

# The place of equal opportunities in the devolution settlement: a legal analysis

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# 1. Introduction

I have been asked to produce a report on the options for amending the provisions of the Scotland Act 1998 or other aspects of the Scottish devolution settlement which relate to or affect the promotion of equality of opportunity and the elimination of discrimination. I understand that this report is intended to facilitate the Equality and Human Rights Commission's contribution to the Scottish Government's 'National Conversation'<sup>1</sup> and to wider public discussion about issues of equality and human rights within Scotland.

In particular, I am asked to advise what are the options for modifying the existing arrangements for allocating responsibility within the devolved settlement for 'equal opportunities' in the following three situations.

- (a) The existing devolution settlement is maintained in its current form.
- (b) Further devolution of powers and functions takes place to the Scottish Parliament.
- (c) Scottish independence (within the EU).

In preparing this analysis, I have taken note of the conclusions of the research commissioned by the Equality and Human Rights Commission entitled 'Equal opportunities and the Scottish Parliament: a progress review.'<sup>2</sup> In addition, the key documents on the devolution settlement have been analysed, including the preparatory material associated with the Scotland Act 1998, the explanatory notes published with the text of the Scotland Bill, the discussion paper produced by the Scottish Government, 'Choosing Scotland's future: a national conversation',<sup>3</sup> the reports and consultation papers prepared by the Calman Commission on Scottish Devolution, relevant position papers and consultation papers produced by the various Scottish political parties, and the 2005 report of the Steel Commission, along with further associated material and academic commentary.

This paper begins with a summary of the existing devolution settlement, to set the scene. It then examines the grey areas that exist within the system of Scottish devolution before examining the formal and informal mechanisms that enable the devolution settlement to be adjusted. Then

the reserved status of equal opportunities under the Scotland Act 1998 is examined, along with the limited powers enjoyed by the Scottish Parliament and Government. Finally, the possibilities of adjusting or amending the devolution settlement to enhance the effective protection and promotion of equal opportunities are explored.

## **2. The existing devolution settlement**

The Scotland Act 1998 established the Scottish Parliament and the Scottish Executive (comprised of the Scottish ministers sitting collectively, known now as the Scottish Government which is the term that will be used throughout this paper). The Act sets out the ‘powers’ of the Scottish Parliament and, in a less direct manner, delineates the ‘functions’ of the Scottish ministers and thus of the Scottish Government as a whole.<sup>4</sup>

### **2.1 The powers of the Scottish Parliament**

The Act devolved the power to the Scottish Parliament to make primary legislation on all matters which are not reserved to the UK Parliament, as long as any laws passed by the Scottish Parliament comply with EU and European human rights law. In other words, the Scottish Parliament in Edinburgh can pass laws (or change existing laws) concerning any issue, except where an issue relates to or is linked with a ‘reserved matter’, as long as the laws the Parliament passes comply with EU requirements and European human rights law. However, only the UK Parliament at Westminster can pass new laws or amend existing law that affects reserved matters.

The Scotland Act achieves this by providing in s. 29(1) that the Scottish Parliament has competence to legislate unless the Act excludes that competence. S. 29(2) establishes that an act is outside the Scottish Parliament’s legislative competence where:

- it purports to have legislative or executive effect outside Scotland
- it purports to modify ‘protected enactments’ (Schedule 4)
- it relates to ‘reserved matters’ (Schedule 5)
- it is incompatible with the European Convention on Human Rights (ECHR) or EU law, and/or
- it would remove the Lord Advocate from his/her position as head of the system of criminal prosecution and investigation of deaths in Scotland.

If the Scottish Parliament acts outside its competence by legislating on a reserved matter, the measure in question can be struck down by the courts. (The Act also makes provision for additional mechanisms which

are designed to ensure that the Scottish Parliament does not act outside its field of competence. For example, the Presiding Officer of the Scottish Parliament must state whether he or she considers that the provisions of any Bill introduced into the Parliament comes within its sphere of legislative competency, while the Secretary of State for Scotland [a minister of the UK Government] is given the power to 'veto' the referral of Bills passed by the Scottish Parliament for Royal Assent in certain circumstances. This paper will not examine these mechanisms in detail.)

Schedule 4 sets out certain 'protected enactments' (that is, legislation enacted by the UK Parliament) whose provisions cannot be modified by the Scottish Parliament. These include four 'constitutional' enactments, including the Human Rights Act 1998 and key provisions of the European Communities Act 1972, certain statutory provisions relating to the judicial officers, enterprise zones, rent rebate and council tax subsidies, the Scotland Act itself, and 'the law on reserved matters', which covers primary and secondary legislation and 'rules of law' (common law rules) relating to 'reserved matters'. Schedule 4 therefore sets out the limits on the legislative competency of the Scottish Parliament.

Schedule 5 of the Scotland Act 1998 clarifies what constitutes 'reserved matters', by setting out a detailed list of these 'reserved' matters in respect of which only the UK Parliament can legislate. These include a list of 'general reservations', areas which are reserved in their entirety and set out in Part I of Schedule 5, and then a list of 'specific reservations', which define certain specific aspects of general areas of state activity as set out in Part II as reserved matters. Areas subject to 'general reservation' include the 'Constitution' and 'foreign affairs', including matters related to EU membership: areas subject to 'specific reservations' include certain aspects of transport, energy, social security, employment law and equal opportunities (more on which below).

## **2.2 The functions of the Scottish Government**

The functions of the Scottish Government are delineated in a more indirect manner. S. 44 of the 1998 Act establishes the Scottish Executive, now known as the Scottish Government, whose members are collectively described as the Scottish ministers and, in general, have collective responsibility for the exercise of executive powers and functions that relate to devolved (that is, non-reserved) matters.

S. 53 of the 1998 Act made provision for the transfer of the functions previously exercised by UK ministers and derived from the royal prerogative (the general source of executive power in the UK) or pre-devolution legislation to the Scottish ministers, 'so far as they are exercisable within devolved competence'.

This means that the Scottish ministers now exercise the functions previously exercised by UK Ministers in or as regards Scotland that relate to non-reserved matters: responsibility for these functions was formally transferred from UK ministers (and in particular the Secretary of State for Scotland and the Scottish Office) to the Scottish Executive in 1999.<sup>5</sup>

The Scottish Parliament itself can also choose to confer functions upon Scottish ministers in respect of devolved matters which come within its areas of competence, including the power to make secondary legislation in the form of Scottish Secondary Instruments (SSIs).

In contrast, Scottish ministers cannot be given responsibility by the Scottish Parliament for reserved matters that lie outside the Parliament's competency.<sup>6</sup> However, the UK Parliament can and does confer additional functions upon the Scottish ministers by legislation. There is nothing in the devolution settlement established by the Scotland Act which prevents the UK Parliament choosing to confer additional powers and functions upon Scottish ministers in respect of reserved matters. In addition, UK ministers can transfer responsibility for reserved functions to Scottish ministers via the use of Orders in Council with the approval of the UK Parliament.

However, in both cases, it is usual for the approval of the Scottish Parliament to be sought via Legislative Consent Motions (LCMs, otherwise known as Sewel motions) before Scottish ministers are given responsibility for reserved matters. As the Calman Commission stated in its final report, '[P]ublished guidance to UK Government Departments... makes it clear that [Westminster] Bills containing provisions altering the executive competence of Scottish Ministers should be treated as subject to the Sewel convention and hence as requiring the consent of the Scottish Parliament.'<sup>7</sup> (See below for more detail on this).

This means that the Scottish ministers, unlike the Scottish Parliament, may be conferred with functions that relate to reserved matters. However, it should be noted that the Scottish Parliament can and does scrutinise how Scottish ministers perform functions which have been conferred upon them in respect of reserved matters. Scottish ministers

are accountable to the Scottish Parliament for how they exercise their powers and perform their functions in general as a collective body: as a result, committees of the Parliament, or individual MSPs through parliamentary questions, can scrutinise how Scottish ministers exercise any reserved powers and functions that have been conferred upon them.

The Scottish Parliament may also control the scope of reserved functions and powers conferred upon Scottish ministers, by imposing conditions as to the scope and content of these functions when they give their consent to the conferral of these powers and functions via Legislative Consent Motions (see below). In addition, when Scottish ministers introduce secondary legislation in the course of exercising reserved powers which have been conferred upon them, the practice is for these orders to be laid before the Scottish Parliament, potentially offering the opportunity for a parliamentary debate on how the Scottish Government is exercising its functions. Therefore, while the Parliament has no authority to act in respect of reserved matters, it may indirectly scrutinise how Scottish ministers exercise reserved functions and powers conferred upon them by the UK Parliament or UK ministers.

### **2.3 The basic structure of the devolution settlement: a summary**

To summarise, the current devolution settlement gives the Scottish Parliament the power to exercise legislative competence over all matters except those which have been expressly reserved to the UK Parliament. In other words, the powers of the Scottish Parliament are defined in terms of the areas where they cannot exercise legislative competence, rather than in terms of the areas where they can. The Scottish ministers sitting together as the Scottish Government exercise executive functions that relate to devolved matters, but may also be conferred with additional executive functions that relate to reserved matters, over which the Scottish Parliament may exercise some indirect scrutiny.

However, as discussed further below, it should be borne in mind that the UK Parliament under the current devolution settlement (and in line with the orthodox understanding of the UK's unwritten constitution) retains the power to legislate on any matter, including devolved matters, if it so chooses. This means that the UK Parliament can at least in theory substantially alter the devolution settlement, and still remains the final source of formal legislative authority.

### **3. Grey areas within the devolution settlement**

‘The future of Scottish devolution within the Union’, the first report and consultation paper produced by the Calman Commission on Scottish Devolution in December 2008, classified reserved functions as falling into two distinct categories: (a) those that are ‘integral to the effective functioning of the United Kingdom as a sovereign nation-state with international responsibilities’, and (b) those that relate to the efficient economic functioning of the UK.<sup>8</sup>

The Scottish Government in ‘Choosing Scotland’s future’ have adopted a similar scheme of classification, describing reserved matters in para. 1.6 as either involving (a) issues ‘considered fundamental to the United Kingdom as a state, such as the Head of State and constitution, citizenship, foreign affairs (including representation at the European Union), security and defence’, or (b) areas ‘where the United Kingdom Government Departments had been and remained responsible for services in Scotland, such as social security, health and safety, and tax collection, or areas in which it was considered important to have a common regime across the United Kingdom, such as employment and business law’.

However, both the Scottish Government in ‘Choosing Scotland’s future’ and the Calman Commission in its first report acknowledged that there is often no clear-cut or ‘bright-line’ distinction between reserved and devolved functions. For example, under the current devolution settlement, both Scottish ministers and the Scottish Parliament have competency over certain aspects of transport policy such as road safety, while other aspects of transport policy are defined as reserved matters in Schedule 5.

