

Scotland Bill

Equality Network

The Equality Network is a national lesbian, gay, bisexual, transgender and intersex (LGBTI) equality organisation in Scotland. We welcome the opportunity to submit evidence to the Committee, on the Scotland Bill. As always, our policy position on this is based on our engagement with LGBTI people across Scotland.

The Equality Network's main focus in relation to the proposals for further devolution is on equality law, which at present is reserved by section L2 of part 2 of schedule 5 to the Scotland Act 1998 (with very limited exceptions to the reservation).

We submitted evidence to the Smith Commission in October 2014, jointly with ten other equality organisations in Scotland. In that evidence we called for consideration to be given to the devolution of equality law.

That evidence can be found here: <http://www.equality-network.org/wp-content/uploads/2014/11/Letter-to-Smith-Commission.pdf>

We were disappointed that the Smith Commission did not recommend the full devolution of equal opportunities, but we welcomed that the recommendations included devolving some aspects of equality law.

Does the Scotland Bill implement the Smith proposals?

The Smith Commission agreement was somewhat open-ended on equal opportunities. It said that the Equality Act 2010 would remain reserved, but that the powers of the Scottish Parliament would include, but not be limited to, the introduction of gender quotas in respect of public bodies in Scotland. It also confirmed that socio-economic rights would remain devolved.

The UK Government's Command Paper of January 2015 was rather clearer. It proposed that the power to legislate on equalities in respect of public bodies in Scotland would be devolved, including but not limited to the introduction of gender quotas. The Command Paper said "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. However, the Scottish Parliament will not be able to lower the protections found in the Equality Act 2010."

We welcome this, which we understand to mean that the Scottish Parliament would be able to strengthen and add to protections from discrimination, and requirements to promote equality, in both the employment and service provision activities of Scottish public authorities, but would not be able to remove any of the protections or requirements already provided by the Equality Act.

We agree with the concerns of the Devolution (Further Powers) Committee, set out in your interim report of 14th May 2015, about the wording of draft clause 24 (equal opportunities) accompanying the UK Government's Command Paper. We do not think that draft clause 24 properly implemented the policy set out in the Command Paper and discussed above.

Clause 32 of the Scotland Bill is certainly an improvement on draft clause 24. However, we think that clause 32 still does not fully implement the policy in the Command Paper.

Clause 32(3) adds two new exceptions from the reservation of equal opportunities. The second of these is the exception which seems to be intended to implement the policy described above. It would allow the Scottish Parliament to legislate on equal opportunities in relation to the Scottish functions of Scottish (or cross-border) public authorities. The new devolved power does not include modification of the Equality Acts 2006 and 2010, but does include legislating for provision that is additional or supplementary to any provision in the Equality Acts (at the date of commencement of clause 32), and in particular provision imposing requirements that the Equality Acts do not prohibit (at that date). The power also includes the power to legislate in a way that re-applies provisions in the Equality Acts, with modification, but without affecting the provisions as they apply for the purposes of those Acts.

We have two concerns about clause 32(3). Firstly, it is unclear to us that, as it stands, the clause devolves the power to legislate for gender quotas for the boards of public bodies. Such legislation would be likely to constitute “positive discrimination” which is currently unlawful under the Equality Act 2010. In order to make such legislation, it would therefore be necessary to disapply the discrimination provisions of the Equality Act, in strictly limited circumstances. It appears that clause 32(3) does not allow this.

We therefore welcomed amendment 162, proposed at the Commons Committee stage of the Scotland Bill, which would have removed this difficulty by explicitly devolving the power to legislate for “equal opportunities in relation to an appointment as a member of a Scottish public authority”. We think that amendment is a clear provision, which certainly devolves the power to legislate in relation to gender quotas on public boards, as well as allowing similar legislation relating to other protected characteristics if the Scottish Parliament so decided.

Amendment 162 is consistent with the Scottish Government’s suggested version of clause 32, in their response to the Committee’s report of 14th May.

We note that an alternative amendment addressing this issue, amendment number 123, was also considered at the Commons Committee stage. We do not think that amendment, as drafted, would be effective in removing the problem we identified above.

We hope therefore that amendment 162 will be re-introduced at Report stage, and will have the support of the UK Government and the House of Commons.

Our second concern about clause 32(3) relates to the exact effect of paragraphs (a), (b) and (c). The proposed devolved power does not include the power to modify the Equality Acts, but does include the power to make supplementary or additional provision, which may impose new requirements that are not prohibited by those Acts.

We would welcome further clarification from the UK Government about the extent of this devolved power. Would it be possible, for example, for the Scottish Parliament, if it chose, to legislate to extend the protection from discrimination by Scottish public

bodies, to cover discrimination against those transgender and intersex people who are not currently covered by the relatively restricted 'gender reassignment' protected characteristic in the Equality Act? Such an example certainly seems to us to fall within the scope of the proposed new devolved competence on equality described in the UK Government's Command Paper.

We note that a number of other changes to clause 32 were suggested by the Scottish Government in the version of that clause set out in their response to the Committee's 14th May report, and we have no particular view on those.

Beyond the Smith Commission proposals

The Equality Network has consistently supported the full devolution of equality law, since the original Scotland Bill was under consideration in 1998.

Factors that point towards the devolution of equality law include that:

- Scotland's demographics are different from those of England and Wales. For example, Scotland includes rural local authority areas with small populations that have relatively small numbers of some groups sharing protected characteristics. A range of issues, such as identity and otherness, therefore require different responses.
- Large areas of law which intersect with equality law are devolved and different in Scotland, including for example law on housing, health, education, police and justice, local government and legal functions involved in enforcement through the Scottish courts.
- The Scottish Government and Parliament are geographically and in other ways more accessible to people, businesses, and public sector and third sector organisations in Scotland than Westminster is, have a better understanding of Scots law, society and culture, and are therefore in a particular position to legislate appropriately for Scotland.

The devolution of equal opportunities would enable equality law and policy to be set appropriately by the Scottish Parliament for Scotland's specific needs.

We welcome the progress that Scotland has made on LGBTI equality since 1999. The Scottish Government (and former Executive) and Scottish Parliament have good track record of consultative and inclusive development of legislation relating to LGBTI issues. For example, the equal marriage legislation (the Marriage and Civil Partnership (Scotland) Act 2014) was consulted on extensively by both Government and Parliament, and in our opinion is better in a number of important ways as a result. We believe that the devolution of equality law would allow the same kind of consideration, and the same matching to the Scottish context, to be achieved in the areas of protection from discrimination and promotion of equal opportunities.

We would hope therefore to see, in time, further progress on the devolution of equality law, beyond the Smith Commission proposals.

Thank you again for the opportunity to respond to the consultation.