**

**Recommendation: That performance indicators for employment support programmes take into account sustainability of employment and the achievement of wider claimant objectives alongside entry into employment.**

#### **4.2.6 Delivery of social security**

The delivery of social security can be difficult to separate from claimant experiences and outcomes. How parts of the service are delivered, such as assessments and employment support, can have a direct impact on whether or claimants receive a benefit and on experiences of being treated with respect (or not). While these are

addressed in the previous section, human interactions within social security offices and the wider public narrative around social security and claimants also have a part to play. The co-production model can help develop positive working relationships between claimants and front line staff, with findings about what people consider it means to be treated with respect embedded in working practices through the charter of social security rights. Some potentially problematic aspects of current approaches are highlighted in this section. Public opinion is perhaps harder to control, but the choice of official language – ‘social security’ rather than the stigmatising ‘welfare’ (Garrett, 2015) – does indicate that Scottish policymakers recognise the impact of political rhetoric on social attitudes and claimants’ self-esteem. Two further elements of the delivery of social security with potential to impact on claimants’ awareness of and ability to realise their rights are addressed: the complexity of the system and access to advice.

Some aspects of the social security system clearly represent an interference with claimants’ right to privacy under article 8 ECHR. With the level at which many benefits are paid influenced by family make-up and income, some personal information is inevitably required. However, the ease with which officials investigating suspected cases of social security fraud can access information on claimants held by other public bodies and even private companies is problematic (McKeever, 2009). There is a striking contrast between investigations of suspected tax fraud, in which judicial approval is required for financial records to be accessed, and social security officials’ ability to self-authorise such investigations. The theme of intrusion into privacy continues in many local authorities’ management of discretionary housing payments, widely used to support households affected by changes to housing benefit. Applicants may be asked for very detailed information on income and expenditure, sometimes even whether they have any possessions they could sell or any relatives or friends who could help them make up a shortfall in their housing benefit (Meers, 2015; Harrow Council, undated).

Finally, one of the exceptions to the ineligibility of third and subsequent children for child tax credits (discussed above) applies to children born of “non-consensual conception” (Child Tax Credit (Amendment) Regulations 2017 reg 13). In the absence of a conviction for rape or a domestic abuse offence, this often requires a statement of support from an “approved person” with whom the claimant has been in contact. As was argued during Parliamentary debate on the exception (Hansard, 2016b), and given the relatively low reporting rate for sexual offences (ONS,

2015b),<sup>7</sup> it is likely that many victims will be reluctant to approach an “approved person.” For those who do, raising the issue again with a social security case worker who may not be appropriately trained and who is in a position of power over the claimant brings risks of retraumatisation similar to those associated with cross-examination in the legal process (see Stern, 2010). Adoption of the recommendation to top up the incomes of claimants affected by the reform of child tax credits would have the added advantage of ensuring the so-called ‘rape clause’ does not apply in Scotland. The aspiration to disapply the social sector size criteria would reduce reliance on discretionary housing payments and exposure to the sort of questioning highlighted. A case may remain for a review of the sort of personal information that can be required of social security claimants and in what circumstances, focusing on applications for and investigations of suspected fraudulent claims of devolved benefits.

Social security legislation is long, complex, subject to repeated amendment and normally written in a language far removed from that used in claimants’ everyday lives. Simplification is frequently held up as the Holy Grail internationally, but its achievement has been far from straightforward. New Zealand’s current attempt to consolidate social security legislation and undertake a “plain language rewriting of the law” has won plaudits (Beneficiary Advisory Service, 2016). However, a similar aspiration to a “plain English drafting style” in the Australian reforms of the early 1990s produced a 1,000-section Act described by the Federal Court as “notoriously complex and difficult to interpret,” becoming more complex with each passing year (Harris, 2008; 2013). The limited extent of devolved social security powers means Scotland will have limited scope for addressing “horizontal” complexity caused by the interaction between benefits, but there may be an opportunity to reduce the “intrinsic” complexity of individual devolved benefits. Whether this is desirable may be another matter (Harris, 2015b). Housing benefit has been identified as particularly complex, but the variability of claimants’ housing needs and local housing costs means this is probably inevitable. Simplification through the lifting of rent caps, changes to the rate at which the benefit is withdrawn when the claimant has some earned income or providing housing support on the same basis regardless of tenure could mean significant extra costs or reduced work incentives (Rahilly, 2004). The simplification inherent in the transition from DLA to PIP (through reduction of the number of bands at which the care/daily living component is paid) comes at the cost of responsiveness to individual circumstances. Radical personalisation of the benefit, as discussed above,

---

<sup>7</sup> In 2013-14, only 28% of respondents to the Crime Survey for England and Wales who stated that they had experienced a “serious sexual assault” since the age of 16 said they had reported it to “someone in an official position”.

or even the more cautious suggestion in *A new future* that claimants might be given the option of receiving payment in goods and services rather than cash, would imply an *increase* in complexity. The question for policymakers is whether this is a price worth paying if it results in better outcomes for claimants.

Given that the social security system is in any event likely to remain complex, close cooperation with the advice sector will be required to ensure claimants can access the support they need. Both official and non-government advice services in the UK are highly regarded internationally (ECSR, 2013), yet every year in England and Wales as many as 7 million people who would like to receive advice on a problem are not able to access it (Hodges and Tulibacka, 2009). Luxembourg offers one possible model for improving access, with advice forming part of a highly integrated model of welfare services, delivered through social welfare offices (ECSR, 2013). So while the Luxembourg welfare state is, if anything, even more complex than the UK's due to its blend of social insurance and social assistance benefits, advice on the full range of services and assistance for those in greatest need can be accessed at the same location. If gaps in or problems with access to advice services are identified in Scotland, consideration might be given to a similar 'one-stop-shop' approach: with social security offices and jobcentres already combined, it might be a logical next step to bring (public or independent) advice services under the same roof.

Of course, access to advice in principle, wherever it is delivered, may be of little help in practice if the claimant does not have sufficient information in the first place to indicate that he or she might benefit from advice. Northern Ireland's periodic 'Make the Call' campaigns have proved a successful model of encouraging people to investigate their eligibility for benefits (Department for Communities, undated). It was claimed that the 2011 campaign resulted in the award of £13 million in previously unclaimed benefits (BBC News, 2015), while the 2015 incarnation aimed to generate £30 million in additional payments to 10,000 people. With many claimants subject to a sanction reportedly unaware of the decision until they run out of money (Oakley, 2014), the proposal of Northern Ireland's Welfare Reform Mitigations Working Group (2016) for automatic referral to a dedicated helpline following sanction is a clear example of good practice in ensuring some of the most disadvantaged system users receive the advice they need.

### **Integrating social protection and advice services in Luxembourg**

Run as a partnership between the state and voluntary sector, Luxembourg's social welfare offices play a crucial role in helping citizens navigate a complex, two-tier welfare state. A wide range of services are provided in a 'one-stop-shop' system whose overall objective is to "enable people in need to live a life which respects their human dignity."

Social assistance and advice services were comprehensively overhauled from 2010 with the aim of ensuring that a single office could meet *all* the needs of an individual affected by low income and other social risks. This followed official acknowledgement that the previous patchwork of discretionary assistance could create obstacles to people accessing support and recognition for the first time that social assistance should be available as of right.

Services provided by the social welfare offices include:

- Advice on entitlements from mainstream social insurance schemes (including compulsory health insurance)
- Financial, medical and other forms of assistance, including emergency accommodation, after eligibility for mainstream social security has been exhausted, on the basis of a personalised needs assessment
- Counselling, financial advice, accompaniment to legal appointments and signposting to other services to prevent and relieve difficulties arising from poverty and other social problems

See Croix-Rouge, undated; Le gouvernement, 2010

**Recommendation: That any plans to simplify social security rules should be secondary to ensuring the best possible outcomes for claimants.**

**Recommendation: That an independent review is carried out of the adequacy and ease of access to advice on both devolved and reserved social security in Scotland.**

## **4.3 Summary**

---

The vision of a radically different approach to social security in an independent Scotland set out by the Expert Working Group prior to the 2014 referendum must give way to a pragmatic assessment of how a limited set of devolved powers can be

used to change the system for the better. Social security will, of course, have to compete with other priority areas of devolved policy when spending decisions are being made. In accordance with the 'no detriment' principle established by the Smith Commission (2014), and in line with practice in Northern Ireland, any policy changes that result in higher expenditure in Scotland will have to be funded from devolved resources. Across the North Channel, early ambition to take a different direction to DWP post-2012 has largely been reined in due to concerns about affordability. Rapid implementation of even the list of recommendations in this chapter is unlikely to be feasible.

The principles of dignity and respect can help guide the tough choices to come, but do not in themselves offer an easy path to setting priorities. Even where the Scottish Government has already identified a priority area, as with young carers, the question of whether dignity is best supported by a benefit to help alleviate poverty or other measures to reduce their caring responsibilities should be answered before firm decisions are taken. As indicated, the involvement of young carers themselves will be crucial to identifying the best use of resources. In other areas, the low-hanging fruit is already being picked: neither the envisaged administrative tweaks to universal credit nor the operation of voluntary employment support schemes will have major cost implications, although their impact could nonetheless be significant. *A new future* is notably cautious regarding the prospects of medium-term redesign of disability benefits and the sort of changes discussed here will require careful consideration with extensive involvement of disabled people and carers. A clear priority area in which the devolved powers can be used in support of dignity, equality, non-retrogression in social rights and the Scottish Government's child poverty agenda is in topping up reserved benefits to counteract the limitation of the child element of universal credit to two children per household. Even here there are questions to be answered about interaction with the household benefit cap.

