

The Social Security (Scotland) Act 2018 – A Rights-Based Approach to Social Security?

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Introduction

The Social Security (Scotland) Act 2018 is a significant piece of devolved legislation. It is the first major Act passed by the Scottish Parliament dealing with social security matters, after Part 3 of the Scotland Act 2016 gave effect to the recommendations of the Smith Commission and devolved responsibility for a range of benefits and associated powers to regulate other elements of the social security system.

As such, it represents a substantial extension of the reach and impact of devolved legislation into ordinary life, covering as it does key areas of social welfare support such as disability and independent living allowances, regulated social fund allowances such as funeral payments and Sure Start maternity benefits, and housing benefit.¹ Indeed, noted in the consultation paper produced by the Scottish Government in July 2016, approximately 1.4 million people are receiving support from the benefits devolved to Scotland, while the spend on these benefits amounted to 15% of the total welfare budget in Scotland (£2.7 billion).²

But the significance of the Act extends beyond its impact in terms of devolution. It establishes a new devolved social security system in Scotland – and attempts to establish this system on a framework of principles which include an acknowledgement that access to social security is a human right. Its provisions are thus designed to reflect a rights-based approach to social security, which marks it out as an interesting departure from the legislative status quo. In what follows, the impact and consequences of this approach are analysed, along with the most important elements of the Act.

The Establishment of a Devolved Social Security System

The 2018 Act is ambitious. It was introduced in Parliament by the Scottish Government with the aim of helping to ‘create a fairer Scotland’ by giving effect to a remodelled social security system ‘that is based on a distinctively Scottish guiding vision and set of principles’.³ In line with this ambition, the Act restructures the existing elements of the social security system that fall within devolved competency.

Part 2 of the Act establishes a statutory basis for the provision of ‘assistance’ by Scottish Ministers to different categories of persons in need. Existing benefits are rebranded: for example, ‘carers’ assistance’ replaces ‘carers’ allowance’, while ‘employment-injury assistance replaces ‘industrial injuries benefits’.⁴ (This was a deliberate exercise: it was done

¹ Responsibility for universal credit as an overarching social framework, along with a range of other benefits, remain reserved competencies. However, certain functions associated with universal credit have been devolved. Furthermore, the Scottish Parliament has been given the power to create new benefits and to top-up reserved benefits. See in general Part 3 of the Scotland Act 2016, and *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament*, November 2014, [43]-[60].

² *A New Future for Social Security: Consultation on Social Security in Scotland* (Scottish Government, July 2016), p. 3.

³ *Ibid*, p. 12.

⁴ See ss. 28 and 33 of the Act.

to differentiate the language of the Scottish system from that of the reserved welfare system, with its loaded terminology of ‘benefits’ and ‘allowances’.) New forms of assistance are created, which are designed to supplement benefits still falling within the scope of reserved functions.⁵

The Act also establishes a new administrative framework for determining entitlement and processing payments, which makes some significant adjustments to the functioning of the reserved system. For example, ss. 12-14 impose certain restrictions on the use of medical assessments in determining eligibility for assistance, requiring that they only be conducted by suitably qualified employees of a public body (i.e. not by private contractors) and where they are the only practicable way to obtain information required to determine entitlement to assistance. The legislation also clarifies the procedures governing overpayment recovery and fraud investigations, and confers a range of powers on the Scottish Ministers to regulate the functioning of the devolved social security system and its interaction with various elements of the reserved system like Universal Credit.⁶

The ‘Scottish Social Security Principles’

However, the most innovative aspect of the Act lies elsewhere. In general, UK social security legislation is highly functional. It imposes certain duties and powers upon specific public authorities, lays down eligibility conditions, and makes provision for associated procedural mechanisms – but it does not set out the values or principles that are expected to govern public authority decision-making in this context.⁷ However, the 2018 Act is very different in this respect.

S. 1 of the Act attempts to establish a clear principled basis for the functioning of the new devolved system. It sets out a list of ‘Scottish social security principles’, which are worth quoting in full:

- (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,

⁵ These include ‘housing assistance’, to be paid *inter alia* to people entitled to universal credit who however would be subject to the cap on benefits arising through the operation of the so-called ‘bedroom tax’ introduced by the Welfare Reform Act 2012.

⁶ For an overview of the changes made by the Act, see Child Poverty Action Group, *The Social Security (Scotland) Act 2018*, available at <http://www.cpag.org.uk/content/social-security-act-scotland-2018>.

⁷ See e.g. the provisions of the Welfare Reform Act 2012 as an example.

(g) opportunities are to be sought to continuously improve the Scottish social security system in ways which—

(i) put the needs of those who require assistance first, and

(ii) advance equality and non-discrimination,

(h) the Scottish social security system is to be efficient and deliver value for money.

