

# An Examination of Parity Principles in Welfare and Wider Social Policy.

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## Executive Summary

This paper explores the operation of the parity principle in Northern Ireland (NI), drawing on experiences of Scotland. Issues considered include the background to the 'parity principle' in NI and other examples where it has been identified as an issue, an exploration of the range of arguments articulated as to the implications of breaking parity with GB, how the implications vary depending on the specific policy areas in question, and the likely outcomes of breaking parity in relation to measures included in the Welfare Reform Bill (Northern Ireland) 2012.

We have been invited to take a public law and policy approach to the parity principle, both in relation to social security and wider welfare policy and also other policy areas within the remit of the Commissioner. We have sought to identify a range of factors which must be taken into account in considering NI policy variations from parity with GB (or Scotland, England and Wales, as the case may be). These are:

1. Whether **statutory provisions** require parity;
2. Whether variations from parity are desirable due to **policy considerations**;
3. What the **financial impact** might be on the NI block grant and other expenditure; and
4. Whether **practical considerations**, for example, compatibility of IT systems, preclude or limit variations from the GB systems.

First, by way of introduction, the major provisions of the Welfare Reform Act in Great Britain, which received Royal Assent on 8 March 2012, are outlined and some of the issues to be addressed are discussed.

Secondly, some comments are made on the constitutional arrangements for devolution in Scotland and NI.

Thirdly, an outline is provided of various forms of parity principle drawing on specific policy areas, including welfare policy, employment law, employment and training policy, equality law, education law and policy and children's rights more generally.



This is not intended to be comprehensive but rather to indicate examples of parity and policy variations in practice.

Fourthly, a series of factors are identified which place constraints on policy divergence, particularly in NI, from parity principles.

Fifthly, the operation of the parity principle in welfare law and policy is examined in more detail, with examples of a degree of 'flexibility' in the operation of the welfare system in NI and the constraints upon significant differences between the GB and NI systems, partly due the statutory basis of the parity principle in welfare, but also due to financial constraints and also the constraints of a unified IT system. Some examples are identified where there may be opportunities for a debate on policy divergence.

Sixthly, recommendations are made on where flexibility may be applied to the parity principle in welfare reform in NI.

Finally, some remarks are made in wider issues of parity and policy divergence.

#### Recommendations:

1) Although the Welfare Reform Act is already on the statute book in GB, the NI Executive should be fully involved in policy development surrounding secondary legislation required to implement the Act. It should also enter into discussions with the UK Government on a formal system of consultation on, and participation in, development of welfare policy, including opportunities for the identification of potential policy variations at an early stage of policy development, both in relation to social security matters and the consequential impact on more fully devolved matters.

2) It is recommended that the Welfare Reform Bill should not be progressed through the NI Assembly by accelerated passage. Instead full scrutiny should be made of all aspects of the Bill and consequential secondary legislation, with a view to the identification of potential variations in welfare policy to meet the particular circumstances of NI.

3) There may be arguments for a delay in implementing GB welfare reforms in NI until the implications of the reforms in NI (and GB) are more fully understood. However, there could be significant financial implications of such a stance.



- 4) While it would not be practical to argue for a significantly different social security system for NI compared to GB, there is ample scope to retain existing variations from the GB model and also further variations to meet the particular circumstances of NI.
- 5) The NI Executive and Assembly should carefully consider the extent to which existing reforms, and their implementation, can be varied in NI as part of the introduction of the Welfare Reform Act.
- 6) The NI Executive and Assembly should carefully consider the extent to which existing variations in welfare benefits can be preserved.
- 7) The NI Executive and Assembly should carefully consider the extent to which variations can be made to Universal Credits and Personal Independence Payments which could alleviate the potential negative impact of these reforms on children and young people in NI.
- 8) The NI Executive and Assembly should carefully consider the extent to which existing expenditure on passported benefit payments can be preserved, so as to provide a system which meets the needs of children and young people in NI. In particular, they should look closely at policy development on passported benefits in other devolved countries such as Scotland.
- 9) The NI Executive and Assembly should carefully consider the extent to which existing expenditure on Social Fund payments can be preserved, so as to provide a system which meets the needs of children and young people in NI. In particular, they should look closely at policy development on Social Fund expenditure in other devolved countries such as Scotland.



## 1. Introduction

This is a policy paper prepared by Barry Fitzpatrick, Barry Fitzpatrick Consulting, in collaboration with Professor Noreen Burrows, University of Glasgow. It is one of two papers commissioned by the Northern Ireland Commissioner for Children and Young People in relation to Welfare Reform in Northern Ireland.

This paper explores the operation of the parity principle in Northern Ireland (NI), drawing on experiences of Scotland.<sup>1</sup> Issues considered include the background to the 'parity principle' in NI and other examples where it has been identified as an issue, an exploration of the range of arguments articulated as to the implications of breaking parity with GB, how the implications vary depending on the specific policy areas in question, and the likely outcomes of breaking parity in relation to measures included in the Welfare Reform Bill (Northern Ireland) 2012 (WR Bill).

Scottish experience is included, particularly in relation to consideration of whether social security should be a reserved or devolved matter in Scotland, examination of the approach of the Scottish Government and Parliament to the Welfare Reform Bill (as it then was) and the implications of the Welfare Reform Act (WR Act) for devolved welfare matters in Scotland.

This is not a detailed analysis of specific welfare reforms. Evason<sup>2</sup> sets out the range of welfare reforms already in place and those now enacted in the WR Act in Great Britain (GB). Horgan and Monteith<sup>3</sup> analyse the impact of these reforms on children and young people in NI. There is also a range of briefing papers which we have

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<sup>1</sup> Only passing references are made to the position in Wales.

<sup>2</sup> Evason, E, 'Notes and commentary on adjustments to benefits and tax credits', updated 20 December 2011.

<sup>3</sup> Horgan, G, and Monteith, M, Child Rights Impact Assessment of the Impact of Welfare Reform on Children in Northern Ireland, Belfast: NICCY, 2012. We have also relied on other sources including Law Centre (NI), 'Social Security Parity – A Note for the Social Development Assembly Committee' (May 2011) and NI Welfare Reform Group (NIWRG), 'Briefing on Parity and Parliamentary Scrutiny: The Welfare Reform Bill', 20 March 2012.





found valuable<sup>4</sup> and we would like to thank a range of interviewees who gave us important insights into the implications of the WR Act in NI.<sup>5</sup>

We have been invited to take a public law and policy approach to the parity principle, both in relation to social security and wider welfare policy and also other policy areas within the remit of the Commissioner. We have sought to identify a range of factors which must be taken into account in considering NI policy variations from parity with GB (or Scotland, England and Wales, as the case may be). These are:

1. Whether **statutory provisions** require parity;
2. Whether variations from parity are desirable due to **policy considerations**;
3. What the **financial impact** might be on the NI block grant and other expenditure; and
4. Whether **practical considerations**, for example, compatibility of IT systems, preclude or limit variations from the GB systems.

First, by way of introduction, the major provisions of the WR Act in Great Britain (GB), which received Royal Assent on 8 March 2012, will be outlined and some of the issues to be addressed will be discussed.

Secondly, some comments will be made on the constitutional arrangements for devolution in Scotland and NI.

Thirdly, an outline is provided of various forms of parity principle drawing on specific policy areas, including welfare policy, employment law, employment and training policy, equality law, education law and policy and children's rights more generally. This outline is not intended to be comprehensive but rather seeks to identify examples of parity and policy variations in practice.

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<sup>4</sup> These include CAB and others, 'Conditionality and sanctions in the Welfare Reform Bill' (2011), CHNI, 'Welfare Reform Briefing Housing Benefit', (2011), Contact a Family, 'Future benefit changes – a guide for families with disabled children', (December 2011), Mencap, 'Welfare Reform Bill (2012)1 – Summary' (March 2012), RNIB Briefing, 'Personal Independence Payment: the impact on blind and partially sighted people' (2012).

<sup>5</sup> We would like to thank the following for their contributions to the preparation of this report: Les Allamby, Law Centre (NI); Pauline Buchanan, NIC-ICTU; Sara Boyce, Include Youth; Elaine Conway CiNI; John Dickie, Child Poverty Action Group, Scotland; Kevin Doherty, NIC-ICTU; Colin Harper, Disability Action; Paddy Kelly, Childrens Law Centre; Frances Murphy, Contact a Family; Anne Moore, Save the Children; Edel Quinn, Include Youth; Ricky Rowledge, Council on Homelessness (NI).



Fourthly, a series of factors are identified which place constraints on policy divergence, particularly in NI, from parity principles.

Fifthly, the operation of the parity principle in welfare law and policy is examined in more detail, with examples of a degree of 'flexibility' in the operation of the welfare system in NI and the constraints upon significant differences between the GB and NI systems, partly due the statutory basis of the parity principle in welfare, but also due to financial constraints and also the constraints of a unified IT system. Some examples are identified where there may be opportunities for a debate on policy divergence.

Sixthly, recommendations are made on where flexibility may be applied to the parity principle in welfare reform in NI.

Finally, some remarks are made in wider issues of parity and policy divergence.



## 2. The Welfare Reform Act 2012

The Explanatory Notes to the WR Act state:-

“The major proposal for reform is the introduction of a new benefit, to be known as universal credit, which will replace existing in and out of work benefits. The Act also makes provision for a new benefit, personal independence payment, which will replace the existing disability living allowance.”<sup>6</sup>

Universal Credit (UC), in Part 1 of the Act, is described as follows:-

“9. This Part of the Act contains provisions and confers regulation-making powers for an integrated working-age benefit to be called universal credit, which, depending on the claimant’s circumstances, will include a standard allowance (to cover basic living costs) along with additional elements for responsibility for children or young persons, housing costs and other particular needs.

10. Universal credit will be paid to people both in and out of work, replacing working tax credit, child tax credit, housing benefit, IS, income-based JSA and income-related ESA (for details on provisions for council tax support, please see the note on section 33). It will provide support for people between 18 (or younger in certain cases) and the qualifying age for state pension credit.

11. The aim of universal credit is to smooth the transition into work by reducing the support a person receives at a consistent rate as their earnings increase.

12. The financial support provided by universal credit will be underpinned by responsibilities which claimants may be required to meet. The level of those requirements will depend on the claimant’s particular circumstances.”

Similarly, Personal Independence Payments (PIPs), in Part 4 of the Act, are described as follows:-

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<sup>6</sup> Explanatory Note 4.



“16. In June 2010 the Government announced, as part of the Budget, its intention to reform disability living allowance from 2013-14. Subsequently, in December 2010, a consultation paper Disability Living Allowance reform (Cm 7984) was published. The consultation paper set out the Government’s proposals to replace disability living allowance with a personal independence payment. The provisions in Part 4 set out the framework for the new benefit, while the consultation responses will feed into the detailed design of the benefit which will be provided for in secondary legislation.”



### 3. Constitutional arrangements

#### **3.1. Reserved/devolved boundary**

Devolved matters under the Northern Ireland Act 1998 (NI Act 1998) are any legislative powers which are not excepted, under Schedule 2, or reserved, under Schedule 3. Social security is not listed under either Schedule and hence is devolved.

Nonetheless, the NI Act does provide for a statutory parity principle in relation to “single systems of social security, child support and pensions for the United Kingdom”.

Section 87 of the NI Act 1998 (Consultation and co-ordination) provides:-

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

(2) Without prejudice to section 28, the Secretary of State with the consent of the Treasury, and the Northern Ireland Minister with the consent of the Department of Finance and Personnel, may make— .

(a) arrangements for co-ordinating the operation of the legislation to which this section applies with a view to securing that, to the extent allowed for in the arrangements, it provides single systems of social security, child support and pensions for the United Kingdom; and .

(b) reciprocal arrangements for co-ordinating the operation of so much of the legislation as operates differently in relation to Great Britain and in relation to Northern Ireland.”

However, section 87(3) goes on to state:-

“Such arrangements as are mentioned in subsection (2)(a) or (b) may include provision for making any necessary financial adjustments, other than adjustments between the National Insurance Fund and the Northern Ireland National Insurance Fund.”



Section 87 is put into effect through the Joint Authority set out in section 88:-

“88 The Joint Authority.

(1) The Joint Authority continued in being by section 177(2) of the Social Security Administration Act 1992— .

(a) shall consist of the Secretary of State, the Northern Ireland Minister having responsibility for social security and the Chancellor of the Exchequer; and .

(b) shall continue in being by the name of the Social Security, Child Support and Pensions Joint Authority for the purposes of the legislation to which section 87 applies.

(2) The responsibility of the Joint Authority shall include that of giving effect to arrangements under section 87(2), with power to discharge such functions as may be provided under the arrangements.

(3)The Joint Authority shall also have power—

(a) to require the making by the Commissioners of Inland Revenue of any necessary adjustments between the National Insurance Fund and the Northern Ireland National Insurance Fund, and .

(b) to make any other necessary financial adjustments.”

HM Revenue and Customs took on responsibility for child benefit across the UK in 2005 and therefore child benefit is no longer a devolved matter.<sup>7</sup>

Birrell sets out the history of social security parity between NI and Great Britain.<sup>8</sup> From the Government of Ireland Act 1920, social security has been a devolved matter. This was not a significant issue until the development of the welfare state after World War Two. As Birrell states, “The 1946 National Insurance Act permitted arrangements to coordinate the two systems of insurance so that they operate as a single system and

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<sup>7</sup> Evason, E, Digest of Northern Ireland Law: A short guide to social security law in Northern Ireland, Belfast: SLS Legal Publications, 2006.

<sup>8</sup> Birrell, D, The Impact of Devolution on Social Policy, Bristol: Policy Press, 2009.



the 1949 Social Services (Agreement) Act maintained the rates of contributions and payments in parity for a range of benefits.”

Following the NI Act 1998, a new concordat was established between the Department of Work and Pensions (DWP) and the Department of Social Development (DSD) to provide “guidance for consultation and communication in order to ensure that legislation in Great Britain and Northern Ireland remains the same, or that any divergence could be accommodated.”<sup>9</sup>

The devolution settlement in Scotland differs in its approach towards social security to that of NI. The Scotland Act 1998 lists in a number of schedules matters which are reserved to Westminster. All other matters are devolved. Schedule 5 of the Scotland Act 1998 specifically reserves social security matters to the UK government. Reserved matters include: National Insurance; Social Fund; administration and funding of housing benefit and council tax benefit; recovery of benefits for accident, injury or disease from persons paying damages; deductions from benefits for the purpose of meeting an individual’s debts; sharing information between government departments for the purposes of the enactments relating to social security; making decisions for the purposes of schemes mentioned in the reservation and appeals against such decisions.

There are certain exceptions in the Scotland Act as follows: the subject-matter of Part II of the Social Work (Scotland) Act 1968 (social welfare services), section 2 of the Chronically Sick and Disabled Persons Act 1970 (provision of welfare services), section 50 of the Children Act 1975 (payments towards maintenance of children), section 15 of the Enterprise and New Towns (Scotland) Act 1990 (industrial injuries benefit), and sections 22 (promotion of welfare of children in need), 29 and 30 (advice and assistance for young persons formerly looked after by local authorities) of the Children (Scotland) Act 1995.

Thus there is a uniform system of social security for Scotland and England and Wales by virtue of legislative provisions which apply across GB in very substantial areas of welfare provision. Core aspects of social security are reserved, including most of the substantive provisions of the WR Act. However, and reflecting the fact that social work, health, local government and education are devolved matters, certain aspects of social welfare benefits are devolved. Cairney<sup>10</sup> defines this boundary as being “blurred” and as an example cites “The means to address matters such as child

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<sup>9</sup> Birrell, (2009), p 106.

<sup>10</sup> Cairney, P, ‘Venue shift following devolution: when reserved meets devolved in Scotland’ 16 Regional and Federal Studies 2006, 429-445 at 431.



poverty in Scotland also operate within the context of reserved income tax and benefit regimes. Many policy responses are second order, focusing on access to devolved public services". As is discussed below in relation to welfare reform, the second order nature of Scottish input is reflected in the fact that whilst the key aspects of the social security benefit reform proposals, UC and PIPs, are reserved, passported benefits are all devolved.<sup>11</sup> This is not to underestimate the importance of passported benefits but to demonstrate the extent to which Scottish policy is limited within the current devolution settlement. Thus, in the context of Scottish devolution, there is no requirement for a parity principle as either a legislative provision, as is the case with section 87 of the NI Act 1998, or a constitutional convention in relation to the major aspects of social security. A uniform system operates north and south of the border. In relation to most passported benefits, and other benefits provided within the terms of the devolution settlement, the Scottish Government remains free to adapt policy to meet its own priorities subject to funding constraints.

