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From principles to practice: social security in the Scottish laboratory of democracy*

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The enactment of the Social Security (Scotland) Act 2018 is an important milestone in the development of the second devolved-level social security system within the UK. While the development of the new devolved benefits will continue for several years, the social security principles contained in the Act represent a statement of intent that an emerging Scottish model will be based on a different philosophy to the UK's. This article takes an early look at the challenge the Scottish Government faces in living up to these principles, with a focus on the commitment to put respect for the dignity of individuals at the heart of the system, and work to date towards doing so.

Introduction

One of the key claimed advantages of constitutional decentralisation is the ability of the autonomous components of a state to act as “laboratories of democracy,”¹ developing distinctive solutions to shared policy challenges. Successful experiments may be adopted more widely, the failures abandoned. While this pattern of experimentation followed by policy learning can be observed in the development of some states’ systems of social protection,² it has historically been absent in the UK. Northern Ireland, the one region to have devolved social security competences prior to 2012, has been extremely reluctant to diverge substantially from approaches in Great Britain.³ If this approach has largely been maintained in the wake of the post-2010 coalition and Conservative governments’ controversial welfare reforms, the Scottish Parliament’s assumption of its first significant social security powers opens a new testing ground for distinctive policies.⁴ The passage of the Social Security (Scotland) Act 2018,⁵ which received Royal Assent on 1 June 2018, represents both a major step towards the establishment of a devolved system and a legislative statement of intent regarding the development of a Scottish model of social security.

The expansion of Holyrood’s competences to include social security is inseparable from the 2014 referendum on independence. Whether citizens’ economic welfare would be better served by

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¹ M Keating and P Cairney, ‘Introduction: policy-making, learning and devolution’ (2012) 22(3) *Regional and Federal Studies* 239

² A Arriba and L Moreno, ‘Spain – poverty, social exclusion and “safety nets”’ in M Ferrera (ed), *Welfare state reform in southern Europe: fighting poverty and social exclusion in Italy, Spain, Portugal and Greece* (London: Routledge, 2005)

³ M Simpson, ‘Developing constitutional principles through firefighting: social security parity in Northern Ireland (2015) 22(1) *Journal of Social Security Law* 31

⁴ M Simpson, ‘The social union after the coalition: devolution, divergence and convergence’ (2017) 46(2) *Journal of Social Policy* 251

⁵ asp 9

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independence or remaining part of the UK was central to the debate ahead of the vote.⁶ Consequently, when a single, late opinion poll suggested the electorate might opt for secession, “welfare” was high on the list of fields in which the main UK parties promised new competences would be devolved if voters cast their ballots for the Union.⁷ The Smith Commission would subsequently recommend devolution of limited parts of the social security system – disability and carers’ benefits, the regulated social fund, housing-related benefits and some administrative aspects of universal credit – alongside employment support and the previously devolved responsibility for replacing council tax benefit and the discretionary social fund.⁸ The UK government accepted the Smith recommendations⁹ and the Scotland Act 2016¹⁰ puts this vision into practice, also providing for a power to top up reserved benefits. The first devolved benefit, a supplement to carer’s allowance, is due to commence payment in summer 2018, followed by the Best Start maternity grant and funeral expenses assistance in summer 2019 and the new disability and carer’s benefits in 2020 at the earliest.¹¹

A former chair of the Scottish Human Rights Commission argues that through the independence referendum and subsequent plebiscite on membership of the European Union, “Scotland has presented its credentials internationally and it’s now understood... what its outlook is and what kind of country it wants to become.”¹² To a large extent, this “Scottish brand” is defined by a vision of social justice that is claimed to be qualitatively different to that driving many of the UK government’s actions.¹³ The new devolved competences provide a further opportunity to show the extent of (to borrow a quote usually associated with Wales) the “clear red water” that divides Holyrood from Westminster.¹⁴ The Scottish Government has moved quickly to set out its stall on this front, publishing a set of principles to underpin the development of its social security policy alongside early indications that some devolved benefits will be somewhat more generous than their counterparts in England and Wales.¹⁵ These proposals are situated within a wider political context of social justice-

⁶ G Mooney and G Scott, ‘The 2014 Scottish independence debate: questions of social welfare and social justice’ (2015) 23(1) *Journal of Poverty and Social Justice* 5

⁷ D Clegg, ‘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 2014) <<http://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992>>; W Dahlgreen, ‘Yes campaign lead at 2 in Scottish referendum’ (YouGov blog, 6 September 2014) <<https://yougov.co.uk/news/2014/09/06/latest-scottish-referendum-poll-yes-lead/>> accessed 28 October 2015

⁸ Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (Edinburgh: Smith Commission, 2014)

⁹ HM Government, *Scotland in the United Kingdom: an enduring settlement* (Cm 8990, Edinburgh: Scotland Office, 2015)

¹⁰ c11 part 3

¹¹ Citizen’s Advice Scotland, ‘Details and timescales for the first wave of devolved Scottish benefits announced’ (CAS, 30 May 2017) <<http://www.cas.org.uk/news/details-and-timescales-first-wave-devolved-scottish-benefits-announced>>

¹² R Johnston and A Miller, ‘Interview with Professor Alan Miller’ (2016) 75 *Scottish Human Rights Journal* 2, 3

¹³ G Mooney and C Williams, ‘Forging new “ways of life”? Social policy and nation building in devolved Scotland and Wales’ (2006) 26(3) *Critical Social Policy* 608

¹⁴ DS Moon, ‘Rhetoric and policy learning: on Rhodri Morgan’s “clear red water” and “made in Wales” health policies’ (2013) 28 *Public Policy and Administration* 306

¹⁵ Scottish Government (2016) *A new future for social security: consultation on social security in Scotland*. Edinburgh: Scottish Government

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focused rhetoric, combining ill-defined pledges to better respect social rights in Scotland¹⁶ with the re-establishment of statutory targets for the reduction of child poverty that broadly reflect those abolished by the UK Government in 2016.¹⁷

The Scottish Government's "vision" for devolved social security is: "Social security is important to all of us and able to support each of us when we need it." Realisation of this vision is to be guided by the eight principles in the 2018 Act:¹⁸

- a) social security is an investment in the people of Scotland
- b) social security is itself a human right and essential to the realisation of other human rights,
- c) the delivery of social security is a public service
- d) respect for the dignity of individuals is to be at the heart of the Scottish social security system
- e) the Scottish social security system is to contribute to reducing poverty in Scotland
- f) the Scottish social security system is to be designed with the people of Scotland on the basis of evidence
- g) opportunities are to be sought to continuously improve the Scottish social security system in ways which
 - o put the needs of those who require assistance first, and
 - o advance equality and non-discrimination
- h) the Scottish social security system is to be efficient and deliver value for money.

