We are disappointed that the committee members have decided to focus their scrutiny of the Scotland clauses on the practicalities of devolving tax, welfare, borrowing and the Crown Estate, to the exclusion of the issue of equalities. CRER – like a variety of organisations\(^1\) – have a number of concerns relating to Clause 24 which purports to deliver on the Smith Commission proposals for limited devolution of equalities. The draft clause 24 is difficult to interpret and there are serious questions as to whether they deliver the Smith proposals. There are further concerns that the clause, as drafted, would lead to confusion and inconsistencies in equalities law in Scotland and could also leave equality law in Scotland effectively on hold.

We are concerned that neither of the Parliaments nor Governments nor any political party are devoting any particular attention to this aspect of the draft clauses. Neither the UK or Scottish Parliament committees undertaking pre-legislative scrutiny has addressed the issue to date, nor has it featured in a recent UK government consultation event that we attended. It may be that some or all of our concerns are unfounded – but we need governments and/or parliaments to assess them.

In fact, when considering issues such as taxation, welfare and social justice, the issue of where power over equalities should lie is an important concern. As the Scottish Parliament’s welfare reform committee has heard in evidence\(^2\), UK welfare reforms - including cuts to benefits and changes to payment methods - have had an very unequal impact on society. The position of equalities law should therefore be considered alongside these other issues.

\(^1\) See, for example, the SCVO submission to the inquiry – “a number of issues with other clauses have also been raised by third sector organisations, in particular relating to equalities law”.
\(^2\) See, for example, Engender, Women’s Aid, Close the Gap and the Scottish Refugee Council at - [http://www.scottish.parliament.uk/s4_welfare_reform_committee/budget_2015-16_engender_swa_ctg_src.pdf](http://www.scottish.parliament.uk/s4_welfare_reform_committee/budget_2015-16_engender_swa_ctg_src.pdf)
The current position

As a general rule, equalities issues are and will remain reserved. Up until now, the exceptions contained in the relevant part of the Scotland Act 1998 limit Scottish Parliament powers to:

- Generally encouraging equal opportunities “other than by prohibition or regulation”
- Placing duties on public bodies with devolved functions “to make arrangements” in order to ensure their functions are carried out with due regard to meeting the equal opportunity requirements.

In short – a power to encourage and (in the case of public bodies) take steps to deliver compliance with standards set at Westminster, rather than any powers to set higher or different standards.

What do the UK Government’s proposals for devolution mean for equalities?

Paragraph 60 of the Smith Commission report made clear that “Equal opportunities” – including the subject matter of Equality Acts 2006 and 2010 - would remain reserved. However, the Scottish Parliament would have powers including (“but not limited to”) introducing gender quotas in respect of public bodies in Scotland, and in relation to socio-economic rights in devolved areas.

Section 6.2 of the new Command paper – “Scotland in the union: an enduring settlement” - is more expansive in explaining what the UK government proposes to achieve. Clause 24 of the draft Scotland clauses will “devolve to the Scottish Parliament the power to legislate on equalities in respect of public bodies in Scotland, which will include but not be limited to the introduction of gender quotas and the consideration of socio-economic inequality when making strategic decisions. This power will enable the Scottish Parliament, by imposing new requirements on public bodies in Scotland, to introduce new protections for employees and customers of those bodies with regards to their devolved functions”.

The chosen method of devolving these powers is, according to paragraph 6.2.3, to add to the exceptions to the reservation of “equalities” in Schedule 5 of the Scotland Act 1998.

In summary, the Smith Commission and Command Paper appear to envisage enhanced powers in terms of setting equalities standards in relation to the devolved public sector only.

What does draft clause 24 achieve? Ambiguities and inconsistencies

The draft clause first provides an exception to the general reservation of equalities – so that the Scottish Parliament can legislate “in relation to the Scottish functions of any Scottish public authority or cross-border public authority”. However, there is then an exception to the exception – so there is no such devolution “to the extent that provision is made by the Equality Act 2006 or the Equality Act 2010.”

The expression “to the extent that provision is made” is ambiguous.

On one view, that could mean that if the Equality Act deals with a subject in any way – “provision is made”, and that’s the final word and not amenable to legislation by the Scottish Parliament.

Another view would be that unless a proposal by the Scottish Parliament in relation to Scottish functions of a Scottish public authority is actually prohibited by the Equality Act, then it would be safely acting within its powers. Depending on how that clause is interpreted, it could lead to a
situation where there is very limited scope at all for the Scottish Parliament to take action on equalities.

The importance of clarifying the scope of the clause becomes apparent when we look at possible measures the Scottish Parliament might want to implement and consider the effect of the clauses.

Most starkly, “gender quotas” for public boards – which both the Smith Commission and Command Paper expressly say should be devolved. Assuming we can show this relates to “Scottish functions”, on one view very clear “provision is made” within the Equality Act 2010 to say that any such quota would be prohibited\(^3\).

We have heard it argued that equalities protections should be the same across the UK to protect the single market. However, rather than ensuring consistency of protection across the UK, the clause risks creating inconsistencies and confusion within Scotland - with the possibility of different standards applying between public and private sector, between different public sector bodies, and even within some public sector bodies\(^4\).

These are just some examples of possible problems with the draft clause on equalities.

**How could the Scotland clauses be improved?**

We remain of the view that the Scottish Parliament should have full power over equalities – as we submitted to the Smith Commission along with eleven other equalities organisations.

However, if there remain concerns that the current provisions of the Equalities Act should be retained as a minimum standard, then we would suggest it would be possible to devolve to the Scottish Parliament the power to take any steps it reasonably considers will enhance equalities. We would be reluctant to see the scope of the devolved powers limited to devolved “Scottish functions” because of the possibility of confusion and inconsistencies outlined above.

In any event, detailed scrutiny of Clause 24 is essential.

---

\(^3\) See, for example, “A Quick Gender Audit of the Smith Commission Report” by Professor Christine Bell, where the author suggests that because quotas are unlawful, the Equality Act 2010 would require to be amended - [http://www.futureukandscotland.ac.uk/blog/quick-gender-audit-smith-commission-report](http://www.futureukandscotland.ac.uk/blog/quick-gender-audit-smith-commission-report)

\(^4\) We also note that equalities are devolved to Northern Ireland