As a result, uncertainty often exists in practice as to where the border lies between reserved and devolved competencies. The definitions set out in Schedule 5 of the 1998 Act of the scope of reserved matters cannot cover every aspect of every area of potential uncertainty. Inevitably, some grey areas will exist as to whether a particular issue falls into a reserved or devolved area of legislative competency. (This is illustrated by the uncertain place of equal opportunities in the devolution settlement, discussed below.)

This uncertainty can arise even with respect to the relatively clearly delineated powers of the Scottish Parliament. However, there is even greater scope for ambiguity when it comes to the often blurred division of

responsibility between UK and Scottish Ministers. The distinction between devolved and reserved ministerial functions is often very uncertain. Sometimes this is the inevitable result of the grey areas that exist as regards the limits of the devolved areas of legislative competency, which 'translate' into grey areas in the division of executive functions between UK and Scottish Ministers. At other times, it arises from the manner in which UK and Scottish ministers at times have 'concurrent' – that is, overlapping - responsibility for some issues.<sup>9</sup> These overlapping areas of mutual competence can blur the devolution picture.

The same problem may arise when it comes to the question of where responsibility rests for the activities of public authorities within the devolved settlement. 'Scottish public authorities', as defined in Part III of Schedule 5, are public bodies primarily carrying out devolved functions and therefore subject to the legislative authority of the Scottish Parliament. Such Scottish public authorities can exercise 'mixed functions', that is, a combination of functions that relate to both devolved and reserved matters, and still come within the sphere of devolved competency. However, when their functions overlap or intersect with those of 'reserved bodies' (that is, bodies over which the devolved authorities cannot exercise control, such as 'cross-border public authorities' or bodies exercising a function specifically conferred in relation to a reserved matter), then issues of concurrent responsibility may again arise. In such cases, it may not always be clear where accountability rests for the decisions, actions or failures to act of Scottish and reserved authorities in such areas of overlapping competence.

## **4. Making the devolution settlement work**

This blurred line between devolved and reserved matters reflects the complexity of modern governance and the multifaceted nature of state activity in contemporary society. It is normal for any devolved or federal system to generate a certain level of complexity and uncertainty. In addition, identifying what should or should not be a reserved matter is not a simple process. Substantial differences of views exist in Scotland as to what matters should come within the competence of the Scottish Parliament and Government. Even commentators and political parties which are broadly supportive of the contours of the current devolution settlement differ on exactly when it might be best to treat a function or power as a reserved or devolved matter.

For example, both the Scottish Government in 'Choosing Scotland's future' and the final report of the Calman Commission have identified a range of matters where further devolution might be possible and desirable, even if the existing constitutional architecture of the UK was to be left broadly unaltered. However, both papers also noted the wide difference in views that exist across Scottish society and the UK at large as to what powers and functions should be devolved, even if the question of Scottish independence was put to one side.

Given this practical and conceptual uncertainty that lurks within the devolution settlement, it becomes important to understand the mechanisms that have been put into place to enable the devolution settlement to work.

### **4.1 The flexible or 'open' nature of the devolution settlement**

It is important to realise that the devolution settlement established by the 1998 Act is 'open' or 'unlimited': the powers of the Scottish Parliament or the functions of the Scottish Government may be changed through a flexible process that need not require the enactment of new primary legislation.

The UK Parliament retains the power to legislate in all areas if it chooses: s. 28(7) of the Scotland Act 1998 provides that 'this Section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.' This means that the UK Parliament can and does legislate on matters that relate to non-reserved matters, and can also change or vary the provisions of the Scotland Act itself and thus the powers of the Scottish Parliament.

However, a constitutional convention known as the Sewel Convention has emerged that when the UK Parliament wishes to, (a) legislate in respect of a devolved matter, (b) vary the powers of the Scottish Parliament or (c) confer new functions on Scottish ministers (although some uncertainty exists about this third category), it will first seek the consent of the Scottish Parliament, which will be asked to pass a Legislative Consent Motion (a 'LCM', previously known as a 'Sewel motion'). This has enabled some of the latent uncertainties as to what constitutes a reserved or devolved matter to be side-stepped, and has smoothed over potential tensions between the UK and Scottish Parliaments.

In addition, s. 30 of the Scotland Act 1998 permits the legislative competency of the Scottish Parliament to be enlarged or reduced by the passing of Orders in Council, which is a special form of secondary legislation whereby UK ministers can effectively amend existing legislation (but in the case of the 1998 Act only with the approval of the UK Parliament).

This power would allow UK Ministers, with the approval of the UK Parliament, to confer extended competency on the Scottish Parliament, by, for example, allowing it to legislate in respect of an otherwise reserved matter. It could also be used to limit the competency of the Scottish Parliament, by reclassifying a particular issue as a reserved matter.

However, thus far, this s. 30 power has only been used to extend the competency of the Scottish Parliament by permitting it to legislate in areas that would otherwise be off-limits as reserved matters, or else has been used to clarify whether new bodies such as the Equality and Human Rights Commission are reserved bodies, that is, public authorities whose functions relate to reserved matters and therefore fall outside the legislative competency of the Scottish Parliament by virtue of Part III of Schedule 5.<sup>10</sup> Again, this has proved to be a useful tool to clarify some uncertain elements of the devolution settlement. It also makes it possible for the powers of the Scottish Parliament to be extended on an incremental, issue-by-issue basis, if necessary.

As noted above, s. 63 of the Scotland Act 1998 also enables Orders in Council to be passed which can provide that functions (legislative or executive) which would otherwise only be exercisable by UK ministers to be exercised by, or only with the approval of, the Scottish ministers in or as regards Scotland. In other words, UK ministers with the approval of

the UK Parliament can confer additional legislative or executive competency upon the Scottish Government in respect of matters which would normally come within the reserved powers of UK Ministers.

This can take the form of a full transfer of exclusive competency to the Scottish Government. That is, the Scottish Government can be given sole responsibility for these functions insofar as they relate to Scotland. Alternatively, concurrent competency may be established where both the UK ministers and Scottish ministers may have competency in respect of particular functions, or Scottish ministers may be required to approve any action taken by UK ministers in respect of particular functions insofar as that action touches upon or relates to Scotland.<sup>11</sup> Again, this is a useful mechanism for oiling the joints of the existing devolution settlement.

In addition, again as noted above, the UK Parliament can confer functions directly on the Scottish ministers through primary legislation. (This power is by custom only exercised after a LCM is passed by the Scottish Parliament, although as previously noted some uncertainty remains as to whether the Sewel Convention actually requires this.) Again, this introduces an element of flexibility into the system, permitting functions to be conferred on the Scottish Government in instances where the Edinburgh Government may be better placed to implement measures in Scotland than the central UK Government departments.

As noted above, the Scottish Parliament can also exercise an indirect scrutiny role over how Scottish ministers give effect to reserved functions and powers which have been conferred upon them by the UK Parliament or UK Ministers. The possibility also exists for the Scottish Parliament to use the LCM procedure to impose conditions or limits on the functions that can be transferred or conferred upon Scottish Ministers. This again highlights the inherent potential flexibility of the current devolution settlement.

#### **4.2 Non-legal mechanisms – memoranda of understanding and concordats**

Various informal mechanisms have also been established to ensure that the devolution settlement works efficiently. A Memorandum of Understanding (MoU) agreed in 2001 between the UK Government and the Scottish Executive sets out the principles that will underlie relations between both executives. This MoU is a general set of statements of political intent relating to communication and co-operation, and is not legally binding in law.

Various bilateral mechanisms have also been established between UK Government departments and their Scottish counterparts, which are at times based on departmental 'concordats', which are agreed directive guidelines setting how the working relationship between both departments is to be conducted. Again, these concordats are not legally binding, but in practice play an important role in shaping interaction between UK and Scottish departments in matters where reserved and devolved responsibilities overlap.

However, within the basic structure established by the original legislation, the use of the amending powers and the existence of MoUs and concordats, the devolution settlement still remains partially dependent on a certain amount of ad hoc arrangements to overcome its latent ambiguities.<sup>12</sup>

This can be illustrated by taking the implementation of EU legislation as an example. The UK as a member state of the EU is under an obligation to implement legislation generated by the EU institutions. As a result, s. 57(1) of the 1998 Act establishes that UK ministers may take the necessary action to implement EU legislation in both reserved and non-reserved areas. However, EU legislation can be implemented in different ways by member states, provided that there is conformity with the basic requirements of the legislation in question. In addition, it appears that there is no obstacle in EU law to EU legislation being implemented in different ways in different parts of a member state, again as long as the basic requirements are observed. This means that EU legislation that affects devolved matters can either be implemented by Scottish ministers or directly by UK ministers. As a result, both UK and Scottish ministers take responsibility at different times to give effect to EU legislation which affects devolved matters.

A Concordat on Co-ordination of European Union Policy governs the day-to-day process of developing EU policy and implementing EU obligations. However, the Concordat does not provide a definite set of guidelines for determining when UK or Scottish ministers should implement EU legislation that relates to devolved matters. It appears that ad hoc arrangements are agreed on an issue-by-issue basis.

A recent report by the European and External Relations Committee of the Scottish Parliament drew attention to a lack of clarity as to the process of determining when UK or Scottish ministers would take responsibility for implementing EU legislation, and called for an enhanced role for the Scottish Parliament in scrutinising this process.<sup>13</sup>

This report serves to highlight the fact that ambiguities and uncertainties still cause uncertainty within the devolution settlement, notwithstanding the useful statutory and informal arrangements that have been put in place to enable devolution to work. The final report of the Calman Commission also criticised the ‘underdeveloped’ intergovernmental mechanisms that currently exist, both in the context of EU and domestic matters.<sup>14</sup>

It also should be noted that the indirect scrutiny role that the Scottish Parliament can exercise in respect of reserved functions transferred to or conferred upon Scottish ministers also remains a little ambiguous and less than clearly defined. For example, committees of the Scottish Parliament rarely focus upon policy areas where reserved functions exercised by Scottish Ministers, or a mixture of devolved and reserved functions, are at issue, as the example of the implementation of EU legislation demonstrates. In addition, the grey areas that exist in the devolution settlement generate uncertainty as to the issues in respect of which the Scottish Parliament has devolved functions, creating uncertainty for parliamentarians, civil servants and the public alike.

## 5. Equal opportunities

### 5.1 Equal opportunities as a reserved matter

The existence of lurking ambiguities within the devolution settlement is particularly notable in the context of equal opportunities. Paragraph L2 of Part 11 of Schedule 5 provides that equal opportunities is a reserved matter, with the Act specifying that this includes ‘the subject matter of the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995’. However, paragraph L2 goes on to carve out an exception to this general reservation of equal opportunities matters:

“Exceptions

‘The encouragement (other than by prohibition or regulation) of equal opportunities, and in particular of the observance of the equal opportunity requirements.