This article assesses the scale of the challenge facing the Scottish Government as it seeks to put these principles into practice. Its main focus is on principle (d), which focuses on the respect for the dignity of individuals, taking the position that the development of this key principle into practice will contribute to the realisation of other social security principles. Notably, it is impossible to discuss social security as a means of upholding dignity without reference to the *right* to social security and other human rights. A commitment to protecting claimants' dignity will necessarily require consideration of protection against poverty and the reduction of inequality, as well as being in keeping with a continuous search for ways of improving the claimant experience and doing so in cooperation with claimants themselves. The first section seeks to define the concept of dignity in the context of social security, highlighting that there is not necessarily a single, clear definition. This is followed by a section focusing on the commitment to respect the dignity of individuals, particularly the dignity of claimants, in the Scottish social security system and discussion of how this has been reflected in the development to date of the devolved benefits. The subsequent sections shift the spotlight from policy to process, examining the potential contribution of user involvement in policy development to the protection of claimant dignity (and the challenges associated with meaningful coproduction) and the important role of scrutiny, review and appeal processes in ensuring the principles are upheld. A concluding section emphasises the scale of the challenge ahead as the Scottish Government attempts to live up to the standards it has set itself.

¹⁶ N Sturgeon, 'Nicola Sturgeon speech at the United Nations on gender equality and human rights' (Scottish National Party, 5 April 2017) <https://www.snp.org/nicola_sturgeon_speech_at_the_united_nations_on_gender_equality_and_human_rights> accessed 31 May 2017

¹⁷ Child Poverty (Scotland) Act 2017 asp 6; Welfare Reform and Work Act 2016 c7

¹⁸ Social Security (Scotland) Act 2018 asp 9 s1

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Dignity in the context of social security: an elusive definition

At face value, a pledge to develop a social security system based on respect for the dignity of individuals is commendable. In international human rights law, social security represents one of the core rights “of central importance in guaranteeing human dignity.”¹⁹ Yet the concept of human dignity is relatively poorly defined²⁰ – the “very essence” of human rights protection, but not necessarily a right in itself.²¹ Absent an agreed definition, it is all but impossible to assess whether the principle is successfully reflected in practice. One of the first tasks for the Scottish Government, then, is to set out how it understands a term that is central to its vision for a devolved welfare state. The Scottish Social Security Committee has taken evidence on how this concept of dignity might be operationalised, opening up an understanding of the elements that require to be in place to give effect to dignity in practice that has been part of shaping the Scottish Government’s thinking.²² This evidence was based on the authors’ commissioned work for the Equality and Human Rights Commission that draws on McCrudden’s analysis of a legal concept of dignity derived largely from articles 3 and 8 of the European Convention on Human Rights, relating to the right to be protected from inhuman and degrading treatment and the right to family life, respectively. In relation to social security policy, the authors propose an interpretation of dignity as requiring access to a minimum level of income or resources, an interpretation that suggests UK policy since 2010 has, at times, fallen short of this standard.²³ Reinforcing this analysis are the international human rights instruments to which the UK is a signatory, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the United Nation Convention on the Rights of the Child (UNCRC). Alongside this legal interpretation of dignity sits an everyday understanding of the term, in which claimants’ interactions with the social security system and their construction by those with responsibility for it are at least as important as what the regulations have to say about individuals’ entitlements and obligations.

McCrudden suggests that the protection of dignity has four main elements, each relating to a right explicitly or implicitly conferred by article 3 or 8 ECHR: protection from inhuman or degrading treatment and living conditions, the ability to access one’s essential needs, individual autonomy and protection of cultural identity.²⁴ Although the House of Lords has made clear that charitable assistance can be an acceptable means of protection against inhuman or degrading living conditions,²⁵ each of the three remaining elements of dignity requires, or potentially requires, an income. The focus here is on essential needs, which, for relative definitions of poverty, include social and cultural participation. For Townsend, poverty consists of “resources... so seriously below... the

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

²⁰ C Dupre, ‘Unlocking human dignity: towards a theory for the 21st century’ (2009) 2 European Human Rights Law Review 190; C O’Mahony, ‘There is no such thing as a right to dignity’ (2012) 10(2) International Journal of Constitutional Law 551

²¹ *Pretty v United Kingdom* (app 2346/02) [2002] 35 EHRR 1 H18

²² Scottish Parliament Social Security Committee, *16th Meeting 2017, Session 5, Thursday 14th September 2017*

²³ C McCrudden, ‘Human dignity and judicial interpretation of human rights’ (2008) 19(4) European Journal of International Law 665; M Simpson, ‘“Designed to reduce people... to complete destitution”: human dignity in the active welfare state’ (2015) (1) European Human Rights Law Review 66

²⁴ C McCrudden, ‘Human dignity and judicial interpretation of human rights’ (2008) 19(4) European Journal of International Law 665

²⁵ *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66

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average” that the individual is “excluded from ordinary living patterns, customs and activities,”²⁶ while Marshall argues that the social rights of citizenship include the ability to “live the life of a civilised being according to the standards prevailing in the society,”²⁷ implying sufficient resources to enjoy accommodation, goods, services and activities in keeping with current expectations. More recently, the European Council and Commission refer to “income and resources... so inadequate as to preclude... a standard of living considered acceptable in the society,” encompassing “activities (economic, social and cultural) that are the norm for other people” as well as physical essentials such as housing and healthcare.²⁸ Some measures to protect dignity, then, might also be expected to contribute to the reduction of either the extent or severity of poverty, in keeping with principle (e) under section 1 of the Social Security (Scotland) Act 2018.

In common with the relative definitions of poverty, article 11 ICESCR, which confers a right to an adequate standard of living (mirrored in article 27 UNCRC), goes beyond physical necessities for survival to encompass “the cost of participating in the everyday life of society.”²⁹ The subsidiary rights to food and housing recognise the need for these to meet cultural and technological requirements as well as to sustain life.³⁰ While ICESCR is a useful source in as much as it very clearly ties social security to the protection of dignity, as a basis for identifying what an adequate standard of living actually looks like it lacks precision. The European Social Charter’s (ESC) income standards represent a more readily applicable benchmark, albeit that income-based poverty lines can themselves be criticised as arbitrary.³¹ According to articles 12 and 13 ESC, income from a social security benefit should be no less than 40% of the equivalised median income, with the claimant’s total income from all sources including social security and social assistance top-ups not “manifestly below” 50% of the equivalised median. Given the lack of clear distinction between social assistance and social security in the UK system, the latter offers the more useful guidance. Benefits may be reduced below this level for non-compliance with reasonable jobseeking conditions, but the claimant should not be deprived of his or her “means of subsistence.”³² Article 16 requires that families have access to adequate housing and an adequate income, with states normally found to be compliant if they offer family benefits of at least five per cent of the median income per child.