Other means of improving the claimant experience are less readily achievable through legislation. The proposed charter of social security rights has a role to play in shaping interactions between claimants and staff in social security offices, and a review of how sensitive personal information can be requested, accessed or used could form part of its drafting. However, there must also be an onus on political leaders to conduct themselves in a way that positively influences both employee and wider social attitudes towards claimants. Complexity in social security is often criticised, yet the search for a solution has thus far been in vain. Claimants' awareness of their rights, then, will remain dependent for the foreseeable future on access to sufficient advice services. Finally, ongoing monitoring of all parts of the

system, but especially those where problems have been identified, such as disability assessments and the standard of employment support for claimants with complex needs, will be required to ensure that the aspirations to dignity, respect and continuous improvement are delivered.



## 5 | Protecting dignity and respect through scrutiny, oversight and review

### 5.1 Introduction

---

Increased legislative protection for dignity, respect and social rights in Scotland would be an important symbolic step, but would not in itself fulfil the commitments made in *A new future*. Subsequent social security legislation needs to be developed and the system administered in accordance with these principles. While the recommendations in chapter 4 can help with this process, legislators, independent experts and, potentially, Scottish society as a whole all have a role to play in ensuring that policy lives up to the promise. Even if it does, there will inevitably be occasions when claimants feel they are *not* treated with dignity or respect, or are otherwise denied their rights. Robust mechanisms for the review and appeal of decisions are not only crucial for rectifying incorrect decisions, but with the right feedback mechanisms can help ensure that the first-instance decision is more likely to be correct in the future.

### 5.2 Scrutiny and oversight

---

While some of the measures recommended in chapter 3 would increase judicial capacity to oversee and enforce social rights in Scotland, the courts represent an inefficient means of protecting dignity and respect on a systematic scale. This is due in part to the limited legal basis for a judicial finding on ‘respect’. Even if one rejects the argument of social rights sceptics that unelected judges have no legitimate role in determining what should be spent in support of citizens’ welfare, in practice it is through the legislature that most rights will continue to be realised (see Fredman, 2006; McCall, 2016). Following any co-production or consultation process, then, legislative scrutiny has a crucial contribution to make in ensuring the principles of dignity and respect are upheld and rights protected. The limitations inherent in the

legislative process mean a scrutiny gap exists that expert advice and, perhaps, wider societal scrutiny have a role to play in filling.

### **5.2.1 Legislative scrutiny**

Parliamentarians' workload is the key challenge to effective legislative scrutiny. Social security Bills are a significant contributor to this workload due to their length and complexity. In the UK this is exacerbated by the enabling nature of the primary Acts, which delegate power to the Secretary of State to set out the detail of how the system works in regulations. Although Parliament can reject regulations, it has little opportunity to carry out detailed scrutiny and is unable to make amendments. Secondary legislation in turn leaves considerable discretion to be exercised by decision makers in social security offices, widening the scrutiny gap further still (McKeever, 2016).

Committees play a valuable role in scrutinising the operation of the system, for example the House of Commons' Work and Pensions Committee's (2016) review of the operation of Jobcentre Plus in the House of Commons and the large volume of work by the Welfare Reform Committee (2016) in the 2011-16 Scottish Parliament. Specialist, dual-purpose committees, responsible for both ongoing departmental oversight and scrutiny of legislation – as found in the Scottish Parliament and German Bundestag – are identified as examples of best practice by Hagelund and Goddard (2015). They argue that an enhanced role for committees, including oversight of secondary legislation, is necessary to improve parliament's ability to hold the executive to account. Scrutiny of compliance with human rights obligations in the UK Parliament has come in for particular criticism from the Joint Committee on Human Rights (2013). The Northern Ireland Assembly offers one possible solution, having convened an ad-hoc committee (2013) to consider the equality and human rights implications of a Welfare Reform Bill modelled on Westminster's Welfare Reform Act 2012. However, whether this is preferable to mainstreaming concern for dignity and human rights into all aspects of the scrutiny of social security legislation can be questioned.

The Welfare Reform Committee at Holyrood had a strong record of interrogating the economic impact of UK government social security policy at Scotland level (2013a), at local authority level (2014b), at household level (2015a) and on women (2015b) as well as investigations of specific items of welfare reform policy including the 'bedroom tax' (2013b) and conditionality (2014a) and links between welfare reform and food poverty (2014c). Whether such an impressive record of self-directed work can be maintained in the context of an inevitable, steep increase in the legislative

scrutiny work of the successor Social Security Committee as the expansion of Holyrood's powers impacts upon the relatively small number of MSPs is questionable.

**Recommendation: That the Scottish Parliament monitors the impact on committee scrutiny and member workloads of additional devolved functions.**

### 5.2.2 Expert scrutiny

Independent scrutiny can help overcome the limitations of legislative scrutiny by offering expert, non-politically aligned analysis that can examine the detail of emerging regulations *and* take a wider view of the functioning of the system as a whole. The value of the UK's (unique) Social Security Advisory Committee has been recognised in its survival of the so-called 'bonfire of the quangos', in which 210 public bodies were reduced to 70 through abolition or merging, and in a subsequent departmental triennial review (McKeever, 2016). Members advise the Secretary of State on policy proposals and have considerable scope to set an independent research agenda, within fairly tight resource limitations (Logie, 1989). The constitution of the Committee enables diversity in membership, to ensure that the scrutiny and advice can accommodate a range of perspectives.

Independent, expert advice would be beneficial in Scotland as at UK level and is likely to become increasingly necessary as the Social Security Committee's workload grows (Devolution (Further Powers) Committee, 2015). Even if, as a Scottish civil servant has suggested, social security "is no longer shared or devolved, it's a shared set of responsibilities" (Simpson, 2017: 263), the Scottish Government will *not* be able to share in the expertise available to DWP through the SSAC. The Scotland Act 2016 specifically bars devolved social security in Scotland from its remit, despite the view of Lord Kirkwood that it was "essential to have a single statutory independent UK body that can provide oversight" of the interaction of the difference pieces of a more regionally diverse system (Hansard, 2016). The UK Government justified this decision on the grounds that it was simply preserving the SSAC's longstanding role of advising the UK and Northern Ireland administrations. However, it would be no less logical to suggest that the Act represents the abandonment of the SSAC's historic remit to scrutinise social security for the whole of the UK – Westminster and Stormont having previously been the only legislatures to exercise powers in this field. With little likelihood of reversal of this position, the Scottish Government (2016a) consultation on the use of the new social security powers suggests that the establishment of a dedicated Scottish scrutiny body is likely. If dignity and respect were established as foundational principles of social security in Scotland, then

assessment of the system's compliance with those principles would inevitably form part of the work of any future committee. If, like the SSAC, the Scottish committee could determine part of its own research agenda, it might be expected to pay some attention to how adherence to these fundamental principles could be enhanced over time. A commitment on the part of the Scottish Government to collecting data on the impact of its approach to social security on income adequacy and on protected groups under the Equality Act 2010 would greatly assist this process.

A Scotland-specific advisory committee on social security has both advantages and disadvantages under the revised devolution settlement. For most of its existence, the SSAC has not had to deal with significant policy divergence, as provision in Northern Ireland – previously the only jurisdiction with devolved competence – has closely mirrored that in Great Britain (Simpson, 2015b). One recent SSAC report (2015) charts the beginnings of a process of regionalisation and localisation. If partial devolution of competence results in the development of a distinct set of disability, carers' and housing benefits in Scotland, further fuelling the emerging appetite for divergence in Northern Ireland, alongside the fragmentation of discretionary assistance and council tax reduction schemes even within England and Wales, the potential workload for a committee serving the whole of the UK will soar. A Scotland-specific body could alleviate this problem, and could include within its remit the power to take evidence from other expert committees where issues overlap. However, a committee whose sole focus is on devolved Scottish benefits might be ill-placed to assess their interaction with reserved benefits, the impact of divergence on freedom of movement within the UK or the consequences for the social union. A UK committee barred from commenting on devolved Scottish benefits would be no better off. While there are new structures for inter-governmental co-ordination on social security – in particular through the Joint Ministerial Working Group on Welfare – this will focus on high level political agreement and implementation issues. The need remains for detailed scrutiny and review of draft legislation, including secondary legislation, where the detail of how these policy objectives shape the services provided is spelt out. McKeever (2016) suggests the scrutiny gap could be bridged through informal cooperation between the SSAC and an independent, expert Scottish committee (probably unsatisfactory), the SSAC agreeing a memorandum of understanding to advise the Scottish government on a non-statutory basis (against the spirit of the UK government's refusal of a statutory Scottish remit) or, feasibly, a place on the SSAC for a member of the Scottish committee and vice versa.

