

The changing relationship between England and Scotland could confuse equality provision north of the border

By Democratic Audit UK

*Is the Smith Commission report on the future of the governance of Scotland 'woman friendly'? **Christine Bell** carries out a 'gender audit' of the document, and concludes that equality provision may become confused owing to the changing balance of legislative power between Holyrood and Westminster.*

Clearly every aspect of the Smith Commission Report is of importance to both women and men. What follows, is an attempt to assess where and how women have been specifically addressed, directly or indirectly, in the Report and its proposals.

No specific mention of women

Women do not receive a specific mention. This is a pity. Inclusion of women was at the heart of debates over independence and the forms of power which should be devolved. Even some rhetorical acknowledgement of the importance of the inclusion of women and the need to have a gender impact assessment of how the different configurations for how new powers might be implemented, would have been good.



Holyrood (credit: [Spencer Means, CC BY ND 2.0](#))

Yes to gender quotas for public bodies

Gender quotas are mentioned. Paragraph 60 states:

“The Equality Act 2010 will remain reserved. The powers of the Scottish Parliament will include, but not be limited to, the introduction of gender quotas in respect of public bodies in Scotland.”

It is a bit unclear what this means: the two sentences are somewhat at odds with each other. Equality has always been a bit weird with regard to reserved and devolved powers: equality legislation has always been reserved, but the Scottish government have been given some equality powers, for example to 'promote equality'. Recently the Scottish Government have opened a consultation on using Section 30 of the Scotland Act 1998 (the one that allows the UK government to devolve a reserved power to the Scottish Government, and was used to allow the referendum itself), to allow quotas on public bodies. This paragraph seems to suggest that in principle devolving such a power is now agreed. But it is a bit difficult to understand how it will take place legally. These quotas would be likely to be unlawful under the Equality Act 2010, and devolving power to the Scottish Government does not resolve that, unless the Equality Act is simultaneously amended. If this sounds confusing, it is because it is. Hopefully, however, where there is a will there is a way, and the Smith Commission report establishes the will.

No or 'we forgot to think about it' to gender quotas for the Scottish Parliament

There is no mention of gender quotas for the Scottish Parliament. Paragraph 23 states: The Scottish Parliament will have all powers in relation to elections to the Scottish Parliament and local government elections in Scotland (but not in relation to Westminster or European elections).' Paragraph 26 states: that 'UK legislation will give the Scottish Parliament powers to make decisions about *all matters* relating to the arrangements and operations of the Scottish Parliament and Scottish Government' (emphasis added). However, if governed by the Equality Act 2010 – which as mentioned above is to remain reserved, quotas would again require an amendment of the 2010 Act, as well as devolution of a specific power to Scotland.

Similarly, while women-only party short lists are currently legal under UK discrimination legislation, this is under a removal of election candidates from discrimination law that is temporary and currently expires in 2015. According to Smith, the regulation of political parties is to remain reserved, and so it would seem the question as to whether to continue this exception will remain reserved.

Furthermore, currently such shortlists are permitted but not required, and again, legislation requiring them would remain out-with the control of the Scottish Parliament without more (although the SNP as a party has not used the permitted option thus far, along with the Liberal Democrats and Conservatives, indicating perhaps limited appetite for anyone to push this issue). But the point remains: the Scottish Parliament may not really have *all* powers in relation to elections and the arrangements and operations of the Scottish Parliament and Scottish government.

However, the 'sovereign right of the people of Scotland to determine the form of government best suited to their needs' (Smith Report para 20), could be usefully be understood to include some capacity for those people to provide for quotas for women and other under-represented groups, should they so wish to see the Parliament better reflect and represent the diversity of the people it serves.

Equality needs to be dealt with more centrally in the development of the proposals

The above points indicate that equality provision is going to become even more incoherent with devolved and centralised legislative power even more confused. Furthermore, an act, the main purpose of which is within the competence of a devolved body is not be ultra vires if it merely 'incidentally' affects a reserved matter. This could be fairly difficult to argue with respect to quotas relating to reserved seats, which were understood to negate the 2010 Act's equality prohibition and did not come within any of the permitted exceptions. But it creates further scope for litigation around any lack of clarity as to the devolved/reserved division. Even the current ambiguities are not good for ensuring clearly implemented equality law obligations (see [Equality and Human Rights Commission Report](#)).