Other instruments confer specific rights upon particular social groups. Article 28 of the UN Convention on the Rights of Persons with Disability (UNCRPD) guarantees disabled people the right to an adequate standard of living and to access social security, including assistance with disability-

²⁶ P Townsend, *Poverty in the United Kingdom* (London: Penguin, 1979) 31

²⁷ TH Marshall, ‘Citizenship and social class’ in TH Marshall and T Bottomore, *Citizenship and Social Class* (London: Pluto, 1992)

²⁸ Council of the European Union, ‘Joint report by the Commission and the Council on social inclusion’ (7104/04, Brussels, 5 March 2004) 8

²⁹ In conjunction with article 25(1) UDHR – see World Bank, ‘World development report 1990: world development indicators’ (Oxford: Oxford University Press, 1990) 26; A Eide, ‘The right to an adequate standard of living including the right to food’ in A Eide, C Krause and A Rosas (eds), *Economic, social and cultural rights: a textbook* (Alphen an den Rijn: Kluwer Law International, 2001) 133

³⁰ Committee on Economic, Social and Cultural Rights, ‘General comment 12: the right to adequate food (article 11)’ (E/C.12/1999/5, Geneva: United Nations, 1999); Committee on Economic, Social and Cultural Rights, ‘General comment no 4: the right to adequate housing (art. 11 (1) of the Covenant)’ (sixth session, 1991) (Geneva: United Nations, 1991)

³¹ C Garroway and JR de Laiglesia, ‘On the relevance of relative poverty for developing countries’ (WP314, Issy-les-Moulineaux: OECD Development Centre, 2012)

³² European Committee of Social Rights, *Digest of the case law of the European Committee of Social Rights* (Strasbourg: Council of Europe, 2008) 97-101

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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. Article 3(1) UNCRC 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 UNCRPD. 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.³³ The child’s right to benefit from social security is protected by article 26, and in decision-making on social security policy or entitlements the best interests of the child should be assessed with an eye to article 27 (the right to an adequate standard of living) and, arguably, the Child Poverty (Scotland) Act 2017. The latter reinstates (in Scotland only) the former presumption in UK law that children should not live in households experiencing poverty according to any of four statutory definitions.

The UK has ratified all the agreements mentioned, but only the ECHR unambiguously forms part of domestic law. Consequently, while the ESC, ICESCR, UNCRC³⁴ and CRPD provisions mentioned are relevant to a normative discussion of what a social security system based on respect for dignity looks like, they cannot be judicially enforced in the UK courts – nor does the state participate in the quasi-judicial structures associated with the ESC or ICESCR. The ECHR focuses primarily on civil and political rights, hence the protection of social rights in the UK is limited: article 8 ECHR and Protocol 1, article 1 (P1-1) on protection of property rights can be used in defence of existing social security entitlements or, in conjunction with article 14 ECHR, to challenge discriminatory policies and practices, but for adults at least there is no absolute right to financial support from the state.³⁵ Nonetheless, the use of other human rights instruments as aids to interpretation of the ECHR rights has potential to provide a “back door” to justiciability. Notably, in the dissenting judgments in *SG* and High Court decision in *DA* there are signs that a section of the UK judiciary is increasingly willing to use article 3(1) UNCRC to read a right to social security for children, or at least some protection for existing child-related benefits, into article 8 and P1-1 ECHR.³⁶

Turning to dignity as an everyday concept, rather than a legal one, there is a wealth of empirical evidence regarding what claimants consider it means to be treated with dignity, and in particular ways in which they feel the system fails to do so. The two definitions overlap to some extent: unsurprisingly, the level of income the social security system provides is among the most common

³³ Committee on the Rights of the Child, ‘General comment no 14 on the right of the child to have or her best interests taken as a primary consideration (art 3, para 1)’ (CRC/C/GC/4, Geneva: United Nations, 2013)

³⁴ The best interests of the child must be treated as a primary consideration in decisions of specific matters and the Welsh Government must have due regard to the UNCRC rights collectively – Children (Northern Ireland) Order 1995 no 755 (NI 2); Children Act 2004 c31 s11; Borders, Citizenship and Immigration Act 2009 c11 s55; Rights of Children and Young Persons (Wales) Measure 2010 nawm2 s1

³⁵ *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406; *Nagy v Hungary* (app 53080/13) judgment of 13 December 2016 para 80, 113

³⁶ *R (on the application of SG and others) (previously JS and others) v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449; *R (on the application of DA) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (admin); for discussion, see M Simpson, ‘Case comment: *R (on the application of DA) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (admin)’ (forthcoming, 2017) *Journal of Social Security Law*

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complaints. Claimants report feeling they are not “entitled to a quality of life,”³⁷ but are “just existing,” or “living... like a pigeon... you’re just there pick pick pick, and that’s it.”³⁸ Often, the threat to dignity flows less from the effects of poverty on physical health than from the demoralising experience of being forced to rely on family, friends or foodbanks for essentials and being unable to afford everyday social activities.³⁹ This sense of shame does not spontaneously emerge within claimants, but is linked to a “cultural economy of disgust” towards the poor, deliberately fostered by political and media narratives.⁴⁰ Such attitudes, reflected in the portrayal of claimants one minute as feckless dependants, the next as cunning fraudsters,⁴¹ also permeate human interactions in social security bureaucracies, legitimising their treatment (studies suggest) with paternalism, condescension or suspicion⁴² and having a real impact on decisions regarding entitlement to benefit.⁴³

A Scottish social security system based on respect for the dignity of individuals

The commitment to develop a social security system that respects the dignity of individuals therefore has implications for how policy objectives are translated into legal provisions *and* on how the system operates in practice. However, although the Social Security (Scotland) Act sets out the principles that will shape social security, it provides little indication of how devolved benefits will actually function. Rather, it serves as an enabling Act, setting out the areas in which devolved benefits can be developed but conferring extensive powers upon Ministers to set out the detail in secondary legislation. It is possible to identify a number of ways in which the new competences might be used to better protect dignity although there are practical limits to what can be done in the short term: resource considerations and the challenge of taking over the administration of social security need to be considered. The devolution settlement also places limitations on Scotland’s scope for putting the principles into practice.

³⁷ D Edmiston, ‘How the other half live: poor and rich citizenship in austere welfare regimes’ (2017) *Social Policy and Society*: FirstView article <<https://doi.org/10.1017/S1474746416000580>>

³⁸ R Patrick, ‘Working on welfare: findings from a qualitative longitudinal study into the lived experience of welfare reform in the UK’ (2014) 43(4) *Journal of Social Policy* 705, 710-3

³⁹ K Garthwaite, *Hunger pangs: life inside foodbank Britain* (Bristol: Policy Press, 2016); R Patrick, ‘Living with and responding to the “scrounger” narrative in the UK: exploring everyday strategies of acceptance, resistance and deflection’ (2016) 24(3) *Journal of Poverty and Social Justice* 245

⁴⁰ T Jensen and I Tyler, ‘Benefit broods: the cultural and political crafting of anti-welfare commonsense’ (2015) 34(4) *Critical Social Policy* 470, 470

⁴¹ R Patrick, ‘Living with and responding to the “scrounger” narrative in the UK: exploring everyday strategies of acceptance, resistance and deflection’ (2016) 24(3) *Journal of Poverty and Social Justice* 245; G McKeever, ‘Social citizenship and social security fraud in the UK and Australia’ (2012) 46(4) *Social Policy and Administration* 465