So also in NI, there are aspects of welfare provision which are devolved but not formally covered by sections 87 and 88. These include passported benefits and issues such as educational maintenance allowances.

There are also variations in social security provisions, discussed below (at para 4.1.2) such as in housing benefit, which have been agreed by the DSD and the DWP under the parity arrangements. One aspect of welfare reform is that Social Fund payments will no longer be treated as 'social security', with implications for the funding and administration of these payments in both NI and Scotland.

### **3.2 Constitutional issues more generally**

More generally, situations in which Westminster legislates for a devolved legislature differ, in practice, between Scotland and NI. In Scotland, according to the 'Sewel Convention', the Scottish Parliament can pass a Legislative Consent Motion (LCM, also known as a Sewel motion), in which it agrees that the Parliament of the United Kingdom may pass legislation on a devolved issue extending to Scotland, over which the Scottish Parliament has regular legislative authority.<sup>12</sup>

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<sup>11</sup> These are benefits based on entitlement to other benefits, for example, free school meal entitlement, bus passes, discount leisure passes and Government Energy Assistance Packages.

<sup>12</sup> "It is used when the UK Parliament is considering legislation extending only (or having provisions extending only) to England and Wales, and the Scottish Parliament, being in agreement with those





LCMs are relatively rare in NI<sup>13</sup> and the process is more informal.<sup>14</sup> Although the Belfast Agreement envisaged that they might be used, particularly in relation social security,<sup>15</sup> it is typical for the NI Assembly to legislate on social security matters, even if the legislation is word-for-word the same as in GB. One example of a LCM, in relation to the WR Act, was a technical provision on transfer of information.<sup>16</sup> The Report to the Committee made clear that “[t]he Committee also noted that the Welfare Reform Bill includes other provisions which are set out in the DSD papers below and which are not the subject of the Legislative Consent Motion”.<sup>17</sup>

However, a more substantive use of a LCM is identified below<sup>18</sup> in relation to child protection measures. Here, the NI Minister for Health proposed a LCM in the NI Assembly so that the reforms to the vetting and barring system in England and Wales could apply to NI also.<sup>19</sup> This was so that information could be shared through an integrated IT system across England, Wales and NI.

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provisions, wishes for the UK Parliament to extend them to Scotland. This saves the need for separate, similar legislation to be passed by the Scottish Parliament. It is also used when Westminster is considering legislation applying to Scotland but which relates to both devolved and reserved matters, where it would otherwise be necessary for the Scottish Parliament to legislate to complete the jigsaw. As well as legislation about devolved matters, the convention extends to cases where UK Bills give functions to Scottish Executive, including in reserved areas, or which seek to change the boundary between reserved and devolved matters.” (Wikipedia, ‘Legislative Consent Motion’, [http://en.wikipedia.org/wiki/Sewel\\_convention](http://en.wikipedia.org/wiki/Sewel_convention)). As of 25 June 2011, 107 Legislative Consent/Sewel motions had been passed by the Scottish Parliament.

<sup>13</sup> Anthony, G and Morrison, J, ‘Here, there and (maybe) here again, the story of law making in post-1998 Northern Ireland’, in Hazell, R and Rawlings, R (eds), Devolution, Law Making and the Constitution, London: Imprint Academic, pp 155-192, at 179.

<sup>14</sup> Birrell (2009), p 115.

<sup>15</sup> Multi-Party Agreement, (NIO, 1998), para 26(e).

<sup>16</sup> The Motion read, “That this Assembly agrees that the provisions in clauses 122 and 123 of the Welfare Reform Bill, as amended at Committee Stage in the House of Commons, dealing with the transfer of tax credit functions and the supply of information by a Northern Ireland Department, or by a person providing services to a Northern Ireland Department, should be considered by the UK Parliament.” (Social Development Assembly Committee, Report on the Legislative Consent Motion associated with the Westminster Welfare Reform Bill, 22 June 2011).

<sup>17</sup> Para 9 of the Report.

<sup>18</sup> See section 4.6.

<sup>19</sup> <http://archive.niassembly.gov.uk/record/reports2010/110321.htm#aa>, 21 March 2010.



### 3.3 Debates around devolution and welfare provisions

The Calman Commission<sup>20</sup> (see Appendix 1) considered development of the devolution settlement in Scotland. Its conclusion is summed up as follows, "The Commission did not favour significant devolution of powers in relation to pensions and the main parameters of social security citing practical arguments (funding arrangements) and the existence of existing processing centres or the complexity of the social security system. They also were concerned that variations in rates or conditions of access to benefits might lead to "benefit tourism"). The Calman Commission also espoused a principle of a 'common social citizenship' where at least minimum social standards were agreed across the territory of the UK. Therefore for reasons both of practicality and principle the Commission did not recommend any major devolution of powers in the field of social security."

With the election of a SNP government having a majority of seats in the Scottish Parliament the view of the current Scottish Government is that, in an independent Scotland, the Scottish Government would have responsibility for both tax and benefits.

In comparison, there has not been an equivalent 'Calman' analysis of social citizenship in NI.<sup>21</sup> The Belfast Agreement makes passing reference to parity in social security,<sup>22</sup> which indicates acceptance of parity on the part of the parties to the Agreement, but there does not appear to have been much debate around parity at the time of the passage of the NI Act in 1998.

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<sup>20</sup> Calman, L. (2009) *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century: Final Report – June 2009*, Edinburgh: Commission on Scottish Devolution. The Commission on Scottish Devolution, the Calman Commission, was established in 2008 by way of an opposition Labour Party motion passed by the Scottish Parliament on 6 December 2007, with the support of the Conservatives and Liberal Democrats. The governing Scottish National Party (SNP) opposed the creation of the Commission. Its function was "to review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament, and continue to secure the position of Scotland within the United Kingdom."

<sup>21</sup> Birrell D and Heenan D, *Devolution and social security: the anomaly of Northern Ireland*, (2010) 18.3, *Journal of Poverty and Social Justice*, pp 281-93, at 291.

<sup>22</sup> Multi-Party Agreement, (NIO, 1998), para 26(e) "option of the Assembly seeking to include Northern Ireland provisions in United Kingdom-wide legislation in the Westminster Parliament, especially on devolved issues where parity is normally maintained (e.g. social security, company law)."



## 4. Forms of Parity principle

### 4.1 The parity principle in social security

#### 4.1.1 Introduction

The parity principle in social security is one of the few forms of parity which has an explicit statutory basis, as set out above in sections 87 and 88 of the NI Act 1998.

The duty of 'consultation and co-ordination' has been interpreted by the DSD (and its predecessors), from well before the NI Act 1998,<sup>23</sup> to involve a virtually immutable 'parity principle' between NI and GB social security law. It is therefore typical for the DSD to state the following:-

"The Department for Social Development explains 'the long standing principle of parity dictates that an individual in Northern Ireland will receive the same benefits, under the same conditions, as an individual elsewhere in the United Kingdom'. The Department states that, because of this, that 'policy proposals for the NI Welfare Reform Act will therefore largely mirror those contained in the UK Westminster Act'<sup>24</sup>.

Section 87 is a 'consultation and coordination' provision. The wording is, "shall from time to time consult one another with a view to securing that, to the extent agreed between them, the legislation to which this section applies provides single systems of social security, child support and pensions for the United Kingdom". Although there are regular contacts between the DWP and the DSD, these provisions would appear to require consultation between the two Departments before proposals for changes to the system are made.<sup>25</sup> It would not be sufficient for the DWP merely to inform the DSD of proposed changes. As such, there ought to be an opportunity, at an early stage, for the DSD to consider and propose variations in any changes 'in the particular circumstances of NI'.

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<sup>23</sup> Birrell and Heenan identify the National Insurance Act 1946 as an early example of reciprocal arrangements.

<sup>24</sup> DSD, Welfare Reform Bill (Northern Ireland) 2011 Equality Impact Assessment Consultation September 2011, p 11.

<sup>25</sup> The Scottish Government sought a similar consultation device in its dealings with the UK Government on social security issues during discussions in the context of the Welfare Reform Bill but were unsuccessful in gaining a commitment from the UK Government. For further discussion, see section 6.2.4.



The mechanisms set out in section 88 appear to facilitate the outworking of any agreement reached. However, in practice, they appear to give the DWP and the Treasury an effective veto on any variations in NI social security law.<sup>26</sup>

It therefore appears to have been generally agreed that there should be a single social security system, based on the GB model.<sup>27</sup>

This was supported by the statement of the (SDLP) Minister for Social Development in an Assembly debate on 4 June 2007 when she stated, as quoted by Birrell and Heenan,

“the Minister for Social Development acknowledged that the principle of parity was frustrating to an Assembly keen to pass its own laws and policies. However, she noted that Northern Ireland was not self-financing and the cost of paying benefits was heavily subsidised by GB. Therefore, while diverging from parity might be ideologically desirable, financial realities make it extremely problematic (NIA, 2007a).”

It is important to note that expenditure on social security is separate from the Block Grant which is calculated in accordance with the Barnett Formula. The NI expenditure is entitlement-based while the Block Grant is calculated on a population quotient, based on equivalent English (or English and Welsh, or GB) expenditure.

As Birrell and Heenan state,

“If social security policy changed to differ from the rest of the UK, these funding arrangements could be adjusted by UK ministers (HM Treasury, 2007). If the Northern Ireland Assembly were to increase benefit levels, there is a strong possibility that the Treasury would take the view that GB should not be subsidising Northern Ireland for this purpose. Consequently, it would refuse to pay increased benefits and reduce the level of subsidy needed to maintain parity in benefits (NIA, 2008).”

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<sup>26</sup> Birrell and Heenan state (at p 283) “The most recent concordat between the DWP and DSD, in 2003, provided guidance for consultation and communication to ensure that legislation remained the same or any divergence was accommodated (DWP, 2003). This means that if the Northern Ireland Assembly wished to pursue alternative policies, this would require a financial settlement with the Treasury with any losses being met from the Northern Ireland budget.

<sup>27</sup> The Calman Commission reached the same conclusion, “The Calman Commission also espoused a principle of a ‘common social citizenship’ where at least minimum social standards were agreed across the territory of the UK. Therefore for reasons both of practicality and principle the Commission did not recommend any major devolution of powers in the field of social security.” However the present Scottish Government does not necessarily take the same view.



Therefore, in answer to the proposition on “the likely outcomes of breaking parity in relation to measures included in the Welfare Reform Act (Northern Ireland)”, the enactment of significantly different provisions in the NI Welfare Reform Act could, in practice, only occur with the agreement of the DWP and the Treasury. This reality of welfare parity is reflected in a recent Assembly debate on welfare reform (20 February 2012). An SDLP motion,<sup>28</sup> calling for opposition to the welfare reforms, was defeated by 44 votes to 38.<sup>29</sup> A DUP amendment welcomed the reforms but called for mitigating measures to avoid the ‘negative impact’ of the reforms on NI.

Therefore, while there is room for negotiation around variations to the GB system, there is no realistic prospect of ‘breaking parity’, in the sense of devising devolved solutions to the subject-matter of the WR Act. This was emphasised by the Secretary of State, following the debate. He stated:-

“It is absolutely vital to maintain parity. It would be really unthinkable for the Northern Ireland Executive to have to create a wholly new welfare system and the IT system to run it. That would be a horrendous prospect, but there is very significant flexibility.”<sup>30</sup>

In Scotland, there is no devolution of social security itself. However there are consequential effects on other welfare benefits, such as council tax rebates and passported benefits, and other programmes, such as housing, which are devolved.

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<sup>28</sup> The SDLP motion stated:-

“That this Assembly believes that the coalition Government’s welfare cuts and major aspects of their welfare reform agenda are having and will continue to have a significant detrimental impact on our community; recognises that the impact will be more severe for Northern Ireland given our historically high levels of disadvantage and our higher proportions of families with children and people in receipt of disability living allowance; notes that the accumulated cost of welfare cuts to the local economy could reach £450m; and calls on the Executive to make opposition to a wide range of the welfare reforms their highest priority and to immediately pursue robust negotiations with the coalition Government to pursue all possible legal and operational flexibilities and financial support to mitigate the impact of the welfare cuts and changes imposed on Northern Ireland.”

An alternative DUP amendment stated:-

“Leave out all after ‘Assembly’ and insert

“reaffirms its unanimous support for welfare reforms that are aimed at simplifying the social security process and helping people to get back to work; notes with concern the negative impact that many of the coalition Government’s proposed welfare reforms could have on vulnerable people in Northern Ireland; and calls on the Minister for Social Development to continue his robust engagement with the coalition Government and to work with Executive colleagues via the Executive subgroup on welfare reform to pursue, where possible, measures to mitigate the negative impacts of the proposed welfare reforms on Northern Ireland.””

<sup>29</sup> <http://www.bbc.co.uk/news/uk-northern-ireland-17101438>.

<sup>30</sup> <http://www.bbc.co.uk/news/uk-northern-ireland-17101438> 26 February 2012



#### **4.1.2 Variations in NI social security law and practice**

Despite this apparently absolute parity principle in relation to social security, there are variations from the GB system in the NI system. One is identified by Birrell and Heenan, namely on payment of housing benefit to landlords rather than tenants.<sup>31</sup> This therefore reflected a variation on parity on policy grounds, given the 'particular circumstances of NI', as perceived by the Social Development Assembly Committee.<sup>32</sup>

First, it is already clear that any variations in social security parity with significant financial implications, even if approved by the DWP and the Treasury, would have to come out of the Block Grant or other expenditure. In this case, there were no financial implications as the payment being made to one party as opposed to another.

Secondly, as stated in the DSD EQIA on the Welfare Reform (Northern Ireland) Act 2011, the explanation is made that a common IT system requires a common system of benefits:-

"At an operational level, the social security systems in Northern Ireland and Great Britain have developed in parallel and have very close inter-relationships. Virtually all social security benefits paid in Northern Ireland are processed on computer systems provided and operated by DWP. In practice therefore, any departure from the parity arrangements could result in this Department incurring costs to fund the development and procurement of bespoke IT systems or meeting the additional costs associated with

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<sup>31</sup> pp 285-6, "The introduction of the Northern Ireland Welfare Reform Bill in 2007, which proposed to put into law the same social security provisions as the UK 2007 Welfare Reform Act, led to an item of policy divergence. There was much concern in the Northern Ireland Assembly that if this Act were simply mirrored in Northern Ireland, regulations would allow payment of the new Housing Allowance directly to tenants in the private rented sector rather than to landlords. The Assembly Committee suggested that this would cause additional difficulties for low-income tenants already struggling to prioritise their money, possibly leading to arrears and evictions and placing further burdens on the social housing sector. As a result of these concerns, the minister, Margaret Ritchie (SDLP) decided that she had enough leeway to retain the current system, whereby payments were made directly to landlords. The theory underpinning the Act in GB was that giving tenants additional responsibilities would promote and encourage financial self-management. The Assembly in Northern Ireland considered the additional responsibilities as burdens rather than freedoms. Consequently, an ideological viewpoint led to a breach of parity, which the UK government accepted on the basis of being a minor divergence."

<sup>32</sup> Prior to the WR Act changes, housing benefit has been paid directly to landlords in Scotland. Local housing allowance is paid to claimants who rent from a private landlord but in certain circumstances it can be paid directly to landlords. See [http://scotland.shelter.org.uk/get\\_advice/advice\\_topics/paying\\_for\\_a\\_home/housing\\_and\\_council\\_tax\\_benefit](http://scotland.shelter.org.uk/get_advice/advice_topics/paying_for_a_home/housing_and_council_tax_benefit).



access to and modification of the GB/DWP system. In view of the financial implications, any departure from parity needs to be given the most careful and detailed consideration.”<sup>33</sup>

However, in this example, the original IT system provided for payment to landlords and therefore there were little or no resources or costs involved in retaining it.<sup>34</sup>

A further example of variation, provided by Birrell and Heenan, concerns deductions from benefits, namely,

“the 1971 Payment for Debt (Emergency Provisions) Act. While this Act was not social security legislation, it enabled recovery from any monies paid by government, including benefits. It was designed to counteract a widespread rent and rates strike, which was part of a protest campaign against internment without trial. In 1971–72, it was estimated that 22,000 tenants in the public sector were participating in the action. This legislation enabled deductions to be made from a wide range of social security benefits in lieu of rent.”<sup>35</sup>

The legislation was eventually repealed in 1990. In an important contribution to issues of welfare parity, Law Centre (NI)<sup>36</sup> sets out some examples of variations in social security parity including that “greater powers to make deductions from social security benefits are maintained in Northern Ireland”, although the gap has narrowed with developments in GB social security law more generally.