Imposing duties on—

- (a) any office-holder in the Scottish Administration, or any Scottish public authority with mixed functions or no reserved functions, to make arrangements with a view to securing that the functions of the office-holder or authority are carried out with due regard to the need to meet the equal opportunity requirements, or
- (b) any cross-border public authority to make arrangements with a view to securing that its Scottish functions are carried out with due regard to the need to meet the equal opportunity requirements.”

Therefore, equal opportunities in general are classified as a reserved function. However, the Scottish Parliament is given the power to encourage equal opportunities and compliance with equal opportunities legislation, except where this involves ‘prohibition or regulation’. In other words, the Scottish Parliament is given the competence to take steps to encourage respect for equal opportunities throughout Scottish society, but cannot impose legal regulation to achieve this aim. In addition, the Scottish Parliament is given the power to impose duties on Scottish public authorities or cross-border authorities with responsibility for devolved matters, which can require them to ‘make arrangements’ to ensure that the performance of their functions is carried out with due

regard to the need to meet equal opportunity requirements. Thus the Scottish Parliament can impose legally binding duties on devolved and certain cross-border public authorities (but not private individuals, private bodies or voluntary organisations), in order to ensure that they give due regard to complying with equal opportunities law in carrying out their functions.

The distinction made here between reserved and devolved powers is unusual. Equal opportunities are defined as a reserved area of competency, and then an exception is made which permits the Scottish Parliament to exercise some limited power in a narrowly defined manner. In contrast, the usual manner in which the 1998 Act distinguishes between reserved and devolved powers is to define the scope of reserved powers as precisely as possible, leaving anything that falls outside that scope as areas of devolved competency.

For example, in the area of human rights, Schedule 4 of the 1998 Act lists the Human Rights Act 1998 as a 'protected enactment' which the Scottish Parliament cannot amend or repeal. However, no other limits are imposed on the ability of the Scottish Parliament to make provision for the extra protection of human rights, as long as the Parliament does not in so doing venture into other reserved areas. As a consequence, the Scottish Parliament was able to establish the Scottish Commission for Human Rights by primary legislation in 2006, with the mandate to promote respect for all human rights and the power to recommend changes to Scottish law and to inquire into the practices of devolved public authorities.<sup>15</sup>

However, the position is different with equal opportunities. Here the general area of equal opportunities is sealed off as a reserved matter, not just specific enactments such as the Sex Discrimination Act 1975. The Scottish Parliament is given a carefully defined area of devolved competence, permitting it to encourage respect for equal opportunities and compliance with anti-discrimination law and to impose equal opportunity duties upon devolved public bodies. The Explanatory Notes to the Scotland Act 1998 state that '[T]hese exceptions from the reservation will allow the Scottish Parliament for example to develop schemes to secure better provision of services to groups who may be the subject of discrimination or to legislate to require certain public authorities and office-holders to have due regard to equal opportunity requirements'.<sup>16</sup> However, these are relatively limited powers. They permit the Scottish Parliament to develop to some extent a distinct Scottish approach to equality issues if it chooses to do so. However, the

scope of these powers is uncertain, and appears to be relatively narrow and circumscribed, as the following detailed discussion shows.

## **5.2 The reserved area of equal opportunities**

The 1998 Act defines equal opportunities in broad terms:

“Equal opportunities” means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.’

This definition of the reserved subject area of equal opportunities is supplemented by the provision in Paragraph L2 of Schedule 5 that this includes ‘the subject matter of the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995’. (These Acts were at the time the primary anti-discrimination statutes. They have since been supplemented by additional legislation, including the Equality Act 2006.)

The phrasing of Paragraph L2 makes it clear that equal opportunities as a reserved matter ‘includes’ the subject matter of these statutes: it is not just limited to their scope.

This means that the control or regulation of discrimination that is linked to any of the widely defined grounds set out in this definition will come within reserved competency. This also means that only the UK Parliament has the power to make new anti-discrimination legislation or amend existing legislation that relates to any of these equality grounds.<sup>17</sup>

It is difficult to identify areas where anti-discrimination legislation could be passed that would not come within this definition of equal opportunities. It could be argued that legislation which prohibited discrimination on the grounds of a criminal record might not be covered, as it could be argued that possession of a criminal record would not be a ‘personal attribute’. (However, note that the somewhat analogous concept of a ‘personal characteristic’ has been given an expansive definition in the case-law of the House of Lords and the European Court of Human Rights on Article 14 ECHR, the right to non-discrimination in the enjoyment of Convention rights.<sup>18</sup>) Outside of this, however, the width of the definition of equal opportunities contained in the Act appears

to reserve most if not all of the circumstances where forms of discrimination might be regulated.

However, nothing in the definition of equal opportunities in the Act would appear to prevent the Scottish Parliament combating some of the social factors that cause (or the knock-on effects of) discrimination and prejudice via alternative legislative or policy routes. For example, criminal law is a devolved function: therefore the Scottish Parliament could introduce new criminal offences dealing with domestic violence, which is often the product of entrenched patterns of sex discrimination and gendered power relations. It could also develop housing, educational, health care and promotional strategies to reduce instances of domestic violence and the attitudes that generate such violence.

Therefore, for example, the Parliament or Scottish ministers can make use of the criminal law, or the devolved education powers, or their ability to provide financial support for cross-community initiatives, or a variety of other possible legislative or policy routes to combat sectarianism.<sup>19</sup> For yet another example from a different context, the Scottish Parliament can use its devolved housing powers to impose enhanced accessibility standards upon house-builders across Scotland, thereby removing obstacles faced by many persons with disabilities.<sup>20</sup> It can also ensure appropriate health care provision for persons with disabilities with specific health needs.

However, it is clear from the wording of the 1998 Act that the 'prevention, elimination or regulation of discrimination' is the key element in determining whether a matter is reserved or not. If a measure is concerned with preventing or regulating discriminatory behaviour, then it falls into the reserved category. If it is indirectly concerned with addressing the casual factors or the knock-on consequences of discrimination or inequality, but does not regulate acts of discrimination as such, then it would appear not to be reserved as an equal opportunities matter.

In the debates at Committee stage on the Scotland Bill in 1997, John McAllion MP expressed concern that as housing and other matters came within the 'subject matter' of the Sex Discrimination Act and the other 'named' equal opportunity statutes, the Scottish Parliament would not be able to take action on housing accessibility and related issues. However, Henry McLeish MP, at the time the relevant UK Government spokesman, reassured him that this would not fall within the scope of reserved functions.<sup>21</sup> This is consistent with the analysis in the previous paragraph that whether a matter will be reserved or not will turn on

whether it involves the prevention or regulation of discrimination as such, not whether it can be indirectly linked to equality of opportunity. (Every devolved function could be seen as linked to equality of opportunity to some degree.)

Some ambiguity could be said to exist as to what exactly constitutes the 'prevention, elimination or regulation' of discrimination. Prohibiting incitement to racial hatred or sectarianism through the criminal law, for example, could at a stretch be seen as a form of 'regulation' of discrimination. However, from the specific reference to the anti-discrimination statutes, it is likely that the scope of the reserved matters linked to equal opportunities is confined to where some element of anti-discrimination law itself is in play. There would appear to be little to support an extremely wide or strained interpretation of the meaning of 'regulating discrimination'.

### **5.3 The devolved powers of the Scottish Parliament**

#### *5.3.1 The power to 'encourage'*

Nevertheless, the concept of 'regulation' may exercise a serious restraint on the limited devolved powers of the Scottish Parliament in this area. The Parliament as noted above can encourage equal opportunities, and 'in particular the observance of the equal opportunity requirements', but not by means of 'prohibition or regulation'. This devolved power to encourage equal opportunities has a wide scope: here, the width of the concept of 'equal opportunities' as defined in the 1998 Act is useful, as it allows the Scottish Parliament to promote observance of equality of opportunity across the full range of the different equality grounds set out in the definition.<sup>22</sup> As a result, it makes it possible for the Parliament to encourage the development of a particularly Scottish emphasis on equal opportunity principles which reflects Scottish social and cultural values.

Thus far, this 'soft power' has been used to establish the Equal Opportunities Committee of the Scottish Parliament and the Scottish Government's Equality Unit. It also has enabled the Scottish Parliament and Government to introduce various equality mainstreaming and promotional initiatives and allocate financial and other resources to encourage equal opportunities. This has facilitated an approach to promoting and mainstreaming equality that is appropriate to Scotland.

However, the Parliament under this exception cannot 'prohibit' or 'regulate' conduct, only encourage good behaviour. This is a highly ambiguous provision, especially as any form of state intervention, even

light-touch encouragement and inducement of good behaviour, could be seen as a form of regulation.

Presumably, this restriction on the devolved powers of the Parliament prevents the imposition of any legally binding obligations upon individuals or companies to refrain from discriminatory behaviour. However, it is unclear whether the inclusion of obligations to adhere to equal opportunities as part of an overarching set of regulatory standards qualifies as 'regulation' under the 1998 Act. This would not involve the direct prohibition of discriminatory behaviour. Therefore, on one possible interpretation of paragraph L2 of Schedule 5, no direct regulation would be involved and thus the devolved Parliament could make provision for equal opportunities requirements to be built into various sets of legally-binding standards. However, on another interpretation, the inclusion of equal opportunities within any form of regulatory framework could be seen as regulation for the purposes of the 1998 Act.

Concerns about falling foul of the reservation of devolved matters to the central UK Government appear to have resulted in the omission of equal opportunity benchmarks from the National Care Standards, which were drawn up by the Scottish Executive under the Regulation of Care Act 2001. As these Standards imposed regulatory requirements upon private and voluntary sector care providers which were to be monitored and supervised by the Executive, it appears as if the Executive took the view that imposing equality standards under this regulatory framework would constitute regulation and therefore lie outside of their functional competency.<sup>23</sup> (Note that the power conferred on the Scottish Parliament by the second leg of paragraph L2 to impose duties to give due regard to equality of opportunities is confined to public authorities and therefore could not have been used to impose obligations upon private care providers: see below.)

This indicates that real concern exists that if the Scottish Government or another devolved public authority acting as a regulatory body were to introduce equal opportunity requirements into its standard-setting frameworks which could constitute regulation of discriminatory acts or behaviour, this would fall foul of the Scotland Act. As a result, the reserved nature of equal opportunities may actually be blocking the mainstreaming of equal opportunities considerations within regulatory frameworks established by devolved authorities.

### *5.3.2 The duty-imposing power*

The only form of legally binding obligation that the Scottish Parliament appears to be able to impose is that provided for by the second leg of the exception to the scope of the reserved equal opportunities area, which permits the Parliament to impose duties on ‘any office-holder in the Scottish Administration, or any Scottish public authority...to make arrangements with a view to securing that the functions of the office-holder or authority are carried out with due regard to the need to meet the equal opportunity requirements’, or on ‘any cross-border public authority to make arrangements with a view to securing that its Scottish functions are carried out with due regard to the need to meet the equal opportunity requirements’.

