

# Equalities, Human Rights and Civil Justice Committee

3rd Meeting, 2024 (Session 6), Tuesday 30 January 2024

## Subordinate legislation

### Note by the Clerk

#### Purpose of the paper

1. This paper invites the Committee to consider the following negative instrument:

- [The Equality Act 2010 \(Specific Duties\) \(Use of Member Information\) \(Scotland\) Revocation Regulations 2023 \(SSI 2023/375\)](#) – Policy Note and links to relevant impact assessments are at [Annexe A](#).

## The Equality Act 2010 (Specific Duties) (Use of Member Information) (Scotland) Revocation Regulations 2023 (SSI 2023/375)

2. The purpose of this instrument is to revoke Regulation 6A of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.
3. This removes the requirement for Scottish Ministers to gather information on the relevant protected characteristics of members of a listed authority and provide that information to the listed authority in question. The consequent duties in regulation 6A on listed authorities are also revoked.

They are:

- the duty to use the information to better perform their public sector equality duty;
- the duty to include in their mainstreaming progress reports details of the number of men and of women who have been members of the authority during the period covered by the report; and
- how it has used, or is planning to use, the information provided by the Scottish Ministers to take steps towards increasing diversity amongst its members so far as relevant protected characteristics are concerned.

4. Officials have taken steps over a number of years to seek to establish a workable process to comply with the regulation. Barriers and challenges that have arisen from how the data collection requirement of the regulation is framed have however prevented compliance being achieved. No credible way to comply has therefore been identified, hence the revocation.
5. There have also been concerns that, due to the small number of members on some public boards, individuals could be identified on the basis of their protected characteristics.

## Delegated Powers and Law Reform Committee Consideration

6. The Delegated Powers and Law Reform Committee (DPLR) considered the instrument at its meeting on 9 January 2024 and agreed that it did not need to draw the Parliament's attention to the instrument on any grounds within its remit. [Read the Official Report of the 1st meeting, 9 January 2024.](#)

## Equalities, Human Rights and Civil Justice Committee Consideration

7. SSI 2023/375 was laid on 14 December 2023 and referred to the Equalities, Human Rights and Civil Justice Committee. The instrument is subject to the negative procedure and due to come into force on 8 February 2024.
8. **The Committee is invited to consider any issues which it wishes to raise on this instrument and is required to report to the Parliament by 5 February 2024.**

## Procedure for negative instruments

9. Negative instruments are instruments that are "subject to annulment" by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. The annulment process would require a motion to be agreed in the Chamber.
10. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
11. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.

12. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
13. If the Parliament resolves to annul an SSI, then what has been done under authority of the instrument remains valid, but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book). Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.
14. Each negative instrument appears on the Equalities, Human Rights and Civil Justice Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
15. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Clerks to the Committee  
January 2024

## Annexe A

### SSI 2023/375

# The Equality Act 2010 (Specific Duties) (Use of Member Information) (Scotland) Revocation Regulations 2023

## Scottish Government Policy Note

The instrument was made in exercise of the power conferred by Section 155(5)(c) of the Equality Act 2010. The instrument is subject to negative procedure.

### Purpose of the instrument

To revoke Regulation 6A of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.

Regulation 6A requires the collection of data by Scottish Ministers of listed authorities' members' protected characteristics. Officials have taken steps over many years to seek to establish a workable process to comply with this regulation. Barriers and challenges that arise from how the data collection requirement of the regulation is framed have prevented compliance being achieved. No credible way to comply has been identified.

### Policy objectives

Regulation 6A of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 requires that "The Scottish Ministers must from time to time take steps to – (a) gather information on the relevant protected characteristics of members of a listed authority; and (b) provide information gathered by them to the listed authority in question". A listed authority must use information received to better perform the Public Sector Equality Duty (PSED); and certain authorities must set out specified details in any corresponding report on progress on mainstreaming the PSED.

Since Regulation 6A was enacted, officials have taken steps to gather information from public boards required by this duty, on behalf of Scottish Ministers. However, there have been barriers to this, due to the challenges around how the data collection requirement is framed, and the process for Scottish Ministers to collect information directly from board members. Since this regulation was introduced, the introduction of the General Data Protection Regulations in May 2018 has also changed how data is collected, managed and processed. A key challenge is that due to the small number of members on some public boards, there are reasonable concerns that individuals could be identified on the basis of their protected characteristics.

Regulation 6A places a mandatory legal duty on Scottish Ministers with which they must comply. Given no credible pathway to compliance has been identified, remedial action is required to ensure that Scottish Ministers are not in breach of their legal obligations.

Officials in the Directorate for Equality, Inclusion and Human Rights continue to consider what other means could deliver the policy outcomes intended when Regulation 6A was made, as part of the wider and phased review of the operation of the PSED in Scotland. Other amendments to the principal regulations (The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012), subject to the affirmative procedure, are intended to be made and brought into force in 2025.

## EU alignment consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

## Consultation

Since 2021, officials have undertaken a robust review of the operation of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.

This significant progress led to the development of a series of detailed policy proposals which were set out in a public consultation paper (published December 2021 – April 2022). This consultation exercise included consulting on a wide range of improvement proposals. These included asking for stakeholders thoughts on improving duties relating to Scottish Ministers, including views on Regulation 6A.

The consultation paper built on the evidence received through extensive stakeholder engagement, which included 1-1 meetings with equality advocacy groups and listed public authorities, as well as an initial written consultation exercise undertaken in Summer 2021. Officials also undertook an extensive programme of engagement while the consultation was live.

A total of 128 responses were received to the public consultation. The majority of organisation respondents were listed authorities. Equality advocacy groups made up around one-quarter of organisation respondents. Consultation responses have since been published alongside independent analysis to these responses.

Following the public consultation, feedback shows that stakeholders are largely in support of simplifying the Regulation 6A process and agreed the current duty is not viable in its current format.

However, any new process will face data collection difficulties. While officials continue to consider what other means could deliver the policy outcomes intended, it is advised that Ministers act now to remedy the non-compliance with the law as it stands and agree that officials immediately take steps to revoke the current duty.

## Impact assessments

An Equality Impact Assessment (EQIA) has been completed on the policy and is linked below:

[The Equality Act 2010 \(Specific Duties\) \(Use of Member Information\) \(Scotland\) Revocation Regulations 2023 \(legislation.gov.uk\)](#)

During the assessment process, officials observed that changes to this legislation would have a neutral impact on those with the relevant protected characteristics given that this regulation cannot be complied with in its current form. This will result in no impact, either positive or negative, on all protected characteristics. However, the expectation over time would be for this to shift from a neutral to a positive impact given positive work that is happening across Government, including considerations as to what other means could deliver the policy outcomes intended when that regulation was created as part of the ongoing programme of Public Sector Equality Duty improvement activity in Scotland. The time and effort that would need to be spent on continuing to seek a credible pathway to compliance will instead be spent on those more positive endeavours, with overall benefit to protected groups.

## Financial effects

The Minister for Equalities, Migration and Refugees confirms that no Business and Regulatory Impact Assessment (BRIA) is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.