A temporary variation concerned housing benefit changes including a cap of the number of bedrooms for which a benefit claim could be made. This was reduced in GB from 5 bedrooms to 4 and was adopted in NI from April 2011.<sup>37</sup>

Law Centre (NI) also identifies that “different rules apply to studying” where there are different rules between GB and NI. GB has moved to an ‘hours rule’ whereby only full-time study is covered by student benefits while NI has retained the previous regime of both part-time and full-time study on designated courses. Once again, we appear to

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<sup>33</sup> DSD EQIA Consultation, p 15.

<sup>34</sup> Indeed, Birrell and Heenan (at 287) point out that the SSA provides back up services to parts of London and storage, search and retrieval service for paid benefit orders for the whole of UK.

<sup>35</sup> Birrell and Heenan, p 285.

<sup>36</sup> Law Centre (NI), ‘Social Security Parity – A Note for the Social Development Assembly Committee’, May 2011. See now NIWRG Briefing Paper, March 2012.

<sup>37</sup> See <http://www.lawcentreni.org/EoR/benefits-and-tax-credits/housing-benefit.html>



have a policy variation with limited financial implications and the retention of a previous set of criteria on the IT systems.<sup>38</sup>

Law Centre (NI) also cites differences in the administration of social security. A primary issue is that of lone parents actively seeking work. In GB, the age of the youngest child of a lone parent which triggers an obligation to actively seek work has come down from 12 years to 7 years and will come down to 5 years in 2012<sup>39</sup>.

Here the distinction between Departmental arrangements comes into play as the social security system and the administration of employment tests rest with the DWP, while in NI, the former rests with the DSD and the latter with the Department of Employment and Learning (DEL). The frequency of 'signing on' for work focussed interviews has been reduced to 2 weeks for lone parents in GB but remains 13 weeks in NI.

On policy grounds, it was argued in NI that there had not been the same investment in childcare strategies as in GB. Therefore these more restrictive tests and sanctions were not introduced. No doubt, the DWP and/or Treasury could come up with some forecast on the likely 'cost' of introducing/not introducing these revisions but it may be presumed that the financial implications were not significant. Once again, by retaining a previous system, the IT costs were also marginal.

A further significant variation concerns issues of Council Tax/Water Charges and rebates. In NI, there is a system of rate rebates administered by the local administration. It was accepted by the DWP that NI had a different system and that the GB model could not be applied in NI.<sup>40</sup>

### **4.1.3 Devolved welfare benefits**

Two further areas of potential variation from parity are discretionary payments under the Social Fund and passported benefits, such as Free School Meal Entitlement (FSME).<sup>41</sup>

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<sup>38</sup> The issue of Educational Maintenance Allowances (EMAs) is dealt with under 'Employment and Training Policy' (see below, at section 4.3.2).

<sup>39</sup> See <http://www.lawcentreni.org/EoR/benefits-and-tax-credits/income-support.html>

<sup>40</sup> Further variations in NI social security law are set out in the NIWRG paper, section 5, 'The Welfare Reform (NI) Order 2010- A Recent Deviation from Westminster Measures'.

<sup>41</sup> <http://www.welfarerights.net/benefits-guides/Social-Fund>





Social Fund payments have been covered by the social security budget and hence subject to social security parity. Discretionary payments, at least in theory, allow for greater variations in welfare policy.<sup>42</sup> The discretionary Social Fund is budget limited. Social Fund payments will become fully devolved under the WR Act and will cease to be treated as 'social security'.

Passported benefits<sup>43</sup> are not considered to be social security and hence are covered by the Block Grant.<sup>44</sup> They are benefits based on entitlement to other benefits, for example, FSME, bus passes, discount leisure passes and Government Energy Assistance Packages.

## **4.2 The parity principle in employment rights**

One explicit reference to a statutory parity principle in employment law is Article 235 of the Employment Rights (Northern Ireland) Order 1996, the most important source of employment rights in NI employment law, which was enacted under a Direct Rule administration :-

"253.—(1) The Department [of Employment and Learning] shall be the appropriate Northern Ireland authority for the purposes of section 238 of the ... Employment Rights Act 1996 ("the Act of 1996").

(2) Accordingly, the Department may, with the consent of the Department of Finance and Personnel, make reciprocal arrangements with the Secretary of State for co-ordinating the relevant provisions of this Order with the corresponding provisions of the Act of 1996 so as to ensure that they operate, to such extent as may be provided by the arrangements, as a single system."

It is unclear how far any formal "arrangements" have been made but it is clear that substantive (or enforceable) employment rights in NI are virtually identical to those in Great Britain.

This is particularly the case where there is a welfare element to an employment right, for example on maternity leave and pay. An example is an attempt, by the ECNI amongst others, to persuade the Committee on Employment and Learning to extend

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<sup>42</sup> There are three types of discretionary payments available, Community Care Grants, Budgeting loans and Crisis loans.

<sup>43</sup> <http://www.welfarerights.net/passport-benefits.php>

<sup>44</sup> Note on EMAs.



protection in the Draft Employment (NI) Act 2002 from 'employees' to also protect 'workers'. The Assembly was dissolved before the Act could be enacted. Eventually Direct Rule Ministers brought forward what became the Employment (Northern Ireland) Order 2002.<sup>45</sup> The 'family-friendly' policies in the Order only protected 'employees'. It appears to be the case that, because the maternity pay provisions affected social security payments, there could not be divergence between GB and NI employment law with social security implications. Hence the entire Order reverted to protection for 'employees'.

There is also a perception that the implementation of EU employment law must be identical across GB and NI. For example, the Department of Employment and Learning (DEL) produced a Consultation Document, 'The Agency Workers Directive - A Public Consultation 2010'. The annexed draft Agency Worker Regulations repeated word-for-word already enacted GB Regulations, suitably customised for NI circumstances. A number of organisations, including NICE<sup>46</sup> and the Law Centre (NI)<sup>47</sup> challenged these proposals on a number of grounds. An amendment was made to the draft Regulations, in light of concerns over GB case law on protection of agency workers. However, this amendment reflected an amendment to the pre-existing GB Regulations and did not acknowledge separate NI case law and other concerns.

On the other hand, there appears to be greater latitude in both collective labour law and in the procedural aspects of employment law. For example, in GB, both statutory disciplinary and grievance procedures have been abolished. After an extensive consultation exercise, the DEL decided to repeal statutory grievance procedures but not statutory disciplinary procedures. It was clear from the DEL's Consultation Document that it did not consider itself constrained by a parity principle in terms of devolved procedural matters.<sup>48</sup>

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<sup>45</sup> No 2863 (N.I 2) The Employment (Northern Ireland) Order 2002.

<sup>46</sup> NICE Response to the Department of Employment and Learning's consultation on the Agency Workers Directive (2010) (<http://www.nicem.org.uk/elibrary/publication/nicem-response-to-the-department-of-employment-and-learning-consultation-on-the-agency-workers-directive>)

<sup>47</sup> Law Centre response to DEL consultation: The Agency Workers Directive 2010.

<sup>48</sup> "Devolution has created an energy for regional solutions that reflect the particular needs of the local economy. Given that employment law is a devolved matter, neither the Gibbons review nor the BERR public consultation sought the views of interested parties in Northern Ireland. The Department therefore determined that it was appropriate to undertake its own exploration of the options for improving the existing dispute resolution systems and initiated an extensive pre-consultation process as a proxy for the GB Gibbons review." (emphasis added), 'Disputes in the workplace: a systems review Public consultation', DEL, 2009, para 4.2.



Further reforms to employment law are coming into effect or being proposed in GB. For example the qualifying period for unfair dismissal was increased from one year to two years for those employed from April 2012. This may well have a significantly detrimental effect on the employment protection of young workers. As yet, no similar proposals have been made by the DEL in NI.

There have also been significant proposals to amend the law relating to tribunal applications, including the introduction of fees for applications. Once again, these changes may well have a detrimental effect on access to justice for young workers but it may be that these procedural changes will not be applied in NI where there is a stronger sense of devolved autonomy on these issues.

Employment law and collective labour law are not devolved in Scotland. Dispute resolution matters are treated as a GB matter although, given Scotland's separate legal system, there are different rules on issues such as rules of evidence in tribunals.<sup>49</sup>

### **4.3 The parity principle in employment and training policy**

Employment and training policy is a devolved matter in NI. The parity principle operates to a large extent here also. Three significant issues can be considered. The first is inextricably linked with welfare provision, namely voluntary and mandatory participation of young workers in work experience programmes. The second concerns the retention or reform of Educational Maintenance Allowances (EMAs). The third concerns Higher Education Tuition Fees.

#### *4.3.1 Work experience programmes*

The Work Programme was launched throughout Great Britain in June 2011. This has proved to be very controversial in GB,<sup>50</sup> with concerns over sanctions for young people who leave a 'voluntary' placement early and wider concerns over young

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<sup>49</sup> The Scottish Government is consulting on a separate tribunal system for Scotland, 'Consultation on the Scottish Government's Proposals for a New Tribunal System for Scotland Friday, March 23, 2012' (<http://www.scotland.gov.uk/Publications/2012/03/8967>).

<sup>50</sup> The DWP website describes the Work Programme as follows, "The Work Programme will provide tailored support for claimants who need more help to undertake active and effective jobseeking. This means individuals will receive the specific help to overcome the barriers that prevent them from finding and sustaining work. Contracted service providers will have complete autonomy to decide how best to support the claimants referred to them."



workers 'working for nothing'.<sup>51</sup> The scheme has now been amended in GB to remove the sanctions element in some circumstances. However, there are further proposals to expand mandatory work experience schemes in GB.

The DEL set out details of the Steps to Work programme on its website.<sup>52</sup> The NI Direct website does set out work programmes, such as Access to Work (NI) and Pathways to Work, in the context of disabled people.<sup>53</sup> According to the DEL, any equivalent is not expected to happen in NI until at least April 2013.<sup>54</sup>

#### 4.3.2 Educational Maintenance Allowances

Educational Maintenance Allowances (EMAs)<sup>55</sup> have been abolished in England but have been retained, and reformed, in Scotland.<sup>56</sup> In NI, the DEL has been consulting on a retained, but reformed EMA system, following a review by PriceWaterhouseCoppers in 2010.<sup>57</sup> One interesting possibility, in relation to IT implications, is that the IT system is still operational in NI<sup>58</sup> and that Scotland has had the resources to retain the system, albeit in a revised form.

Include Youth are campaigning to have an expansion of the categories of young people entitled to non-means tested EMAs,<sup>59</sup> although the Minister for Employment and Learning has used parity arguments to express reservations on this reform.<sup>60</sup> Include

<sup>51</sup> Shiner, P, 'High court should seize chance to curb government's workfare programme', The Guardian, 31 March 2012 (<http://www.guardian.co.uk/law/2012/mar/30/high-court-workfare>).

<sup>52</sup> <http://www.delni.gov.uk/index/finding-employment/finding-staff/fe-fs-help-to-find-employment/stepstowork.htm>. See also <http://www.nidirect.gov.uk/index/information-and-services/employment/jobseekers/jobseekers-programmes/stepstowork.htm>

<sup>53</sup> <http://www.nidirect.gov.uk/index/information-and-services/people-with-disabilities/employment-support/work-schemes-and-programmes.htm>

<sup>54</sup> NIWRG Briefing Paper, p 5.

<sup>55</sup> EMAs have been resourced through Annual Managed Expenditure (AME) rather than the Barnett Formula (Midwinter, p 187) but are now financed through a 'Barnett consequential' (Assembly debate, 'Widening access to EMAs motion, 6 February 2012). (See section 5.3)

<sup>56</sup> [www.emascotland.com](http://www.emascotland.com). See The Scottish Government (2011) EMA Guidance Released to Stakeholders March 2011.

<sup>57</sup> Fergus Devitt (Department for Employment and Learning), DEL Committee, 21 September 2011.

<sup>58</sup> <http://www.delni.gov.uk/index/further-and-higher-education/ema-educational-maintenance-allowance.htm>

<sup>59</sup> Sara Boyce (Include Youth), DEL Committee, 25 January 2012: "Our concerns about education maintenance allowance (EMA) centre on the current discriminatory situation whereby young people on pre-vocational schemes such as the Give and Take scheme are not eligible for a weekly non-means-tested allowance, unlike their peers on Training for Success programmes."

<sup>60</sup> Minister of Employment and Learning, Assembly debate, 6 February 2012.



Youth has invited the DEL (and the DEL Committee) to examine the revised Scottish system, where young people on pre-vocational courses are now included.<sup>61</sup>

There is therefore an interesting possibility of what can be described as 'devolution triangulation', whereby, first, NI could adopt the English approach of abolishing EMAs, secondly, could reform the system to accommodate NI policy considerations but, thirdly, could use the Scottish model as a template.

#### *4.3.3 Higher Education Tuition Fees*

A significant devolution controversy concerns the ability of devolved administrations to have different tuition fees for 'home' and other UK students at Institutions of Further and Higher Education within their jurisdictions. This was initially a Scottish initiative, taken up by both the Welsh and NI legislatures. A graduate endowment scheme was initially introduced in Scotland requiring students to repay £2000 in fees. The SNP Government has abolished all student contributions in respect of higher education for students domiciled in Scotland.

The Scottish Government, through the Scottish Funding Council, provides a teaching unit of resource for a number of funded places in Scottish universities. Once a student has been accepted to study s/he is not required to pay fees and there is no graduate endowment. Because this system in effect pays the tuition fee element for students, Scottish University places must be open on the same terms to EU students, although the Scottish Government is currently investigating whether it can charge an administration fee to EU students. Students from the rest of the UK are required to pay fees and Universities may set these fees to a maximum of £9000. This policy is controversial insofar as students from the rest of the UK are treated less favourably than EU students and a challenge has been mounted in the Scottish courts to test its legality under the Equality Act 2010 (national origin discrimination) and human rights arguments. This

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<sup>61</sup> Sara Boyce (Include Youth), DEL Committee, 25 January 2012: "We urge the Committee to examine the provision of EMA in Scotland. Following a major consultation exercise, the EMA programme there was revised to ensure that it is better targeted at those young people who are from the lowest income families, as well as those who are considered to be vulnerable. Scotland's EMA guidance makes it very clear that young people on pre-vocational schemes are eligible to receive EMA .... It also defines vulnerable students as those who are at risk of non-participation or of underachieving, and it stipulates that there should be a degree of flexibility when administering EMA for that group of young people. That flexibility should include matters such as attendance, qualifications and the eligibility period." See also Include Youth, EMA for young people on pre-vocational schemes Briefing paper for MLAs 1 February 2012.



challenge is a private challenge and there is no evidence that the UK government has sought to put pressure on the Scottish Government to change their policy since it is an area clearly within devolved competence.

NI has also introduced differential tuition fees, on a similar basis to Scotland (and, on a different basis in Wales).<sup>62</sup> Similar issues arise in Northern Ireland over compliance with the Race Relations (NI) Order 1997 (as amended)(RRO). The DEL announced, on 12 September 2011, that "The Executive agreed on 8 September that tuition fees would be kept at current levels, subject only to inflationary increases. This means that the maximum fee will be £3,465 per annum for entry in September 2012." In relation to students from Great Britain who wish to study in Northern Ireland, the Minister said he wanted students coming here to do so for the right reasons, because of the quality of our institutions. He confirmed that DEL will shortly be bringing subordinate legislation to the Committee for Employment and Learning which will allow our universities and colleges to charge higher fees to students from other UK administrations.

For those wishing to study in the UK the Minister said:

"The decision by the Executive means I can confirm that we will continue to provide tuition fee loans for Northern Ireland students who attend university in any part of the UK. These loans will be available to cover the cost of the loan up to a maximum fee of £9,000. I am sure that this will allay the concerns of many young people hoping to enter Higher Education in September 2012."<sup>63</sup>

This is an interesting example of a devolved solution being adopted by other administrations. However, certainly in NI, the implications of the Barnett Formula, in this case based on English expenditure on higher education, requires the financial shortfall to be made up by precise policy and financial calculations both by the relevant Government Department and the Department of Finance and Personnel.

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<sup>62</sup> See 'Tuition fees in the United Kingdom',  
([http://en.wikipedia.org/wiki/Tuition\\_fees\\_in\\_the\\_United\\_Kingdom](http://en.wikipedia.org/wiki/Tuition_fees_in_the_United_Kingdom)).

<sup>63</sup> 'Farry confirms Higher Education funding arrangements for Northern Ireland'  
(<http://www.delni.gov.uk/index/press-releases/press-releases-july-2011-september-2011/farry-confirms-higher-education-funding-arrangements-for-northern-ireland.htm>).



#### **4.4 The parity principle in equality law**

Many of the NI equality statutes have been identical in wording to those in GB, for example on sex and racial discrimination. So also implementation of EU equality directives has been, with a few exceptions, identical to GB.