In other words, s. 1 of the Act lists the values that ought to guide the functioning of the newly established framework. It thus gives statutory expression to a particular vision of what a social security system should be, in a way that is without parallel in any other piece of UK legislation. Other legislation has identified particular goals that public authorities should strive to achieve – such as the positive equality duty set out in s. 149 of the Equality Act 2010, or the child poverty reduction targets set out in the Child Poverty Act 2010 and the Child Poverty (Scotland) Act 2017. There is even a partial Scottish precedent in the form of s. 5 of the Welfare Funds (Scotland) Act 2015, which requires local authorities to take reasonable steps to ensure applicants for assistance are treated with respect and dignity. But S.1 of the 2018 Act is exceptional in how it attempts to provide a comprehensive list of the values that should animate the Scottish social security system.

The Act also attempts to ‘lock-in’ respect for these principles by requiring the Scottish Government to draw up a ‘Scottish Social Security Charter’, which should set out what is to be expected from the Scottish Ministers in designing and delivering social security, and from persons applying for and receiving assistance – and reflect the principles articulated in s. 1 of the Act in so doing.⁸ The Charter is to be drafted in consultation with persons already receiving social assistance, and renewed every five years following further consultation with persons in receipt of assistance and other vulnerable groups. Ministers are required to report to Parliament on any changes being made to the Charter, a draft of which must be approved by positive resolution – while s. 20 places a statutory duty on the Scottish Ministers to report annually to the Scottish Parliament on the performance of the Scottish social security system. In other words, the Charter is supposed to set out clear commitments as to how successive Scottish Governments intend to shape and administer the new devolved social security system, which should reflect its principled basis as set out in s. 1 of the Act – and thereby provide both a guide to the administration and a focus for political debate.

Social Security as a Human Right

A key ingredient in this principle-based approach is the reference in s. 1 of the Act to social security being ‘itself a human right and essential to the realisation of other human rights’. This assertion may seem strange to readers whose assume that references to human rights in UK law are confined to the civil and political rights protected by the European Convention on Human Rights (ECHR). However, the right to social security is a well-established socio-economic right within the framework of international human rights law, recognised as such by Article 22 of the Universal Declaration of Human Rights (UDHR) and protected by the provisions of Article 9 of the International Covenant on Economic, Social and Cultural

⁸ S.15 of the Act.

Rights (ICESCR) and Articles 12 and 13 of the European Social Charter (ESC).⁹ S. 1 of the 2018 Act thus recognises the existence of such a right, thereby breaking new ground again in giving legislative acknowledgment to a socio-economic right – and provides that respect for this right should be one of the principled underpinnings of the new framework.

Interestingly, the Scottish Government's initial policy proposals in this area contained no reference to a human right to social security, choosing instead to emphasise more abstract values such as 'fairness' and 'dignity'. Human rights language first made an appearance in the Scottish Government's response to its original consultation paper, published in February 2017. This response noted the breath of responses from civil society and bodies such as the Scottish Human Rights Commission which had focused on the human rights dimension to its proposed reforms.¹⁰ It went on to affirm that the Scottish Government considered that extending protection for human rights in this context was a 'key priority', and that it was committed to adopting a 'rights-based approach' to social security issues which would be reflected in the language of the forthcoming Bill.¹¹ Similarly, in a policy position paper it published in September 2017 to accompany the Bill's introduction into the Scottish Parliament, the Scottish Government placed particular emphasis on how the right to social security was recognised in international human rights law, and stated that 'a rights based approach must be the cornerstone of the new system'.¹²

As the Bill progressed through Parliament, this 'rights based approach' attracted strong cross-party support. The central tenets of the Bill attracted no substantive opposition, and at Stage 3 it was passed with unanimous support. Furthermore, amendments introduced during the Bill's progression served to reinforce its rights orientation. An additional scrutiny mechanism was established in the form of the Scottish Commission on Social Security, an independent body charged with reporting regularly on the extent to which Scottish Ministers are complying with their commitments under the above-mentioned Scottish Social Security Charter – which, in so doing, is to have regard not only to the principles set out in S. 1 of the Act, but also to 'any relevant international human rights instruments', including in particular ICESCR.¹³

Furthermore, an additional duty was imposed on Scottish Ministers to promote take-up of assistance under the Act, requiring the development of an out-reach strategy to encourage eligible persons to seek support.¹⁴ Again, this duty is unique – and reflects the view that take-up of assistance should be encouraged on the basis that it is a basic human right to receive such support when in need. S. 10 also establishes a 'right of access to independent advocacy'

⁹ The UK has ratified both ICESCR and ESC, and agreed to be bound as a matter of international law by these provisions.

¹⁰ Scottish Government, *A New Future for Social Security: Scottish Government Response to the Consultation on Social Security in Scotland*, February 2017, p. 4, available at <https://beta.gov.scot/binaries/content/documents/govscot/publications/factsheet/2017/02/social-security-scottish-government-response/documents/75440430-3a48-47ac-b061-bb680954c7a2/75440430-3a48-47ac-b061-bb680954c7a2/govscot:document/>.

¹¹ *Ibid*, p. 55.

