

## Scotland Bill

### Engender

Engender welcomes the Devolution Committee's focus on the contents of the Scotland Bill (the Bill), and the opportunity to submit our views. We have monitored the progression of the legislation from the publication of the draft clauses and UK government command paper, and due to undue speed, lack of transparency and lack of scrutiny, there have been limited avenues to raise our concerns.

We have advocated for a process of devolution that allows for democratic engagement with Scottish civil society from the outset. We have done so on the basis that consultation with those affected by the changes is essential to arrive at sustainable and effective arrangements, as well as to build on the participatory politics that triggered the devolution of further powers. The debate on the division of power and responsibility between Holyrood and Westminster cannot just be a constitutional abstraction. The powers that are transferred will have the potential to change the lives of people in Scotland. We have argued for a participatory process from a gender equality perspective, setting out how the Scotland Bill *could* signal progress for the realisation of women's rights.<sup>1</sup> New powers could be used to tackle women's extreme inequality within the social security system, to strengthen equalities legislation, to abolish employment tribunal fees, and to create a progressive abortion law for Scotland.

A key opportunity to ensure that any new legislation drives progressive change, by embedding human rights, equality, gender-sensitivity and democratic participation as key principles within the devolution process, has been missed. However, opportunities remain to improve the Bill during the remainder of the Scotland Bill's passage onto the statute book.

We are therefore calling on the Devolution committee to encourage the UK and Scottish Governments, wherever possible to consider the imperatives of reducing economic and social inequality within final negotiations. Critically, this includes equality for women, and for disabled people and other minority groups. This briefing takes on two tasks. It sets out how amended clauses that relate to social security, equality law, and abortion could be used to tackle gender inequality in Scotland. It also points to areas where the intention of the Smith Commission Agreement has not been delivered by the Scotland Bill. Some of these shortcomings are related to process, and we identify where we think that an abbreviated process has caused weaknesses that could be remedied to better support people who access benefits in Scotland.

### 1. Social Security

Women are twice as reliant on social security as men, because of gender inequality. Welfare reform is therefore having an egregiously disproportionate impact on

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<sup>1</sup> Engender (2014) [Engender submission to the Smith Commission](#)

Engender (2015) [A statement to the Joint Ministerial Working Group on Welfare](#)

women's access to resources, security and safety. Between 2010 and 2014, 85% of the £26 billion worth of cuts announced by the UK Coalition government came from women's incomes.<sup>2</sup> Given this context, there are clear opportunities to design a more equitable system that moves towards gender equality in access to economic resources within a transfer of powers. We therefore advocated for full devolution of social security to the Scottish Parliament, in line with 83% of over 1000 participants in our Smith Commission survey.<sup>3</sup>

The complicated division of responsibility for social security between Westminster and Holyrood that has emerged presents a number of challenges. Effectively addressing issues of systemic inequality necessitates a holistic approach, and the piecemeal devolution contained within the Smith recommendations undermines this. Scope for progressive change for women is now limited by the lack of coherence between reserved and devolved powers, particularly with regard to the sanctions and conditionality regime, Housing Benefit and Child Benefit.

In the context of the Scotland Bill, we are therefore calling for the most expansive approach possible, to provide space for a divergent approach based on equality, dignity and human rights in Scotland. Flexibility will be vital in enabling the Scottish Parliament to create an integrated system, alongside devolved policy areas and services. The potential for maximum policy discretion underpins all of the recommendations that we make below.

## **1.1 Clause 19: Disability, industrial injuries and carer's benefits**

### *1.1.1 Benefits for disabled people*

Disabled women are greatly impacted by changes to benefits and tax credits, and are amongst the very hardest hit by welfare reform. They are much less likely to be in full-time employment than non-disabled people, and many have caring responsibilities of their own. This is reflected in the fact that disabled men experience a pay gap of 11% compared with non-disabled men, whilst for disabled women this is doubled at 22%.<sup>4</sup>

The current clause 19 defines 'disability' in a narrow way that disallows the introduction of benefits for people with particular conditions, including mental health issues and less visible disabilities, and places time restrictions on eligibility criteria. This would unnecessarily constrain the Scottish Parliament from designing new benefits to best meet the needs of all groups of disabled people, in line with devolved services in Scotland. Rather, it would effectively transfer the power to rebrand the same benefits, and to increase the level within the confines of the overall settlement. It would also undermine the potential to create a better system for disabled women, who are amongst those most in need of support.