This power enables the Parliament to impose duties on public bodies to give due regard to the importance of complying with equal opportunity laws, with Schedule 5 defining ‘equal opportunity requirements’ as ‘the requirements of the law for the time being relating to equal opportunities.’ It has been used to impose a series of such duties on Scottish authorities since 2000. Camilla Kidner of the Scottish Parliamentary Information Centre (SPICE) and the author of the progress review commissioned by the Equality and Human Rights Commission<sup>24</sup>, have listed the following devolved legislation as containing equal opportunities duties:

Standards in Scotland’s Schools etc Act 2000
The Housing (Scotland) Act 2001
Regulation of Care (Scotland) Act 2001
Mental Health (Care and Treatment) (Scotland) Act 2003
Local Government in Scotland Act 2003
The Public Appointments and Public Bodies etc (Scotland) Act 2003
Commissioner for Children and Young People (Scotland) Act 2003
National Health Service Reform (Scotland) Act 2004
Anti-Social Behaviour etc (Scotland) Act 2004
Transport (Scotland) Act 2005
The Charities and Trustee investment (Scotland) Act 2005

Further and Higher Education (Scotland) Act 2005
Police, Public Order and Criminal Justice (Scotland) 2005
The Planning (Scotland) Act 2006

Whereas the public sector equality duties currently imposed by Westminster legislation on all British public authorities relate only in respect of race, disability and gender equality, the equal opportunities duties imposed on some Scottish public authorities by the Scottish Parliament have been largely based on the wider and more inclusive Schedule 5 definition of equal opportunities.

For example, s. 21 of the Further and Higher Education (Scotland) Act 2005 requires the newly established Scottish Further and Higher Education Funding Council to 'exercise its functions in a manner which encourages equal opportunities and in particular the observance of the equal opportunity requirements', with 'equal opportunities' defined with reference to the definition of the term set out in Paragraph L2 of Schedule 5 of the 1998 Act.

However, it should be noted that duties imposed under this power are required to focus on ensuring that functions are carried out with due regard to the need to comply with equal opportunity requirements, that is, with existing anti-discrimination law. The Scottish Parliament has not been given the power to impose positive duties on public authorities which take the form of new legally binding obligations to refrain from certain types of discriminatory behaviour or to adopt substantive steps to give effect to equal opportunity policies which go beyond the scope of existing equality law. As a consequence, the equal opportunities duties that the Scottish Parliament can impose are in important ways more limited in scope than the positive equality duties that the UK Parliament has imposed on British public bodies. The UK Parliament can impose new substantive legal requirements in the equal opportunities field; the Scottish Parliament can only impose duties which ensure 'due regard' is given to existing equal opportunity law.

This also means that latent ambiguities exist here as elsewhere as to the nature and extent of the duties that the Scottish Parliament can impose upon devolved public authorities. For example, if the Parliament decided to require devolved public authorities to carry out mandatory equal pay audits, this could be seen as the imposition of a duty designed to ensure public authorities are giving due regard to their obligations under the

equal pay legislation, and therefore as a measure that comes within the scope of devolved competency under paragraph L2. However, the imposition of mandatory pay audits could also be seen as imposing a new 'equal opportunities requirement' and therefore as falling outside devolved competency.

Much would depend on whether mandatory pay audits are classified as a regulatory measure designed to ensure compliance with equal pay law (and therefore coming within devolved competence), or as a new substantive legal obligation which is additional to existing equal opportunities legislation and therefore a new 'requirement'. A strong case can be made for the former view, as pay audits can be seen as tools designed to ensure better compliance with equal pay law rather than as substantive non-discrimination requirements. However, the fact that some ambiguity nevertheless exists here illustrates the problems that lurk within the current devolved settlement.

In the debates at Committee stage on the Scotland Bill in 1997, an amendment was proposed by Roseanna Cunningham MP which would have enabled the Scottish Parliament to require public bodies to make arrangements with a view to securing that their functions are carried out with due regard to the principle that there should be equality of opportunity for all people. This amendment was rejected, with Henry McLeish MP, at the time the relevant Government minister, emphasising that such a wide duty-imposing power would go well beyond the power given to the Scottish Parliament in the Bill, which he described as enabling 'the Scottish Parliament to establish requirements relating to the observance by public bodies of the legal requirements of equal opportunities that may be in place.'<sup>25</sup>

Therefore, the duty-imposing power given to the Parliament by the second exception to the general reservation of devolved matters is again limited in scope. This devolved power allows the Scottish Parliament to impose particular equal opportunities obligations on Scottish public authorities that can encourage the development of a heightened focus on equality in the Scottish public sector. However, this useful power is limited and uncertain in scope.

#### **5.4 The Equality and Human Rights Commission as a reserved body**

The reserved nature of equal opportunities in general is also reflected in how Paragraph 3(2)(c) of Part III of Schedule 5 originally listed the Equal Opportunities Commission, the Commission for Racial Equality and the

Disability Rights Commission as ‘reserved bodies’, over which the Scottish Parliament had no competency. The Scotland Act 1998 (Modifications of Schedule 5) Order 2006 (S.I. 2006 No. 609) now similarly lists the Equality and Human Rights Commission as a reserved body.

It might have been possible to give the Scottish Parliament competency to confer functions upon the Equality and Human Rights Commission or modify its functions insofar as they related to devolved matters. Maintaining equal opportunities as a reserved function does not necessarily require that public bodies playing an enforcement/promotional role should also be classified as reserved bodies in respect of their devolved functions. However, as the Explanatory Notes to the Scotland Act 1998 note, the general reservation of equal opportunities made it ‘questionable whether or to what extent the Scottish Parliament might have been able to legislate’ with respect to the Equality and Human Rights Commission and its predecessor equality commissions.<sup>26</sup> In any case, the Equality and Human Rights Commission has been classified as a reserved body under the existing devolution settlement by the statutory provisions mentioned in the previous paragraph, reflecting the limited scope of action of the devolved authorities in the field of equal opportunities.

### **5.5 The conferral of reserved equal opportunities functions upon Scottish Ministers**

However, it should be noted that the reserved status of equal opportunities and the Equality and Human Rights Commission does not mean that Scottish ministers (as distinct from the Scottish Parliament) are wholly deprived of any functions that relate to equality and non-discrimination. As noted above, primary legislation passed by the UK Parliament that concerns reserved matters may nevertheless confer functions upon the Scottish Ministers.

Thus for example, paragraph 2(3) of Part 1 of Schedule 1 to the Equality Act 2006 provides that Scottish ministers must be consulted before the relevant UK Minister appoints the ‘Scottish Commissioner’, the member of the Equality and Human Rights Commission with special knowledge about ‘conditions in Scotland’. In addition, the legislation imposing the positive equality duties on British public authorities gives the Scottish ministers the power to impose specific duties on Scottish and cross-border bodies in respect of their devolved functions, in order to ensure implementation of the general duties to promote equality on the grounds of race, gender and disability<sup>27</sup> (which required the Scottish Parliament

to pass a Legislative Consent Motion under the Sewel Convention, as it affected the devolved matter of promoting equal opportunities.<sup>28)</sup>

Orders imposing such duties are laid before the Scottish Parliament. The Parliament would appear to have the power to vote to annul these orders, as orders made by the Scottish Government are classified as 'Scottish Secondary Instruments' (SSIs) which may be approved or annulled by the Parliament. In addition, the Parliament may exercise scrutiny over their contents and the approach of the Scottish Government to the positive equality duties through its scrutiny role, a task performed in this context by the Equal Opportunities Committee.<sup>29</sup>

This indirect capacity of the Scottish Parliament to regulate the exercise by Scottish ministers of reserved powers conferred upon them by Westminster enables the devolved Scottish institutions to co-operate in developing a distinct Scottish approach to implementing the positive duties. For example, the SSIs setting out the specific duties imposed on Scottish public authorities under the disability and gender equality duties include a requirement for Scottish ministers to report to the Scottish Parliament on progress every three years.<sup>30</sup> In addition, the SSI setting out the specific duties imposed on Scottish public bodies under the gender duty requires that those who employ 150 persons or more must prepare equal pay statements, a requirement which is not imposed in the equivalent English statutory instrument.<sup>31</sup>

In addition, the Scottish Parliament could presumably, as part of its general power to scrutinise the performance of devolved public authorities, examine how ministers and other devolved authorities had been implementing the requirements of the duties when it receives these triennial reports, even if its regulatory powers and general competence in this area are limited by paragraph L2 of the 1998 Act. This allows the Parliament to maintain a scrutiny role over how the Scottish Government is exercising the reserved powers conferred upon it, even if the Parliament has limited direct competence in this area.

(Note that the orders governing the imposition of specific positive gender and disability equality duties on Scottish public authorities were not introduced by the Scottish ministers on foot of their devolved functions or through exercising powers conferred upon them by the Scottish Parliament exercising its duty-imposing powers under paragraph L2 of the 1998 Act. As the previous paragraphs have made clear, these Orders were introduced via the exercise of reserved functions conferred by the UK Parliament upon Scottish ministers with the legislative consent of the Scottish Parliament: the Orders were presumably laid

before the Scottish Parliament on the basis that SSIs must be subject to scrutiny by the devolved Parliament to whom Scottish Ministers are accountable.

Thus, the imposition of legal obligations on certain public authorities to produce 'equal pay statements' via the specific duties imposed by Scottish ministers under the positive gender duty did not give rise to any questions as to whether this came within devolved competency, as the ministers were exercising a reserved function that had been conferred upon them by the UK Parliament, not a devolved function subject to the uncertain limits set out in paragraph L2 of the 1998 Act. In approving the inclusion of this requirement in the relevant SSI, the Scottish Parliament appear not to have been legislating in this field as such, but rather were approving how the Scottish Government were exercising their functions under its general scrutiny powers. The distinction is a technical one, but nevertheless of importance.)

## **6. The need for clarity – equal opportunities debates in the Scottish Parliament**

The uncertainty that surrounds the scope of devolved powers in the area of equal opportunities can be illustrated by the discussion in the Equal Opportunities Committee and in the Parliament itself on three LCMs or Sewel motions that have been passed in recent years in respect of equal opportunities legislation proposed by the UK Parliament.

In 2005, the Parliament passed two LCMs relating to two Bills which were passing at the time through the Westminster Parliament, which subsequently became the Disability Discrimination Act 2005 and the Equality Act 2006 respectively. The subject matter of both these motions was initially discussed in the Equal Opportunities Committee. Subsequently the motions were passed by the Parliament, with a brief debate taking place on the occasion of the approval of the LCM concerning the Equality Bill on 26<sup>th</sup> October 2005. (The LCM relating to the Disability Discrimination Bill was approved without debate on 24 February 2005.)