**Recommendation: That an independent expert advisory committee on Scottish social security be established, taking account of the need to include a wide range of stakeholder expertise in the constitution of the committee.**

**Recommendation: That the Scottish Government, DWP, the UK's Social Security Advisory Committee and a new Scottish oversight committee work together to develop mechanisms for the effective oversight of the interaction of reserved and devolved social security systems.**

### **5.2.3 Societal scrutiny**

The energising effect of the independence referendum and its impact on political engagement and participation in Scotland have been widely remarked upon (Electoral Commission, 2014; Tierney, 2014). Politicians have claimed these high levels of participation were at least in part underpinned by the hope that “Scotland could be a fairer country,” albeit in a way that was “not absolutely defined” (Simpson, 2016: 149). Opportunities may exist to harness this enthusiasm for a drive towards a welfare state based on a more Scottish conception of fairness, underpinned by a deeper, claimant-informed understanding of dignity. Through wider education of the public about social rights (see Shields, 2014), it might be possible to devise mechanisms for *societal* scrutiny of the protection of dignity through social security to complement parliamentary and expert scrutiny. Marshall (1992), the leading citizenship theorist, argues that social rights emerged directly from the exercise of newly-acquired democratic rights in the first half of the 20<sup>th</sup> century. There is potential for the wider exercise of democratic rights to reinvigorate social rights in the 21<sup>st</sup> century. The scale of this challenge should not be underestimated: human rights education is a long term, complex and for some educators controversial task (High Commissioner for Human Rights, 2004; Struthers, 2016). Even South Africa, a country with a human rights-centred narrative of national rebirth, has struggled to raise citizens’ awareness of their rights and how to enforce them (Mubangizi, 2014; Langeveldt, 2012). More focused capacity-building at a smaller scale may have a role to play in filling this gap in the short to medium term. For example, a report on poverty was one of the few concrete outputs of Northern Ireland’s short-lived Civic Forum (McCaffrey, 2013).

**Recommendation: That co-production methods should be used for ongoing, holistic scrutiny of dignity and respect in Scottish social security.**

### 5.2.4 Review and appeals

Even a social security system perfectly designed to promote dignity and respect requires oversight to ensure it does so in practice. Getting benefit decisions “right first time” should be the objective (Administrative Justice and Tribunals Council, 2011), but inevitably there will be a need to challenge first instance decision-making. The high volume of successful appeals in parts of the UK system demonstrates that social security agencies do not always reach the correct decision on what an applicant is, or is not, entitled to (Thomas, 2015). A feedback loop between review systems and decision makers should also be in place to ensure that, where decisions have been overturned, individual and system learning can occur (SSAC, 2016). The concern is that this is not happening, with 63 per cent of first instance decisions being overturned by tribunals, including 65 per cent of PIP decisions. These statistics reinforce the conclusion of the independent review of PIP that public trust in the fairness and consistency of decisions is not currently being achieved (MOJ, 2017; DWP, 2017). Equally importantly, claimants must feel their dignity is respected in the reviews and appeals process as in the rest of the system. Alongside these mechanisms for appealing individual decisions, the courts provide an opportunity to review the legality of the regulations or the human rights compliance of the primary legislation on which benefits are based.

### 5.2.5 Appealing individual decisions

The right to a fair hearing in the determination of one’s rights and obligations is protected by article 6 ECHR and access to an independent appeals process is an element of the right to social assistance in article 13 ESC. While article 6 ECHR suggests a number of procedural requirements must be met to fulfil the right to a fair hearing, it does not lay down a particularly prescriptive formula for the hearing of claims and resolution of disputes. In particular, although the opportunity to appeal a decision to an independent tribunal must exist at some point, there is no absolute requirement for an initial decision to be made or the first appeal heard by independent tribunal (*R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2001]; Brown and Corner, 2002).

Consequently, the ESRC (2013) has found a variety of social security review and appeal mechanisms to be compatible with the procedural requirements of article 13 ESC. Often, as in Croatia and Latvia, the first avenue of appeal is to the ministry or agency that made the initial decision, with the opportunity of a further appeal to a court or tribunal. Elsewhere, the appeal may be heard in the first instance by an independent committee (Iceland) or court (Czech Republic). The fact that the

independent element of Scottish Welfare Fund appeals is provided by the Scottish Public Services Ombudsman rather than a tribunal, then, is not necessarily problematic. Attention will have to be paid to the Ombudsman's capacity to uphold the principles of dignity and respect in an unfamiliar role (Mullen and Gill, 2015). The ECSR is concerned that *all* decisions should be appealable and that there should not be unreasonable procedural barriers, for example time limits, or delays. The ECtHR shares this concern, noting that hindrances in *fact* to accessing justice are just as incompatible with the right to a fair hearing as hindrances in law. Examples include prevention of access to legal advice, the need to seek prior authorisation for an appeal, high costs without legal aid, language barriers or a waiver of a right to a hearing that cannot be regarded as truly voluntary (*Golder v UK* [1979-80]; McBride, 1998). Where no legal or factual blockage exists, claimants' lack of knowledge about the right to challenge social security decisions or their perception of appeals as futile may nevertheless impinge on their ability to access their article 6 rights.

Bryson and Berthoud (1997; see also Adler, 2010) suggest appellants want three things from a review or appeal process: most obviously the benefit originally applied for, but also to know the reasons for and to believe in the fairness of the decision – or draw attention to its “fundamental unfairness.” Subsequent studies with tribunal users confirm that procedural justice, focused on reasons and fairness, is as important as substantive justice, which is focused on the outcome. Tribunals, less formal than the criminal and civil courts, can enable appellants to participate effectively in hearings, ensuring that their voice is heard and that procedural justice is achieved (McKeever, 2013). With many claimants relatively ignorant of social security law and their rights, perceptions of the process will be coloured by the outcome, their ability to participate and their understanding of what is going on. All of these can be heavily dependent on access to advice services (Work and Pensions Committee, 2010). Claimants, and society as a whole, must be assured that the appeal is to a neutral arbiter, and perceptions of neutrality will be influenced by the independence of the arbiter from the agency whose decision is under review (Richardson and Genn, 2007). The potential to embed dignity and fairness in a Scottish social security system also extends to tribunals. Defined as public authorities under the Human Rights Act 1998, tribunals are under a duty not to impinge on ECHR rights, including those from which a right to dignity can be derived, and this duty could be extended to other social rights by Scottish legislation (as described in chapter 3). More specifically, the Tribunals, Courts and Enforcement Act 2007 establishes that tribunals will follow procedural rules that ensure justice is done and that proceedings are fair and accessible, with an overriding obligation to deal

with cases fairly and justly (for example, the Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008).

The Europe-wide trend towards internal review by the original decision-making authority before an appeal to tribunal can be made – endorsed by the Scottish Government (2016a) – does not necessarily mean the claimant’s rights are either eroded or enhanced (Cowan *et al*, 2017). Not only has each approach been observed to have its strengths and weaknesses, but apparently similar mechanisms can yield different results in different contexts. The Work and Pensions Committee (2010: 32) concluded that internal review of DLA and AA decisions, despite lacking independence from the decision making authority, was working extremely well. Meanwhile, it was remarked in evidence that claimants considering whether to request internal review of a decision on incapacity benefit or appeal to a tribunal were in fact faced with a “false choice... would you like us to look at our decision again superficially or would you like us to look at our decision again seriously?” The SSAC (2016) found that, properly conducted, mandatory reconsideration could be an efficient process to improve dispute resolution, but that the evidence it received showed the process does not work as well as it should.

Ultimately, neither tribunal nor internal review provide a fool proof mechanism for ensuring people are always able to enforce their social security rights. Regardless of the process, access to expert advice is of crucial importance in seeing the appeal through to *any* sort of conclusion. Up to half of all people who attempt to deal with civil justice matters themselves give up before a conclusion can be reached (Genn, 1999; Moorhead *et al*, 2008; Denvir *et al*, 2012). For those who do reach the end of the process, the outcome is less likely to be favourable than for those who are legally supported (Genn *et al*, 2006; McKeever, 2013). The “design fantasy” of internal review, that legal representation is unnecessary, is simply not supported by the evidence, with some decision making authorities now *advising* applicants to seek independent advice with their review (Cowan *et al*, 2017: 222). The Work and Pensions Committee (2010) suggests the process could be improved for claimants by requiring DWP to engage more promptly, improving signposting to advice services and ensuring people know their appeal is more likely to succeed if they appear in person at an oral hearing. These recommendations would be relatively easy to incorporate into a Scottish system. The Northern Ireland Welfare Reform Mitigations Working Group’s (2016) proposed system of automatic referral to advice services for sanctioned claimants provides one possible model that might be applied more widely to claimants who receive an adverse decision.



At the level of the individual claimant, then, internal review may offer few, if any, advantages over appeal to a tribunal. However, at a systemic level, it has been suggested that the process impacts positively on the *overall* quality of decision making. This may be because it is easier for reviewers to offer feedback to initial decision makers on where they are going wrong, enabling them to better apply the law next time round, whereas lack of feedback from tribunals to decision makers means an opportunity to learn how to get decisions right first time may be missed (Harrington, 2010). This does not negate Cowan *et al's* (2017: 231) observation that “mandatory reconsideration, by definition, suffers from a lack of independence,” underlining the need for tribunals to be independent of the department whose decision they review, and to be seen as such (McKeever, 2010). There is also no guarantee that any learning that occurs within public bodies will extend to private contractors operating parts of the social security system, from which some of the most serious failings (for example in the assessment process for incapacity-related benefits) have emanated (Thomas, 2015; McKeever, 2014). Although more regular attendance by DWP officials at tribunals might form one means of closing the feedback loop, ultimately this is an issue of culture as much as process, but one that the DWP has now moved closer to accepting.<sup>8</sup> As the AJTC (2011) argues, significant improvements in first-instance decision require commitment on the part of organisational leaders to learning and the creation of an organisational culture that is receptive to user feedback, aims to rectify problems internally at an early state and does learn the lessons of cases that go to appeal. As the means by which decision are reviewed become increasingly diverse, this commitment to improvement must be reflected in how organisations learn the lessons of all forms of appeal and requests for reconsideration (STAJAC, 2015).