- **We are calling for the restrictive definition of disability in clause 19 of the Scotland Bill to be replaced with the definition used in the Equality Act 2010.**<sup>5</sup>

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<sup>2</sup> Engender (2015) [A widening gap: women and welfare reform](#)

<sup>3</sup> Engender (2014) [Engender submission to the Smith Commission](#)

<sup>4</sup> Inclusion Scotland (2013) *Women in work MSP briefing*

<sup>5</sup> Previously tabled amendments 112 and 128 address this.

### 1.1.2 Benefits for carers

Around 60% of unpaid carers are women, women are twice as likely to claim carer's allowance as men, and are twice as likely to give up paid work in order to care. Carers are also impacted by cuts to benefits for disabled people, as linked entitlements are lost despite circumstances remaining unchanged.

Clause 19 also sets out a narrow definition of those eligible for a devolved carers' benefit, stipulating that this would apply only to carers aged 16 or over, who are not in full-time education and not employed. Given the gendered profile of unpaid care, these restrictions would undermine the opportunity for the Scottish Parliament to tackle women's economic inequality through a distinct approach to carers' benefits that recognised women's caring roles and supported women to balance paid and unpaid work.

- **We are calling for the restrictions on eligibility for carers' benefit to be removed from clause 19 of the Scotland Bill.**<sup>6</sup>

### 1.2 Clause 21: Discretionary payments: top-up of reserved benefits

The powers to create new benefits in areas of devolved responsibility and to make discretionary payments with regard to reserved benefits hold great potential to mitigate the discrimination faced by women within the social security system. Many devolved policy areas that relate to social security are critical in terms of gender equality, including employability, social care, delivery of childcare, housing and violence against women. Disabled, black and minority ethnic, refugee and older women, lone mothers and carers are all particularly at risk of harm as a result of the UK Government's cuts to public spending.<sup>7</sup> Meanwhile, links between women's poverty and child poverty are widely recognised. The ability to increase women's disposable income in a targeted way would be manifestly beneficial to those most disadvantaged by economic 'shocks' and the austerity agenda.

The restrictions placed on these powers within the Scotland Bill, however, fundamentally differ from the recommendation made by the Smith Commission that "[t]he Scottish Parliament will have new powers to create new benefits in areas of devolved responsibility." This undermines the potential of new powers to prevent women from reaching the point of extreme need at which they would be eligible for this limited form of short-term support. It also undermines potential for increased coherence in Scotland's policy approach to gender equality and progress against its broad range of commitments on gender issues.

- **We are calling for clause 21 to be redrafted to allow the creation of new benefits in devolved areas, and to remove restrictions on the 'topping up' of benefits.**<sup>8</sup>

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<sup>6</sup> Previously tabled amendment 48 addresses this.

<sup>7</sup> Engender (2015) [A widening gap: women and welfare reform](#)

<sup>8</sup> Previously tabled NC31 addresses this.

### 1.3 Clauses 22: Discretionary Housing Payments

Women experiencing domestic abuse face considerable barriers when trying to leave an abusive partner. Access to safe housing is crucial for women at risk of abuse due to low income, a lack of independent resources, immigration status and homelessness. Domestic abuse is the fourth most common reason given for homeless application in Scotland, and research shows financial abuse is part of 89% of women's experience of domestic abuse.<sup>9</sup>

This has been exacerbated by welfare reform. Thousands of carers are losing an average of £105 per week in housing benefit as a result of the benefits cap,<sup>10</sup> and 49% of households subjected to the benefits cap are headed by single parents with children under five.<sup>11</sup> The 'bedroom tax' has resulted in a loss of housing benefit for many women and accessing replacement DHPs continues to cause uncertainty and anxiety for women trying to move to safety. Changes to the benefit entitlement of EU migrants mean that many women separating from abusive partners can no longer claim housing benefit.

Clause 22 stipulates that eligibility for DHPs is contingent on receipt of housing benefit and restricts access for those who have been sanctioned. This does not fulfil the intention of the Smith Agreement. Women must have consistent access to safe accommodation, regardless of their entitlement to housing benefit or perceived non-compliance with conditionality for reserved benefits. This is especially important in the context of the huge cuts to housing support for women set out above.

- **We are calling for restrictions over eligibility for Discretionary Housing Payments in clause 22 to be removed from the Scotland Bill.**<sup>12</sup>

### 1.4 Clause 23: Discretionary payments and assistance

As outlined above, women are impacted hugely by cuts to social security and public services as a result of their caring roles for children, and relatives who are disabled, elderly or have long-term health conditions. Lone parents in particular are being pushed deeper into poverty and experiencing poor mental and physical health as a result of welfare reforms and uncertainty over measures that have yet to be introduced.