Both LCMs were necessary under the Sewel Convention as the amendments to existing anti-discrimination and equal opportunities law introduced by both pieces of legislation affected matters which came within devolved competency. In particular, the positive disability equality duty introduced by the Disability Discrimination Bill and the positive equality duty introduced by the Equality Bill touched upon devolved functions in several different ways. These duties were imposed upon Scottish public authorities and would impact upon how these authorities carried out their functions in devolved areas of competency such as education and health. The legislation also made provision for the conferral of reserved powers upon Scottish ministers to make provision for the imposition of specific equality duties upon Scottish devolved public authorities (as previously discussed above), and to exercise certain functions in respect of the Equality and Human Rights Commission, which was established by the Equality Act 2006. As a result, the Sewel Convention required the Scottish Parliament to indicate its consent to these legislative reforms.

Both LCMs are worded in similar terms. The motion in respect of the Disability Discrimination Bill is phrased as follows:

‘That the Parliament agrees the principles contained in the provisions of the Disability Discrimination Bill including the power to impose duties on public authorities so far as those provisions relate to matters within the legislative competence of the Scottish Parliament or confer functions on the Scottish Ministers.’<sup>32</sup>

The motion in respect of the Equality Bill is similar:

‘That the Parliament agrees the principles contained in the provisions of the Equality Bill, including the power to impose duties on public authorities, so far as those provisions relate to matters within the legislative competence of the Scottish Parliament or confer functions on the Scottish Ministers, and agrees that those provisions should be considered by the UK Parliament.’<sup>33</sup>

Neither LCM states in precise terms how the proposed UK legislation, and in particular the introduction of the positive equality duties, will affect matters that come within devolved competency. It was clear and non-controversial that the conferral of reserved powers upon Scottish ministers and the proposed regulation of areas such as education and housing would affect devolved responsibilities. However, the LCMs give no guidance on how exactly the proposed UK legislation will affect the existing legislative competency of the Scottish Parliament in the equal opportunities field. In addition, in the discussion on the draft motions before the Equal Opportunities Committee on both motions, and the debate on the floor of the Parliament on the Equality Bill LCM, ministers did not attempt to set out the extent to which the introduction of the duties via UK legislation would overlap with the Scottish Parliament’s limited competencies in the area of equal opportunities.

This resulted in a confused debate on the floor of the Parliament on the Equality Bill LCM with different MSPs taking very different views of the extent to which the proposed UK legislation affected matters that came within the existing equal opportunities competency of the Scottish Parliament. Margaret Mitchell (Central Scotland, Conservative Party) took the view that ‘...the content of the Equality Bill lies predominantly outwith the Scottish Parliament’s legislative competence...’, presumably taking the view that the Scottish Parliament had extremely limited competency in the equal opportunities field under para. L2 of Sch. 5 of the 1998 Act.<sup>34</sup> In contrast, Carolyn Leckie (Central Scotland, SSP) suggested that this Sewel motion involved the Scottish Parliament ‘giving away’ some of its devolved powers, thereby apparently assuming that the Parliament under para. L2 had relatively wide-ranging equal

opportunities competency when it came to imposing duties upon public authorities.<sup>35</sup>

A similar assumption seemed to underlie the approach adopted by Christine Grahame (South of Scotland, SNP), who appeared to assume that not only did the Scottish Parliament already have the power under para. L2 of Sch. 5 to impose wide-ranging 'new' equality duties on public authorities that went beyond securing compliance with existing duties, but also that the provisions of para. L2 already imposed distinct equal opportunities requirements upon Scottish devolved authorities:

My and my party's view is that that process will interfere with the devolution settlement. For example, the bill will impose a duty on public authorities to promote gender equality, but my understanding is that such a duty already exists in Scotland under the terms of schedule 5 to the Scotland Act 1998. Therefore, the proposal interferes with the devolution settlement...the processes and practicalities of the bill will take power away from the Parliament in areas that are already devolved and in which we are putting clear blue water between us and Westminster... There are no clear borders between reserved and devolved issues, especially in the areas with which the bill deals...the tide is moving towards Westminster taking back from the Parliament powers that were hard fought for.<sup>36</sup>

In contrast, the then Deputy Minister for Communities, Johann Lamont MSP, appeared to adopt a narrower reading of para. L2, criticising Ms Grahame for not seeming to 'be able to distinguish between promoting equal opportunities and laying down a duty', thereby emphasising the Parliament's limited ability to impose statutory duties in the equal opportunities field.<sup>37</sup>

This parliamentary exchange of views illustrated deep uncertainty as to the extent to which the Scottish Parliament could legislate in the area of equal opportunities, and in particular the extent to which it could impose duties upon public authorities to comply with equal opportunities requirements. The discussion on the draft LCMs for both Bills in the Equal Opportunities Committee shed little light on this issue: the Committee in its deliberations and evidence-gathering concentrated upon the key policy issues, rather than examining the extent to which the proposed legislation overlapped with existing devolved competencies.<sup>38</sup>

The legislative memoranda that accompanied the Disability Discrimination and Equality Bill LCMs give a little more guidance as to

the presumed scope of devolved functions in the area of equal opportunities.<sup>39</sup> Both memoranda emphasise the limited competency of the Scottish Parliament in the field of equal opportunities. For example, the memorandum accompanying the Equality Bill LCM notes at para. 3 that the Bill is ‘predominantly concerned with matters outwith the legislative competence of the Scottish Parliament’, and in para. 4 that ‘matters dealt with in the Bill are, as matters relating to equal opportunities, almost entirely reserved by Schedule 5 of the Scotland Act 1998’.

Both memoranda then proceed to examine the limited area of overlap, noting that Scottish ministers have the devolved power to impose specific duties upon Scottish public authorities under the second leg of the exception in para. L2 to ensure compliance with the positive gender equality duty. Thus, para. 10 of the Equality Bill memorandum states that:

In relation to the gender duty, what is within devolved competence is the power for the Scottish Ministers to impose specific duties in secondary legislation on Scottish public authorities, or cross border public authorities in relation to their Scottish functions, to ensure that those functions are carried out with due regard to the need to meet that duty. This would fall within devolved competence under the terms of the second exception to the equal opportunities reservation in schedule 5 to the Scotland Act.

Para. 13 of this memorandum then states that ‘[T]he general duty to promote equality of opportunity between men and women and the elimination of unlawful discrimination will therefore impact on devolved areas of responsibility and the powers in [clause] 76B [of the proposed Equality Bill] fall within the terms of the exception to the reservation [in para. L2].’ Para. 7 of the Disability Discrimination Bill memorandum is phrased in similar terms.

Insofar as this suggests that Scottish ministers have the devolved power to require Scottish public authorities to take particular steps to comply with substantive equal opportunities requirements imposed by the UK Parliament, this is a relatively non-controversial reading of para. L2. However, what is not clear from this statement is whether the memoranda are suggesting that Scottish ministers have the devolved power to impose specific duties that impose new requirements upon public authorities, or whether this power is limited to ensuring better compliance with the substantive requirements set out in Westminster legislation.

In other words, the memoranda do not make clear whether Scottish ministers are considered to have the devolved power to impose supplemental or additional specific duties (such as imposing equal pay audit requirements) to reinforce any equality duties imposed by Westminster, as distinct from the reserved power that the proposed UK legislation would confer upon them. The memoranda also do not clarify what type of specific duties can be imposed under the devolved competencies of the Scottish Parliament and Scottish ministers under the Scotland Act.

However, the text of both memoranda appears to suggest that the devolved powers in this area are quite wide, by stating that the introduction of the general duty (as distinct from the conferral of reserved functions upon Scottish ministers to introduce specific duties) impacted on devolved equal opportunity functions. This indicates that the drafters of the memoranda considered that the devolved authorities have the power to introduce duties equivalent to the general gender equality duty, which is a broad interpretation of the second leg of the exception, the 'duty-imposing power', set out in para. L2. However, beyond this subtle clue, the 2005 LCMs yield little firm guidance on the scope of devolved powers in the field of equal opportunities.

Recently, the LCM for the Equality Bill currently being debated in the UK Parliament has been published, along with a supporting memorandum.<sup>40</sup> Both have been examined by the Subordinate Legislation and Equal Opportunities Committees of the Scottish Parliament.<sup>41</sup> There is an interesting contrast between this LCM and its accompanying memorandum and the 2005 LCMs. The 2009 LCM is more precise: it is also more cautiously phrased, indicating that serious uncertainty still surrounds the scope of devolved equal opportunity powers.

For example, the text of the LCM is as follows:

That the Parliament agrees that the relevant provisions of the Equality Bill, introduced in the House of Commons on 24 April 2009, to make provision within the legislative competence of the Parliament and to alter the executive competence of Scottish ministers in respect of the public sector duty to promote equality, the hearing of disability discrimination school education cases by the Additional Support Needs Tribunals for Scotland, the arrangements for educational endowments, the power to prescribe qualification authorities in relation to equality, and transitional arrangements for single sex educational establishments, should be considered by the UK Parliament.

This is much more precise than the wording of the previous LCMs, which spoke in general terms of the UK legislation impacting upon devolved competency. It is also notable that this LCM makes it clear that the proposed Equality Bill will confer reserved powers upon the Scottish Ministers. This point is reiterated at paras. 8-10 of the accompanying memorandum, which avoids making any reference to the scope of devolved powers in the area of equal opportunities.

This LCM therefore provides greater clarity in making it clear that the proposed UK Bill will confer reserved powers upon the Scottish Ministers, thereby altering their competency. The previous LCMs and accompanying memoranda were more ambiguous and vague, failing as they did to clarify whether the powers to impose specific duties conferred upon Scottish ministers were reserved or devolved in nature. The 2009 LCM also appears to reflect the limited scope of the Scottish Parliament's devolved competency in the equal opportunities field, by clearly stating that only a few precise issues affected by the proposed UK legislation gave rise to the need for a Sewel motion.

However, the inherent uncertainty that continues to exist in this area is highlighted by the very useful evidence given by Colin Brown of the Scottish Government Legal Directorate to the Equal Opportunities Committee on the question of how the introduction of a single general equality duty, as proposed by the UK Bill, would impact on the devolved competency of the Scottish Parliament.<sup>42</sup> This evidence notes the complexity of the equal opportunities provisions in Schedule 5 of the Scotland Act, and also emphasises the lingering uncertainty that exists as to (a) the meaning of 'equal opportunities' and the width of the reserved functions in this area, and (b) the scope of the devolved functions of the Scottish Parliament under the 'encouragement' and 'duty-imposing' powers. Colin Brown comments as follows:

'In general, equal opportunities are a reserved matter but, as members appreciate, there are exceptions to that. There is quite a bit of legal underpinning and some complexity beneath it. Section L2 of schedule 5 to the Scotland Act 1998 provides a definition of equal opportunities. That definition has certain restrictions within it, such as

'the prevention, elimination or regulation of discrimination'

on specific grounds. The public sector equality duty includes a list of protected characteristics that does not coincide exactly with the list that is in the Scotland Act 1998 and refers to various needs

that, again, do not coincide exactly with what is in the 1998 act. Therefore, we consider that elements of the duty could be created within devolved competence...It makes provision that could be seen to be within the Parliament's legislative competence. It does not alter that competence.'