**Recommendation: That claimants seeking to avail of any review or appeal mechanism are signposted to independent expert advice and the Scottish Government reviews whether current access to advice is adequate.**

**Recommendation: That practices are developed to ensure feedback and learning between review and appeal processes and decision makers, including the consideration of recommendations developed by the Scottish Tribunals and Administrative Justice Advisory Committee.**

**Recommendation: That the Scottish Courts and Tribunals Service and Scottish Public Services Ombudsman report annually on how their handling of social**

---

<sup>8</sup> In its (yet to be published) response to the SSAC (2016) paper on decision making, DWP agreed to increase the number of Presenting Officers at ESA and PIP appeals in order to facilitate feedback from the tribunal to decision makers.

**security appeals adheres to the objective in the Tribunal Procedural Rules to deal with cases fairly and justly, and with their duties under the Human Rights Act 1998, any new statutory protection of dignity, respect and social rights or Charter of Social Security Rights and Obligations.**

### **5.2.6 Judicial review of policy and its implementation**

Where the challenge is not to an individual decision but to the underlying policy, the ability of UK citizens to enforce many of the rights associated with the protection of dignity has been limited by the non-incorporation of social rights treaties into domestic law. Although the use of other provisions of international law as aids to interpretation of the ECHR rights can provide a ‘back door’ into the domestic courts, recent judicial reviews show continued reluctance to recognise the enforceability of such rights. In one case alone, *R (SG) v Secretary of State for Work and Pensions* [2015] (an unsuccessful judicial review of the household benefit cap), five Supreme Court Justices adopted four different positions on the applicability of article 3(1) UNCRC. Lords Reed and Hughes felt the Convention was not enforceable in the UK. Lord Carnwath considered child rights irrelevant to a case concerning discrimination against adult claimants. Lady Hale relied heavily on article 3(1) in deciding that the cap represented disproportionate discrimination against lone parents. Lord Kerr, in the most ambitious judgment, suggested the UNCRC is directly effective in UK law. However, other non-ECHR social rights played no part in any of the five judgments. That is not to discount the potential for judicial review to force policy change that is discriminatory or in breach of fundamental rights. The challenge, as in all forms of strategic litigation, is to find the right case: the difficulty is that the level of interference with an individual’s social rights will need to be high to create judicial consensus.

Embedding the ESC or ICESCR in Scottish legislation as recommended in chapter 3 would enable claimants to rely on the rights within when challenging devolved social security regulations or the actions of a Scottish social security agency. Despite the persistence of debates as to the justiciability in principle of social rights (King, 2012; Baker, 2013), this would move Scotland towards the position in jurisdictions where such rights are constitutionally protected. Belgian courts have applied the constitutional right to the protection of dignity through the provision of social security in finding against the capping of certain forms of assistance to disabled people (*Cleon v la Commission communautaire française* [2011]) and against retrogression in social rights more generally (Hachez, 2016). In Germany in 2010, following decades of conservatism regarding the enforcement of social rights, the

Constitutional Court was prepared to find an unemployment benefit unconstitutional on the basis of provisions of the Basic Law guaranteeing dignity and defining Germany as a 'social state' (BVerfG 1 BvL 1/09, 9.2.2010). The court found the legislature had failed to set the level of the benefit in a needs-oriented, realistic and transparent manner based on reliable data. This was followed by a 2012 judgment that failure to uprate asylum seeker benefits in line with inflation was unconstitutional (BVerfG 1 BvL 10/10, 1 BvL 2/11, 18.7.2012). Winkler and Mahler (2013: 392) describe this development as "an innovative and progressive interpretation of the German Constitution with human dignity as its foundational value."

The Scotland Act 1998 (ss29 and 33) provides for devolved legislation to be refused Royal Assent or found invalid on the grounds of non-compliance with the ECHR rights. This would not apply to provisions that failed to conform with other human rights agreements and only the UK Parliament could put in place such a binding requirement. However, their incorporation into Scottish law as suggested in chapter 3 would allow the courts to shine a light on instances of non-compliance and require them to interpret legislation or judge the actions of public authorities according to the relevant rights to the extent possible.

### 5.3 Summary

---

Oversight of the social security system takes many forms and takes place at every step from the initial development of policy to decisions on eligibility. The limitations inherent in legislative scrutiny, likely to be exacerbated by the Scottish Parliament's increasing workload, mean independent experts and civil society have an important contribution to make. The UK Government's decision to exclude devolved Scottish benefits from the remit of the SSAC can be remedied to an extent by the creation of a similar body in Scotland, but this still leaves a scrutiny gap in respect of the interaction of the various emerging systems around the UK. Effective societal scrutiny may require considerable capacity-building among participants or wider civic education on social rights.

The key problems with the reviews and appeals process are well known: claimants' lack of knowledge of rights and the system, and decision makers' failure to learn the lessons of previous successful appeals. Better signposting towards advice can go a long way towards addressing claimants' problems and a possible model for doing so is being developed in Northern Ireland. Closing the feedback loop is a different kind of challenge, requiring a shift in organisational culture. The establishment of a new

Scottish social security agency provides an opportunity to effect this change, in keeping with the commitment to continuous improvement. Judicial review will remain an option if the failing is systemic or policy-related rather than an individual incorrect decision, and an enhanced legal status for social rights would make this a more robust means of protecting dignity.

## 6 | Conclusions

### 6.1 A social security system based on dignity and respect

---

The Scottish Government's commitment to a social security system that treats claimants with dignity and respect is to be welcomed. As chapter 2 demonstrates, claimants have too often felt that their treatment in the UK system was anything but dignified or respectful. However, if the two terms are to become more than rhetoric, then a reasonably clear statement of what they mean in the context of social security is required. On one level, this task is one for claimants themselves. They are the experts on the experience of applying for and receiving benefits and on what it means to be treated with respect (or not) in one's interactions with the system. The commitment to dignity and respect is therefore inseparable from the promise to develop policies and systems with the people of Scotland and the proposed charter of social security rights should emerge from this kind of co-production process. Policy makers should also be included within capacity building to understand, define and operationalise dignity in a workable, highly bureaucratic system.

Despite its vagueness, dignity is also a legal term with a clear link to the right to social security and therefore to a minimum standard of living. No legal source gives a definitive answer to what that minimum standard might be, but McCrudden's (2008) view that dignity requires protection from inhuman living conditions, access to essential needs, a measure of autonomy and some level of cultural participation is a good starting point. If the ECHR implies any income floor, it is likely to be a low one. Other human rights agreements ratified by the UK, the Child Poverty (Scotland) Bill and social research on a minimum income standard suggest that the acceptable minimum for households including children may be anywhere between a level just below 50% and above 80% of the median. Adequate child benefits and assistance with disability-related costs form part of this picture. Reasonable conditions may apply, and benefits may be reduced for non-compliance, but everyone must be able to access means of subsistence. Discrimination in the enjoyment of social rights should be avoided and anyone wishing to dispute a decision on eligibility must have access to a sufficiently independent review or appeal mechanism.

Placing social rights beyond the ECHR on a statutory footing, placing a strong presumption in favour of compliance on public authorities and policymakers, as with the ECHR at UK level, would provide a solid foundation for the protection of dignity in social security and other fields of social policy. As well as providing new grounds for judicial review, embedding social rights in this way would help push them to the forefront of the minds of those undertaking legislative or independent expert scrutiny of social security and form a potential means of increasing public awareness. A duty to have due regard to the rights or a non-justiciable claimant charter would form a less robust means of protecting dignity, but would nonetheless enhance the political accountability of the Scottish Government for doing so. Ideally, any social security charter would *complement* the incorporation of social rights into Scottish law and have a wider application than to claimants alone.

## 6.2 Dignity, respect and the new devolved benefits

---

The revised 2016 devolution settlement transfers only limited social security powers to Scotland. The root-and-branch transformation envisaged by the Expert Working Group (2014) in the event of a vote for independence in 2014 will not be possible. Nonetheless, the new devolved benefits offer considerable scope for enhancing the role of social security in protecting dignity. The commitment to raise the level of carer's allowance is an important first step, even if it can be questioned whether it goes far enough. The announcement that participation in employment support schemes will be voluntary is arguably the most important measure available to the Scottish Government in terms of protecting jobseekers from destitution under the UK welfare-to-work regime. Current plans for a young carers' benefit have perhaps been developed too hastily given the rhetorical emphasis on developing policy *with* those affected. Young carers themselves have an important contribution to make to establishing whether a cash payment is the best means of addressing the disadvantage they face. Proposed administrative changes to universal credit are less eye-catching, but offer a means of protecting claimants' ability to meet their essential needs – particularly the avoidance of rent arrears – while allowing autonomy to choose to manage their own budgets across the month if they prefer. Splitting payments between joint-claimant couples can likewise help safeguard access to essential needs for the individual and children, as well as equalising the financial balance of power within a couple.