There are three major areas of divergence between GB and NI equality law. First, there is the 'fair employment model' on religious and political discrimination, primarily in the labour market, involving targets for employment of the two majority communities, affirmative action, monitoring and reviews.

Secondly, the NI equality law system pre-dates that in GB in having a 'public sector equality duty' (PSED), namely section 75 of the NI Act 1998, covering 9 grounds, including age. The Equality Act 2010 in GB extends pre-existing PSEDs from race, disability and gender to cover also age, sexual orientation and religion or belief.<sup>64</sup>

Thirdly, NI equality law, in general, lags behind GB equality law, despite a high degree of activity around a proposed Single Equality Act in NI in the early 2000s. The Equality Act 2010 harmonises employment and training equality law on the basis of EU principles and extends these principles into non-employment and training fields. In particular, age discrimination law now applies in non-employment fields.

The NI Executive's Programme for Government 2011-12 proposes such legislation in NI but a wide range of deficiencies, affecting children and young people who are disabled (to some extent), ethnic minority children and young people and lesbian, gay, bisexual and trans children and young people, remain.

An interesting attempt at policy divergence concerned the enactment of the Equality Act (Sexual Orientation) Regulations (NI) 2006 (EA(SO)R), ahead of similar legislation in GB. At a time of 'assertive' Direct Rule<sup>65</sup>, the Race Relations (NI) Order 1997 was used as the template for the EA(SO)R rather than provisions on religion or belief in the Equality Act 2006, upon which the GB SO Regulations were modelled. In consequence, the EA(SO)R included harassment provisions in areas such as education, housing and the provision of goods, facilities and services. However, the harassment

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<sup>64</sup> For a commentary on progress on section 75 in NI, see Fitzpatrick, B, 'The Life, 'Death' and Potential Revival of Section 75', *Minority Rights Now!* Issue 4 (2011) 22-27

(<http://www.nicem.org.uk/elibrary/publication/minority-rights-now-issue-4>).

<sup>65</sup> See section 5.2.2/



provisions of the EA(SO)R were challenged by way of judicial review, initially by the Christian Institute.<sup>66</sup> The Northern Catholic Bishops intervened in the litigation and their submissions dominated the proceedings.

The High Court struck out the harassment provisions, partly on procedural grounds, but also on the basis that the definition of harassment was 'too wide', particularly in the context of Article 9 rights ('freedom of thought, conscience and religion'). In consequence, it is arguable that LGBT students have inadequate protection from harassment in education. However, no fresh proposals have been made to develop a fresh definition of harassment in the EA(SO)R, in consequence of the High Court ruling.<sup>67</sup>

A wider attempt at policy divergence was the Office of the First Minister and Deputy First Minister (OFMDFM) consultation on a Single Equality Bill for NI,<sup>68</sup> some years before a similar exercise commenced in GB. However, while the latter resulted eventually in the Equality Act 2010, no single equality legislation has been enacted in NI.

#### **4.5 The parity principle in education law and policy**

Both NI and Scotland have devolved systems of education, which are, in many ways very different to those in England and Wales.<sup>69</sup> There appears to be an overlap between many education laws in England and Wales and in NI, certainly during the time of Direct Rule Ministers as Ministers of Education for NI.

One example is in relation to examination regulations. This is based on Article 79(1)(c) of the Education (NI) Order 1998 which provides,

"79.—(1) In carrying out its functions under this Part the Council [Council for the Curriculum, Examinations and Assessment (CCEA)] shall—

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<sup>66</sup> Christian Institute & Ors, Re Judicial Review [2007] NIQB 66 (11 September 2007).

<sup>67</sup> For analysis of similar issues in relation to the RRO, see Fitzpatrick, B, 'Racial Equality in Education: What Role for the Law?', Minority Rights Now! Issue 5 (2011) (<http://www.nicem.org.uk/elibrary/publication/minority-rights-now-issue-5-spring-summer-2011>).

<sup>68</sup> OFMDFM, 'A Single Equality Bill for Northern Ireland A Discussion Paper on options for a Bill to harmonise, update and extend, where appropriate, antidiscrimination and equality legislation in Northern Ireland', June 2004.

<sup>69</sup> See Birrell (2009), pp 69-72.





(c) seek to ensure that the standards of examinations and assessments conducted by bodies or authorities in Northern Ireland are recognised as equivalent to the standards of examinations and assessments conducted by bodies or authorities exercising similar functions elsewhere in the United Kingdom.”

Rooney and Fitzpatrick<sup>70</sup> have identified an effective ‘institutional’ parity principle between examination regulations in NI and GB. Provisions on issues such as access to dictionaries and reading time, for students for whom English is an additional language, are determined by the Joint Council on Qualifications (JCQ), a body which includes qualification and examination bodies across the UK. The CCEA is technically responsible for examination regulations in NI but it automatically applies JCQ provisions, particularly on ‘newcomer’ students who are significantly disadvantaged by these provisions. It transpires that the Scottish Qualifications Authority has more progressive arrangements.<sup>71</sup>

It can be noted that Article 79(1) does not preclude “standards of examinations and assessments” adopted in Scotland. However, the explanation given for following an English model is that most NI students sit examinations under England and Wales Examination Boards and therefore that students under the same Examination Boards must sit exams under the same conditions. The Scottish system has a separate system of examinations and Examination Boards and hence can ‘opt-out’ of JCQ requirements on certain matters.

There are now outline proposals to ‘overhaul’ the A-level examination system.<sup>72</sup> As the BBC website states, “[The] proposals, which could be implemented from September 2014 for students sitting exams in 2016, would apply to the English exam system - but exam boards also set A-levels for pupils in Wales and Northern Ireland.”<sup>73</sup> Significant issues might therefore arise concerning an English Secretary of State for Education,

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<sup>70</sup> Rooney, E and Fitzpatrick, B, ‘Promoting Racial Equality in Northern Ireland’s Post-Primary Schools’, NICEM, Belfast, 2011 (<http://www.nicem.org.uk/elibrary/publication/promoting-racial-equality-in-northern-irelands-post-primary-schools>).

<sup>71</sup> For legal analysis see Fitzpatrick, B, ‘Racial Equality in Education: What Role for the Law?’, *Minority Rights Now!* Issue 5 (2011) (<http://www.nicem.org.uk/elibrary/publication/minority-rights-now-issue-5-spring-summer-2011>).

<sup>72</sup> Ofqual, Exchange of letters on proposed A level reforms, 3 April 2012 (<http://www.ofqual.gov.uk/news-and-announcements/83-news-and-announcements-news/873-ofqual-statement-on-proposed-changes-to-a-levels>)

<sup>73</sup> <http://www.bbc.co.uk/news/education-17609142> (4 April 2012).



apparently in consultation with some universities, setting the standards for A-levels in an otherwise strongly devolved area of policy.

Another recent proposal is to deduct fines for non-attendance of students from Child benefit.<sup>74</sup> 'Behaviour tsar' Charlie Taylor was invited by the Secretary of State for Education to examine this issue after disturbances across England in the summer of 2011. In NI, the duty of a parent, in relation to the education of their children, is found in the Education and Libraries (Northern Ireland) Order 1986.<sup>75</sup> According to the website of Education Support for Northern Ireland, "Education and Library Boards through their Education Welfare Service [on referral from a school's Education Welfare Officer] have a legal responsibility to make sure that parents and carers meet their own responsibility towards their children's education. If they do not, the Education and Library Board is duty bound to use the legal processes of Court action, to uphold a parent's duty to make sure that the young people in their care receive an education."<sup>76</sup>

Inevitably, such announcements attract significant UK-wide media attention, although they are proposals emanating from the UK Government in relation to the education system in England.

#### **4.6 The parity principle in relation to children's rights more generally.**

Many of these issues are already familiar to the Commissioner, for example, the distinctions between her powers and those of Commissioners in England, Scotland and Wales.<sup>77</sup> Birrell identifies the development of Children's Commissioners, first in Wales, then in NI and finally in Scotland and then England as an example of 'innovative policies', describing the 2003 Order was "one of the few innovative pieces of legislation introduced in the first period of devolution."<sup>78</sup>

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<sup>74</sup> 'Dock truants' child benefit, ministers urged', BBC website, 16 April 2012 (<http://www.bbc.co.uk/news/education-17705238#>).

<sup>75</sup> ""The parent of every child of compulsory school age shall cause him/her to receive efficient full time education suitable to his/her age ability and aptitude, and to any special educational needs he/she may have, either by regular attendance at school or otherwise."

<sup>76</sup> <http://www.education-support.org.uk/parents/school-attendance/>.

<sup>77</sup> See Fitzpatrick, B and Dickson, B, 'Article 24 of the Commissioner for Children and Young People (Northern Ireland) Order 2003 – the review of the Office of the Commissioner: Compatibility with Paris Principles' (2006) ([http://www.niccy.org/uploaded\\_docs/NICCY%20Legislation%20Review%20-%20Main%20Report.pdf](http://www.niccy.org/uploaded_docs/NICCY%20Legislation%20Review%20-%20Main%20Report.pdf)).

<sup>78</sup> Birrell (2009), pp 35-38.



For some time parity has been viewed by advocates of children's rights in Northern Ireland with mixed feelings. This was particularly the case under Direct Rule when the Assembly was suspended and when a number of positive policy developments were occurring in GB in relation to tackling child poverty. These included Sure Start and Extended Schools provision. While the NI budget received the 'Barnett Consequentials' associated with the expenditure on these programmes in England, the money was not allocated directly to similar programmes in NI. After pressure was brought to bear, money was allocated to a 'Sure Start' programme, although it has not been developed or resourced to the extent it was in England. Later, in 2006, resources were made available under the Children and Young People's Funding Package to roll out 'Extended Schools' programmes, although again arguably these have not been resourced or developed to the extent they have elsewhere.

In these cases parity was viewed as a positive thing by advocates of children's rights, in the absence of innovative policy development during the suspension of the Assembly. However, at around the same time as the Extended Schools funding was being released, the Secretary for State for Northern Ireland also decided to apply parity to the issue of physical punishment. In England and Wales, Section 58 of the Children Act 2004 had removed the defence of 'reasonable chastisement' for those with parental responsibility, but had replaced it with 'reasonable punishment', allowing this defence to continue to be used in relation to charges of common assault. While an earlier consultation by the Office of Law Reform had concluded that there was no consensus on this issue in NI, Section 58 of the Children Act 2004 was extended to NI via the Law Reform (Miscellaneous Provisions) (NI) Order 2006, a move which continues to limit the protection of children and breaches children's rights under Articles 19 and 37(a) of the UNCRC.<sup>79</sup>

Another issue of significance to children's rights concerns parity principles in the criminal justice system. Most of these controversies concern a period before policing and justice was devolved, although NI enjoys a separate criminal justice system. The most significant controversy concerned the introduction of Anti-Social Behaviour Order (ASBO) legislation in NI, namely the Anti-Social Behaviour (Northern Ireland) Order 2004 ('the 2004 Order'), following on from similar legislation in England and Wales. The alleged failure of the NIO to comply with its equality scheme, particularly in failing to conduct an EQIA on the proposals, was the subject of complaints to the

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<sup>79</sup> UK Children's Commissioners' Report to the UN Committee on the Rights of the Child (2008), p14.



Equality Commission by the Children's Law Centre, the Children's Commissioner and others, under paragraphs 10 and 11 of the NI Act.

These complaints were largely upheld by the Equality Commission and its investigation report became embroiled in judicial review proceedings, brought by Peter Neil against the imposition of an ASBO on him.<sup>80</sup> One of the complaints considered was that the Minister of State had stated his intentions, in the Westminster Parliament, to enact the relevant legislation, while a consultation process was still being undertaken. For these purposes, it represents a significant example for a strong parity principle being applied by Direct Rule Ministers in the time before policing and justice was devolved to the NI Department of Justice in 2010.

It is still too early, and outside the scope of this report, to establish whether this parity principle still operates. However this is a matter which the Commissioner will wish to keep under review.

An associated issue concerns child protection issues, which were initially covered by the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007. The scheme was reviewed in England and Wales in 2010-11 and, as a result, a vetting and barring scheme (VBS) was proposed by way of the Protection of Freedoms Bill<sup>81</sup> in England and Wales. Although Scotland chose to develop a "parallel and broadly aligned" scheme in Scotland,<sup>82</sup> the NI Minister for Health proposed a Legislative Consent Motion in the NI Assembly so that the reforms in England and Wales could apply to NI also.<sup>83</sup>

However the Minister was lobbied by the Commissioner to continue to include work with 16 and 17 year olds within the scope of the VBS. As the Minister stated, "Work and regulated activity with 16- to 17-year-olds will not be removed from the scope of the VBS in Northern Ireland on the grounds that the risk of harm to a 16- or 17-year-old can be as great, if not greater in some circumstances, as the risk to a child under the age of 16. I have now been advised that Ministers in England and Wales have

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<sup>80</sup> In the Matter of an Application by Peter Neill for Judicial Review, judgment of 7 October 2005, 2005 No. 21782 (High Court), Neill, Re Application for Judicial Review [2006] NICA 5 (08 March 2006).

<sup>81</sup> The Bill is still completing its progress through Parliament (<http://services.parliament.uk/bills/2010-12/protectionoffreedoms.html>).

<sup>82</sup> The relevant legislation in Scotland is the Protection of Vulnerable Groups (Scotland) Act 2007.

<sup>83</sup> Part 5 'Safeguarding vulnerable groups, criminal records etc.', Chapter 1 'Safeguarding of vulnerable groups' therefore covers England and Wales and NI, but not Scotland.



decided to bring work with 16- and 17-year-olds back within the scope of the VBS. I commend Ministers for that change in policy direction.”<sup>84</sup>

It is significant that IT considerations played a large part in the decision to provide an integrated VBS across England, Wales and NI. The Minister stated,

“By keeping pace, we should also be able to plug into some of the technology that will deliver continuous updating of disclosure certificates under the new VBS. That should not be underestimated either in financial terms or in its appeal to employers and volunteer managers in Northern Ireland.”

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<sup>84</sup> <http://archive.niassembly.gov.uk/record/reports2010/110321.htm#aa>, 21 March 2010.

<sup>85</sup> ‘Response from the Northern Ireland Commissioner for Children and Young People to the Consultation on Part One of the Criminal Records Regime Review’, 29 February 2012, p 3.



## 5. Parity Factors

From this review of parity principles across a range of policy areas within the remit of the Commissioner, it can be seen that a range of factors underpin parity principles.

In essence, there are four factors that must be considered when exploring parity in non-reserved matters:

1. Whether **statutory provisions** require parity;
2. Whether variations from parity are desirable due to **policy considerations**;
3. What the **financial impact** might be on the NI block grant and other expenditure; and
4. Whether **practical considerations** preclude variation from the GB systems, for example, compatibility of IT systems

### 5.1 Statutory provisions

In a number of cases, there are statutory provisions which involve a degree of parity between NI law and policy and that in other parts of the UK in areas which are devolved matters. In Sections 87-88 of the NI Act, there is a statutory declaration of social security parity. However, this is also a duty on the parts of the DWP, the DSD and the Treasury to consult on and coordinate a single system of social security. It appears that the extent of this duty to consult has yet to be tested. We also find statutory provisions in employment law, namely Article 235 of the Employment Rights (Northern Ireland) Order 1996, and education law, Article 79(1)(c) of the Education (NI) Order 1998, which purport to tie devolved matters into the regimes in GB.

It can be noted that the NI Act is Westminster legislation and that the other two examples were enacted during periods of Direct Rule. It can be seen that these provisions are not as constraining as they might appear. However, other factors both

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<sup>87</sup> Guidance from June 2010 in Scotland (<http://www.scotland.gov.uk/Publications/2010/06/29093004/2>) still includes regulated voluntary work. On 28 February 2011, the Scottish Government introduced a new membership Protecting Vulnerable Groups Scheme to replace and improve upon the current disclosure arrangements for people who work with vulnerable groups. It is intended to “help to ensure that those who have regular contact with children and protected adults through paid and unpaid work do not have a known history of harmful behaviour”. (<http://www.scotland.gov.uk/Topics/People/Young-People/children-families/pvglegislation>).



place constraints on variations from parity in NI but also provide opportunities for such variations.