The current clause 24 prescribes extremely narrow parameters for the short-term assistance it devolves to the Scottish Parliament. This discretionary assistance is similar to community care grants within the Scottish Welfare Fund (SWF), which is an extremely valuable resource for lone parents, women escaping domestic abuse, refugee women and other women on extremely low incomes. Including 'families under exceptional pressure' as criteria for eligibility, in line with the interim SWF and

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<sup>9</sup>Refuge (2008) [What's yours is mine: The different forms of economic abuse and its impact on women](#)

<sup>10</sup> Carers UK (2014) [Caring and Family Finances Inquiry](#)

<sup>11</sup> DWP (2015) [Benefit Cap Quarterly Statistics: GB households capped to May 2015](#)

<sup>12</sup> Previously tabled amendments 116, 117 and 129 would remove some of these restrictions.

the previous DWP Social Fund, would widen access for different groups of vulnerable women and their children. As above, clause 23 excludes people who have been sanctioned from accessing support. We know that many women have had their income stopped as a result of issues outwith their control, such as access to childcare, and see no reason for this restriction to be included in primary legislation. The stipulation that discretionary payments must support 'individuals', would also limit the scope to support systemically marginalised groups, such as lone parents, refugees, or unpaid carers.

- **We are calling for restrictions under clause 23 to be removed and for Exception 8 to be extended to include 'families under exceptional pressure' under.**<sup>13</sup>

### **1.5 Clause 25: Universal Credit: persons to whom, and time when paid**

The power to vary the administration of Universal Credit (UC) holds potential to better support women with little or no financial independence. This includes many women who are living with domestic abuse. Access to financial support and safe housing are crucial for these women and their safety is undermined by the single, monthly household payment under the Universal Credit regime.<sup>14</sup>

Clause 25 allows the Scottish Parliament to vary the current arrangements under UC to allow more frequent payment of benefits to both adult members of a household. The Scottish Government has committed to address these concerns over women's financial dependency once it has the power to do so. If control over these administrative issues was removed from the Scotland Bill and expedited as a priority to the Scottish Parliament, then access to resources and physical safety for women in danger could be achieved more quickly in Scotland.

If clause 25 remains in primary legislation, we would continue to have concerns over the issue of approval for any changes by the UK Secretary of State. Despite assurances from the UK Government that this does not amount to a 'veto', we have concerns about timescales, and that access to resources and physical safety for women in danger could be delayed due to complex constitutional processes (as has been experienced in Wales and Northern Ireland).<sup>15</sup>

- **We are calling for clause 25 to be removed from the Scotland Bill and for power over the administration of Universal Credit to be devolved via a section 30 order.**
- **Failing this, we are calling for greater clarity over the form of mandated approval of any changes by the UK Secretary of State.**

### **1.6 Clause 26: Employment support**

Many groups of women are far from the labour market. This includes women who are returning to work after providing support to sick or disabled relatives or after

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<sup>13</sup> Previously tabled amendments 130 and 131 address this.

<sup>14</sup> Scottish Women's Aid (2014) [Briefing paper on welfare reform and refuge accommodation](#)

<sup>15</sup> Political and Constitutional Reform Committee, [Oral evidence, 2 Feb 2015 \(Questions 260, 261\)](#)

taking extended leave to care for children. However, despite the stated aim of employability programmes to help those further from the labour market, women are being let down by the current system, as programmes fail to take account of and remove the barriers which prevent or restrict women's labour market participation.

The power over employment support offers potential to better support unpaid carers, lone parents, women experiencing domestic abuse, disabled, older and refugee women, in line with specific obstacles they face in accessing paid work. It also offers potential to mitigate the gendered patterns of skills acquisition that lead to occupational segregation and see women clustered in low-paid, insecure jobs. At present, employment programmes ignore these factors when pairing jobseekers with mandatory work activity, serving to further entrench them and to perpetuate the gender pay gap.

The current clause 26 includes restrictions that undermine the potential for power over employability programmes to be tailored in line with the support needs of different groups of women. The Smith Commission Agreement did not stipulate a limited form of support for those facing long-term unemployment that must last for a year. The anomalously excluded Access to Work scheme should also be devolved to the Scottish Parliament to increase the possibility of holistic support for disabled people. Nor should support be restricted to people on reserved benefits, but be extended to those who qualify for newly devolved benefits, many of whom will be in need of tailored employment support.