⁴² P Dwyer, K Jones, J McNeill, L Scullion and A Stewart, ‘First wave findings: disability and conditionality’ (York: Welfare Conditionality, 2016); S Wright and ABR Stewart, ‘First wave findings: jobseekers’ (York: Welfare Conditionality, 2016); D Edmiston and L Humpage, ‘Resistance or resignation to welfare reform? The activist politics for and against social citizenship’ (2016) *Policy and Politics*: online article <<http://dx.doi.org/10.1332/030557316X14802575969590>>

⁴³ D Caswell & M Høybye-Mortensen, ‘Responses from the frontline: how organisations and street-level bureaucrats deal with economic sanctions’ (2015) 17(1) *European Journal of Social Security* 31; C Altreiter and B Leibetseder, ‘Constructing inequality: deserving and undeserving clients in Austrian social assistance offices’ (2015) 44(1) *Journal of Social Policy* 127

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Disability benefits represent by far the most significant part of the social security system to come under devolved control, accounting for £2.1 billion of expenditure in 2014-15 compared to £600 million on the other devolved benefits.⁴⁴ They are also an area in which claimants' rights have come under pressure in the UK and internationally in the post-2008 age of austerity,⁴⁵ building on longer-recognised problems with the assessment of applicants' eligibility for both disability and incapacity benefits.⁴⁶ Alongside rather vague promises of an improved assessment process,⁴⁷ the only concrete proposals from the Scottish Government to date are to give claimants more opportunity to opt for direct payment of their benefit to providers of services including home adaptations and energy⁴⁸ and not to involve private companies in assessments,⁴⁹ the latter somewhat controversially enshrined in the primary legislation.⁵⁰ This perhaps misses an opportunity to address the fact that UK disability benefits are a relatively blunt instrument, with the two care-related and two mobility-related bands of personal independence payment leaving relatively little scope to respond to individual circumstances, placing a ceiling on entitlement for the most seriously disabled and causing a cliff-edge loss of eligibility for those with less serious conditions.⁵¹ A more readily personalisable benefit would give greater scope for payments to reflect individual needs, but at the cost of greater complexity. That is not to say that complexity must be avoided at all costs,⁵² but any gains in terms of claimant outcomes would have to be weighed against higher administrative costs, which could be considerable if it were no longer possible to share IT systems with DWP.⁵³ Spicker further points out that a highly personalised benefit of this nature might require more frequent and more intrusive assessments or access to personal information, with the implication that it could become a threat to claimant dignity.⁵⁴

Greater ambition can be seen in the field of carers' benefits. For adult carers, the Scottish Government proposes an increase in carer's allowance to the same level as jobseeker's allowance

⁴⁴ Scottish Government, *A new future for social security: consultation on social security in Scotland*. (Edinburgh: Scottish Government, 2016)

⁴⁵ Committee on the Rights of Persons with Disabilities, '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, 2016); Committee on the Rights of Persons with Disabilities, 'Concluding observations on the initial report of Italy' (CRPD/C/ITA/CO/1, Geneva: United Nations, 2016)

⁴⁶ G McKeever, 'Improving decision making in employment and support allowance' (2014) 21(1) *Journal of Social Security Law* 13

⁴⁷ Somewhat elaborated on in the draft legislation, which provides that a disability benefit may be awarded for a guaranteed period (which may be permanent) without reassessment – Social Security (Scotland) Act 2018 asp 9 s51

⁴⁸ Scottish Government, *A new future for social security: consultation on social security in Scotland*. (Edinburgh: Scottish Government, 2016)

⁴⁹ Scottish Government, 'New social security agency puts people first' (Scottish Government news release, 27 April 2017) <<https://news.gov.scot/news/new-social-security-agency-puts-people-first>>

⁵⁰ Social Security (Scotland) Act 2018 asp 9 s12; see also SP deb 1 Feb 2018, 3rd meeting session 5 col 37-42

⁵¹ K Rummery and C McAngus, 'The future of social policy in Scotland: will further devolved powers lead to better social policies for disabled people?' (2015) 86(2) *Political Quarterly* 234

⁵² N Harris, 'Complexity in the law and administration of social security: is it really a problem?' (2015) 37(2) *Journal of Social Welfare and Family Law* 209

⁵³ V Wass, '*Billett v Ministry of Defence*: a second bite' (2015) 4 *Journal of Personal Injury Law* 243; *McLaughlin's application for judicial review, Re* [2016] NICA 53

⁵⁴ P Spicker, *What's wrong with social security benefits?* (Bristol: Policy Press, 2017)

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(£73.10 per week), while a dedicated young carers' benefit is also envisaged.⁵⁵ The higher payment to adult carers will clearly be welcome – the current allowance of £62.10 is below the destitution threshold identified by Fitzpatrick and others.⁵⁶ However, whether it is sufficient to ensure a life in dignity is perhaps more questionable. Jobseeker's allowance is intended to be a short term benefit, and normally is, with 60% of claims lasting around six months. Carer's allowance tends to be a long term benefit, with more than 50% of claims lasting two years or longer.⁵⁷ As such, it is arguable that the support group of employment and support allowance would be a better comparison. Claimants in the support group receive £109.65 per week, meaning such a change would carry a significant cost implication – 66,000 people currently receive carer's allowance in Scotland, with another 45,000 thought to be eligible but not claiming.⁵⁸ The proposed young carers' benefit also has merits in that it would reduce the poverty this group often faces, in keeping with the rights to social security and an adequate standard of living in articles 26 and 27 UNCRC. However, payment for caring could entrench the other disadvantages that affect young carers, including exclusion from ordinary childhood activities and educational underachievement.⁵⁹ This could affect enjoyment of a range of other rights protected by the UNCRC, including 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) and play or leisure (article 31),⁶⁰ with a knock-on impact on longer term life chances. So whereas increasing young carers' incomes is at face value desirable, doing so is not without risk.

Devolved competence in relation to the main income replacement benefits is much more limited, extending only to control of the housing element of and payment arrangements for universal credit.⁶¹ This in turn limits the scope of devolved benefits to contribute to the realisation of the Act's principle (e) by reducing poverty. Divergence from England and Wales can be expected in the form of compensation for claimants affected by the social sector size criteria ('bedroom tax') through a new housing assistance benefit.⁶² At one point it appeared that the objective of ensuring housing benefit continued to cover social rents would be fatally undermined by the extension of the local housing allowance to the social sector, which would have rendered the 'bedroom tax' redundant

⁵⁵ Social Security (Scotland) Act 2018 asp 9 s28, 81; Scottish Government, *A new future for social security: consultation on social security in Scotland*. (Edinburgh: Scottish Government, 2016); Scottish Government, 'More support for young carers' (news release, 20 September 2017)

⁵⁶ S Fitzpatrick, G Bramley, F Sosenko, J Blenkinsopp, S Johnsen, M Littlewood, G Netto and B Watts, *Destitution in the UK* (York: JRF, 2016)