No proposals for significant reform of disability benefits or use of the power to top up reserved benefits have yet been brought forward. The likely costs involved mean any

such decisions will require careful thought. The top-up power could be used in many ways to undo cuts to reserved benefits or as a poverty reduction measure, but may require careful negotiation with the UK government to exclude top-up payments from the benefit cap. At present the most pressing case for its use is the compensation of claimants with three or more dependent children who can only claim benefits in respect of two. This step would ensure affected families can continue to meet their essential needs, avoid retrogression, reverse an immediate blow to hopes of meeting the targets of the Child Poverty (Scotland) Bill and protect victims of sexual and domestic abuse offences from having to relive the experience when applying for benefit. As with young carers, there is a strong argument for working with disabled people to determine how the support they receive might be improved, perhaps through greater personalisation of the benefit. More immediately, the well documented problems with assessments for disability and incapacity-related benefits mean this is an area in which performance must be carefully monitored and the lessons of successful appeals learned. Consideration must also be given to how the success of employment support schemes can be monitored to ensure that effective support that meets the participant's needs is available to all who hope to improve their chances of sustained, rewarding employment.

As emphasised, a system that treats its users with dignity and respect is about more than just the rules governing access to and the levels of particular benefits. An organisational and political culture that treats claimants as equal citizens is crucial to the realisation of the respect aspiration *and* can make a difference to decisions on eligibility. Complexity being an inevitable feature of any social security system, access to advice on one's likely entitlements, support through the application process and assistance with any appeal or review are equally important to ensuring individuals receive what they are entitled to. The appeal or review process itself must be suitably impartial and meet the procedural requirements of article 6 ECHR; since experience to date suggests a mechanism by which every claimant can pursue his or her appeal unassisted remains a pipedream, signposting to adequately resourced, expert advice services should be provided.

### 6.3 Ambition vs resources

---

Before the Smith Commission, before the independence referendum, the passage of the Welfare Reform Act 2012 was a key moment in the build-up of momentum towards greater autonomy in social security for Scotland. The Act was not only seized as an argument for independence, but left some advocates of the Union more

receptive than previously to limited social security devolution (Simpson, 2017). A similar effect could be seen in Northern Ireland, where the use of previously-dormant devolved social security powers to soften some of the hard edges of the coalition government's reforms suddenly seemed a realistic possibility (Simpson, 2016). Ultimately, however, most of Northern Ireland's rather limited mitigation measures will be restricted to periods of two to four years: resource considerations have trumped ambition to forge a distinctive path.

Now that some social security competences have been devolved, Scotland will have to grapple with similar challenges. The resource-intensive nature of social rights is widely remarked upon and what Holyrood can achieve will depend to a large extent on what it is able, or prepared, to spend (Nolan, 2015). So while the report contains a fairly extensive list of recommendations in respect of the devolved benefits, it would be unrealistic to expect the early implementation of every one. Indeed, in some cases the recommendation is to delay action. Rather, a menu is presented, from which some options may be prioritised because of the low cost attached, prior political commitments, their importance in protecting dignity or their relevance to other policy imperatives, notably child poverty reduction. A commitment to dignity and respect requires certain minimum standards, is an obstacle to the lowering of current standards, indicates a direction of travel for the future and implies the sustained participation of citizens in informing design, delivery and feedback stages. Overnight transformation, though, will not occur.

## 6.4 Concluding remarks

---

For a Scottish Government (2016d) committed to building a "fairer Scotland," social security is among the most important policy areas to be transferred following the Smith recommendations. Even in the context of a limited set of new competences, there is potential to improve outcomes for recipients of the devolved benefits, notably disability and carers' benefits, and for participants in employment support programmes. The devolved functions in respect of universal credit and the opportunity to top up reserved benefits present an opportunity to have an even wider impact, although there are unanswered questions about the extent to which the household benefit cap and other operational matters might obstruct Scotland's ability to make distinctive provision in these areas.

Dignity, the related human provisions of human rights law (including those outside the ECHR) and the aspiration to treat individuals with respect are worthy principles



on which to base a social security system. The report demonstrates that this task need not start with a blank sheet. Examples exist within the UK and internationally of efforts to protect dignity and social rights in social security and in policy more generally, to improve claimant outcomes and to help people understand their rights and responsibilities, access their entitlements and get a fair hearing when they disagree with a decision. Other means of doing so are drawn from or hinted at by academic and legal sources. Recommendations cover everything from quasi-constitutional protection of social rights to the policymaking process, specific policy options for devolved benefits, the frontline operation of the system and the appeals and reviews process. It is now up to the Scottish Government to follow up publication of the Social Security (Scotland) Bill by fleshing out *its* vision for a new devolved approach to social security based on dignity and respect and to explain why it feels its chosen course of action offers the best means of doing so.

# Bibliography

Access Scotland (2017) *Scottish Outdoor Access Code*. Inverness: Scottish Natural Heritage

Ad-hoc Committee (2013) Report on whether the provisions of the Welfare Reform Bill are in conformity with the requirements for equality and observance of human rights (NIA 92/11-15). Belfast: NI Assembly

Adler, M (2010) 'Understanding and analysing administrative justice' in Adler, M (ed) *Administrative justice in context*. Oxford: Oxford University Press

Adler, M (2016) 'A new leviathan: benefit sanctions in the 21<sup>st</sup> century', *Journal of Law and Society* 43(2) pp.195

Administrative Justice and Tribunals Council (2011) *Right first time*. London: AJTC

Altreiter, C and Leibetseder, B (2015) 'Constructing inequality: deserving and undeserving clients in Austrian social assistance offices', *Journal of Social Policy* 44(1) pp.127

Arnstein, S (1969) 'A ladder of citizen participation', *Journal of the American Planning Association* 35, pp.216

Association of Directors of Adult Social Services and Association of Directors of Children's Services (2011) *Young carers: personalisation and whole family approaches*. London: ADASS and ADCS

Baker, J (2013) 'The unwritten constitution of the United Kingdom', *Ecclesiastical Law Journal* 15(1) 4

BBC News (2015) 'NI benefit uptake campaign pays out £13.1m to 4,000 people' (BBC News, 25 October) [BBC News Northern Ireland](#)

BBC News (2017) 'Frank's Law: Scottish Conservatives push for dementia care law change' (BBC News, 4 March) [BBC News Scotland](#)

Beneficiary Advisory Service (2016) 'Submission on the Social Security Legislation Rewrite Bill 2016'. Christchurch: BAS

Berry, K (2014) *Discretionary housing payments* (SPICe briefing 14/17). Edinburgh: Scottish Parliament

Billings, P (2011) 'Income management in Australia: protecting the vulnerable and promoting human capital through welfare conditionality?', *Journal of Social Security Law* 18(4) 167

Birrell, D and Gray, AM (2014) 'Welfare reform and devolution: issues of parity, discretion and divergence for the UK government and the devolved administrations' *Public Money and Management* 34(3) 205

Birrell, D and Gray, AM (2016) *Delivering social welfare: governance and service provision in the UK*. Bristol: Policy Press

Bovaird, T, Stoker, G, Jones, T, Löffler, E and Roncancio, MP (2016) 'Activating collective coproduction of public services: influencing citizens to participate in complex governance mechanisms in the UK', *International Review of Administrative Sciences* 82(1) 47

Bowen, P (2016) 'Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary?', *European Human Rights Law Review* (4) 361

Boyle, K (2015) 'Economic, social and cultural rights in Scotland'. Edinburgh: SHRC

Brown, P and Corner, T (2002) 'Applying *Alconbury*: article 6, third parties and development plans', *Journal of Planning and Environmental Law* (Jun) 661

Bryson, A and Berthoud, R (1997) 'Social security appeals: what do the claimants want?', *Journal of Social Security Law* 4(1) 17

Caritas Aotearoa (2016) 'Submission to the Social Services Select Committee on the Social Security Legislation Rewrite Bill'. Wellington: Caritas Aotearoa

Caswell, D and Høybye-Mortensen, M (2015) 'Responses from the frontline: how organisations and street-level bureaucrats deal with economic sanctions', *European Journal of Social Security* 17(1) 31

Child Welfare Information Gateway (2014) *State statutes: the rights of unmarried fathers*. Washington DC: Children's Bureau

Child Welfare Information Gateway (2016) *State statutes: determining the best interests of the child*. Washington DC: Children's Bureau

Children's Society (2015) 'Young carers in focus: know your rights'. London: Children's Society

Citizens Advice (2015) *The role of carer's allowance in supporting unpaid care*. London: Citizens Advice

Clegg, D (2014) 'David Cameron, Ed Miliband and Nick Clegg sign joint historic promise which guarantees more devolved powers for Scotland and protection of NHS if we vote No' (Daily Record, 15 September)

Commission on a UK Bill of Rights (2012) *A UK Bill of Rights? The choice before us*. London: Commission on a Bill of Rights

Commission on Scottish Devolution (2009) *Serving Scotland better: Scotland and the United Kingdom in the 21st century*. Edinburgh: Commission on Scottish Devolution

Committee for Social Development (2013) *Report on the Welfare Reform Bill (NIA Bill 13/11-15) (NIA74/11-15)*. Belfast: NI Assembly

Committee of Independent Experts (1996) *Conclusions XIII-4*. Strasbourg: Council of Europe

Committee of Public Accounts (2014) *The work programme (HC457)*. London: House of Commons

Committee on Economic, Social and Cultural Rights (1991), 'General comment no 4: the right to adequate housing (art. 11 (1) of the Covenant)'. Geneva: United Nations