This is interesting for several reasons. It is apparent that uncertainty exists as to the extent to which the Scottish Parliament lacks devolved competency outside of the areas of discrimination law that are clearly classified as reserved functions in Schedule 5. The proposed new general equality duty imposes duties on public authorities to promote good relations between different groups, and to assess how to meet the needs of different groups in an equal and non-discriminatory manner. This evidence suggests that such functions may come within devolved competency, highlighting again that the distinction between equal opportunities and other areas of government activity is not clear.

In the discussion that followed within the Equal Opportunities Committee, there was general consensus that the duty to be imposed by the Equality Bill upon certain listed English public authorities to promote socio-economic equality in the exercise of their strategic functions would affect devolved competencies if extended to Scotland. Although this would touch on issues of 'equality', it did not seem to come within the reserved 'equal opportunities' area as set out in Sch. 5, as it did not concern or closely relate to the subject matter of anti-discrimination law as such. This would appear to be correct. However, it again serves to highlight the inherent uncertainty that exists in this area.

Therefore, even before the scope of the 'encouragement' and 'duty-imposing' powers are considered, it is apparent that the borderline between reserved and devolved powers in the area of equal opportunities and equality law in general remains unclear. The Equal Opportunities Committee noted the evidence given on this issue and drew it to the attention of the Parliament at large. However, latent ambiguity continues to haunt this area of the devolved settlement.

## **7. Should equal opportunities be devolved?**

Given this uncertainty, does a case exist for the revision of the existing devolution settlement in this area? In the debates at Committee stage on the Scotland Bill in 1997, an amendment was proposed by Roseanna Cunningham MP which would have made equal opportunities a fully

devolved matter (by deleting it from the list of reserved matters). This amendment was supported by SNP, Plaid Cymru and Liberal Democrat MPs, on the basis that making equal opportunities an area of devolved competency would permit the Scottish Parliament to introduce its own equality legislation dealing with particularly Scottish issues such as sectarianism. In addition, Roseanna Cunningham MP and others argued that it would enable the Scottish Parliament to introduce legislation that went further than existing UK equality legislation.

However, this amendment was overwhelmingly defeated by the votes of Conservative and Labour MPs. In the course of that debate, Henry McLeish MP, responding for the UK Government, argued that devolving equal opportunities 'would undermine the level playing field for business and individuals in employment and other matters in the UK, and clearly the Government cannot accept that.'<sup>43</sup> In other words, the justification underlying the decision to make equal opportunities a reserved area is the concern to ensure a common regime for individuals and businesses across the UK, and in particular to ensure that individuals enjoy the same protection under anti-discrimination law.

Equal opportunities are therefore treated within the current devolution settlement as falling into the second category of reserved matters identified by the Scottish Government in 'Choosing Scotland's future' and the Calman Commission in its first report – that is, issues that involve the efficient and fair economic and social functioning of the UK as a single state, and therefore which are reserved to the UK Parliament.

An argument could also be advanced that as EU legislation is so important in the equal opportunities context, and the UK ministers are primarily responsible for negotiating and implementing EU directives, it makes sense to treat equal opportunities as a reserved matter. However, it should be noted that Scottish ministers implement EU legislative obligations in other contexts. Therefore, the argument that the link between equal opportunities and EU law makes it more appropriate to treat it as a reserved matter is probably not sufficient in and of itself to be a primary justification for excluding it from devolved competency.

Another argument which has been offered to support the classifying of equal opportunities as a reserved function relates to the close link between discrimination law and employment law. Paragraph H1 of Schedule 5 provides that 'employment rights and duties and industrial relations' are reserved matters, including the subject-matter of legislation such as the Transfer of Undertakings (Protection of Employment)

Regulations 1981, the Trade Union and Labour Relations (Consolidation) Act 1992, the Employment Tribunals Act 1996, the Employment Rights Act 1996, and the National Minimum Wage Act 1998. Employment law was reserved on the basis of similar logic as equal opportunities, because it was considered fair and efficient to have a common regime in place throughout the UK. However, discrimination law is closely intertwined with some elements of employment law. For example, the system of employment tribunals regulated by the Employment Tribunals Act 1996 is used to adjudicate discrimination law claims arising in the context of employment. Therefore, the case has sometimes been made that employment rights and equal opportunities should be treated in an analogous manner, and that both matters should be classed as reserved to ensure a level playing field across the UK.

However, the case is increasingly made that the question of responsibility for equal opportunities should be re-opened, and serious consideration should be given to re-classifying equal opportunities as a devolved matter, either in whole or in part, and either in combination with employment law or on its own.

In paragraph 2.24 of 'Choosing Scotland's future', the Scottish Government suggests that 'Scotland could also have full responsibility for equal opportunities legislation and enforcement agencies... This would allow Scotland to deal appropriately with those issues which particularly affect Scotland, such as sectarianism.' Evidentiary submissions to the Calman Commission on Scottish Devolution from an assortment of civil society organisations and public authorities made similar arguments.

For example, the charity Ecas argued that devolved Scottish legislation 'does not always dovetail well' with the reserved provisions of the Disability Discrimination Act 1995.<sup>44</sup> To illustrate this, Ecas gave the example of their experience of receiving conflicting advice from Scottish transport agencies and reserved bodies on the stance that had been adopted by regulators in Scotland in respect of how to reconcile conflicting demands for wheelchair spaces and bicycle racks on trains. Ecas also argued that as areas such as education, health and social care, and sport and leisure that generate significant issues for persons with disabilities were devolved, an 'artificial split' existed between these devolved matters and the reserved area of equal opportunities, which was inhibiting the creation of coherent and effective policy.

The Scottish Council for Voluntary Organisations (SCVO) suggested that Scotland's particular demographics, wide spread of rural space and

issues with sectarianism could justify the devolution of equal opportunities<sup>45</sup>. Similar arguments were made by the Educational Institute of Scotland,<sup>46</sup> City of Edinburgh Council,<sup>47</sup> UNISON,<sup>48</sup> and others. The Law Society of Scotland argued that discrimination law should be devolved, because of its close interrelations with devolved issues such as incapacity, mental health and vulnerability.<sup>49</sup> Stonewall Scotland pointed out that equal opportunities were reserved but family law was devolved, again creating uncertainty and an artificial split.<sup>50</sup>

Additional arguments could be made in favour of devolving responsibility for equal opportunities. When the Scotland Act was passed in 1998, the legal framework in place throughout Britain was primarily concentrated upon the 'prevention, elimination and regulation of discrimination', with the view of ensuring equality of treatment for all groups. However, since 1998, the introduction of positive equality duties throughout Britain, and the introduction of equal opportunities duties in Scotland, Wales and London, has changed the legal landscape.

The positive duties are designed to promote substantive equality through imposing obligations on public authorities to take a proactive approach to eliminating disadvantage. The Equalities Review report,<sup>51</sup> published in 2007, has similarly called for a focus on different aspects of equality than just equality of treatment, including equality of outcomes, process and autonomous rights-based status. The Equality Bill 2009 contains provisions for a wide-ranging equality duty to be imposed on all public authorities, as well as for a duty to promote socio-economic equality to be imposed on certain public authorities in respect of their strategic functions. Therefore, the argument could be made that the approach adopted in the 1998 Act of treating the regulation of equal opportunities as largely a matter of prohibiting discrimination is now outdated. It may unduly restrict the ability of the Scottish Parliament and Scottish ministers to develop a more positive approach to promoting equality that would best suit the particular circumstances of Scotland and the wide definition of equal opportunities set out in Schedule 5.

Of course, the contrary case could still be argued that there is a need for a UK-wide level playing field in an area of law, such as equal opportunities, which touches on fundamental rights. It also could be argued that the substantial expansion of discrimination law since 1998 already puts a legal framework into place to deal with Scottish-specific issues. For example, the prohibition of religious discrimination which the UK Parliament introduced in the Employment Equality (Religion or Belief) Regulations 2003 and the Equality Act 2006 puts into place protection against religion-based sectarianism. The Scottish Parliament

could therefore use its 'encouragement' power to promote compliance with this legislation.

In addition, it should also be noted that the question of the status of equal opportunities is not just a simple matter of determining whether it should be treated as a devolved or reserved function in its entirety. In its evidence to the Calman Commission, the Scottish Trade Union Congress (STUC) suggested that the Equality and Human Rights Commission could be provided with 'stronger and more autonomous enforcement powers' in Scotland. This proposal raises the question of whether enforcement powers in the area of equal opportunities could be devolved, or whether the functions of the Equality and Human Rights Commission that relate to devolved matters could come within devolved competency. Is it possible to separate out enforcement provisions from the rest of equal opportunities law? Might other areas of equal opportunities law and policy be capable of being separated out and devolved? A related issue concerns the close link between equal opportunities and employment law. Is it possible to devolve some or all of equal opportunities, if employment law is kept as a reserved function?

These are all complex questions, which may involve difficult choices of law and policy. However what is clear is that there is, at a minimum, a need for greater clarity as to the scope of the equal opportunities powers that are currently devolved. Research commissioned by the Equality and Human Rights Commission indicates that uncertainty as to what constitutes 'regulation' and the apparently limited range of devolved functions in this area appear to be generating confusion among stakeholders and a reluctance to take action on the part of Scottish public authorities.<sup>52</sup> As a result, there is a clear need to examine the potential options for adjusting and clarifying the place of equal opportunities within the devolved settlement: at present, it represents one of the most problematic grey areas within the current framework.

## **8. The options for adjusting the place of equal opportunities within the devolved settlement**

In examining the options for modifying and clarifying the existing arrangements for allocating responsibility within the devolved settlement for equal opportunities, it is necessary to take into account the evolving debate surrounding devolution and the future constitutional status of Scotland. Therefore, as mentioned in the introduction to this paper, it makes sense to consider where equal opportunities might 'fit' in the following three situations.

- (a) The existing devolution settlement is maintained in its current form.
- (b) Further devolution of powers and functions takes place to the Scottish Parliament.
- (c) Scottish independence (within the EU).

### **8.1 Equal opportunities within the existing devolution settlement**

As mentioned above, the devolution settlement is not fixed. Sections 30 and 63 of the 1998 Act, taken in conjunction with the Sewel Convention and the use of Legislative Consent Motions (LCMs), make it possible to make incremental adjustments to the devolution settlement without having to reshape the fundamentals of the Scotland Act. The informal mechanisms such as concordats that are used to guide day-to-day interaction between the UK and Scottish departments can also be used to fix certain problems that arise.