## **5.2 Policy considerations**

Devolution was intended to allow for such policy divergences to take into account different priorities. A parity principle applied across the board would negate the purpose of devolution. Here we explore examples which demonstrate that it is entirely possible to have different arrangements in relation to non-reserved matters, provided that they are financially sustainable, and don't cause major practical problems.<sup>88</sup>

### *5.2.1 Scottish experiences*

The Scottish government, under both a Labour led coalition and now under an SNP administration, have forged a distinctly Scottish dimension in several policy areas. Sometimes this distinct approach has been at some considerable cost. Cairney sets out some of these issues to show the imbalance of power where welfare issues are concerned. Thus in relation to 'free' personal care for the elderly he writes:

"The most high profile policy of the first Scottish Parliament session (1999-2003) was the decision in Scotland to depart from the UK line and implement the recommendation of the Sutherland Report on 'free' personal care for the elderly. The practical effect was to give a non-means-tested payment of £145 per person per week for those who qualified for personal care and an extra £65 for those who qualified for nursing care (Keating et al, 2003). However these payments removed the entitlement of recipients to the UK Attendance Allowance (£38-65) and the UK Treasury refused to give their saving to the Scottish Executive (£22 million). As Simeon suggested (2003), if the UK Government had been sympathetic to the policy a solution would have been found, but general Whitehall indifference to Scotland had turned to hostility (particularly since UK Ministers had failed to persuade their Scottish counterparts to maintain a UK line)."

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<sup>88</sup> For other examples, See Birrell (2009), particularly chap 3, 'Innovations, flagship policies and distinctiveness'.



This example demonstrates the significant power that can be exerted by the UK government where it would prefer to see parity maintained in the sense of having Scotland follow the lead of the UK government even in clearly defined devolved areas. A significant aspect of this example is that the same political party was in government in both Scotland and across the UK. This consideration does not apply in NI, at least since the days when there was a single Conservative and Unionist Party.

A second example where Scotland (and Wales and Northern Ireland) have clearly diverged from England is in relation to tuition fees for higher education, which has already been discussed at section 4.3.3. In this example, different parties were in government in Scotland and across the UK.

A third policy area, shared with Wales and Northern Ireland, is the decision to abolish prescription charges. Wales was the first devolved administration to abolish prescription charges in 2007. Northern Ireland abolished them in 2010 and Scotland as from April 2011. In Scotland, any Welsh or Northern Irish prescription is dispensed free of charge under reciprocal agreements with those administrations but English prescriptions are charged for at the English rate unless the patient can show that they are entitled to receive items free of charge.

Examples of policy divergence leading to policy convergence relate to the creation of Children's<sup>89</sup> and Older Peoples' Commissioners.<sup>90</sup> In both cases, the lead was taken by the Welsh Assembly by creating a Children's Commissioner for Wales in 2001, followed by NI in 2003, Scotland in 2004 and England in 2005. Wales introduced an Older Peoples' Commissioner for Wales in 2008 and NI followed suit in 2011.

In addition to these Scottish policy differences, there are some differences in the way passported benefits operate in Scotland. Given that this area is under review following the introduction of the WR Act as discussed below, only one example is given as to how differences might arise. Healthy eating in schools has been a priority for the Scottish Government since 2003. There is specific legislation in Scotland relating to health promotion and nutrition in schools. Access to free school meals is part of that initiative and eligibility requirements are written around eligibility for benefits such as Income Support, income related Employment Support Allowance but also, unlike in England, around Child Tax Credit. In addition, local authorities are free to provide free school lunches for all children in P1 –P3. These provisions are slightly more

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<sup>89</sup> Birrell (2009), pp35-38

<sup>90</sup> Birrell (2009), pp38-40.





generous than in England extending the range of beneficiaries. All passported benefits are now under review in terms of eligibility requirements.

### 5.2.2 The NI experience

A significant factor in parity issues is a desire for, or pressure for, policy convergence between NI and GB (or England, England and Wales or, occasionally, Scotland). For example, the DSD, in its documentation and policy statements on welfare reform, broadly repeats the rationale for welfare reform set out by the DWP in GB. This thinking finds its way into welfare policy in areas which are more 'fully' devolved, such as discretionary Social Fund payments, although considered 'social security',<sup>91</sup> and passported benefits, which are covered by the Block Grant.

So also youth employment and training policy is closely intertwined with welfare policy, for example, on tests of 'actively seeking work'.

This thinking also finds its way into welfare-related employment law. The Calman Commission refers to 'social citizenship' across the UK which can be seen to underpin parity in employment rights more generally, although not necessarily in relation to dispute resolution. It remains to be seen whether further reforms of employment law, for example, increasing the qualifying period in unfair dismissal protection, is duplicated in NI.

This concept of social citizenship also influences aspects of parity in equality law. In fields such as gender equality, disability equality and race equality, NI legislation has mirrored GB legislation, frequently word-for-word. On the other hand, the 'particular circumstances of NI' have justified radically different developments in NI equality law, most notably in the fair employment model and in section 75, although the development of the PSEDs in GB has heightened convergence, albeit by GB 'catching up with' NI.

As Keating states, "[d]evolution has been promoted as a laboratory for policy experiment".<sup>92</sup> Perhaps the fair employment model and section can be seen in this light. So also differential tuition fees can be seen as a Scottish initiative, adopted also

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<sup>91</sup> Under the Bill, they will no longer to so considered and will be largely converted into loans covered by the Block Grant or AME.

<sup>92</sup> Keating, M, 'Devolution and Public Policy Making', in Carmichael, P et al (eds), Devolution and constitutional change in Northern Ireland, Manchester: University of Manchester Press, 2007, pp 231-242, at 237.



in NI and Wales. He goes on to say that “[t]he UK, however, lacks forums in which this type of policy exchange can take place on an equal basis. Whitehall is massively larger than the devolved administrations, is little interested in what they do, and spurns the idea that they can learn from them.” Interestingly, he concludes, “The rejection of devolution in England leaves Scotland and Wales more isolated unless they, with Northern Ireland, can put together new networks for policy exchange and learning and create counter-poles to Whitehall.”

The reality of the present ‘devolution settlement’ in the UK is that NI, Scotland and Wales are ‘devolved countries’ but England is not and that the range of devolved matters vary from one devolved country to the next.

Hence, when the UK Government produces a new policy initiative, it receives considerable media and legislative attention,<sup>93</sup> even if the initiative only applies to England, England and Wales or GB. Those in NI considering these developments may, or may not, realise that technically they do not apply to NI and it is not unusual for NI media sources to debate such developments. Inevitably, questions are asked in NI, ‘when will it apply to us’, even if the policy area is devolved and outside more explicit parity principles.

It is also the case that there was little impetus for policy divergence during periods of Direct Rule, most obviously when the first NI Assembly was abolished in 1974 until the present Assembly took over devolved power in December 1999 and then again when the NI Assembly was suspended from 14 October 2002 until 7 May 2007.<sup>94</sup> It was during this first period that the two statutory parity provisions in employment law and education law were enacted. An example of parity in the second period was the bringing into effect in NI of Anti-Social Behaviour Order legislation, in response to GB developments, despite considerable resistance in NI.

More generally, Birrell sets out reasons for convergence between NI law and policy and that in GB (and frequently, specifically, in England or England and Wales). First, “direct rule ministers could ask the question why policies or changes in policies which applied to their home constituencies should not apply to Northern Ireland or why Northern Ireland should be different. (...) A second

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<sup>93</sup> For example, the recent proposals on deducting ‘truancy fines’ from Child benefit was treated as headline news on ‘The Nolan Show’ on Radio 5 Live, 15-16 April and by ‘The Today Programme’ on 16 April.

<sup>94</sup> See Birrell, D, (Birrell, 2009a) Direct Rule and the Governance of Northern Ireland, Manchester; Manchester University Press, 2009.



reason for the convergence in policy was the tradition of parity in some devolved areas prior to direct rule. (...) A third reason was an absence of pressure in Northern Ireland for the maintenance or development of distinctive policies and in practice some groups campaigned for closer parity with Britain, for example, in early-years provision. A fourth reason was that during the long period of direct rule, the Northern Ireland Civil Service was under little pressure to develop distinctive policies and a fifth factor was the requirement to follow EU directives in an increasing number of areas."<sup>95</sup>

However, Birrell notes an apparent strategy of 'assertive direct rule' during the second period of direct rule from 2002 until 2007, namely Direct Rule Ministers taking significant policy initiatives, which did not always meet with approval locally, for example the proposed introduction of Water Charges. Two examples during that period are the OFMDFM consultation on a Single Equality Bill and the drafting of the Equality Act (Sexual Orientation) Regulations on the basis of the RRO rather than equivalent GB provisions in the Equality Act 2010.

Obviously, since the re-establishment of devolved government in 2007, NI Executive ministers in NI Government Departments have responsibility for devolved matters. As Birrell points out, many areas are covered by EU law. In an area such as agriculture, this involves EU Regulations which must be applied uniformly across the EU. In other areas, where EU Directives apply, the devolved administrations and legislatures ought to have some freedom to adapt the minimum standards of Directives to the particular circumstances of the devolved countries. However, there is a strong mentality of uniform implementation of EU Directives across the UK.<sup>96</sup>

In other areas, it can be argued that elements of a 'convergence mentality' still apply in at least some areas of policy development, whether or not parity principles apply to those areas.

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<sup>95</sup> Birrell (2009a), p 231.

<sup>96</sup> For discussion of the 'no gold-plating' approach of the UK Government, that is, minimum implementation of EU Directives, as applied by a NI Government Department, see 'NICEM Response to the Department of Employment and Learning's consultation on the Agency Workers Directive', 2011 (<http://www.nicem.org.uk/elibrary/publication/nicem-response-to-the-department-of-employment-and-learning-consultation-on-the-agency-workers-directive>).



### 5.3 Financial considerations – the Barnett Formula

When considering breaking parity with GB, a careful consideration of the financial implications must be undertaken. According to a House of Commons Research Paper,

“Some type of formula for allocating funds between the countries of the Union can be traced back to arrangements introduced in the 1880s by the then Chancellor, George Goschen. In 1888 he decided to use a formula to allocate probate duties in support of local government.”<sup>97</sup>

The financial framework for devolved government in NI is described by Midwinter, as follows:-

“It is an expenditure-based system, focused on agreeing changes to the existing baseline. The Spending control framework for the Northern Ireland Assembly is similar to that for UK departments. Three-year budget plans, reviewed each second year, are set within an aggregate called total managed expenditure (TME). Firm three-year figures are set for spending that is discretionary and controllable by the Assembly, in a departmental expenditure limit (DEL), while other spending which is demand led is known as annually managed expenditure (AME) and subject to annual review.”<sup>98</sup>

Social security benefits accounted for about 60% of AME in 2005-06.

DEL expenditure is calculated according to the ‘Barnett Formula’. In relation to NI, this is described as follows:-

“The Barnett formula helps to determine the size of the Northern Ireland block. If during the course of the annual public expenditure survey (PES) there are negotiated changes to comparable programmes in Great Britain (excluding social security), then a fixed proportion of that change is generally added to, or deducted from, the Northern Ireland block. The relevant proportion is currently 2.87% representing the relative sizes of the populations of Northern Ireland and Great Britain in 1991. For example, if £1 is added to health budgets in Great Britain, then £28.7 million is added to the Northern Ireland block. The Secretary of State has the discretion to allocate the block (other than social

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<sup>97</sup> ‘House of Commons Research Paper 98/8, The Barnett Formula’, p 6. The allocation of the block between departments is now made by the NI Executive.

<sup>98</sup> Midwinter, A, ‘The Financial Framework’, in Carmichael et al, p 187.



security) between services in response to local needs and priorities. Social security spending is largely determined by the value of benefits and the expected level of demand. As in Scotland and Wales the Barnett Formula does not determine the overall size of the block.”<sup>99</sup>

As Midwinter states, “Under this arrangement Northern Ireland receives a population-based proportion of changes in planned spending on comparable government spending in England (or England and Wales; or Great Britain as appropriate).”<sup>100</sup>

Therefore the Barnett Formula is based on a population quotient, on the basis of comparable English, or English and Welsh, or GB, expenditure, which is taken to reflect the respective needs of the three devolved countries of the UK. The policy implications are therefore significant. In times of increased government expenditure, the NI Block grant increases and the NI Executive would be expected to increase expenditure proportionately. However, in times of decreased government expenditure, a similar decrease in NI expenditure would be expected, and indeed, the resources would not be available, outside of specific negotiations, to maintain previous policies.

Therefore, when considering breaking parity with GB, a careful consideration of the financial implications must be undertaken. Are there likely to be a significant costs associated with the policy variation? Is the UK Treasury likely to refuse to fund this from the AME budget? What would the implications be for the DEL budget and is this cost proportionate to the political commitment to the policy divergence?

## **5.4 Practical considerations**

We now outline a number of practical considerations to be taken into account in identifying the scope for policy variations from parity.

### *5.4.1 Administrative factors*

One significant factor is the resources available to the NI administration. Civil servants would argue that the NI administration has limited resources, a lack of ‘critical mass’ of policy officers, to develop a wide range of autonomous policies. More so, it has limited resources to draft autonomous statutory provisions. Therefore, in terms of

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<sup>99</sup> House of Commons Research Paper 98/8, p 14.

<sup>100</sup> Midwinter, p 188.



resources, and the prioritisation of resources, it is tempting to follow the GB (or English or English and Welsh) template. For example, the DEL consultation documentation on the Agency Workers' Regulations closely mirrors that in GB, including on the EQIA of the proposals. A striking exception to this rule was the OFMDFM consultation on a Single Equality Act in 2004, although no legislation emerged from the process. Another example of extensive consultation is the DEL consultation on dispute resolution which drew on experience in Ireland as well as NI and GB.

It also appears to be tempting to follow an English/English and Welsh template, even if there has been a divergent policy development in Scotland.

#### *5.4.2 Institutional factors*

In many areas of devolved policy, there are common institutions across the UK. One example is the Joint Council on Qualifications (JCQ), which determines access arrangements for examinations across the UK. The CCEA sits on the JCQ and appears to adopt automatically JCQ provisions, even though the Scottish Qualifications Authority occasionally adopts different standards, on the basis that Scotland has a separate system of examinations and Examination Boards.

Another example is the vetting and barring system and the apparent imperative to have the same system, so that information on individuals could be accessed from systems across UK. Nonetheless, it appears that Scotland is not revising the system to incorporate the changes to be introduced in England and Wales and, in consequence, in NI, by way of a Legislative Consent Motion.

#### *5.4.3 IT factors*

A highly significant factor which underpins parity is the IT implications of variations from parity. This is most obvious in welfare policy where any variations in NI policy have to be based on pre-existing IT systems which are retained in NI despite reforms to welfare policy in GB. A new 'Real Time Information' IT system is being developed to facilitate the implementation of UC, including online access for claimants. It is



anticipated that a pilot will be undertaken in GB from April 2013 and the system will be applied from October 2013.<sup>101</sup>

It was also used as a justification for having the same VBS in NI as in England and Wales. An interesting aspect to this issue of IT compatibility concerns reform of EMAs, which have been abolished in England but have been retained and reformed in Scotland.

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<sup>101</sup> A Real Time Information system (RTI) on Data & Money flows is being developed (DSD, 'What is Universal Credit?' 1 March 2012).



## 6. Parity and welfare reform

### 6.1 Introduction

Until now, a small number of variations from the parity principle have taken place in the NI social security system, usually involving the non-implementation of reforms in the GB system. It is also noteworthy that these variations do not concern benefits for disabled people, such as Disability Living Allowance (DLA). It also appears to be the case that many of these variations occurred under the previous Labour administration in GB.

However, although the WR Act involves substantial change to the system, it is important to appreciate that many reforms have already taken place, under both Labour and Coalition administrations. In her paper on changes to the welfare system,<sup>102</sup> Eileen Evason outlines 41 changes to the system, only 8 of which are introduced in the Welfare Reform Act. None of these reforms has been subject to variations in NI. Horgan and Monteith have analysed the potential impact of these reforms in their paper and it is not proposed to repeat this here.

However, an issue arises as to whether the introduction of the WR Bill in NI, consolidating these reforms as well as introducing new ones, provides an opportunity to reconsider the impact of these pre-existing reforms, particularly on children and young people. Since primary and secondary legislation have to be enacted, and IT systems developed to implement UC and PIPs, it is arguable that the cumulative effect of pre-existing and WR Act reforms should be examined and opportunities explored to develop policy variations in both to reflect the particular circumstances.

### 6.2 Welfare Reform Act

#### 6.2.1 The Scottish debate

The WR Act received the Royal Assent on 8 March 2012. The Act does not, to any great extent, alter the fundamental division of legislative competences between the Scottish Parliament and Westminster since the matters covered by the Act are reserved

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<sup>102</sup> Evason, E, 'Notes and commentary on adjustments to benefits and tax credits', updated 20 December 2011 (see <http://www.lawcentreni.org/news/recent-news/38-featured-slideshow/861-poverty-and-welfare-reform.html>).





matters. The Scottish Government has placed on record that it is not arguing for further devolution of powers under this legislation. So, in terms of legislative competences, the WR Act does not alter the fundamental distinctions between reserved and devolved matters except in the areas discussed below; the Social Fund and Council Tax Benefit.