These ambiguities look to become even more tortuous legally. The spirit of reserving the Equality Act is a good one in so far as it based on ensuring across the UK women should have some common floor of equality provision. Indeed, European Union and European Convention on Human Rights obligations establish part of such a floor. However, more thought needs to be given to how to create a coherent legislative framework within Scotland, which works from the basis that the floor should not be a ceiling on what the Scottish Government can provide for, or limit different policy approaches to equality – such as provision for quotas in parties of Scottish Parliament. Equality under the law, and what it permits, would be better not 'fudged' or left in an unresolved tension between reserved and devolved powers.

Socio-economic rights

Interestingly, paragraph 60 also states: The Scottish Parliament can legislate in relation to socio-economic rights in devolved areas. Again, this power would need to be exercised against the backdrop of the reserved power relating to the statutory duty to reduce such inequalities in the Equality Act 2010. As such this Act forms a floor. However, paragraph 60 raises the prospect of developing socio-economic rights, and perhaps even some sort of Scottish Constitution, operating in devolved areas.

Abortion

Paragraph 61 states: "The parties are strongly of the view to recommend the devolution of abortion and regard it

as an anomalous health reservation. They agree that further serious consideration should be given to its devolution and a process should be established immediately to consider the matter further.” Again this is a bit strange – almost as if they could not make up their minds. They are ‘strongly of the view to recommend devolution of abortion’ but ‘agree that further serious consideration should be given to its devolution’ Which is it? Recent reports of the process indicate that the matter was changed at the last minute due to Labour Party objections to devolution, but this has left the proposal unclear.

The issue is of great importance to women, and perhaps it is good that the matter is left open to wider discussion –only three out of the eleven members of the Commission were women, and neither the Labour Party nor the Liberal Democrats had a women nominee. Re-opening abortion laws is always a tricky business (as the strangeness of this provision perhaps testifies). Devolution could see a more restrictive abortion regime, or nothing much changed. Or, it could even see the area usefully being taken out of criminal law altogether and regulated as a matter of health care legislation.

Surrogacy and other issues

Paragraph 62 devolves a range of medical issues, including ‘surrogacy’. So, the Scottish Government could, for example, enable payment for surrogacy rather than regard it as something which should always be done without charge. Or, of course, limit its use somehow.

Benefits and women

Paragraph 44(1) provides for devolution of: ‘Benefits for carers, disabled people and those who are ill: Attendance Allowance, Carer’s Allowance, Disability Living Allowance (DLA), Personal Independence Payment (PIP), Industrial Injuries Disablement Allowance and Severe Disablement Allowance’. Carers, who are disproportionately women, will therefore look now to the Scottish rather than the UK government for support. Paragraph 44(2) which lists other benefits to be devolved adds, among other things, ‘Sure Start Maternity Grant’ to its list. Child benefit, maternity allowance, statutory maternity pay, and widowed parent’s allowance, however, all remain reserved.

Where to watch out for and attempt to influence the detail

As regards other issues, less immediately ‘about gender’, women might also be concerned now to know and to seek to influence as women some issues which remain open:

- What will be the gender representation on the now much more empowered ‘Joint Ministerial Committee’, which if robustly implemented as a strong consultative mechanism could start to operate as a brake on the UK Cabinet, and perhaps even a sort-of ‘second regional executive’. It is great to see more women in the Scottish Cabinet just recently, but will women be placed at the heart of the new power structures that are to strengthen the Scottish voice in reserved areas? Will women be given equal representation as the Scottish members on a range of new consultative mechanisms which are to be set up to ensure UK approaches to issues such as foreign policy?
- How will women seek to shape and even build the commitments to greater local government, and are there opportunities for further gender representation here?
- How messy will welfare will get? Bits and bobs of Universal Credit are devolved, and that benefit itself seems pretty messy. The tax and welfare provisions require implementation proposals to have a stringent gender equality appraisal for their impact on women.
- Could women seek something specific on Smith’s proposal that there is more political education on devolution? Could they push for ‘education for empowerment’ as oppose to education as information about powers, and an exciting programme built to support women’s engagement in political life?

And finally, will women, or anyone other than predominantly male politicians and economists, be involved in any way in the negotiation of crucial paragraph 95, which sets out principles for how changes to Scottish powers should affect the Barnett allocation? Crudely put paragraph 95 provides for reducing the allocation where Scotland gains revenue increasing powers, and augmenting funds where Scotland gains powers to take over

centralised functions that have a delivery cost. Re-negotiating the formula to implement clause 95 is left in the hands of the two governments and their economists, although they are to update and report to the two Parliaments. But the formula to implement clause 95 is crucial to the capacity to fund public services in Scotland (and of course important to the rest of the UK too). So let's watch it carefully. To paraphrase Catch-22: it's some clause, that clause 95.

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Christine Bell is Professor of Constitutional Law at the University of Edinburgh