Therefore, even if equal opportunities remain classified as a reserved function, these mechanisms could be used to address some of the uncertainty that currently surrounds this area. In particular, they may prove useful in clarifying what Scottish public authorities, including Scottish ministers and even the Scottish Parliament, can do in the equality field.

To begin with, there is a case for recognising equal opportunities as a unique area, where, notwithstanding its reserved status, the Scottish Parliament and Scottish ministers are given special powers to encourage respect for equality and to impose duties on devolved public authorities. Given that equal opportunities is therefore a complex area where reserved and devolved functions are closely intertwined, the

argument could be made that greater use could be made of sections 30 and 63 of the 1998 Act to transfer specific responsibilities in the equal opportunities field to the Scottish Parliament and Government respectively. Any such transferred powers and functions would be clearly exercisable by the devolved bodies, and therefore the opaque constraints imposed on the limited powers currently exercised by the Scottish bodies in the equal opportunities field would be circumvented.

For example, s. 63 could be used by UK ministers to transfer the function of framing equal opportunity standards to be applied in care home regulation to the Scottish Ministers, if the UK Parliament approved and the Scottish Parliament was happy to pass a LCM. S. 30 could even be used to transfer the power to impose positive equality duties on Scottish public authorities to the Scottish Parliament, again if both Parliaments approved. Such use of the inherent flexibility of the devolution settlement would allow for ad hoc and incremental adjustments on an issue-by-issue basis to the existing devolution settlement where necessary to ensure the effective implementation of equal opportunities standards.

However, the Order in Council procedure required to transfer powers and functions under sections 30 and 63 is unwieldy and time-consuming. If political agreement was forthcoming, it could be more efficient if future Westminster legislation on equality issues would follow the model of the current statutory provisions governing the positive equality duties, and with the legislative consent of the Scottish Parliament confer the function of framing the specific equality regulations that would apply in Scotland on the Scottish Ministers. Again, such direct conferral of powers by the UK Parliament would circumvent some of the current limitations of the existing devolution framework. The Scottish Parliament would also be able to exercise scrutiny over how the Scottish ministers performed this function, even if, as previously noted, there is a need to clarify and enhance how parliamentary scrutiny is exercised in situations where Scottish ministers are performing a mixture of devolved and reserved functions, or just exercising a reserved power that has been conferred upon them.

The Equality Bill currently proceeding through the UK Parliament could provide the perfect opportunity for such a transfer. This could transfer specific functions to the Scottish ministers (subject to the consent of the Scottish Parliament), such as the power to frame the specific equality duties that will apply to Scottish public authorities. The Bill could also give Scottish ministers the ability to amend or adjust the proposed new codified structure of discrimination law in defined ways. For example, the

new Bill is expected to impose a single general equality duty upon public authorities throughout Britain: Scottish ministers could therefore be given the power to introduce the specific duties that would govern how public authorities implement this duty, and could also confer the power upon Scottish ministers to amend the general equality duty so as to require devolved authorities to take steps to eliminate sectarianism.

Of course, there may be political resistance to any extensive transfer of powers and functions to the Scottish Parliament and ministers. In addition, there are constitutional concerns about transferring extensive legislative competency to the executive branch (meaning in this context the Scottish Ministers), especially given the need to ensure greater clarity as to when and how the Scottish Parliament can scrutinise how Scottish ministers exercise reserved powers and functions.

This means that there may be political and legal limits to the extent to which the flexibility of the devolution settlement can be used to circumvent the rigid existing framework governing the allocation of responsibility for equal opportunities. A comprehensive solution may require a more substantial modification of the devolution settlement as it currently stands.

However, it may also be worth giving some consideration to whether the informal mechanisms for ensuring the smooth working of the devolution settlement could be used to smooth over some of the difficulties generated in the area of equal opportunities. Given the complex relationship between reserved and devolved powers in this area, it could be argued that there is a need to ensure that UK and Scottish ministers work closely together when equality issues are at stake.

For example, it could be beneficial for the Equal Opportunities Committee of the Edinburgh Parliament to devote some time to examining the interaction between UK and Scottish departments in this area, and the extent of consultation and dialogue that goes on in practice when equal opportunities are involved. (The recent report by the European and External Relations Committee on the Transposition of EU Directives might provide a suitable model: see above.) Such an inquiry could also explore the limits of the powers of the Scottish Parliament in the equal opportunities context, and perhaps probe the question of what constitutes 'regulation' in this context.

It might also be worth giving some consideration to whether it would be possible or desirable to work towards the framing of a Concordat on Equal Opportunities, which might provide a clear framework for greater

joint co-ordination in this area by both governments. (This time, the Concordat on Co-ordination of European Union Policy might provide a useful model.) This will not solve or even address all the problems that arise in the equality context, but at the administrative level, it may yield some useful results.

## **8.2 Further devolution**

For a substantial change in the existing situation, the possibility of adjusting the status of equal opportunities as part of an overall reform of the devolution settlement should be considered. As discussed above, the possibility of such a comprehensive overhaul of Scottish devolution forms or has formed the subject of consultation by both the Scottish Government and the Calman Commission. Therefore, it makes sense to consider the various ways in which the status of equal opportunities might be adjusted.

### ***8.2.1 Devolving equal opportunities***

To start with, one option that, as noted above, is receiving reasonably extensive support is for equal opportunities to be removed from the list of reserved functions, by deleting paragraph L2 of Schedule 5. This would effectively enable the Scottish Parliament to pass equal opportunities legislation which would apply throughout the full range of devolved matters, that is, in areas such as housing, education, policing, local government, health and social care, sports and the arts and so on where the Parliament has legislative competency. Such legislation could involve the prohibition or regulation of behaviour, with the Parliament amending and adjusting the pre-devolution discrimination legislation to fit Scottish conditions.

However, equal opportunities legislation enacted by the Scottish Parliament would not apply in the field of social security, immigration and nationality and other areas which might remain reserved. This might generate some potentially problematic areas of overlap in areas such as transport, where overlapping competency exists. However, this would not itself be an insurmountable problem. Whether UK equality law or Scottish equality law applied would depend on the status (devolved or non-devolved) of the underlying subject-matter. Different federal and state anti-discrimination laws co-exist together throughout the USA, Canada and Australia.

### ***8.2.2 The relationship between employment law and equal opportunities***

A very important question would be whether employment law and industrial relations remained reserved matters. On the one hand, if employment and industrial relations are also removed from the list of reserved functions, then Scottish equality law would be capable of applying to the crucial area of employment. It would also enable the Scottish Parliament to introduce legislation amending or modifying existing mechanisms for enforcing discrimination law. It could, for example, establish a distinct system of equality tribunals on the Irish model, which would adjudicate all equality claims at first instance.

However, if employment and industrial relations law remain a reserved function, then the issue may become more complex. Different views might exist as to whether Scottish equal opportunities law would apply in employment and the workplace in such a situation. It could be argued that if the current reserved status of 'employment rights and duties and industrial relations' was maintained, this would mean the Scottish Parliament would lack the competency to legislate on any matters relating to employment rights and duties. Equal opportunities law could readily be seen as creating 'employment rights'. Therefore, if this interpretation of the scope of the reserved matters relating to employment is adopted, Scottish equal opportunities legislation would not apply to employment.

In such a case, the potential problems generated by the existence of separate Scottish and UK equal opportunity laws might be amplified, and some additional problems of overlap might open up in areas such as training. However, EU law would provide a common floor in this area, and it is unlikely that significant difficulties of overlap would arise. It would be possible to have separate Scottish equal opportunities legislation relating to matters such as housing and health care, which would be enforced by the Scottish courts and perhaps by a separate Scottish Equality Commission (see below), while reserved UK legislation still applied to employment and would be enforced by the UK-wide employment tribunals.

However, a second interpretation of 'employment rights and duties and industrial relations' could also be adopted, to the effect that the matters reserved in the employment context cover employment and industrial relations law, but not other forms of legal regulation which happen to apply in the employment context. In other words, it could be argued that employment as such is not a reserved area, just 'employment rights and

duties and industrial relations’, and equal opportunities law could be seen as creating a separate and distinct set of rights and duties from those generated by employment law, in the same way that Scottish criminal law or the law of delict might impose certain ‘rights and duties’ on employers.

If this interpretation was adopted, then Scottish equal opportunities law might be capable of applying to employment. It could be seen as a slightly strained argument, but in any case, clarification of the relationship between any devolved equal opportunities legislation and any reserved employment law matters would be necessary.

### ***8.2.3 Partial devolution of equal opportunities***

In general, as discussed above, the question of whether it would be appropriate to have different discrimination law codes applying in different parts of Britain is politically charged and potentially controversial. However, it should be noted that there would be no fundamental constitutional objection to devolving responsibility for equal opportunities. Northern Ireland has separate and distinct equality legislation, which includes, for example, a prohibition on discrimination on the grounds of political opinion and a set of positive equality duties which are imposed on private employers, neither of which has a counterpart elsewhere in the UK. Also, in many ways, EU discrimination law could be seen as providing a floor of protection throughout the UK, in conjunction with the provisions of the ECHR. Nevertheless, the question of whether to make equal opportunities a devolved matter in its entirety will inevitably generate some political disagreement.

It may be possible to separate out distinct elements of equal opportunities law and policy, keeping some as reserved matters and devolving others. For example, an argument could be made that paragraph L2 of Schedule 5 could be amended by deleting the reference to ‘regulation’ in the definition of reserved equal opportunities. This would mean that the ‘prohibition and elimination’ of discrimination would remain a reserved matter. However, it could also have the effect of enabling the Scottish Parliament to incorporate equal opportunities standards into devolved regulatory frameworks and to introduce positive equality duties upon public and private bodies if it chose to do so. The basic anti-discrimination framework would remain a reserved matter, but the regulation of how bodies should comply with this legislation and respect equal opportunities would be devolved. However, some uncertainty may still exist as to whether any form of equal opportunities

legislation that imposes legally binding requirements can be disconnected from the 'prohibition and elimination' of discrimination.

In the human rights context, the Human Rights Act 1998 provides a minimum floor of rights protection across the UK and is defined as a 'protected enactment' in Schedule 4 of the 1998 Act (see above). The basic provisions of British anti-discrimination legislation could also be defined as 'protected enactments' and left as reserved matters. However, given the structure and technical detail of UK discrimination law, this could create complexities when subsequent Scottish devolved legislation began to overlap with any protected enactments.

This potential problem could be circumvented by identifying certain core sections of the major statutes and listing them as protected, while the rest of the legislation would not be reserved and therefore could be amended or repealed by subsequent Scottish legislation. However, given that the Human Rights Act affords some protection against discrimination and that the wide scope of the EU anti-discrimination directives would still be binding throughout the UK, the argument could be made that there would be no need to retain some protected enactments in the equal opportunities field.