The WR Act has been subject to debate in the Scottish Parliament because of the need for a Legislative Consent Motion under the Sewel Convention.<sup>103</sup> The Scottish Parliament, according to the terms of this Convention, must formally give its consent where UK legislation gives additional powers to Scottish Ministers. The WR Act does have some impact on the powers of Scottish Ministers, for example by giving Scottish Ministers powers to make consequential, supplementary, incidental or transitional provisions, by regulations, in relation to the introduction of Universal Credit or PIPs.<sup>104</sup>

Other areas which required the consent of the Scottish Parliament were in relation to data sharing, industrial injuries disablement benefits and the establishment of the Social Mobility and Child Poverty Commission.

The debates around the LCM provided the initial forum in which the political response to the Welfare Reform Bill took place in Scotland. It is clear that there is no opposition to reform of the social security system in principle.<sup>105</sup>

However it is also clear from debates in the Parliament and from the evidence of the Scottish Government that there are strong concerns in relation to the WR Act. These concerns led to the Scottish Parliament refusing in part the LCM insofar as the powers of Scottish Ministers would be extended to make regulations in consequence of the

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<sup>103</sup> See discussion at section 3.2.

<sup>104</sup> In her Legislative Consent Memorandum, lodged with the Scottish Parliament on 3 March 2011, Nicola Sturgeon MSP set out what this means. "Clause 33 of the Act gives Scottish Ministers the power to make consequential provisions, by regulations, in relation to the introduction of UC, where such provisions fall within the competence of the Scottish Parliament. This will enable Scottish Ministers to make such amendments to Scottish legislation as might be necessary, for example, to remove references to existing benefits and replace these with references to UC. Clauses 42 and 43 support this general power and provide further detail and procedure for those regulations. This conferral of functions on Scottish Ministers amounts to an alteration of their executive competence and will therefore require the consent of the Scottish Parliament".

<sup>105</sup> In her second Legislative Consent Memorandum of October 2011, Nicola Sturgeon MSP sets out the Scottish Government position, one that is shared by all the political parties in the Parliament. "The Scottish Government supports the simplification of the welfare system, where this will shorten the journey from unemployment to work, make it easier for the most vulnerable to access benefits and reduce costs. The Scottish Government is prepared, in terms of general principle, to consider the Welfare Reform Bill and the introduction of Universal Credit (UC) as a means of effecting this simplification". (paragraph 7)



introduction of UC and PIPs. The consequence of this is to require Scottish legislation enabling Scottish Ministers to make such amendments.

### 6.2.2 Scottish concerns

Particular Scottish concerns in relation to the WR Act relate to: the impact of cuts in the welfare budget which are being implemented at the same time as the social security system is being amended; the need for better inter-governmental working arrangements including a right to be consulted and a right to consent to changes in UK arrangements where they impact on Scottish devolved matters; the impact on kinship carers of social security arrangements; handling of passported benefits; the impact on Scottish housing and homelessness policies of under occupation rules in relation to the housing benefit part of Universal Credit; the impact of devolution of Council Tax benefit accompanied by a 10% cut in the value of this benefit. These concerns are dealt with briefly in turn. The first two issues are dealt with under this section and the remaining issues are discussed more generally in relation to devolved welfare matters (at section 6.3.3).

It is clear from the debates in the Scottish Parliament that many MSPs had concerns not so much about the simplification of the social security system but as to the effects of the cuts in public expenditure on welfare and, in particular, on individuals and groups within their constituencies. The Scottish Government presented an overview of analytical work on welfare reform to the Scottish Parliament Committee on Health and Sport in November 2011<sup>106</sup>. Clearly there will be winners and losers in respect of the changes but it is still early days to see how the changes will impact in Scotland both in terms of the impact on the economy of the cut in benefits (estimated by DWP at being £2 billion in Scotland) and on individuals or families. With a greater understanding of these impacts, Scottish Ministers will need to review policy priorities.

The Scottish Government has attempted to influence UK Ministers to create what Nicola Sturgeon MSP has called 'a space within the existing devolution framework for mature and constructive negotiation to improve UK legislation from a Scottish perspective, for example to better reflect variances in devolved policies or service provisions'.<sup>107</sup> In effect the Scottish Government is asking for a Scottish right to be

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<sup>106</sup> Scottish Government, 'Overview of analytical work on welfare reform', November 2011

<sup>107</sup> In the technical notes around the LCM and the introduction of UC and PIPs (October 2011), the Scottish Government noted the significant risks of the introduction due to lack of detail on the face of the



consulted and possibly a right to withhold consent to particular arrangements which would adversely impact on Scottish devolved matters.<sup>108</sup> This is a kind of mirror image of section 87 of the Northern Ireland Act and would require UK Ministers to acknowledge differences in approach

The Welfare Reform (Further Provisions) Scotland Bill was introduced by Nicola Sturgeon on 22 March 2012. It is an enabling bill allowing Scottish Ministers to make regulations in consequence of the introduction of UC and PIPs.

Devolved policy re-formulation work can only be completed after the GB Government has set out in further regulations its own detailed rules in relation to UC and PIPs. The Scottish Government will work to re-formulate entitlement to benefits in Scotland and make regulations under this Act.

### *6.2.3 Scottish Scrutiny and Consultation Mechanisms*

As has been noted several times, the WR Act will have considerable impact in Scotland. It has driven some innovations in arrangements for scrutiny and for stakeholder participation.

Key stakeholders are local authorities as represented by COSLA whose members are responsible for delivery of a wide variety of passported benefits and may assume additional responsibilities in relation to the operation of successor arrangements to the Social Fund and Council Tax Benefit. The Scottish Government working jointly with COSLA has established further stakeholder fora including a Welfare Reform Scrutiny Group composed of people from voluntary organisations knowledgeable about welfare issues working with COSLA and Scottish Government, a Housing Benefit Reform Stakeholder Advisory Group and a Disability Organisations Forum. There is an

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Welfare Reform Act and suggested that some of these risks might be mitigated 'if the UK Government were to introduce a requirement that would involve the Scottish Parliament in the processes by which subordinate legislation applying in Scotland , which impacts on areas in which Scottish Ministers exercise functions but which does not fall within their executive competence, is developed'. The technical notes explain that the "the UKG has to date refused to acknowledge the validity of our request".

<sup>108</sup> A consistent theme from the Calman Commission through the discussions of the Scotland Bill to the Welfare Reform Act has been the need for better and deeper working relationships between the Scottish and the UK governments. Intergovernmental relations are governed by a Memorandum of Understanding with concordats in place detailing how exchange of information and consultations take place at the level of officials and at ministerial level. In this area there clearly needs close working relationships because of the blurred boundaries between reserved and devolved powers.



urgency about the work of these groups given the timetable for reform set out by the UK government and the relative lack of experience in social security in Scotland.

The Scottish Parliament meanwhile has established an ad hoc Committee on Welfare Reform which met for the first time on 23 February 2012. Its remit is 'to keep under review the passage of the UK Welfare Reform Bill and monitor its implementation as it affects welfare provision in Scotland and to consider relevant Scottish legislation and other consequential arrangements'. It is intended that the Committee members will develop an expertise in social security and related matters which could be said to be lacking in the Scottish Parliament given the division of competences described above.<sup>109</sup>

#### 6.2.4 Lessons for NI from Scotland

The first lesson for NI is that, even with a statutory parity provision, the NI Executive does not appear to be in a strong position to participate in policy formation in GB on welfare reform.<sup>110</sup> The Scottish Government wishes to see a more formal structure for consultation and coordination, at least in the areas where reserved and devolved matters interact and overlap, for example, on passported benefits and the devolved nature of the Social Fund. This need for consultation and coordination is more acute in NI where the entire social security system is technically devolved but subject to an overriding parity principle. The phrase in section 87 'shall from time to time consult one another' must include when significant policy developments are being proposed by DWP.

There is ample case law in the NI courts on the need to consult during the policy formation process.<sup>111</sup> Clearly, there are strong links, both formal and informal,

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<sup>109</sup> For information on the Committee and access to its papers see

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/46339.aspx>.

<sup>110</sup> A possible exception to this is in relation to work capacity assessments under DLA (to become PIPs). In the Assembly proceedings on Monday, 20 February 2012, the Minister for Social Development stated, "The new benefit has many of the core principles that underpin DLA, such as providing financial support to people with a disability. It will be tax-free; it will be paid whether you are in or out of work; and it is a non-contributory benefit. My Department has ensured that the particular circumstances of Northern Ireland have been incorporated into the design of the new assessment process for PIPs. Last summer, we piloted the new process with over 200 customers in Northern Ireland. That is real action being taken to address the consequences of the Welfare Reform Bill rather than just talking about the changes."

<sup>111</sup> In the Christian Institute case, various aspects of requirements on consultation were considered. At para 18, it is stated, "In the General Consumer Council's Application it was stated at paragraph 36



between the DSD and the DWP and NI has a representative on the SSAC. There will never be 'equality of arms' between the DSD (and the DEL and the DFP), on the one hand, and the DWP and the Treasury, on the other. However, the particular circumstances of NI (and, for that matter, Scotland and Wales) should be taken into account at the policy formation stage and, at the very least, opportunities for flexibility and country-by-country variations identified at an early stage, rather than after the major policy developments have been put in place.

Secondly, Scotland has put in place stronger institutional structures to ensure the full participation of local authorities, which may have a lesser role in NI, but also the community and voluntary sector, in the implementation of the WR Act in Scotland. The Social Development Assembly Committee will have an opportunity to examine the WR Bill in detail, unless an attempt is made to 'accelerate' the Bill through the Assembly and a Welfare Reform Committee has been established within the NI Executive but the institutional structures being put in place in Scotland are not being replicated in NI.

## **6.3 The impact of Welfare Reform in NI<sup>112</sup>**

### *6.3.1 Evidence base and cost/benefit analysis*

There has been extensive research into the implications of the Act in Scotland and Wales.<sup>113</sup> A similar analysis has been adopted by IFS in relation to the impact of

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that a combination of considerations had led to a legitimate expectation of consultation with the GCC in relation to the draft Water and Sewage Services (Northern Ireland) Order 2006 – "First of all this arose because a programme of consultation with the applicant was announced in advance of the process. Secondly, the applicant was regarded as a key party to and a major stakeholder in this process. Thirdly, the applicant has a special statutory position in relation to consumer issues and thus a particular statutory interest in the matters which are the subject matter of this draft order. Fourthly the applicant has a special position in the new legislative scheme set up by the draft order as a guardian of the consumer interest."

At para 21, it is stated, "The four requirements of consultation were stated in R (Coughlan) v North & East Devon Health Authority [2001] QB 213 at para 108 – "To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

<sup>112</sup> See Horgan and Montieth.

<sup>113</sup> For example, the Welsh Government has published 'Analysing the impact of the UK Government's welfare reforms in Wales – Stage 1 analysis' (February 2012).



existing welfare reform in NI.<sup>114</sup> Widespread concern has been expressed at the impact of UC<sup>115</sup> and PIPs in NI.<sup>116</sup>

For example, the Institute for Fiscal Studies (IFS) estimates that existing reforms to the welfare system will disproportionately affect people with disabilities in NI as NI has a higher proportion of people with disabilities than GB.<sup>117</sup>

From the perspective of the parity principle debate, what is central here is the need for accurate costing of the impact of the WR Act reforms in NI, together with the potential cost of policy variations, both in terms of the financial, and associated resource, costs of policy variations, in particular, accurate estimates of IT costs.

It would also be useful to have projected potential costs of the implementation of WR Act reforms in areas of devolved matters, such as healthcare, social care, education and housing. What are the implications for the housing budget in NI of the WR Act reforms? What are the implications for healthcare and social care costs? To what extent can the NI Executive take anticipated additional expenditure in devolved budgets into account in arguing for policy variations, with financial implications, in NI?

### *6.3.2 The NI debate*

This section considers the likely outcomes of breaking parity in relation to measures to be included in the WR Bill (NI). The NI debate can be seen to have three dimensions. First, can there be flexibility in the application of welfare reforms already in operation or to be brought into operation as part of the enactment of the WR Act and the wide range of secondary legislation which will follow it? Secondly, can existing variations be preserved in the new regime? Thirdly, how much flexibility can there be in the development of UC and PIPs to meet the particular circumstances of NI?

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<sup>114</sup> Browne, J, 'The impact of tax and benefit reforms to be introduced between 2010–11 and 2014–15 in Northern Ireland', London: IFS, 2010, at p 13.

<sup>115</sup> NIWRG Briefing Paper, p 9.

<sup>116</sup> Contact a Family, 'Future benefit changes – a guide for families with disabled children', December 2011.

<sup>117</sup> IFS, 'The Impact of Tax and Benefit Reforms to be Introduced between 2010-11 and 2014-15 in Northern Ireland', 2010.



As stated above, the parity factors to be taken into account are:-

1. Whether **statutory provisions** require parity;
2. Whether variations from parity are desirable due to **policy considerations**;
3. What the **financial impact** might be on the NI block grant and other expenditure; and
4. Whether **practical considerations** preclude variation from the GB systems

### 6.3.2.1 Existing reforms

In terms of existing reforms, as stated above, the introduction of the WR Bill and secondary legislation in NI provides an opportunity to reconsider whether they are all appropriate for the particular circumstances of NI. It is not proposed here to examine all of these reforms but rather to highlight some which have been the subject of particular controversy.<sup>118</sup> Some of the controversies which have received considerable media attention have resonated in NI while others have not yet done so.

In terms of the latter controversies, the DEL does not propose to introduce a Work Programme in NI until at least April 2013, presumably to coincide with the introduction of UC, although it will not be fully operational until October 2013 and will involve a transition of claimants on to UC until 2017. Media attention has focused on sanctions, particularly for young people withdrawing from 'voluntary' work placements<sup>119</sup> and also the system of contracting out work placement services and the 'benefits' which those who take on such 'workers', particularly in the community and voluntary sector, gain against the costs of doing so.<sup>120</sup> Can there be a NI solution to these issues, not involving the contracting out of job interviews? Can the NI system have different conditions to those operating in GB?<sup>121</sup>

Secondly, systems of work capability assessments are already in place for recipients of DLA. In GB and NI, these assessments have been contracted-out<sup>122</sup> and have been

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<sup>118</sup> And identified to us in interviews.

<sup>119</sup> Shiner, P, 'High court should seize chance to curb government's workfare programme', *The Guardian*, 31 March 2012 (<http://www.guardian.co.uk/law/2012/mar/30/high-court-workfare>).

<sup>120</sup> 'Charities to leave Work Programme' Some charities are leaving the government's £5bn Work Programme, claiming the upfront payments they receive do not cover the initial cost of helping jobseekers find employment (<http://www.bbc.co.uk/go/em/fr/-/news/business-17538046>).

<sup>121</sup> Welfare Reform Group, p 6.

<sup>122</sup> Gentleman, A, 'They try hard to avoid paying' *The Guardian*, G2, p 8.



criticised for the rejection rates and high level of successful appeals,<sup>123</sup> despite attempts to justify the high rejection rates.<sup>124</sup> But job interviews conducted by the DEL have not been contracted out, as in GB. With the introduction of PIPs, could it be possible to develop a NI solution to these assessments, given the higher incidence of disability in NI?<sup>125</sup> What would be the financial and other considerations, particularly on IT costs, of doing so?

More generally, there are concerns that these assessments for DLA are already disadvantaging a range of categories of disabled people, including those with mental health issues and those who are blind or partially sighted.<sup>126</sup> However, existing policy variations in NI have not addressed disability issues, despite significantly higher levels of disability in NI and families with disabled members. To what extent can the NI Executive and Assembly address opportunities for policy variations in relation to disability benefits with the introduction of UC and PIPs?

Thirdly, there are worrying developments in relation to housing benefits. For example, Non-dependent deductions (NDDs) which reduce housing benefit to take account of the contribution which non-dependents, frequently young people, are presumed to make to the family budget. These have been frozen since 2001 but are now being rapidly increased, putting pressure on young people to leave the family home. On the other hand, the extension of room in a shared house rule has been extended from those up to 25 years of age to those of 35 years of age. However, there is a short supply of Multiple Occupation Housing (MOHs) in NI, certainly outside student areas. There is also a concern that single men in this age range may have informal access arrangements to their children, which will raise child protection issues around visits.<sup>127</sup> These developments are exacerbated by the highly segregated housing market in NI.

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<sup>123</sup> Gentleman, A, 'Third of incapacity benefit claimants ruled fit to work', *The Guardian*, 16 March 2012 (<http://www.guardian.co.uk/society/2012/mar/15/third-of-incapacity-benefit-claimants-ineligible>).