Committee on Economic, Social and Cultural Rights (1999), 'General comment 12: the right to adequate food (article 11)' (E/C.12/1999/5). Geneva: United Nations

Committee on Economic, Social and Cultural Rights (2008) 'General comment no 19: the right to social security (art 9)' (E/C.12/GC/19). Geneva: United Nations

Committee on the Rights of the Child (2013) 'General comment no 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)' (CRC/C/GC/14). Geneva: United Nations

Committee on the Rights of Persons with Disabilities (2015), 'Concluding observations on the initial report of the Czech Republic' (CRPD/C/CZE/CO/1). Geneva: United Nations

Committee on the Rights of Persons with Disabilities (2016a), 'Concluding observations on the initial report of Germany' (CRPD/C/DEU/CO/1). Geneva: United Nations

Committee on the Rights of Persons with Disabilities (2016b) 'Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention' (CRPD/C/15/R.2/Rev.1). Geneva: United Nations

Committee on the Rights of Persons with Disabilities (2016c) 'Concluding observations on the initial report of Italy' (CRPD/C/ITA/CO/1). Geneva: United Nations

Conservative Party (2014) *Protecting human rights in the UK: the Conservatives' proposals for changing Britain's human rights laws*. London: Conservative Party

Conservative Party (2017) *Forward, together: our plan for a stronger Britain and a prosperous future*. London: Conservative Party

Couling, N (2013) *Conditionality and sanctions: report to the Secretary of State*. London: DWP

Cowan, D, Dymond, A, Halliday, S and Hunter, C (2017) 'Reconsidering mandatory reconsideration', *Public Law* (Apr) 215

Croix-Rouge luxembourgeoise (undated) 'Social welfare'. Luxembourg: Croix-Rouge [Red Cross Luxembourg](http://www.croix-rouge.lu)

Curtice, J and Ormston, R (2011) *Is Scotland more left-wing than England?* Edinburgh: ScotCen Social Research

Davey, C and Lundy, L (2011) 'Towards greater recognition of the right to play: an analysis of article 31 of the UNCRC' *Children and Society* 19(1) 129

Davis, A, Hill, K, Hirsch, D and Padley, M (2016) *A minimum income standard for the UK in 2016*. York: Joseph Rowntree Foundation

Dearden, C and Becker, S (2000) 'Findings: young carers' transitions into adulthood'. York: JRF

Denvir, C, Balmer, NJ and Buck, A (2012) 'Informed citizens? Knowledge of rights and the resolution of civil justice problems', *Journal of Social Policy* 41(3) 591

Department for Communities (undated) '[Benefit uptake programme](#)'. Belfast: Department for Communities

Department for Social Security (1999) *Opportunity for all: tackling poverty and social exclusion* (Cm 4445). London: DSS

Department for Work and Pensions (2003) *Measuring child poverty*. London: DWP

Department for Work and Pensions (2010) *Universal credit: welfare that works* (Cm 7957). London: DWP

Department for Work and Pensions (2015), 'Jobseeker's allowance and employment and support allowance sanctions statistics'. London: DWP

Department for Work and Pensions (2017) *The second independent review of the personal independence payment assessment*. London: DWP

Devolution (Further Powers) Committee (2015) *New powers for Scotland: an interim report on the Smith Commission and the UK government's proposals* (SP720). Edinburgh: Scottish Parliament

Dupre, C (2009) 'Unlocking human dignity: towards a theory for the 21<sup>st</sup> century', *European Human Rights Law Review* (2) 190

Durose, C and Richardson, L (2015) *Designing public policy for co-production*. Bristol: Policy Press

Dwyer, P, Jones, K, McNeill, J, Scullion, L and Stewart, A (2016), 'First wave findings: disability and conditionality'. York: Welfare Conditionality

- Edmiston, D (2017) 'How the other half live: poor and rich citizenship in austere welfare regimes', *Social Policy and Society: FirstView* [article](#)
- Edmiston, D and Humpage, L (2016) 'Resistance or resignation to welfare reform? The activist politics for and against social citizenship', *Policy and Politics*: [online article](#)
- Electoral Commission (2014) *Scottish independence referendum: report on the referendum held on 18 September 2014 (ELC/2014/2)*. Edinburgh: Electoral Commission
- Equality and Human Rights Commission (2016) 'Consultation response on social security in Scotland'. Glasgow: EHRC
- European Committee of Social Rights (2008) *Digest of the case law of the European Committee of Social Rights*. Strasbourg: Council of Europe
- European Committee of Social Rights (2013) *Conclusions XX-2 – article 12; article 13* (Croatia, Czech Republic, Denmark, Germany, Iceland, Latvia, Luxembourg, Macedonia, United Kingdom). Strasbourg: Council of Europe
- European Committee of Social Rights (2015) *Conclusions XX-4 – article 16* (Denmark, Germany, Iceland, Luxembourg). Strasbourg: Council of Europe
- Ewert, B and Evers, A (2014) 'An ambiguous concept: on the meanings of coproduction for health case users and users' organisations?', *Voluntas* 25(2) 425
- Ewing, KD (1999) 'Social rights and constitutional law', *Public Law (Spr)* 104
- Expert Working Group on Welfare (2014) *Re-thinking welfare: fair, personal and simple*. Edinburgh: Scottish Government
- Finn, D and Goodship, J (2014) 'Take-up of benefits and poverty: an evidence and policy review'. London: Centre for Economic and Social Inclusion
- Flanigan, D (2015) 'More human rights, not less: why we need economic, social and cultural rights', *Scottish Human Rights Journal* 70, 1
- Fotaki, M (2015) 'Co-production under the financial crisis and austerity: a means of democratising public services or a race to the bottom?', *Journal of Management Inquiry* 24(4) 433

- Fredman, S (2006) 'Human rights transformed: positive rights and positive duties', *Public Law (Aut)* 498
- Friedman, D (2016) 'A common law of human rights: history, humanity and dignity', *European Human Rights Law Review* (4) 378
- Garrett, PM (2015) 'Words matter: deconstructing "welfare dependency" in the UK', *Critical and Radical Social Work* 3(3) 389
- Garthwaite, K (2016) *Hunger pains: life inside foodbank Britain*. Bristol: Policy Press
- Genn, H (1999) *Paths to Justice*. Oxford: Hart
- Genn, H, Lever, B and Gray, L with Balmer, N and NCSR (2006) *Tribunals for diverse users* (DCA Research Series 1/06). London: DCA
- Georghiou, N and Berthier, A (2016) 'Scotland Act 2016: carer's allowance' (SPICE briefing 16/52). Edinburgh: Scottish Parliament
- Ghelani, D and Tonutti, G (2017) 'The impact of the two-child limit to tax credits'. London: Policy in Practice
- Gray, AM and Carragher, L (2007) *The impact of poverty on the health and well-being of lone parents in Northern Ireland*. Belfast: Gingerbread NI
- Hachez, I (2016) 'Le standstill, ou comment les juges ont permis de mieux protéger les droits fondamentaux en limitant des possibilités de recul' (*Justice en ligne*, 12 February) <<http://www.justice-en-ligne.be/article821.html>>
- Hansard (2009) *Welfare Reform Bill* deb, 3 March, col 283
- Hansard (2016) *HL Deb* vol 769 col 98, 22 February
- Hansard (2017) *HC Deb* vol 620 col 153, 24 January
- Harker, L (2006) *Delivering on child poverty: what would it take?* (Cm 6951) London: DWP
- Harrington, M (2010) *An independent review of the work capability assessment*. London: TSO



Harrington, M (2011) Independent review of the work capability assessment in Northern Ireland. Belfast: DSD

Harris, N (2000) 'Social security and the UN Convention on the Rights of the Child in Great Britain', *Journal of Social Security Law* 7(1) 9

Harris, N (2008) 'Simplification of social security: the international experience', *Journal of Social Security Law* 15(1) 12

Harris, N (2013) *Law in a complex state: complexity in the law and structure of welfare*. Oxford: Hart

Harris, N (2014a) 'Unsuitable arrangements: funeral expenses and the benefits system', *Journal of Social Security Law* 21(3) 126

Harris, N (2014b) 'Welfare reform and the shifting threshold of support for disabled people', *Modern Law Review* 77(6) 888

Harris, N (2015a) 'Austerity writ large', *Journal of Social Security Law* 22(3) 103

Harris, N (2015b) 'Complexity in the law and administration of social security: is it really a problem?' *Journal of Social Welfare and Family Law* 37(2) 209

Hart, RA (1992) *Children's participation: from tokenism to citizenship*. Florence: International Child Development Centre, UNICEF

Hagelund, C and Goddard, J (2015) *How to run a country: a Parliament of lawmakers*. London: Reform

Henn, M, Weinstein, M and Hodgkinson, S (2007) 'Social capital and political participation: understanding the dynamics of young people's political disengagement in contemporary Britain', *Social Policy and Society* 6(4) 467

High Commissioner for Human Rights (2004) 'United Nations Decade for Human Rights Education (1995-2004): report on achievements and shortcomings of the Decade and on future United Nations activities in this area' (E/CN.4/2004/93). Geneva: United Nations

Hirsch, D, Bryan, A, Davis, A and Smith, N (2013) *A minimum income standard for remote rural Scotland*. Inverness: Highlands and Island Enterprise

Hodges, C and Tulibacka, M (2009) *Civil justice in England and Wales – beyond the courts*. Oxford: University of Oxford