¹² Scottish Government, *Social Security Principles and a Rights Based Approach: Social Security (Scotland) Bill - Policy Position Paper*, 20 September 2017, available at <https://beta.gov.scot/publications/social-security-principles-and-a-rights-based-approach/> (last accessed 16 October 2018).

¹³ See ss. 21-22 and Schedule 1 of the Act. The equivalent body at reserved level, the Social Security Advisory Committee, is not subject to a similar requirement and does not in general refer to these standards.

¹⁴ Ss. 3-9 of the Act.

for individuals with disabilities who might otherwise struggle to access their entitlements, with a correlative duty imposed on Scottish Ministers ‘to ensure that independent advocacy services are available to the extent necessary for that right to be exercised’.

Impact and Consequences

Key elements of the 2018 Act are thus shaped by a rights-based approach to social security issues. This has generated a degree of excited commentary. There has even been media talk of how the Act ‘future-proofs’ the Scottish social security system against austerity.¹⁵ However, such claims should be taken with a pinch of salt.

The focus on rights/principles in the 2018 Act differs considerably from the approach adopted by previous social security legislation. It has considerable symbolic value, because of how it represents an endorsement by the Scottish Parliament of the importance and value of (i) socio-economic rights in general and (ii) a rights-based approach to social security in particular. It also has plenty of political value, because of the signals it sends that the Scottish devolved approach to social security will differ from that adopted by Westminster. The focus on rights and principles is also likely to shape future political debates on social security and poverty in Scotland: framing social security issues in these terms helps to ensure that future political contestation and civil society activism in this context will also engage on similar terms. It may also encourage public administration within Scotland to adopt more of a needs-focused approach to social security issues: legislative language can exert a significant influence on bureaucratic responses.

However, it is important to bear in mind the limited scope of the new devolved social security system. As noted above, 85% of social welfare spend in Scotland will remain largely controlled from Westminster. Furthermore, even within the scope of devolved competency, the legal impact of this legislative focus on rights and principles is likely to be limited. Adam Tomkins MSP introduced amendments at Stages 2 and 3 of the Bill’s progress through the Scottish Parliament to clarify the legal effect of S. 1 of the Act, which were subsequently accepted by the Scottish Government. S.2 of the Act now provides that the principles are set out in S. 1 so they ‘can be reflected in the Scottish social security charter’ and be taken into account by the Scottish Commission on Social Security. Beyond that, ‘a court or tribunal in civil or criminal proceedings may take the Scottish social security principles into account when determining any question arising in the proceedings to which the principles are relevant’ – but ‘breach of the principles does not of itself give rise to grounds for any legal action’.

This creates an ambiguous situation. S. 2 suggests that these principles may become relevant considerations for courts and tribunals to take into account when interpreting ambiguous statutory provisions or reviewing the reasonableness of a decision to deny social assistance to an individual or group of persons – in a vaguely analogous manner to how the constitutional principle of the ‘social state’ can be taken into account by courts in many continental European countries,¹⁶ or as the ‘best interests of the child’ test is increasingly referred to in

¹⁵ *The Guardian*, ‘Future-proofed Against Austerity: New Scottish social security system’, 21st January 2018, available at <https://www.theguardian.com/uk-news/2018/jan/21/future-proofed-against-austerity-new-scottish-social-security-system>.

¹⁶ See C. O’Cinneide, ‘The Present Limits and Future Potential of European Social Constitutionalism’, in K. Young (ed.) *The Future of Economic and Social Rights* (CUP; 2019), forthcoming.

UK public law judgments.¹⁷ However, there would appear to be no binding legal obligation on courts and tribunals to take these principles into account. Furthermore, unlike the ‘due regard’ requirements of the public sector equality duty set out in s. 49 of the Equality Act 2010, there is no duty imposed directly on Scottish public authorities to take these principles into account in their day-to-day administration of the social security system.

In addition, the way in which S. 2(1) provides that the principles have been set out so that they can be reflected in the Charter and taken into account by the Commission could be read as greatly limiting their legal impact: this could be interpreted as meaning that their sole function is to inform drafting of the Charter and the Commission’s performance of its scrutiny functions, rather than anything more general. This would not limit the Charter itself being taken into account in judicial proceedings, as permitted by S. 19 of the Act – but it might limit the legal impact of the principles taken as a bloc, and of the legislative acknowledgement of the human right to social security more specifically.

Conclusion

It is therefore likely that the impact of the rights-based approach adopted in the 2018 Act, and of the principles set out in s. 1, will ultimately play out in the political domain. Much will depend on the future legal and political salience of the Scottish Social Security Charter, and the extent to which its contents and the critical scrutiny provided by the Commission on Social Security will inform and energise political debate. Much will also obviously depend on the extent of financial freedom of maneuver available to future Scottish Governments, and background economic and social considerations. However, insofar as the 2018 Act was designed to mark out the Scottish devolved social security system as resting on a distinct set of rights-inflected values, then it could be said to have done its job.

¹⁷ See e.g. *In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* [2018] UKSC 48.