<sup>124</sup> Most benefit recipients 'can work', *Belfast Telegraph*, 25 March 2012 (<http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/most-benefit-recipients-can-work-16135798.html>).

<sup>125</sup> The Joint Committee on Human Rights (JCHR) has expressed concerns at the human rights implications of 'contracting-out' public functions through welfare reform measures. *Legislative Scrutiny: Welfare Reform Bill - Joint Committee on Human Rights* (<http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/233/23305.htm#a15>), para 1.89.

<sup>126</sup> Mencap, 'Welfare Reform Bill (2012)1 – Summary' (March 2012), RNIB Briefing, 'Personal Independence Payment: the impact on blind and partially sighted people' (2012).

<sup>127</sup> Horgan and Monteith, p32.





Does the incorporation of housing benefit into UC provide an opportunity for reconsideration of the effect of these changes on the housing market in NI and the dangers of increased homelessness amongst young adults, particularly the young fathers of children? Can the financial 'cost' of alleviating the negative effects of these changes be quantified, in relation to the NI social security budget? Previous variations have allowed existing IT systems to continue to operate but the opportunity does not appear to have been taken to defer or not adopt these changes.

Fourthly, there are significant changes to the operation of Working Tax Credit, which will be incorporated into the WR Act reforms. In particular, couples with children must work at least 24 hours a week, with one person working 16 hours, to qualify for Working Tax Credit. As Horgan and Monteith point out,

"Many couples report being unable to get the extra hours of work needed to bring them within the new rules, meaning a loss of £73 a week for their family. The difficulties faced by parents trying to increase their hours has been confirmed by shop workers union, USDAW which reported that 78% of its members report that their employers are unable to give them extra hours of work due to the recession."<sup>128</sup>

### *6.3.2.2 Existing variations*

In terms of existing variations, there will be issues around the continuation of payment of the 'housing' element of UC to landlords instead of claimants.<sup>129</sup>

Equally, there is the prospect of tenants, particularly with families, not being able to pay their rent, including the housing benefit component, leading to the dangers of evictions and increased homelessness. It is already anticipated that tenants without financial capability may still have the housing benefit component directly to the landlord, even under UC. But this involves the disaggregation of UC and an IT system which can cope with this. Since there are few financial implications for maintaining this variation, and indeed substantial potential costs of homelessness and added health costs, how far can disaggregation go to meet the particular circumstances of NI?

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<sup>128</sup> Horgan and Monteith , p 38

<sup>129</sup> NIWRG paper, pp 8-9.



Another example is the issue of lone parents 'actively seeking work'. It remains to be seen whether NI variations, on the age of children and the frequency of 'signing on', can be accommodated within the new UC system. The difficulty here is that it is not a question of maintaining an existing system but of accommodating variations in a new IT system, as claimants are transferred from existing benefits to UC between 2013 and 2017.

In terms of Council Tax/rates rebates, the Welfare Reform Act proposes to devolve rebates to local councils but this solution would not work in NI as the local council structure (even after the Review of Public Administration) is not equipped to handle these arrangements.<sup>130</sup> It therefore remains to be seen how this NI policy variation will be accommodated in NI and whether a 10% cut in expenditure should be implemented.

### 6.3.2.3 Welfare Reform Act reforms

Finally, in relation to changes being brought in through the introduction of UC and PIPs, a range of issues are a source of controversy. Two issues were pinpointed by Baroness Ruth Lister at the NICVA conference on welfare reform on 1 March 2012,<sup>131</sup> first, the frequency of payments, to be increased from fortnightly to monthly<sup>132</sup> and, secondly, the payment of UC to the 'head of the household', what has been described as the 'purse/wallet' issue.<sup>133</sup> On these issues, she suggests that NI can 'blaze a trail' in providing policy variations which could be taken up by the rest of the UK.

On the frequency of payments, concerns have been expressed at the ability of families on benefits to budget even on a fortnightly basis, let alone as these changes are introduced. There is a perception of extensive networks of loan sharks in working class areas of NI. What is lacking in these proposals of a cost/benefit analysis, particularly of the consequential costs of these changes. Once again, while it would be possible to

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<sup>130</sup> NIWRP Briefing Paper, p 9.

<sup>131</sup> NICVA, Welfare Reform Conference, 1 March 2012, (<http://www.nicva.org/news/welfare-reform-conference-relive-debate>).

<sup>132</sup> NIWRG Briefing Paper, pp 9-10.

<sup>133</sup> NICVA, Welfare Reform Conference, "Baroness Ruth Lister shares her experiences from the House of Lords which examined the Welfare Reform Bill in detail. She speaks of her frustration at the overturning of the Lords amendments and highlights the lack of input from Northern Ireland peers. She also offered some advice to the Northern Ireland Assembly "Use your flexibility to the maximum, particularly around payment times (fortnightly instead of monthly), and the purse/wallet issue. Carve out your own space - become a flagship for the rest of the UK who I hope will look to Northern Ireland on this".



maintain an existing IT system to preserve fortnightly payments, the introduction of UC and PIPs involve new IT systems and the actual financial cost of building in NI variations into these systems will have to be ascertained.

As for claims being made by way of the internet, this proposal raises serious concerns about its practicality. Very many claimant families may not have internet access. Libraries across NI are being closed or having their opening hours reduced. Already the DOENI has decided not to introduce vehicle taxation by way of the internet. Could a similar approach be undertaken in relation to internet access for welfare claimants?

On the payment of some or all of UC to carers of children,<sup>134</sup> there are concerns in NI at this return to a 'breadwinner' approach to benefit payments which will be heavily discriminatory against access to benefits for primary carers of children. The financial costs are minimal but once again we have to consider the disaggregation of UC or the payment of UC to the primary carer rather than the 'head of the household'.

Another major concern is with the implications of the introduction of UC and particularly PIPs for disabled people, including families with disabled children and/or disabled parents.<sup>135</sup> There are concerns that the new criteria for PIPs will severely disadvantage a wide range of disabled people, including those with mental health issues and those who are blind or partially sighted.<sup>136</sup> There is also concern at the effect of the introduction of new rules on under-occupation of social housing on families including disabled people. For example, the Joint Committee on Human Rights has expressed doubts about possible non-compliance with Article 8 of the European Convention of Human Rights.<sup>137</sup>

There is not a precedent until now for policy variations in NI on disability benefits. However, the introduction of UC and PIPs provides an opportunity to do so.

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<sup>134</sup> NIWRG Briefing Paper, p 10.

<sup>135</sup> NIWRG Briefing Paper, p 7.

<sup>136</sup> Mencap, 'Welfare Reform Bill (2012)1 – Summary' (March 2012), RNIB Briefing, 'Personal Independence Payment: the impact on blind and partially sighted people' (2012)

<sup>137</sup> Legislative Scrutiny: Welfare Reform Bill - Human Rights Joint Committee "1.66 We recommend allowing some additional discretion to exempt disabled people facing exceptional hardship from the under-occupation provisions."



### *6.3.3 Devolved welfare – implications of the Welfare Reform Act*

This discussion will lead with analysis of developments in Scotland, where a significant amount of thinking and preparation has gone into consideration of the implications of the WR Act, and consequential implications for NI.

#### *6.3.3.1 Passported benefits*

There are concerns in Scotland in relation to passported benefits.<sup>138</sup> Most, passported benefits are provided under local Scottish schemes and are delivered by departments of local authorities or other third parties (for example, by Colleges in relation to funding for learners). The details of some passported benefits in terms of rules relating to entitlement are to be found in existing legislation in the field of education, social work or local government finance or sometimes in terms of custom and practice.

Scottish representatives joined with the Social Security Advisory Committee on its work reviewing passported benefits and that work has now been completed.<sup>139</sup> What is clear that each passported benefit will need to be reviewed in terms of entitlement and scope in light of the introduction of UC and PIPs. In the past entitlement has been based on receipt of one of the benefits under the social security regime as a proxy for means testing. This is not possible with the introduction of UC and Scottish Ministers will need to decide on a case by case basis how each passported benefit will be treated.

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<sup>138</sup> A particular concern in Scotland relates to kinship carers. The Scottish Government had also attempted to persuade UK Ministers that the Welfare Reform Act presented an opportunity to rectify the anomalous position of the treatment of kinship carers by the social security system. (For information on kinship care in Scotland see [http://www.adviceguide.org.uk/scotland/your\\_family/family\\_and\\_personal\\_issues\\_index\\_scotland/kinship\\_care\\_scotland.htm](http://www.adviceguide.org.uk/scotland/your_family/family_and_personal_issues_index_scotland/kinship_care_scotland.htm)).

In Scotland kinship carers are recognised as a third group in relation to looked after children in addition to foster carers and the state care system. The Scottish Government has negotiated agreements with Local Authorities in relation to the support and benefits available to kinship carers. GB legislation does not treat kinship carers in this way despite the prevalence of this form of care for children. The Scottish Government argued that kinship care was both cost effective and would help families to help themselves and therefore they should be brought within the relevant components of Universal Credit.(October 2011) UK Ministers have not accepted these argument leaving anomalies between Scottish and UK priorities in this area.

<sup>139</sup> DWP, 'Universal Credit: the impact on passported benefits' Cm 8332 (2012)



The Scottish Government has indicated in its response to the SSAC report that it will bring the report to the Scottish Parliament Welfare Reform Committee and that it accepts the SSAC view that a gradual approach to reviewing benefits is likely to be appropriate. However the DWP notes that the devolved administrations need to focus on the eligibility criteria for passported benefits from 2013.

Although the SSAC Report does not directly address issues of passported benefits in NI, there is a NI representative on the SSAC and, no doubt, the DSD and other NI Government Departments will have to make similar decisions by 2013. However, there is again the prospect of 'devolved triangulation' passported benefits, namely following the English model, following a model in Scotland (or possibly Wales) or devising a NI solution. Once again, the financial, and associated resource, costs will have to be ascertained and taken into account in policy development.

#### *6.3.3.2 Housing Benefit*

The incorporation of Housing Benefit into UC and the conditionality rules regarding under occupancy are also of concern to Scotland. The Scottish Government's analysis of housing benefit reforms shows a significant negative impact in Scotland. Some 60,000 tenants will lose on average £40 per month and the introduction of benefit penalties for under occupation will hit 94,000 social housing tenants.

Apart from the impact on individuals, social housing providers also face a reduction in rent income since there is an intention that rent will no longer be paid to landlords with the fear of large scale default of payment. Combined, the changes in the WR Act will have a major impact on Scotland's housing and homelessness agendas. These long term agendas have been built on assumptions about the stability of the social security system, and without that stability, will require some significant policy adjustment.

Similar concerns exist in NI. While the Scottish Government is seeking a statutory right to be consulted on changes to GB welfare policy which affect devolved welfare policy, the NI Executive already 'enjoys' such a statutory consultation provision. Much of the implementation of UC has still to be put in place through secondary legislation in GB and both primary and secondary legislation in NI.

It is therefore important that the DSD and other NI Government Departments are fully involved in this policy development and that opportunities for policy variations to meet



the particular circumstances of NI are fully explored. This is particularly the case when welfare reforms have a significant potential impact on fully devolved matters such as housing.

### 6.3.3.3 Social Fund

A third area of work for the devolved administration in Scotland relates to the Social Fund. The WR Act abolishes the Social Fund as it is currently structured. The Explanatory Notes to the Bill state that "Community care grants and crisis loans other than those currently available to applicants pending payment of benefit ("alignment loans") will cease. Instead, in England, new locally-administered assistance will be provided by local authorities. In Scotland and Wales the Devolved Administrations will decide the most appropriate arrangements for assistance ..." In England, it is not yet clear whether regulations will be made to govern these discretionary payments or even whether they will be ring-fenced within local authority expenditure. There is no transfer of legislative competences to the Scottish Parliament in this respect. Instead the UK Government will transfer funding for crisis loans and community care grants to the Scottish Government to be used as is deemed appropriate to Scottish circumstances.

The Scottish Government initiated a consultation on successor arrangements to the Social Fund in August 2011.<sup>140</sup> The Scottish Government indicated that funding should address similar needs to those addressed by the Social Fund but that it was seeking views on different ways to deliver support.<sup>141</sup>

The responses to that consultation have now been published and the Scottish Government has indicated that it will make decisions on successor arrangements and bring forward proposals. It is anticipated that the Scottish Government will use existing powers (for example in local government finance or social work) to introduce successor arrangements.

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<sup>140</sup> <http://www.scotland.gov.uk/Publications/2011/07/29104056/1>.

<sup>141</sup> In particular:

- whether the successor arrangements should combine the current systems of grants and loans into one grant fund;
- whether we should use a centralised or local delivery system;
- which organisation or organisations might deliver a locally based scheme;
- re-focussing scheme eligibility;
- providing goods (e.g. using furniture re-cycling, white goods purchased through government procurement) rather than cash grants;
- including other support such as budgeting or other advice and encouraging savings.



One major concern that has been raised as part of the consultation process is the need to provide a common framework for Scotland if responsibility for the management of Social Fund monies is to be spread across the 32 local authorities. It has also been noted that, to meet the timetable for welfare reform, successor arrangements will need to be in place by April 2013.

In NI, it appears that Social Fund payments will still be made through the DSD as local authority structures are not equipped to handle these payments. It would appear that Social Fund expenditure will no longer be considered to be 'social security', calculated on the basis of demand-led expenditure, that is, Annually Managed Expenditure (AME). Instead the total sum will either be calculated on the basis of the Barnett Formula, perhaps using existing expenditure as a baseline, or there may be the possibility of Social Fund expenditure being treated as AME, as EMAs have been treated in the past in NI.<sup>142</sup>

A further possible source of Social Fund expenditure is the Social Protection Fund which, along with a Social Investment Fund, has been set up under the auspices of the OFMDFM.

It is paradoxical that, in a social security system which is intended to be consolidated as a universal system, Social Fund expenditure is being totally decentralised. It is not clear what the expenditure will be, how it will be calculated, what criteria, if any, will be established, at least in England, by way of secondary legislation, what degree of discretion will be enjoyed by local authorities and whether the expenditure will be ring-fenced, at least in England, and what IT systems will be put in place to administer the system. Here again, policy makers in NI should pay close attention to policy development in Scotland (and Wales) in order to identify what alternative policy templates are available and how policy variations in NI can be achieved, within available resources, including potential models of IT systems.

#### *6.3.3.4 Council Tax Benefit/Rate Rebates*

A further element of work consequent on the WR Act is in relation to Council Tax Benefit which is abolished as from 2013. As with the Social Fund there will be no transfer of legislative competence but a transfer of funding equivalent to current

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<sup>142</sup> Although EMAs are now treated under the Barnett Formula.



levels of Council Tax Benefit minus 10%. This funding will presumably added to the block grant.

In August 2011 the Department for Communities and Local Government consulted on how localised schemes might operate in England and stated that "as local government finance is devolved to Scotland and Wales, the Government expects that the Devolved Administration Governments will put forward their own proposals. The Department for Communities and Local Government, HM Treasury and the Department for Work and Pensions will continue to work with the Devolved Administration Governments to ensure that schemes can be developed within the appropriate framework of powers."

The Scottish Government's LCM of October 2011 set out its concerns in relation to devolution of responsibilities for Council Tax Benefit. These include not only the cut in the funding but also the timescale for making changes which will require new business processes and IT systems to be designed and implemented to cope with these changes. Working with COSLA the Scottish Government is currently examining potential successor arrangements and intends to consult on these arrangements in autumn 2012.

Once again, NI has a separate system of Rate Rebates. It will be a challenge to the NI administration to devise a NI-specific system but policy development in Scotland (and Wales) should be taken into account.





## 7. Conclusions and recommendations

Our conclusions and recommendations are as follows:-

1) The statutory provision on parity in social security, in section 87 of the NI Act, provides that “[t]he Secretary of State and the Northern Ireland Minister having responsibility for social security (“the Northern Ireland Minister”) shall **from time to time consult one another**”. In light of the desire of the Scottish Government to be more actively involved in policy formation, where there is interaction and overlap between reserved and devolved matters, it is submitted that the duty to consult set out in section 87 requires the active involvement of the DSD, and other relevant Departments in the NI Executive, in social security policy development at the earliest stages of policy formation, so that the ‘single system’ of social security across the UK can accommodate the particular circumstances of NI and opportunities are identified to allow for policy variations in NI.