Hood, A and Waters, T (2017) *Living standards, poverty and inequality in the UK: 2016-17 to 2021-22*. London: IFS

Hounsell, D (2013) *Hidden from view: the experiences of young carers in England*. London: Children's Society

HM Government (2015) *Scotland in the United Kingdom: an enduring settlement* (Cm 8990) Edinburgh: Scotland Office

HM Treasury (2015) *Spending review and autumn statement 2015* (Cm 9162) London: HM Treasury

Jensen, T and Tyler, (2015) 'Benefit broods: the cultural and political crafting of anti-welfare commonsense', *Critical Social Policy* 34(4) 470

Joint Committee on Human Rights (2013) *Legislative scrutiny update* (HL157/HC1077). London: Parliament

Kenway, P, Bushe, S, Tinson, A and Born, TB (2015) *Monitoring poverty and social exclusion in Scotland 2015*. York: Joseph Rowntree Foundation

King, DS and Waldron, J (1988) 'Citizenship, social citizenship and the defence of welfare provision', *British Journal of Political Science* 18(4) 415

King, J (2012) *Judging social rights*. Cambridge: Cambridge University Press

Langeveldt, V (2012) 'The Chapter 9 institutions in South Africa' (BP287) Pretoria: Southern African Catholic Bishops' Conference

Learner, S (2013) 'Elderly and disabled face "widening postcode lottery" in home care costs'. *Homecare*, 19 September

Lister, M (2005) "'Marshall-ing" social and political citizenship: towards a unified conception of citizenship', *Government and Opposition* 40(4) 471

Lister, R 'Doing good by stealth: the politics of poverty and inequality under New Labour' *New Economy* 8(2) 65

Lister, R (2003) *Citizenship: feminist perspectives*. Basingstoke: Palgrave Macmillan

- Logie, J (1989) 'The Social Security Advisory Committee', *Social Policy and Administration* 23(3) 248
- Lord Low of Dalston, Baroness Meacher and Baroness Grey-Thompson (2015), *Halving the gap? A review into the government's proposed reduction to employment and support allowance and its impact on halving the disability employment gap*. London: Mencap
- Lundy, L (2007) 'Voice is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child' *British Educational Research Journal* 33, 927
- Lundy, L, McEvoy, L and Byrne, B (2011) 'Working with young children as co-researchers: an approach informed by the United Nations Convention on the Rights of the Child', *Early Education and Development* 22(5) 714
- Marshall, TH (1992) 'Citizenship and social class' in Marshall, TH and Bottomore, T, *Citizenship and Social Class*. London: Pluto
- McBride, J (1998) 'Access to justice and human rights treaties', *Civil Justice Quarterly* 17(Jul) 235
- McCaffrey, R (2013) 'The Civic Forum' (RaISe Paper 109/13) Belfast: NI Assembly
- McCall, SM (2016) 'Putting the justice into social justice: how international human rights can deliver progressive social change for Scotland', *Scottish Human Rights Journal* 72, 2
- McCrudden, C (2008) 'Human dignity and judicial interpretation of human rights', *European Journal of International Law* 19(4) 655
- McEwen, N (2005) 'The territorial politics of social policy development in multilevel states', *Regional and Federal Studies* 15(4) 537
- McKeever, G (2009) 'Balancing rights and responsibilities: the case of social security fraud', *Journal of Social Security Law* 16(3) 139
- McKeever, G (2010) 'Reforming social security appeal tribunals in Northern Ireland: parity whether we Leggatt or not?', *Journal of Social Security Law* 17(2) 71

- McKeever, G (2012) 'Social citizenship and social security fraud in the UK and Australia', *Social Policy and Administration* 46(4) 465
- McKeever, G (2013) 'A ladder of legal participation for tribunal users', *Public Law (Win)* 575
- McKeever, G (2014) 'Improving decision making in employment and support allowance', *Journal of Social Security Law* 21(1) 13
- McKeever, G (2016) 'Legislative scrutiny, coordination and the Social Security Advisory Committee: from system coherence to Scottish devolution', *Journal of Social Security Law* 23(3) 126
- McKeever, G and Ní Aoláin, F (2004) 'Thinking globally, acting locally: enforcing socio-economic rights in Northern Ireland', *European Human Rights Law Review* (2) 158
- Merrick, R (2017) 'Government accused of obstructing the homeless from voting while spending millions on helping rich expats register', *Independent*, 10 March
- Minister for Social Development (2013), NIA AQW 20565/11-15, 12 March. Belfast: NI Assembly
- Minister for Social Development (2015a), AQW 46136/11-15, 2 June. Belfast: NI Assembly
- Minister for Social Development (2015b), AQW 46169/11-15, 9 June. Belfast: NI Assembly
- Ministry of Justice (2017), 'Tribunals and gender recognition certificate statistics quarterly: October to December 2016'. London: MOJ
- Mooney, G and Scott, G (2015) 'The 2014 Scottish independence debate: questions of social welfare and social justice', *Journal of Poverty and Social Justice* 23(1) 5
- Moorhead, R, Sefton, M and Scanlan, L (2008) *Just satisfaction? What drives public and participant satisfaction with courts and tribunals?* (RS5/08), London: MOJ
- Mubangizi, JC (2014) 'Some reflections on two decades of human rights protection in South Africa: lessons and challenges', *African Journal of International and Comparative Law* 22(3) 512

Mullen, T and Gill, C (2015) 'Innovation in Scottish administrative justice: where next for the ombudsman model?' UKAJI, 19 January [Article](#)

National Statistics (2015) *Poverty and income inequality in Scotland: 2013-2014*. Edinburgh: Scottish Government

National Health Service (2015) *The NHS constitution: the NHS belongs to all of us*. London: Department of Health

NHS Scotland (2012) *Your health, your rights: the Charter of Patient Rights and Responsibilities*. Edinburgh: Scottish Government

Nolan, A (2015) 'Not fit for purpose? Human rights in times of financial and economic crisis', *European Human Rights Law Review* 4, 360

Oakley, M (2014) *Independent review of the operation of jobseeker's allowance sanctions validated by the Jobseekers Act 2013*. London: DWP

Office for National Statistics (2015) 'Regional labour market, May 2015'. Newport: ONS

O'Mahony, C (2012) 'There is no such thing as a right to dignity', *International Journal of Constitutional Law* 10(2) 551

Patrick, R (2014) 'Working on welfare: findings from a qualitative longitudinal study into the lived experience of welfare reform in the UK', *Journal of Social Policy* 43(4) 705

Patrick, R (2016) 'Living with and responding to the "scrounger" narrative in the UK: exploring everyday strategies of acceptance, resistance and deflection'. *Journal of Poverty and Social Justice* 24(3) 245

Public Bill Committee (2011) *Welfare Reform Bill: written evidence* (PBC (Bill 154) 2010-2012). London: House of Commons

Rahilly, S (2004) 'Housing benefit and work disincentives', *Industrial Law Journal* 33, 81

Reed, H and Portes, J (2014) *Understanding the parental employment scenarios necessary to meet the 2020 Child Poverty Targets*. London: Social Mobility and Child Poverty Commission

Rees, J, Whitworth, A and Carter, E (2013) 'Support for all in the UK work programme? Differential payments, same old problem...' (WP115). Birmingham: Third Sector Research Centre

Richardson, G and Genn, H (2017) 'Tribunals in transition: resolution or adjudication?' *Public Law* (Spr) 116

Rolnik, R (2013) 'Mission to the United Kingdom of Great Britain and Northern Ireland' (A/HRC/25/54/Add.2). Geneva: United Nations

Rummery, K and McAngus, C (2015) 'The future of social policy in Scotland: will further devolved powers lead to better social policies for disabled people?', *Political Quarterly* 86(2) 234

Select Committee on Public Administration (2008), *From Citizen's Charter to public service guarantees: entitlements to public services* (HC411). London: House of Commons

Scotland Office (2009) *Scotland's future in the United Kingdom: building on ten years of Scottish devolution* (Cm 7738). Edinburgh: Scotland Office

Scottish Affairs Committee (2017) 'Oral evidence: Inter-governmental co-operation on social security, 20 March 2017' (HC 1095). London: House of Commons

Scottish Government (2014) *Child poverty strategy for Scotland: our approach 2014-2017*. Edinburgh: Scottish Government

Scottish Government (2016a) *A new future for social security: consultation on social security in Scotland*. Edinburgh: Scottish Government

Scottish Government (2016b) *Consultation on a Child Poverty Bill for Scotland*. Edinburgh: Scottish Government

Scottish Government (2016c) *Creating a fairer Scotland: a new future for employability support in Scotland*. Edinburgh: Scottish Government

Scottish Government (2016d) *Fairer Scotland action plan*. Edinburgh: Scottish Government

Scottish Government (2017a) 'New social security agency puts people first'. Scottish Government [news release](#), 27 April.