⁵⁷ Lord Low of Dalston, Baroness Meacher and Baroness Grey-Thompson, *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, 2015)

⁵⁸ N Georghiou and A Berthier, 'Scotland Act 2016: carer's allowance' (SPICe briefing 16/52, Edinburgh: Scottish Parliament, 2016)

⁵⁹ C Dearden and S Becker, 'Findings: young carers' transitions into adulthood' (York: JRF, 2000); D Hounsell, *Hidden from view: the experiences of young carers in England* (London: Children's Society, 2013)

⁶⁰ C Davey and L Lundy, 'Towards greater recognition of the right to play: an analysis of article 31 of the UNCRC' (2011) 19(1) *Children and Society* 129

⁶¹ Scotland Act 2016 c11 s29, 30

⁶² Social Security (Scotland) Act 2018 asp 9 sch; initial doubts as to the technical feasibility this long-held policy application appear to have been overcome – see Scottish Affairs Committee, 'Oral evidence: Inter-governmental co-operation on social security, 20 March 2017' (HC 1095, London: House of Commons, 2017); J Freeman, SP deb 19 Sep 2017 col 10-20

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and ensured many social tenants' rents exceeded their housing benefit payments.⁶³ Further consideration of how Scottish tenants might be protected from arrears would have been required in this changed context, but the proposal has now been abandoned.⁶⁴ Other Scottish tweaks to universal credit speak to the tension that can exist between the 'essential needs' and 'autonomy' elements of dignity. Fortnightly benefit payments and direct payment of housing-related benefits to landlords may help with budgeting and the avoidance of arrears, but undermine the UK government's stated objective of giving individuals the right (and responsibility) to manage their own finances through monthly payments to the claimant.⁶⁵ The Scottish approach of giving claimants the *option* of requesting fortnightly or direct payments,⁶⁶ rather than doing so by default as in Northern Ireland, is perhaps as good a way as any of balancing these competing aspirations.

Control of the key aspects of universal credit and the other major income replacement benefits – the level of payment and eligibility criteria – remains reserved to Westminster. However, the Scottish Parliament does have power to make top-up payments to individuals entitled to a devolved benefit. If protecting dignity and human rights and improving the service to claimants are to be prioritised, the most obvious use for the top-up power at present is to compensate people affected by the new two-child limit on universal credit and child tax credits.⁶⁷ A judicial challenge to the policy, widely referred to in Scotland as the "family cap,"⁶⁸ was largely unsuccessful in the High Court,⁶⁹ although this is likely to be just the first stage in a long process with an uncertain outcome. Scottish policymakers *can* act to protect the best interests of children and prevent an early blow to hopes of achieving their ambitious new targets for child poverty reduction⁷⁰ by making up the difference in payments, as long as this does not result in the top-up being recovered by DWP through the benefit cap. Meeting the child poverty targets may require further top-ups to child-related benefits in the longer term.

No control over eligibility criteria means no control over the sanctions imposed for breach of these conditions, arguably the greatest threat to claimants' ability to meet their essential needs in the contemporary social security system. The legislation also prohibits the use of devolved benefits to negate the effect of a sanction applied to a reserved benefit.⁷¹ This restriction of devolved power will undoubtedly have come as a disappointment to Scottish policymakers for whom the recent

⁶³ HM Treasury, *Spending review and autumn statement 2015* (Cm9162, London: HM Treasury, 2015); see also Chartered Institute of Housing, *Impact of welfare changes on rented housing in Northern Ireland* (Belfast: CIH, 2017)

⁶⁴ S Barnes, 'Government drops LHA cap plans in huge climbdown' (Inside Housing, 25 October 2017)

⁶⁵ Public Bill Committee (2011) *Welfare Reform Bill: written evidence* (PBC (Bill 154) 2010-2012). London: House of Commons; Committee for Social Development (2013) *Report on the Welfare Reform Bill (NIA Bill 13/11-15)* (NIA74/11-15). Belfast: NI Assembly

⁶⁶ Universal Credit (Claims and Payments) (Scotland) Regulations 2017

⁶⁷ Welfare Reform and Work Act 2016 c7 s13, 14

⁶⁸ On the Engender: Scotland's feminist policy podcast, 26 June 2017

<<https://www.engender.org.uk/content/on-the-engender-podcast/>>

⁶⁹ The application of the policy to kinship care arrangements was found to be unlawful, but the principle of limiting eligibility for child-related benefits in this manner was upheld – *SC v Secretary of State for Work and Pensions* [2018] EWHC 864 (Admin)

⁷⁰ Child Poverty (Scotland) Act 2017 asp 6; see also D Ghelani and G Tonutti, 'The impact of the two-child limit to tax credits' (London: Policy in Practice, 2017)

⁷¹ Scotland Act 1998 c46 sch 5 head F exception 5; Social Security (Scotland) Act 2018 asp 9 s80

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escalation of conditionality in the UK system has been a key concern.⁷² It is difficult to dispute Webster's conclusion that the sanctions regime is "designed to reduce people... to complete destitution" given that single adult jobseekers without dependants could be left with zero income after housing costs for periods of up to three years for repeat failures.⁷³ Further threats to dignity are found in the process, with benefit payments stopped at the commencement of an investigation without waiting to determine whether the sanction is merited and widespread reports of sanctions imposed for very minor or even unavoidable instances of non-compliance.⁷⁴

Efforts are being made to 'design out' sanctions to the extent possible within the constitutional settlement: by making participation in devolved employment support schemes voluntary, the risk of being sanctioned (and therefore the threat to dignity) is diminished. This is an area in which the laboratories of democracy analogy is particularly apt: previous research suggests voluntary welfare-to-work programmes are no less effective than compulsory schemes,⁷⁵ and if this proves to be the case in Scotland then other parts of the UK will face pressure to rethink how they provide employment support. At the very least, pressure for the devolution of further powers to soften conditionality can be expected. In the meantime, some negotiating space might be opened by the power to pay short-term assistance following a decision to suspend or terminate eligibility of a devolved benefit until the conclusion of any appeal process.⁷⁶ As currently constructed, no such provision would be available on the suspension or termination of a reserved benefit. However, it is arguable that the constitutional settlement might give scope for such payments to be made if an arrangement could be reached whereby the funds are recovered from DWP in the event of a successful appeal, or from the claimant in the event that the decision is upheld. This would ensure no overall detriment to either the devolved or DWP budget and prevent the undermining of a legitimately applied sanction, while protecting claimants from the ill-effects of the potentially high proportion that are improperly imposed.⁷⁷

Whether the treatment of claimants will be more dignified or respectful in the devolved system will, of course, only become clear over time. Nonetheless, that the Scottish Government is mindful of the relational aspects of dignity is demonstrated by its commitments to use less stigmatising language ("social security" rather than "welfare"),⁷⁸ to put the user experience first and to view social security

⁷² See M Simpson, 'Renegotiating social citizenship in the age of devolution' (2018) 44(4) *Journal of Law and Society* 646