#### ***8.2.4 The possibility of devolving enforcement of equal opportunities law***

It may be possible to separate out the enforcement of equal opportunities law as a devolved matter, by inserting a third exception in Paragraph L2 to the general definition of equal opportunities as a reserved matter. This would enable the Scottish Parliament to exercise legislative competency over how equal opportunities law is enforced in areas that come within its wider devolved functions.

This could make it possible if desired to establish a separate Scottish Equality Commission as a parallel to the Scottish Human Rights Commission, if this were thought to be desirable. It might also be possible to take discrimination cases out of the employment tribunals and provide for a different enforcement system. As the jurisdiction of the employment tribunals over discrimination law cases is conferred by equality legislation and not by employment law statutes, it could be argued that even if 'employment rights and duties and industrial relations' remains reserved, this would not prevent amendment of the separate anti-discrimination legislation. However, once again, the uncertain extent of the scope of the reserved employment competency remains a potential problem.

Other specific areas of equal opportunities could also be separated out and devolved, at least in theory. For example, the 'prevention, elimination and regulation' of discrimination on the grounds of religion and belief could be made a devolved function. There is a wide menu of potential choices as to how responsibility for equal opportunities could be allocated in a revised devolution settlement. However, from the equality perspective, the key question is whether an adjustment to the existing position will strengthen protection against discrimination and clarify the existing law, or whether fresh complexities will be generated with little return in the way of enhanced respect for equal opportunities.

Finally, it should be noted that, as discussed above, both UK and Scottish ministers can implement EU legislation, and s. 57(1) of the 1998 Act establishes that UK ministers may take the necessary action to implement EU legislation in both reserved and non-reserved areas. This means that the EU dimension to discrimination law does not rule out the devolution of equal opportunities in whole or in part. However, as long as Scotland remains part of the UK, the ability of UK ministers to legislate in respect of devolved matters in order to meet EU commitments may remain as a constitutional necessity, unless alternative mechanisms are put into place to govern the relationship between Scottish devolution and the ultimate responsibility of the UK as a member state to ensure compliance with EU law.

### **8.3 Scottish independence (within the EU)**

In the event of Scottish independence, the Scottish Parliament would acquire the ability to legislate in any and all areas, subject only to the requirements of EU law (presuming an independent Scotland joins the EU) and the provisions of any written constitution that might apply. (An entrenched Bill of Rights similar to those found in most national constitutions, including those of the USA, Ireland and the majority of EU member states, would be likely to contain a clause guaranteeing the right to equality.) The requirements of the ECHR might also restrict the powers of the independent Parliament, either because the Convention had been incorporated into a written constitution, or because the Human Rights Act would continue to apply, or because of the standard political expectation that European states should adhere to the Convention.

Subject to these potential constraints, the Scottish Parliament could legislate freely on equal opportunity matters. The standard practice in Ireland, a state that left the UK, is for existing British laws to be carried over into the law of the new state, unless subsequently amended or

modified at some later date by legislation. Therefore, the existing UK and Scottish law on equal opportunities would in all likelihood continue to apply post-independence, unless or until new legislation is introduced.

The link with the UK Parliament and the UK Government would however be severed, although arrangements could be made as part of an independence agreement for certain cross-border bodies to continue to exercise functions in both states. Depending upon the timetable of independence, a distinct Scottish equality body with enforcement and promotion powers would probably be established by legislation: such a body could be established pre-independence even if equal opportunities remained reserved up to the date of independence, if the UK Parliament were willing to pass the necessary legislation before the date of independence.

## **9. Conclusion**

The devolution settlement is complex and has grey areas and built-in ambiguities. As a mix of reserved and devolved competencies, the allocation of competencies in the area of equal opportunities is particularly complex. The powers of the Scottish Parliament in this area are limited. Methods exist of using the existing devolved arrangements to clarify the situation. Possibilities also exist of devolving competency for equal opportunities, in whole or in part, as part of a wider review of the devolution settlement. The possibility of independence brings its own challenges. However, deciding where equal opportunities should be placed within the constitutional architecture surrounding Scotland's relationship with the UK gives rise to many interesting and complex questions which deserve close consideration.

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<sup>3</sup> Scottish Government. (2007). *Choosing Scotland's future: a national conversation*. Edinburgh: Scottish Government.

<sup>4</sup> See the useful analysis of the current devolution settlement set out in the final report of the Calman Commission, *Serving Scotland Better: Scotland and the United Kingdom in the 21<sup>st</sup> Century*, June 2009, paras. 1.123-1.166.

<sup>5</sup> Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750).

<sup>6</sup> See S. 54 of the 1998 Act.

<sup>7</sup> See para. 1.150 of the final report of the Calman Commission, *Serving Scotland Better*.

<sup>8</sup> The Commission on Scottish Devolution. (2008). *The future of Scottish devolution within the Union: a first report*. Edinburgh: The Commission on Scottish Devolution. p.39, para. 5.15.

<sup>9</sup> S. 56 of the 1998 Act sets out a list of specific legislative powers which can be exercised by both UK and Scottish ministers. These 'shared powers' relate to areas such as road safety information, the funding of scientific research, the making of arrangements for employment training, and the adoption of measures to give effect to UN Security Council resolutions. Concurrent functions may also exist in respect of implementing EU law.

<sup>10</sup> See para. 1.147 of *Serving Scotland Better*, the final report of the Calman Commission.

<sup>11</sup> S. 93 of the 1998 Act also enables UK Ministers to make arrangements for their functions to be exercised on their behalf by Scottish Ministers and for functions of Scottish Ministers to be exercised

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by UK Ministers. Such 'agency arrangements' do not affect ministerial responsibility for the matters in question.

<sup>12</sup> See Part 4B of the final report of the Calman Commission, *Serving Scotland Better*.

<sup>13</sup> SP Paper 89, EU/S3/08/R1, 1st Report, 2008 (Session 3), *Report on an Inquiry into the Transposition of EU Directives*.

<sup>14</sup> See Part 4B of the final report of the Calman Commission, *Serving Scotland Better*.

<sup>15</sup> See the provisions of the Scottish Commission for Human Rights Act 2006.

<sup>16</sup> See Explanatory Notes to the Scotland Act 1998, Ch. 46. Available online: URL [www.opsi.gov.uk/ACTS/acts1998/en/98en46ah.htm](http://www.opsi.gov.uk/ACTS/acts1998/en/98en46ah.htm) Last accessed August 2009.

<sup>17</sup> Similarly, only UK Ministers would presumably have the functional ability to implement EU anti-discrimination directives via regulation, as these functions would relate to a reserved area of competency and lie outside of the devolved functions of the Scottish Ministers.

<sup>18</sup> See e.g. *R (RJM) v Secretary of State for Works and Pensions* [2008] UKHL 63.

<sup>19</sup> See for an example of criminal legislation in this area s. 74 of the Criminal Justice (Scotland) Act 2003 and the provisions of the Offences (Aggravation by Prejudice) (Scotland) Bill.

<sup>20</sup> See, for example, the provisions of the Building (Scotland) Act 2003, and s.52 of the Housing (Scotland) Act 2005.

<sup>21</sup> See *Hansard*, H.C. Deb., 31 Mar 1998, Column 1126.

<sup>22</sup> The Scotland Bill was amended at Committee stage in the House of Commons to extend the definition of equal opportunities to include discrimination on the grounds of a person's age, sexual orientation, language or social origin, thereby widening the devolved powers of the Scottish Parliament to encourage respect for equality on these grounds.

<sup>23</sup> See Fitzgerald, R. (2009) *Equal opportunities and the Scottish Parliament: a progress review*. Manchester: Equality and Human Rights Commission.

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<sup>25</sup> *Hansard*, H.C. Deb., 31 Mar 1998, Col. 1129.

<sup>26</sup> See Explanatory Notes to the Scotland Act 1998, Ch. 46. Available online: URL [www.opsi.gov.uk/ACTS/acts1998/en/98en46ah.htm](http://www.opsi.gov.uk/ACTS/acts1998/en/98en46ah.htm) Last accessed August 2009.

<sup>27</sup> See e.g. s. 49A(3)-(4) DDA 1995, inserted by s. 3 DDA (Amendment) Act 2005:

‘3) The Scottish Ministers may by regulations impose on a relevant Scottish authority such duties as the Scottish Ministers consider appropriate for the purpose of ensuring the better performance by that authority of its duty under section 49A(1).

(4) The Scottish Ministers may by regulations impose on a cross-border authority such duties as the Scottish Ministers consider appropriate for the purpose of ensuring the better performance by that authority of its duty under section 49A(1) so far as relating to its Scottish functions.’

An obligation to consult with Scottish Ministers is also imposed in respect of the duties to be imposed on cross-border authorities not exercising devolved functions.

<sup>28</sup> See *Scottish Parliament Official Report (SP OR)*, 26 October 2005, Cols. 19985-19999. This LCM was also considered by the Equal Opportunities Committee on 13 September 2005: see SP OR: C13 September 2005, Cols. 1082-1110.

<sup>29</sup> For an example of such a duty-imposing SSI, see The Sex Discrimination (Public Authorities) (Statutory Duties) (Scotland) Order 2007, SSI 32. This draft Order was subject to scrutiny by the Equal Opportunities Committee of the Parliament: see Equal Opportunities Committee, Official Report, 20 February 2007, col. 2138-40.

<sup>30</sup> See e.g. Para. 9 of the Sex Discrimination (Public Authorities) (Statutory Duties) (Scotland) Order 2007, SSI 32.

<sup>31</sup> *Ibid.*, Reg. 6: contrast with the requirements set out in the Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006, S.I. 2006/2930, the relevant English instrument.

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<sup>32</sup> See [www.scotland.gov.uk/About/Sewel/SessionTwo/DisabilityDiscrimination-1](http://www.scotland.gov.uk/About/Sewel/SessionTwo/DisabilityDiscrimination-1) Last accessed August 2009.

<sup>33</sup> See [www.scotland.gov.uk/About/Sewel/SessionTwo/EqualityBillhtml](http://www.scotland.gov.uk/About/Sewel/SessionTwo/EqualityBillhtml) Last accessed August 2009.

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## **The place of equal opportunities in the devolution settlement: a legal analysis**

**As Scotland reflects on the first ten years of devolution, this report examines how the devolution settlement affects the promotion of equality.**

It explains the current devolution settlement, highlighting how uncertainty often exists as to where the border lies between reserved and devolved powers. It argues that there is a clear need to examine the options for adjusting and clarifying the place of equal opportunities within the devolved settlement because it is one of the most problematic grey areas. Finally, it considers the debate about the future constitutional status of Scotland and explores the options for equal opportunities in the following three situations:

- the existing devolution settlement is maintained in its current form
- further devolution of powers and functions in the Scottish Parliament
- Scottish independence (within the EU).