Scottish Government (2017b) A new future for social security: Scottish Government response to the consultation on social security in Scotland. Edinburgh: Scottish Government

Scottish Human Rights Commission (2015) 'Commission welcomes key human rights pledge from First Minister'. [SHRC news release](#), 10 December 2015

Scottish Human Rights Commission (2016) Human rights in health and social care – putting it into practice. Edinburgh: SHRC

Scottish Parliament Official Report (2016), SP deb 25 May col 11

Scottish Tribunals and Administrative Justice Advisory Committee (2015) Making decisions fairly: developing excellence in administrative justice in Scottish councils. Edinburgh: STAJAC

Shale, J, Balchin, K, Rahman, J, Reeve, R and Rolin, M (2015) Households below average income: an analysis of the income distribution 1994/95-2013/14. London: DWP

Sharp-Jeffs, N (2015) 'A review of research and policy on financial abuse within intimate partner relationships'. London: Child and Woman Abuse Studies Unit

Shields, K (2014) 'The place of human rights in a future Scotland', Scottish Human Rights Journal 65(Jun) 1

Sicilia, M, Guarini, E, Sancino, A, Andreani, M and Ruffini, R (2016) 'Public services management and co-production in multi-level governance settings', International Review of Administrative Sciences 82(1) 8

Simpson, M (2015a) "'Designed to reduce people... to complete destitution": human dignity in the active welfare state', European Human Rights Law Review (1) 66

Simpson, M (2015b) 'Developing constitutional principles through firefighting: social security parity in Northern Ireland', Journal of Social Security Law 22(1) 31

Simpson, M (2015c) 'The Agreement as missed opportunity for socio-economic rights in Northern Ireland: implications of full implementation for social security reform', Northern Ireland Legal Quarterly 66(2) 105

Simpson, M (2016) 'The social citizenship of lone parents, 2010-2015: evolution and devolution'. PhD thesis, Ulster University

Simpson, M (2017) 'The social union after the coalition: devolution, divergence and convergence', *Journal of Social Policy* 46(2) 251

Smith Commission (2014), Report of the Smith Commission for further devolution of powers to the Scottish Parliament. Edinburgh: Smith Commission

Social Security Advisory Committee (2015) *Localisation and social security: a review* (OP14) London: SSAC

Social Security Advisory Committee (2016) *Decision making and mandatory reconsideration* (OP18) London: SSAC

Social Security Advisory Committee (2017), SSAC to the Minister for Disabled People, Health and Work: The Personal Independence Payment (Amendment) Regulations 2017, 13 March

Social Security Committee, Official Report 2 February 2017

Soss, J, Fording, R and Schram, SF (2013) 'Performance management as a disciplinary regime: street-level organisations in a neoliberal era of poverty governance' in EZ Brodkyn and G Marston (eds), *Work and the welfare state: street level organisations and workfare policies*, Washington DC: Georgetown University Press

Stapleton, D, Protik, A and Stone, C (2008) *Review of international evidence on the cost of disability* (research report 542). London: DWP

Struthers, AEC (2016) 'Human rights: a topic too controversial for mainstream education?', *Human Rights Law Review* 16(1) 131

Surrey Young Carers Forum (2013) *Making it real for young carers*. London: Think Local Act Personal

Swinford, S (2013) '£5bn Work Programme "worse than doing nothing"'. *Daily Telegraph*, 27 June



- Thijssen, P and van Dooren, W (2016) 'Who you are/where you live: do neighbourhood characteristics explain coproduction?', *International Review of Administrative Sciences* 82(1) 88
- Thomas, R (2015) 'Administrative justice, better decision making and organisational learning', *Public Law* (Jan) 111
- Tierney, S (2014) "And the winner is... the referendum": Scottish independence and the deliberative participation of citizens'. UK constitutional Law Association, 29 September
- Tisdall, EKM (2017) 'Conceptualising children and young people's participation: examining vulnerability, social accountability and co-production', *International Journal of Human Rights* 21(1) 59
- van Aerschot, P (2011) 'Administrative justice and the implementation of activation legislation in Denmark, Finland and Sweden' *Journal of Social Security Law* 18(1) 33
- van Eijk, C and Steen, T (2016) 'Why engage in coproduction of public services? Mixing theory and empirical evidence', *International Review of Administrative Sciences* 82(1) 28
- Walker, P (2012) 'Disability campaigners stage central London protest against welfare reforms'. *Guardian*, 28 January
- Wallace, J (2013) *The rise of the enabling state: a review of policy and evidence across the UK and Ireland*. Dunfermline: Carnegie Trust
- Wass, V (2015) '*Billett v Ministry of Defence*: a second bite' *Journal of Personal Injury Law* 4, 243
- Webster, D (2014) 'Independent review of jobseeker's allowance (JSA) sanctions for claimants failing to take part in back to work schemes: evidence submitted by Dr David Webster'. London: CPAG
- Welfare Reform Committee (2013a) *The impact of welfare reform on Scotland* (SP303). Edinburgh: Scottish Parliament
- Welfare Reform Committee (2013b) *The 'bedroom tax' in Scotland* (SP409). Edinburgh: Scottish Parliament

Welfare Reform Committee (2014a) Interim report on the new benefit sanctions regime: tough love or tough luck? (SP552). Edinburgh: Scottish Parliament

Welfare Reform Committee (2014b) *Report on local impact of welfare reform* (SP563). Edinburgh: Scottish Parliament

Welfare Reform Committee (2014c) *Food banks and welfare reform* (SP537). Edinburgh: Scottish Parliament

Welfare Reform Committee (2015a) *The cumulative impact of welfare reform on households in Scotland* (SP657). Edinburgh: Scottish Parliament

Welfare Reform Committee (2015b) *Women and social security* (SP773). Edinburgh: Scottish Parliament

Welfare Reform Committee (2016) *Welfare Reform Committee legacy paper: session 4* (SP946). Edinburgh: Scottish Parliament

Welfare Reform Mitigations Working Group (2016) *Report of the Welfare Reform Mitigations Working Group*. Belfast: OFMDFM

Wiggan, J (2012) 'Telling stories of 21<sup>st</sup> century welfare: the UK coalition government and the neo-liberal discourse of worklessness and dependency', *Critical Social Policy* 32(3) 383

Winkler, IT and Mahler, C (2013) 'Interpreting the right to a dignified minimum existence: a new era in German socio-economic rights jurisprudence?', *Human Rights Law Review* 13(2) 388

Work and Pensions Committee (2010), *Decision making and appeals in the benefits system* (HC313). London: House of Commons, 2010

Work and Pensions Committee (2016) *The future of Jobcentre Plus* (HC47). London: House of Commons

World Bank (1990) *World development report 1990: world development indicators*. Oxford: Oxford University Press

Wright, S and Stewart, ABR (2016) 'First wave findings: jobseekers'. York: Welfare Conditionality

## Case law

---

*Golder v United Kingdom (A/18)* [1979-80] 1 EHRR 524

*R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141

*Hentrich v France* (app 13616/88) [1994] 18 EHRR 440

*R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23

*Pretty v United Kingdom* (app 2346/02) [2002] 35 EHRR 1

*Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406

*R(A) v National Asylum Support Service* [2004] 1 WLR 752

*Ghaidan v Godin-Mendoza* [2004] 2 AC 557

*Salvesen v Riddell* [2013] UKSC 22

*R (Limbuela) v Secretary of State for the Home Department; R (Tesema) v Secretary of State for the Home Department; R (Adam) v Secretary of State for the Home Department* [2005] UKHL 66

*EB v France* (app 43546/02) [2008] 47 EHRR 21

*R (Brown) v Secretary of State for Work and Pensions and others* [2008] EWHC 3158 (Admin) [2009] PTSR 1506

*European Roma Rights Centre v Bulgaria* (complaint 48/2008) [2009] 49 EHRR SE12

BVerfG (German Federal Constitutional Court) 1 BvL 1/09, Judgment of 9 February 2010

*Cleon v la Commission communautaire française* [2011] Conseil d'État, section du contentieux administratif, arrêt no 215.309 du 23 septembre 2011

BVerfG (German Federal Constitutional Court) 1 BvL 10/10, Judgment of 18 July 2012

*R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68

*European Committee for Home-based Priority Action for the Child and the Family v France* (complaint 82/2012) [2013] 57 EHRR SE21

*R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin)

*R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16

*European Federation of National Organisations Working with the Homeless v Netherlands* (complaint 86/2012) [2015] 60 EHRR SE5

*McLaughlin's application for judicial review, Re* [2016] NICA 53

# Contacts

Please contact the Scotland Team for further information about other Commission reports, or visit our [website](#).

Post: Equality and Human Rights Commission  
2<sup>nd</sup> Floor  
151 West George Street  
Glasgow G2 2JJ

Email: [scotland@equalityhumanrights.com](mailto:scotland@equalityhumanrights.com)

For advice, information or guidance on equality, discrimination or human rights issues, please contact the Equality Advisory and Support Service, a free and independent service.

Website [www.equalityadvisoryservice.com](http://www.equalityadvisoryservice.com)

Telephone 0808 800 0082

Textphone 0808 800 0084

Hours 09:00 to 19:00 (Monday to Friday)  
10:00 to 14:00 (Saturday)

Post FREEPOST Equality Advisory Support Service FPN4431

Questions and comments regarding this publication may be addressed to: [correspondence@equalityhumanrights.com](mailto:correspondence@equalityhumanrights.com). The Commission welcomes your feedback.

## Alternative formats

This publication is also available as a Microsoft Word file from [www.equalityhumanrights.com](http://www.equalityhumanrights.com). For information on accessing a Commission publication in an alternative format, please contact: [correspondence@equalityhumanrights.com](mailto:correspondence@equalityhumanrights.com).

© 2017 Equality and Human Rights Commission

Published August 2017

You can download this publication from

[www.equalityhumanrights.com](http://www.equalityhumanrights.com)

© 2017 Equality and Human Rights Commission

Published: August 2017