⁷³ D Webster, '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, 2014) <http://www.cpag.org.uk/sites/default/files/uploads/CPAG-David-Webster-submission-Oakley-review-Jan-14_0.pdf>

⁷⁴ M Simpson, "'Designed to reduce people... to complete destitution": human dignity in the active welfare state' (2005) 1 *European Human Rights Law Review* 66; M Adler, *Cruel, inhuman or degrading treatment? Benefit sanctions in the UK* (Cham: Palgrave Pivot, 2018)

⁷⁵ Social Security Committee, *Official Report 2 February 2017*; L Harker, *Delivering on child poverty: what would it take?* (Cm 6951, London: DWP, 2006)

⁷⁶ Social Security (Scotland) Act 2018 asp 9 s36

⁷⁷ Around 20% of jobseeker's allowance and 40% of employment and support allowance sanctions are overturned; challenges to universal credit sanctions are comparatively rare, but of those to reach tribunal up to 80% have been overturned – D Webster, 'Benefit sanctions statistics: universal credit, JSA, ESA and income support – February 2018' (Glasgow: University of Glasgow, 2018); D Webster, 'Briefing: benefit sanctions statistics, July 2018' (Glasgow: University of Glasgow, 2018)

⁷⁸ PM Garrett, 'Words matter: deconstructing "welfare dependency" in the UK' (2015) 2(3) *Critical and Radical Social Work* 389

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as an investment in people. The only clear signs to date that changes in day-to-day practice are likely are the commitment that disability benefit assessments will not be carried out by private contractors⁷⁹ and the suggestion in the Act that claimants with long term conditions might be less likely to face reassessment.⁸⁰ How the new social security agency conducts its business will be subject to scrutiny for signs of how the commitment to dignity and respect is reflected in its organisational culture. The long transition period over which operation of benefits is scheduled to transfer from DWP means this will take time to become clear, but Ministerial references to the “human face” of the system and the “distrust, misery and despair” that are alleged to characterise the DWP approach appear to acknowledge the importance of the relational dimension to social security.⁸¹

Protecting dignity through scrutiny, appeals and reviews

Turning rhetoric around dignity and respect into reality is not just a matter of adding detail to policy commitments, but of ensuring these are reflected in legislation and its implementation. Here the reliance on Regulations to set out the detailed operation of devolved benefits is somewhat problematic given the scrutiny deficit inherent in the secondary legislative process. Parliamentary workloads can render effective scrutiny of even primary legislation challenging, but this function is further constrained in respect of secondary legislation, which may be rejected but not amended.⁸² At UK level this scrutiny gap is filled in part by the Social Security Advisory Committee (SSAC). Similar expert advice and comment on draft regulations as well as wider issues affecting the social security system as a whole would undoubtedly be beneficial to the Scottish Government, but cannot come from the SSAC itself, which is barred from commenting on devolved benefits in Scotland (despite playing this role in Northern Ireland).⁸³ The creation of a comparable oversight body for the devolved system, the Scottish Commission on Social Security,⁸⁴ is therefore a positive development, increasing the accountability of the devolved administration for its pledges on dignity and respect. A risk remains that there is a void for expert advice on the interaction of devolved and reserved benefits as divergence occurs. McKeever argues that relatively formalised cooperation between the Scottish Commission and UK Committee will be required to mitigate this problem.⁸⁵ If the devolved system is to be designed with the people of Scotland, it is also logical that Scottish society as a whole should play a role in scrutinising the place of dignity and respect within it, perhaps implying ongoing investment in human rights education.⁸⁶

High-level scrutiny of social security legislation and of the operation of the system as a whole must sit alongside oversight of decision making at the individual level. Dignity will not be served if claimants miss out on benefits to which they ought to be entitled, and mistakes will occur no matter

⁷⁹ Scottish Government, 'New social security agency puts people first' (news release, 27 April 2017)

⁸⁰ Social Security (Scotland) SP Bill (2016-17) [18] cl 46(2) cl 34

⁸¹ J Freeman, SP deb 19 Sep 2017 col 10-20

⁸² G McKeever, 'Legislative scrutiny, coordination and the Social Security Advisory Committee: from system coherence to Scottish devolution' (2016) 23(3) Journal of Social Security Law 126

⁸³ Scotland Act 2016 c11 s33

⁸⁴ Social Security (Scotland) Act 2018 asp 9 s21-22, sch 1

⁸⁵ G McKeever, 'Legislative scrutiny, coordination and the Social Security Advisory Committee: from system coherence to Scottish devolution' (2016) 23(3) Journal of Social Security Law 126

⁸⁶ High Commissioner for Human Rights, '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, 2004)

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what steps are taken to embed dignity and respect in legislation and practice. Those who consider challenges to an initial decision need to be sufficiently independent from the original decision maker. This does not mean there can be no role for mandatory reconsideration or some other form of internal review, but this must provide a genuine prospect of decisions being changed and not act as a barrier between the claimant and the 'real' appeal. The option of an appeal to a tribunal external to the social security agency must be available at some point to comply with the procedural requirements of article 6 ECHR (the right to a fair hearing)⁸⁷ and article 13 ESC (the right to social assistance).⁸⁸ Requiring applicants to request internal review before they can appeal to a tribunal, as seems likely to be the norm,⁸⁹ does not necessarily infringe the claimant's rights or undermine the protection of dignity, although previous studies have found that internal review works better in some parts of the UK system than others.⁹⁰ It is more important that all decisions are appealable and that there are no unreasonable hindrances in fact or in law to exercising the right of appeal.⁹¹ Lack of knowledge of how the system works or poor understanding of the reasons for a decision could be examples of such hindrances, so it is important that adequate advice services are available: even if self-representation forms part of the "design fantasy" of mandatory reconsideration, it is clear that outcomes are more favourable for those who are legally supported.⁹² The proposal in Northern Ireland that sanctioned claimants should be automatically referred to advice services might be considered for all applicants who receive an adverse decision.⁹³

Services designed with the people of Scotland

Social security principle (f) states that the devolved system "is to be designed with the people of Scotland on the basis of evidence."⁹⁴ This suggests that some of the unanswered questions about the future shape of policy, identified above, are likely to be addressed over time through engagement with system users and the wider public. This process can also make a contribution to the protection of dignity and the more general protection of human rights through social security provision. Articles 19 and 21 UDHR – the right to freedom of expression and to take part in the government of one's country – can together form a basis for a right for citizens to be involved in shaping policy that affects them. This is reinforced by two of the five PANEL principles for a human rights based approach – participation and empowerment.⁹⁵ Article 12 UNCRC more explicitly confers

⁸⁷ *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23

⁸⁸ European Committee of Social Rights, *Conclusions XX-2 – article 12; article 13* (Croatia, Latvia) (Strasbourg: Council of Europe, 2013)

