POLICY NOTE

THE EQUALITY ACT 2010 (SPECIFIC DUTIES) (USE OF MEMBER INFORMATION) (SCOTLAND) REVOCATION REGULATIONS 2023

SSI 2023/375

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.

Summary Box

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[1] 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.

[1] https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted

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[2] (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[3] have since been published alongside independent analysis[4] 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

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[2] https://www.gov.scot/publications/public-sector-equality-duty-scotland-consultation/
[3] https://consult.gov.scot/mainstreaming-policy-team/public-sector-equality-duty-review/consultation/published_select_respondent
[4] https://www.gov.scot/publications/review-operation-public-sector-equality-duty-scotland-consultation-analysis-report/pages/2/

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 has been completed on the policy and is attached.

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.

Scottish Government
Directorate for Equality, Inclusion and Human Rights

December 2023