**Although the Welfare Reform Act is already on the statute book in GB, the NI Executive should be fully involved in policy development surrounding secondary legislation required to implement the Act. It should also enter into discussions with the UK Government on a formal system of consultation on, and participation in, development of welfare policy, including opportunities for the identification of potential policy variations at an early stage of policy development, both in relation to social security matters and the consequential impact on more fully devolved matters.**

2) It appears that the DSD wishes to have the NI WR Bill progress through the NI Assembly as quickly as possible. At the Committee for Social Development meeting on the ‘Welfare Reform Bill: Social Security Agency’ on 10 November 2012, a representative of the DSD stated:-

“There are some complicating factors in this Bill. When the GB Bill receives Royal Assent, some of its provisions are due to be implemented from 1 April 2012. However, given that we will not be able to introduce our Bill until early 2012, we will not be in a position to enable those provisions to go forward by 1 April 2012. Therefore, technically, at that stage, we will be in breach of



parity. However, there is an understanding that because it is a timing issue, as long as we introduce the Bill with as much speed as we can, that breach will be overlooked, but not for a particularly lengthy period.”<sup>143</sup>

**It is recommended that the Welfare Reform Bill should not be progressed through the NI Assembly by accelerated passage. Instead full scrutiny should be made of all aspects of the Bill and consequential secondary legislation, with a view to the identification of potential variations in welfare policy to meet the particular circumstances of NI.**

3) Consideration should also be given to a phased development of welfare reform in NI. Much of the detail of the reforms will require extensive secondary legislation, both in GB and in NI. The full implications of the reforms will therefore take some time to work out. It is anticipated that there will be a gradual transfer of claimants from existing benefits to UC and PIPs over a four year period until 2017. It remains to be seen whether adequate IT systems will be in place to meet the initial deadline of April 2013 and how IT systems can accommodate policy variations in NI (and the other devolved countries).

**Therefore there may be arguments for a delay in implementing GB welfare reforms in NI until the implications of the reforms in NI (and GB) are more fully understood. However, there could be significant financial implications of such a stance.**

4) This report has identified a range of pre-existing variations between the social security systems in NI and GB.<sup>144</sup>

**While it would not be practical to lobby for a significantly different social security system for NI compared to GB, there is ample scope to lobby for the retention of existing variations from the GB model and also further variations to meet the particular circumstances of NI.**

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<sup>143</sup> Committee for Social Development Welfare Reform Bill: Social Security Agency 10 November 2012, Ms Heather Cousins (Department for Social Development).

<sup>144</sup> See also NIWRG Briefing Paper, p 5.



On each issue, the NI Executive and Assembly should give careful consideration to:-

1. Whether **statutory provisions** require parity;
2. Whether variations from parity are desirable due to **policy considerations**;
3. What the **financial impact** might be on the NI block grant and other expenditure; and
4. Whether **practical considerations**, for example, compatibility of IT systems, preclude or limit variation from the GB systems.

5) The first focus should be on existing reforms, which are already a cause for concern. The implications of reform of housing benefit and associated benefits have yet to be fully felt. The system of employment capability assessments is already a source of great uncertainty and hardship. The Work Programme in GB is already a subject of controversy, even before it is to be introduced in NI.

The WR Act provides an opportunity to provide NI solutions to these issues. For example, can NI variations be negotiated to issues such as the housing benefit component of UC? Do these services need to be contracted-out in NI as in GB? Can they be adapted to meet the particular circumstances of NI?

**The NI Executive and Assembly should carefully consider the extent to which existing reforms, and their implementation, can be varied in NI as part of the introduction of the Welfare Reform Act.**

6) The second focus should be maintaining existing variations in the NI system. Issues such as the payment of housing benefit to landlords and less stringent rules on signing on by lone parents will require imaginative thinking in order to preserve them in the new regime.

Section 87 requires “single systems of social security, child support and pensions for the United Kingdom” but as this paper shows, there is room for variations in the system in NI.<sup>145</sup> While the NI Assembly may wish to adopt a simplified system of welfare benefits, it is not bound by a GB policy of having two benefits, namely UC

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<sup>145</sup> NIWRG Briefing Paper, p 5.



and PIPs, without variations within them. Subject to financial and IT considerations, it should be possible to come up with NI solutions to these issues, even if it involves disaggregation of some benefits, for example, the payment of the housing benefit component of UC to landlords.

**The NI Executive and Assembly should carefully consider the extent to which existing variations in welfare benefits can be preserved.**

7) The third focus should be on developing variations in UC and PIPs to suit policy objectives in NI, taking the particular circumstances of NI into account. In relation to both benefits, the financial and IT implications will have to be assessed.

It should be possible to accommodate some issues, such as the frequency of payments, within the NI system. On payments to primary carers, once again disaggregation of UC, or payment to the primary carer should be considered.

**The NI Executive and Assembly should carefully consider the extent to which variations can be made to Universal Credits and Personal Independence Payments which could alleviate the potential negative impact of these reforms on children and young people in NI.**

8) There may also be more room for variations in passported benefits. However, once again, policy, financial and IT implications will have to be taken into account.

**The NI Executive and Assembly should carefully consider the extent to which existing expenditure on passported benefit payments can be preserved, so as to provide a system which meets the needs of children and young people in NI. In particular, they should look closely at policy development on passported benefits in other devolved countries such as Scotland.**

9) There may be more room for variations in relation to Social Fund payments, which are being devolved to local authorities in England and Wales and to either the Scottish Government or local authorities in Scotland. However, it appears that these



payments may be transferred from AME to the Block Grant and there may be significant financial implications of this transfer.

**The NI Executive and Assembly should carefully consider the extent to which existing expenditure on Social Fund payments can be preserved, so as to provide a system which meets the needs of children and young people in NI. In particular, they should look closely at policy development on Social Fund expenditure in other devolved countries such as Scotland.**



## 8. Some concluding remarks on parity issues

### **8.1 The paradox of devolved autonomy and policy convergence /divergence**

As Birrell has outlined, there was a high degree of policy convergence between NI and GB under the first prolonged period of Direct Rule from 1972 until 1999 and this continued, with some notable 'assertive Direct Rule' exceptions, in the second period of Direct Rule from 2002 until 2007. We have sought to show, through the identification of 'parity factors', that there are still strong pressures to maintain high degrees of policy convergence, not just where there are explicit parity principles on devolved matters, even five years into this most recent period of devolved government in NI.

Scotland (and Wales) have not experienced periods of post-devolution Direct Rule as in NI over these two periods. Admittedly, in Scotland, the early years of devolution coincided with a period when the same political party was in government both in the Scottish and UK Parliaments. However, there is some evidence of a 'reflex action' in NI to follow GB, and particularly English (and English/Welsh), policy developments, at least in some policy areas. There is also some evidence of a greater sense of 'devolved autonomy' in Scotland, on the basis that 'English solutions' may not be appropriate for the circumstances in Scotland.

It is debateable the extent to which there were significant policy divergences between NI and GB during the original period of devolution in NI from the 1920s until the 1970s. And yet, there existed during that period strong constitutional conventions on the extent to which either the NI legislature and administration could intervene on reserved matters but equally the extent to which the UK Parliament and Government could intervene on devolved matters.<sup>146</sup> Calvert set out, in nearly 400 pages, an elaborate system of constitutional governance, drawing also on Commonwealth examples as well as those relating to devolution in NI. All that disappeared on 24 March 1972, when the then UK Prime Minister, Edward Heath, announced the first period of Direct Rule.<sup>147</sup>

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<sup>146</sup> See generally, Calvert, H, Constitutional Law in Northern Ireland A study in regional government, London and Belfast: Stevens and Co and the Northern Ireland Legal Quarterly, 1968.

<sup>147</sup> Birrell, 2009a, p 6.



However, although devolution has been re-established in NI, Scotland and now Wales, it remains unclear what are the 'rules of the game'<sup>148</sup> in terms of new devolution settlement. Topical examples are the imposition of reforms to public sector pensions on the devolved administrations and proposals to introduce regional public sector pay across the UK. The NI Act is recognised a 'constitutional statute'<sup>149</sup>. To what extent should the 'devolved autonomy' of the devolved administrations be recognised in this new devolution settlement, particularly through more formal processes of consultation as arguably required by section 87 of the NI Act 1998?

More generally, at a time when the devolution settlement is being questioned, at least in Scotland, to what extent could this settlement be placed under strain by radical social reforms which initially apply to GB, or, in some cases, only to England, but which, because of the range of parity factors, are likely to have significant social and economic consequences in the devolved countries?

## **8.2 The 'double-edged sword' of parity**

A second set of issues reflect the dilemma of, on the one hand, seeking to identify opportunities for policy variations from parity on issues such as welfare policy and employment rights, when it is argued that the particular circumstances of NI appear to justify them and, on the other, seeking to establish parity with GB (or England/England and Wales) on issues such as Early Years policy (and wider social issues such as reproductive rights and LGBT rights). Perhaps, a way of navigating this dilemma is to seek 'at least parity', with devolved autonomy to develop more appropriate policy solutions in NI.

In this context, one possible way forward is what we have described as 'devolution triangulation', simply that policy makers in NI should give as careful consideration to models of policy development emerging from the other devolved countries as is already given to consideration of policy developments which are initiated by the UK Government, in whatever guise it is adopting, depending on the matters at issue.

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<sup>148</sup> Or a 'new constitutional doctrine' as discussed by Morrison, J, 'Towards a New Constitutional Doctrine?', in Carmichael et al, pp 45-61.

<sup>149</sup> Robinson v Secretary of State for Northern Ireland [2002] UKHL 32, discussed by Morrison at pp 58-59.



### **8.3 Finance**

Inevitably, nearly all policy matters are heavily influenced by financial considerations. The future of the Barnett Formula, and other means of establishing Government expenditure in NI, are well beyond the scope of this paper. Some argue that the budgets of the devolved administrations should be based on 'needs-assessment' rather than the existing Formula.<sup>150</sup> However, the present operation of the Formula involves 'comparable' spending in the devolved countries to that in England, subject to a population quotient. It may be that, once again, the NI administration can look to models of policy development in the other devolved countries for opportunities to develop policy variations in NI, even though the funding itself is based on English expenditure.

### **8.4 Conclusion**

In the end, questions of parity lie at the heart of devolution. On the one hand, there are democratic expectations that devolution means policy and legislation made in NI by the devolved institutions to meet the particular circumstances of NI. On the other hand, a range of parity factors constrain this apparent degree of devolved autonomy.

Certainly, in relation to welfare reform, given the significant social and economic implications of existing and anticipated changes to the NI welfare system, it seems necessary to find NI solutions to NI issues. More generally, the rationale for devolution may be called into question if these democratic expectations are not met.

At least, the devolved institutions in NI should be willing to consider a range of policy options across these areas of policy which we have examined, particularly looking to the policy models in the other devolved countries rather than naturally following the policy models which emerge from the UK Government.

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<sup>150</sup> However, there are elements of 'be careful what you wish for'; see the evidence of Professor David Heald to the Select Committee on the Barnett Formula 1st Report of Session 2008–09 Report with Evidence (HL Paper 139)(2009).





## Appendix 1 – The Calman Commission

The Commission on Scottish Devolution, the Calman Commission, was established in 2008. Its function was “to review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament, and continue to secure the position of Scotland within the United Kingdom.”

The Calman Commission endorsed a form of the parity principle in relation to social policy in its recommendation that “The Scottish Parliament and UK Parliament should confirm that each agrees to the elements of the common social rights that make up the social Union and also the responsibilities that go with them” The concept of a social union implies some form of parity although the current Scottish Government is clear that a common overarching social union does not require uniformity. In its response to the Calman Commission on this point the Scottish Government stated that “this does not mean that policies must be precisely the same everywhere. It does mean that we should work closely together to promote and maintain interactions and cohesion across Scotland, England, Wales and Ireland (both Northern Ireland and with the Republic of Ireland). This is desirable and necessary whether Scotland is independent or part of the UK”.<sup>151</sup>

More specifically, in respect of social security, the Commission posed the question ‘whether there should be scope for significant divergence in welfare services offered and whether current social security arrangements might better respond to specific Scottish issues – in particular whether components could be determined and/or delivered differently and closer to the people they are designed to assist’. (para 5.219) In other words, should or could there be alternative arrangements for social security moving away from a uniform system or parity within the UK.

The Commission did not favour significant devolution of powers in relation to pensions and the main parameters of social security citing practical arguments (funding arrangements) and the existence of existing processing centres or the complexity of the social security system. They also were concerned that variations in rates or conditions of access to benefits might lead to “benefit tourism” (note similar concerns are raised

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<sup>151</sup> <http://www.scotland.gov.uk/Publications/2009/11/09152544/2>.



at EU level). The Calman Commission also espoused a principle of a 'common social citizenship' where at least minimum social standards were agreed across the territory of the UK. Therefore for reasons both of practicality and principle the Commission did not recommend any major devolution of powers in the field of social security.

In particular the Calman Commission opposed devolution of powers in relation to Housing Benefit and Council Tax Benefit despite the fact that both link to the Scottish Government's responsibilities in relation to housing and homelessness and for local taxation. Both Housing Benefit and Council Tax Benefit have been, up to now, administered by Local Authorities in Scotland on behalf of the UK DWP. As the Commission notes 'DWP retains responsibility for policy, stewardship and funding. Local authorities claim subsidies from DWP for benefit expenditure and administration costs incurred'. (5.223) Currently, some 475,000 individuals claim Housing Benefit in Scotland and 562,201 claim Council Tax Benefit. These benefits are worth £1,556m and £380m respectively in Scotland.'

As Calman points out, Housing Benefit is an important tool of housing policy as well as being a benefit for individual claimants. CTB provides about one third of the income local authorities in Scotland derive from Council Tax. Both HB and CTB therefore are closely interlinked with Scottish Government policies and priorities. The reason for not recommending devolution of these aspects of social security was due to the linkages with other benefits including passported benefits, and linkages with the tax system more generally which required a tapering of benefits as income levels rose. Instead the Commission advised stronger working links between the UK and the Scottish Governments to allow for adjustments to be made where necessary to align with Scottish priorities so that there would be 'greater scope than there is now for Scottish variation in these policy areas, in line with the scope for variation in the devolved policy areas to which they are connected'. (5.230). Where any such variation resulted in additional costs then those costs would lie with the proposer of the variations. It would be for the UK government to make changes by suitable regulations. (see recommendation 5.19).

In relation to welfare to work programmes, which in Scotland are funded by the DWP and the more recent formulations of which were just being developed at the time the Commission reported, the Commission advocated a more formal consultation role for those programmes based in Scotland so as to take Scottish needs into consideration. It recommended that the Deprived Area Fund be devolved to Scotland given the geographic nature of its help.



The Calman Commission did not recommend devolution of powers in relation to Attendance Allowance and Disability Living Allowance because of the interdependency with wider social security benefits.

The Commission recommended consideration be given to devolving the discretionary elements of the Social Fund. These elements 'fit neatly into with the Scottish Government's responsibilities for well-being, social work and tackling homelessness as well as the responsibilities that local authorities have for families'. However in relation to the regulated part of the Fund, the Commission recommended retaining the reservation because of links to other passported benefits such as budgeting loans, maternity grants, cold weather payments and funeral payments.

In relation to welfare foods the Commission did not recommend devolution since there were good working relations between Scottish and UK ministers.

Given that the Calman Commission did not recommend major devolution of powers in fiscal policies it is not surprising that it did not recommend major devolution of powers in the field of social security since the tax and benefits systems are so closely linked. As Calman identifies too, the huge complexity of the system of welfare and social security meant that dismantling those links would require major changes to the system which would have gone beyond the remit of the Commission which was to recommend further devolution of powers.

Some of the Calman Commission recommendations on other matters were taken up in the Scotland Act that is currently before the UK Parliament. As the Scottish Parliament's Committee on the Scotland Act notes in its first report of 2011, however, this was not the case with the recommendations in relation to welfare benefits. The Committee noted that there was 'a point of principle that where powers for certain policies, such as housing, care for the elderly etc., are devolved, then consideration needs to be given to the interaction of the social security system with devolved responsibilities'. The Committee noted that in this respect the UK Government had stated that its welfare reform proposals had superseded the Calman recommendations in relation to social security. The Committee on the Scotland Act recommended further intergovernmental work in this regard and, in particular, the creation of an intergovernmental forum a dialogue on welfare matters, particularly crucial because of the fundamental reforms of the social security system under consideration in Westminster, adding that consideration should be given to a statutory underpinning for consultations on welfare reform and cited the importance of consultations on housing and council tax benefits.



In its evidence to the Scottish Parliament Committee on the Scotland Act, the Scottish Government argued that ‘that a formal role for the Scottish Government in the decision-making within the UK’s Department for Work and Pensions would help maximise the potential of DWP funding in Scotland, as DWP programmes increasingly impact on a wide variety of services funded by the Scottish Government – including skills/training, health-related services, regeneration and childcare. The Scottish Government believes the principle of a formally enshrined consultation role to be extremely important, and invites the Parliament to consider how this might be implemented, including the possibility of legislation in the Scotland Act.’ (paragraph 945)