⁸⁹ Social Security (Scotland) SP Bill (2016-17) [18] cl 27

⁹⁰ Work and Pensions Committee (2010), *Decision making and appeals in the benefits system* (HC313). London: House of Commons, 2010; Social Security Advisory Committee (2016) *Decision making and mandatory reconsideration* (OP18) London: SSAC; D Cowan, A Dymond, S Halliday and C Hunter, 'Reconsidering mandatory reconsideration' (2017) (Apr) Public Law 215

⁹¹ *Golder v United Kingdom* (A/18) [1979-80] 1 EHRR 524; J McBride, 'Access to justice and human rights treaties' (1998) 17(Jul) Civil Justice Quarterly 235

⁹² D Cowan, A Dymond, S Halliday and C Hunter, 'Reconsidering mandatory reconsideration' (2017) (Apr) Public Law 215, 222; H Genn, B Lever and L Gray with N Balmer and NCSR, *Tribunals for diverse users* (DCA Research Series 1/06, London: DCA, 2006); G McKeever, 'A ladder of legal participation for tribunal users' (2013) (win) Public Law 575

⁹³ Welfare Reform Mitigations Working Group, *Report of the Welfare Reform Mitigations Working Group* (Belfast: OFMDFM, 2016)

⁹⁴ Social Security (Scotland) Act 2018 asp 9 s1

⁹⁵ Scottish Human Rights Commission, *Human rights in health and social care – putting it into practice*. (Edinburgh: SHRC, 2016)

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upon children a right to have a “voice” in matters affecting them, while the Committee on the Rights of Persons with Disabilities advocates “genuine participation” by disabled people in the development of disability benefits.⁹⁶ The Scottish Government’s flagship coproduction initiative in this field has been the appointment of 2,400 individuals with recent experience of claiming benefits to social security experience panels in June 2017. This follows on from the Welfare Reform Committee’s drive to capture the voices of claimants through its ‘Your Say’ initiative.⁹⁷ At the time of writing it is not yet clear what influence the panels will have over emerging policy. An initial quantitative study (1,144 respondents) finds that members’ perceptions of DWP services are largely negative, with 60% reporting a ‘poor’ or ‘very poor’ experience. A majority of respondents listed advice with a claim and the application process among their top three areas for improvement, with over 40% also identifying the closely related areas of the reconsideration/appeal process and being kept informed about a claim.⁹⁸ A qualitative study based on free-text responses to the survey and focus groups involving 274 panel members reinforces these findings. Further information emerges on the reasons for dissatisfaction with DWP, with inflexibility, lack of transparency, distrust and the stress associated with the process highlighted.⁹⁹

The challenge for Scotland in this area is that user involvement in the design and delivery of services – and all kinds of citizen participation in public services¹⁰⁰ – ranges from meaningful to tokenistic to outright disempowering,¹⁰¹ with the worst-case scenario seeing local communities simply left to fill in the gaps as public services are cut back.¹⁰² Care must also be taken to ensure that co-production initiatives are not simply dominated by those who are more confident and articulate, more directly affected by the decision to be taken and/or have more time to spare.¹⁰³ A human rights-based approach to participation in policymaking, grounded in article 12 UNCRC but potentially of equal

⁹⁶ Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of the Czech Republic’ (CRPD/C/CZE/CO/1, Geneva: United Nations, 2015)

⁹⁷ Welfare Reform Committee, *Welfare Reform Committee legacy paper – session 4* (SP 946, Edinburgh: Scottish Parliament, 2016)

⁹⁸ Respondents over 60 and in less deprived areas are somewhat less likely to report negative experiences, and those with a learning disability or no disability or long term health condition much less likely – Scottish Government Social Research, *Social Security Experience Panels: about your benefits and you – quantitative research findings* (Edinburgh: Scottish Government, 2017)

⁹⁹ Scottish Government Social Research, *Social Security Experience Panels: about your benefits and you – qualitative research findings* (Edinburgh: Scottish Government, 2018)

¹⁰⁰ S Arnstein, ‘A ladder of citizen participation’ (1969) 35 *Journal of the American Planning Association* 216; RA Hart, *Children’s participation: from tokenism to citizenship* (Florence: International Child Development Centre, UNICEF, 1992); G McKeever, ‘A ladder of legal participation for tribunal users’ (2013) (win) *Public Law* 575

¹⁰¹ EKM Tisdall, ‘Conceptualising children and young people’s participation: examining vulnerability, social accountability and co-production’ (2017) 21(1) *International Journal of Human Rights* 59

¹⁰² B Ewert and A Evers, ‘An ambiguous concept: on the meanings of coproduction for health case users and users’ organisations?’ (2014) 25(2) *Voluntas* 425; M Fotaki, ‘Co-production under the financial crisis and austerity: a means of democratising public services or a race to the bottom?’ (2015) 24(4) *Journal of Management Inquiry* 433

¹⁰³ B Ewert and A Evers, ‘An ambiguous concept: on the meanings of coproduction for health case users and users’ organisations?’ (2014) 25(2) *Voluntas* 425; P Thijssen and W van Dooren, ‘Who you are/where you live: do neighbourhood characteristics explain coproduction?’ (2016) 82(1) *International Review of Administrative Sciences* 88; C van Eijk, and T Steen, ‘Why engage in coproduction of public services? Mixing theory and empirical evidence’ (2016) 82(1) *International Review of Administrative Sciences* 28

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relevance to adult social security users,¹⁰⁴ is proposed by Lundy.¹⁰⁵ According to this model, genuine user-shaped decision-making requires not only voice (the right to express one's views) but an opportunity and defined space in which to express those views, an audience willing to listen to the views and genuine influence, so that the views expressed are acted on as appropriate. For this voice to carry weight, it must express an informed view; where complex issues like social security, or indeed the concepts of dignity and respect, are concerned, this is likely to require capacity-building work with citizen participants in policymaking, for example to increase understanding of how the system works at present to underpin proposals for its future improvement.¹⁰⁶ Sicilia and others' study of the development of services for autistic children and their families in Lombardy illustrates the sustained effort required to recruit service users, persuade them that their involvement is worthwhile, support them in the development of proposals and retain their input through the pilot, implementation and dissemination phase.¹⁰⁷ Experience panel members have been given space to express their views and the Scottish Government states that it will be a receptive audience. However, the experience panel outputs to date have clear limitations in their capacity to influence policy. The quantitative study provides a clear indication that DWP is poorly regarded by claimants, but gives only a very general account of which aspects of its service are at fault and no detail of why – although this is addressed to some extent in the qualitative follow-up. Responses to the question on priorities for improvement were constrained by the provision of a rather short list of options that did not include the level of benefit or the conditions for an award, with the qualitative study subject to a similar limitation in this case. A further weakness of an exclusive focus on the experiences of social security claimants in the coproduction process is that it risks missing out on the expertise and experience of frontline staff,¹⁰⁸ whose perspective on some matters might differ to claimants'.¹⁰⁹

In principle, co-production methods can be applied to the design of both policy and delivery mechanisms in any area of social security. It is possible, though, to identify a number of areas in which the voice of the service user and of the Scottish people more widely particularly needs to be heard. As noted, disability benefits account for by far the largest share of expenditure among the devolved areas of the system. It is already known that actually taking control of and beginning to develop a Scottish incarnation of these benefits will take until at least 2020, providing a good opportunity to investigate how they might be improved under Holyrood control.¹¹⁰

Carers' benefits represent the second priority area in which the voice of claimants, or potential claimants, needs to be heard. Higher cash benefits are not the only means of supporting carers; some might prefer increased investment in respite care and other services to a further increase of the allowance. This is particularly pertinent where the proposed young carers' benefit is concerned.