- **We are calling for restrictions in clause 26 on the form of employment support the Scottish Parliament could provide to be removed.**<sup>16</sup>

## **2. EQUALITY LAW**

The transfer of responsibility for equalities legislation has the potential to enable gender equality in Scotland, in a range of ways. The capacity to challenge the actions of employers within an independent adjudication system is a key workplace right with clear gendered implications. The gender pay gap could be partly addressed with tools such as mandatory equal pay audits. Parliamentary quotas and temporary special measures are employed to great effect worldwide to increase the female representation rate.

### **2.1 Clause 32: Equal Opportunities**

#### *2.1.1 Gender quotas*

Women are underrepresented at all levels of political and public life in Scotland. At Holyrood, the female representation rate is only 36% and fewer than 25% of local councillors are women. There are four public boards with no female representation, and 10% of public boards have less than 20% of women sitting on them.<sup>17</sup> Evidence from around the world shows that diverse political representation better meets the needs of societies and there is a correlation between greater parliamentary gender

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<sup>16</sup> Previously tabled amendments 114, 120, 121 and 122 address this.

<sup>17</sup> Scottish Government (2014) [Women on board: Quality in diversity, Scottish Government on the Introduction of Gender Quotas on Public Boards](#)

balance and the political profile of women's rights issues and social policy more broadly.<sup>18</sup>

The current clause 32 does not adequately reflect the Smith Commission Agreement that devolved competence over gender quotas should not be limited to public boards. The debate over public boards has taken prominence throughout the process of further devolution because it was already a live issue in Scotland. The Scottish Government consulted over the introduction of gender quotas for public boards in June 2014, and subsequently entered into dialogue with the UK Government over a section 30 order to devolve necessary competence to the Scottish Parliament. The same logic should be applied to all levels of public representation in Scotland.

Furthermore, the current clause 32 is extremely unclear. Since the initial draft clauses and UK command paper were published in January 2014, Engender has sought clarity over what it enables the Scottish Parliament to do, in light of the way that equalities is currently reserved. Discussions with experts in equalities law have not produced a clear answer, so we believe that redrafting is required to ensure clarity.

- **We are calling for clause 32 to be redrafted in order to clearly devolve the power to introduce gender quotas for public boards, as well as temporary special measures relating to all protected characteristics.**

#### *2.1.2 Full devolution of equality law*

Engender called for full devolution of equality law and regulation in our submission to the Smith Commission. This was supported by 70% of over 1000 people who completed our public survey. It would enable better scrutiny of equalities practice that is more sensitive to Scotland's distinct public sector architecture, by enabling the creation of a Scottish equalities regulator. It would enable better links between equalities policy and devolved domains, for example by allowing the creation of time-limited gender balancing measures in renewable energy-related frameworks of the modern apprenticeship programme.

Full control over equality law would allow for a coherent approach that allowed Scotland competence to introduce measures such as mandatory pay audits, which have formed part of the aspirations for the current Fair Work agenda, as well as decoupling our public sector equality duty from UK measures.

- **We are calling for clause 32 to be redrafted in order to devolve full competence over equality law and regulation to the Scottish Parliament.**<sup>19</sup>

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<sup>18</sup> International Institute for Democracy and Electoral Assistance (2005) [Women in Parliament: Beyond Numbers](#); OSCE Office for Democratic Institutions and Human Rights (2011) [Gender equality in elected office: A six-step action plan](#)

<sup>19</sup> Previously tabled amendment 138 addresses this.

## 2.2 Clause 33: Tribunals

The right to challenge the actions of employers within an independent adjudication system is a key workplace right with clear gendered implications. Unfair dismissal or discrimination against pregnant women and women in certain age brackets, for instance, has been a significant and well-documented barrier to gender equal employment practices. In July 2013, the UK government introduced fees of up to £1200 for individuals to access employment tribunals. Equal pay and discrimination cases have some of the highest upfront costs and the number of claims has dropped dramatically as a result. Figures show that sex discrimination cases fell by 91% in 2014.<sup>20</sup>

The Scottish Government has indicated that it would scrap fees for employment tribunals, and the Smith Commission recommended that all powers over the management and operation of reserved tribunals be devolved to the Scottish Parliament. However, the UK command paper and Scotland Bill do not clearly reflect this. The specific functions of employment tribunals that are to be devolved will be set out in an Order of Council.

- **We are calling for clause 33 to clarify that administration of employment tribunals, including the power to set fees, will be devolved to the Scottish Parliament.**

## 3. Abortion

Engender sees the potential for the devolution of power and responsibility around abortion to Scotland to afford a more progressive law. Both pro-choice and anti-choice organisations have identified weaknesses with the 1967 Abortion Act that is currently in effect.