¹⁰⁴ C Durose and L Richardson, *Designing public policy for co-production* (Bristol: Policy Press, 2015)

¹⁰⁵ L Lundy, 'Voice is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 *British Educational Research Journal* 927

¹⁰⁶ L Lundy, L McEvoy and B Byrne, 'Working with young children as co-researchers: an approach informed by the United Nations Convention on the Rights of the Child' (2011) 22(5) *Early Education and Development* 714

¹⁰⁷ M Sicilia, E, Guarini, A, Sancino, M, Andreani and R Ruffini, 'Public services management and co-production in multi-level governance settings' (2016) 82(1) *International Review of Administrative Sciences* 8

¹⁰⁸ T Bovaird, G Stoker, T Jones, E Löffler and MP Roncancio, 'Activating collective coproduction of public services: influencing citizens to participate in complex governance mechanisms in the UK' (2016) 82(1) *International Review of Administrative Sciences* 47

¹⁰⁹ A Dunn, 'Activation workers' perceptions of their long-term unemployed clients' attitudes towards employment' (2013) 42(4) *Journal of Social Policy* 799

¹¹⁰ Minister's announcement on roll-out of devolved benefits (April 2017?)

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That reducing poverty among young carers should be a priority is reinforced by the Child Poverty (Scotland) Act, but ensuring they enjoy as normal a childhood as possible is already enshrined as a priority for those working with them,¹¹¹ in keeping with a range of UNCRC provisions.¹¹² Again, a holistic assessment of young carers' needs and of how they understand a notional 'right to a childhood', informed by young carers themselves, has potential to identify alternative means of support to be prioritised over or delivered alongside the new benefit.

The co-production model should not be confined to the development of high level policies and systems, but employed in front line encounters. This is perhaps less relevant to the devolved benefits – once an award of a disability or carer's benefit is made, it may be years before the matter is revisited, so that there is little scope for developing an ongoing relationship between claimant and staff member. The benefits in which this can occur – jobseeker's allowance, employment and support allowance and universal credit – remain reserved, although the possibility of delivering frontline services through the Scottish social security agency might merit exploration. The approach is relevant to employment support schemes. If the work programme has been "worse than doing nothing" in its contribution to getting harder-to-help clients, including disabled people, reintegrated into the paid workforce,¹¹³ then it makes sense to involve those claimant groups in a discussion about what kind of support could help them return to employment. A voluntary employment support scheme should also be seen as an opportunity to increase the role of the individual claimant in shaping a personalised activation plan that aims to identify what he or she wants to achieve from participation and help make progress towards it – an approach that, in principle at least, is central to Scandinavian welfare-to-work models.¹¹⁴

Conclusion

Social security law never stands still for long, but these are particularly significant times for its development at both national and devolved level. The trajectory of UK policy since 2010 has been consistently in the direction of reduced generosity towards and increasingly disciplinary treatment of working age claimants. Besides the coalition and Conservative governments' policy imperative of cutting expenditure, this approach has been driven by the assumption that "tough love"¹¹⁵ is necessary to help move claimants (back) into paid work. A large part of the Scottish political elite has made its rejection of this analysis clear since 2011,¹¹⁶ but prior to the Scotland Act 2016 the devolved institutions had little scope to put an alternative vision into practice. While devolved social security competences remain limited in their extent, and will be slow to bear fruit, there is now potential for Scotland to begin to act as a laboratory of democracy in this field. Initial indications are that policymakers there will be more inclined to experiment than their counterparts in Northern Ireland,

¹¹¹ Association of Directors of Adult Social Services and Association of Directors of Children's Services, *Young carers: personalisation and whole family approaches* (London: ADASS and ADCS, 2011)

¹¹² For example, rights to development, cultural participation, association with others, family life, health, an adequate standard of living and play or leisure

¹¹³ S Swinford, '£5bn Work Programme "worse than doing nothing"' (Daily Telegraph, 27 June 2013)

¹¹⁴ P van Aerschot, 'Administrative justice and the implementation of activation legislation in Denmark, Finland and Sweden' (2011) 18(1) Journal of Social Security Law 33

¹¹⁵ Welfare Reform Committee, *Interim report on the new benefit sanctions regime: tough love or tough luck?* (SP552, Edinburgh: Scottish Parliament, 2014)

¹¹⁶ Scot Parl deb 22 December 2011 session 4 col 4941-4989

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despite the latter's much more extensive powers.¹¹⁷ If the results suggest a more compassionate approach to claimants – protecting living standards while imposing less onerous jobseeking conditions – can reduce poverty without apparent ill effects on transitions to employment, the UK government is likely to face questions about the implications for its own approach.

That said, questions remain about whether the emerging devolved social security system can genuinely live up to the high standards the Scottish Government is striving to set itself. Managing expectations will be a challenge in itself: knowledge that 'social security' is being devolved without understanding of the nuances is likely to lead some to anticipate changes to the main out-of-work benefits that Holyrood cannot deliver at present. The commitment to enhance the user experience might also clash with the principle that social security should be efficient and offer value for money. The Scottish National Party has to date been cautious about using recently-devolved taxation powers to raise more revenue,¹¹⁸ although that has begun to change with the introduction of the new Scottish Income Tax, three of whose five bands are (slightly) higher than the UK equivalent. In the absence of more ambitious deployment of devolved revenue-raising powers, any aspiration to greater generosity in some areas of social security will have to compete with other priorities for a share of existing funds. This does not necessarily rule out more generous devolved benefits or the topping up of reserved benefits as the overall cost of poverty to the public purse can be higher.¹¹⁹ These limitations on both competences and resources mean the principle that continuous improvement should be pursued will be difficult to deliver. If DWP continues along the retrogressive path of recent years, then from a claimant's perspective the social security system as a whole is unlikely to improve regardless of the evolution of devolved benefits; while the top-up power could in principle be used to prevent this, the more the real value of reserved benefits diminishes, the more expensive its use becomes.

¹¹⁷ M Simpson, 'Developing constitutional principles through firefighting: social security parity in Northern Ireland (2015) 22(1) Journal of Social Security Law 31

¹¹⁸ The 2016 manifesto promised non-implementation in Scotland of "the tax cut for higher earners proposed by the Tories," but no increase to any of the bands of income tax – Scottish National Party, *Re-elect: manifesto 2016* (Edinburgh: SNP, 2016) 9

¹¹⁹ D Gibbons, *The decline of crisis and community care support in England: why a new approach is needed* (London: Centre for Responsible Credit, 2017)