However, abortion is a politically polarising issue around the world, and we are aware of international experience that suggests that nations infrequently revisit abortion legislation, that legislative processes attract significant amounts of international scrutiny and resources, and that myths around reproductive healthcare are widespread. We also note that Scotland currently has no organisation working specifically on reproductive health and rights, and that there is no current public discourse around abortion in Scotland. For these reasons, Engender and other women's and human rights organisations are keen to see as much time as possible for civil society to build capacity to engage in the discussion about how women's reproductive health and rights should be realised in Scotland if abortion is devolved. The original Smith Agreement suggested that all parties were committed to the devolution of abortion, but that this would not happen as part of the Scotland Bill.

## 4. The Process

Engender has significant concerns with the extreme speed, lack of scrutiny and lack of transparency that have characterised the passage of the Scotland Bill. This is in keeping with the timescales involved in the production and publication of both the

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<sup>20</sup> Ministry of Justice <https://www.gov.uk/government/collections/tribunals-statistics>

Smith Commission Agreement, and UK Government command paper and initial draft clauses of the Bill.

We have called for a process of devolution that allows for democratic engagement with Scottish civil society from the outset. Along with nineteen other organisations, we argued that progressive change for women could be driven by embedding human rights, gender equality and inclusion as key principles within the new legislation.<sup>21</sup> We have consistently raised the fact that such an approach would not only benefit women, but the broad gender equality agenda that both governments are committed to progressing. These opportunities have been missed. A less rushed process would have allowed for fuller consultation, negotiation and scrutiny. We believe it would have led to a fairer, more robust and more legitimate outcome.

There have been limited attempts by the Scotland Office and the Scottish Government to consult with civil society in Scotland, but incongruously the Joint Ministerial Working Group on Welfare has worked behind closed doors. Given the complexity of the social security agreement in particular, and the practical and technical risks involved in the transfer of operations, this is regrettable. There are frontline services and advice organisations in Scotland with deep expertise on welfare rights, and better consultation could help to identify unintended consequences and operational difficulties as a result of devolving only some aspects of social security. Ultimately this could have a profound impact on people at risk of harm.

At Westminster, the lack of meaningful scrutiny at committee stage represents another missed opportunity to incorporate a wider set of views. The Committee of the whole House process does not allow for the submission of oral and written evidence from wider stakeholders. Debate amongst committee members is replaced by scripted speeches followed by votes along party lines. All substantive amendments tabled on welfare benefits, employment support and equal opportunities were voted down, despite having received the backing of not only almost all of Scotland's MPs, but also many third sector organisations that work with people directly affected by the changes, on anti-poverty, equalities and welfare rights issues. This represents a democratic deficit for Scotland. The process has served political interests and worked to a political timetable, including the UK General Election, rather than those whose lives will be affected.

## **Conclusion**

The Scotland Bill is inconsistent in a number of crucial ways, which undermines the potential of new powers to be engaged in support of women and other marginalised groups of people in Scotland. Firstly, as set out in full above, the Bill does not fully deliver the spirit and substance of the Smith Commission Agreement. Notably absent is the ability to create new benefits that relate to devolved areas of competence and to introduce gender quotas, for public boards, but also more widely.

In terms of social security, many clauses are unnecessarily restrictive and prescribe a degree of policy direction that we would not expect to see within the transfer of

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<sup>21</sup> Engender (2015) [A widening gap: women and welfare reform](#)

powers. This will significantly limit the Scottish Parliament in any attempts to design an empowering, more progressive system that challenges the dominant 'welfare' agenda in the UK. In light of the extraordinary gender bias at the heart of the UK system, this means that an opportunity to tackle ways that social security undermines gender equality is slipping by. These narrow parameters also undermine the Scottish Parliament's ability to adopt a holistic approach that is integrated with devolved services and takes account of stakeholders' views.

In terms of equal opportunities, experts in equality law say that clause 19 of Scotland Bill is still unclear. We are therefore calling for clarity about what the clause should enable the Scottish Parliament to do, in terms of gender quotas and employment tribunals, and for the clause to be redrafted accordingly. We believe that the full devolution of equality law and regulation would be optimal, to increase flexibility within Scotland's distinct public sector architecture and coherence with related devolved policy areas.

We are grateful to the committee for seeking the views of Scottish civil society, on a process that has been characterised by the lack of opportunities to provide meaningful input. We urge the committee to raise these concerns with both governments wherever possible.

## **About Us**

Engender is Scotland's gender equality organisation. For more than 20 years we have worked across Scotland on feminist policy, advocacy, and activism. We make women's inequality visible, and bring women together to make change happen.