

POLICY NOTE

THE EQUALITY ACT 2010 (SPECIFIC DUTIES) (SCOTLAND) AMENDMENT REGULATIONS 2016

SSI 2016/159

1. The above instrument is proposed to be made in exercise of the powers conferred by sections 153(3) and 207(4) of the Equality Act 2010 (“the 2010 Act”). The instrument is subject to the affirmative procedure.

Policy Objectives

Diversity Succession Planning for Board Appointments

2. The 2014 Programme for Government commitment to impose a new requirement on public bodies to publish the composition of their boards, was made as part of the Scottish Government’s broader work to further equality and diversity, and specifically its commitment to promoting improved gender balance on the boards of private, public and third sector bodies.
3. The Scottish Government want to encourage boards to actively plan how they will increase the diversity of those on their boards so that they more broadly reflect the general population and the communities that they serve and this new duty will help to move us towards achieving this.
4. The duty will ensure that a process is put in place allowing those listed public authorities with appointed board members to use the information on their board’s diversity, broken down by all relevant protected characteristics, to support their succession planning and to publish their board’s gender breakdown, subject to disclosure restrictions. This information will be gathered securely and confidentially by the Scottish Government, on the board’s behalf who will also aggregate the data into larger Scotland- wide figures. This will allow more detailed information, covering each of the relevant protected characteristics, to be published nationally.
5. This information will assist public authorities to develop their board diversity succession plans, including the steps they will take to increase their board diversity.
6. Public authorities will be required to publish their plans, allowing greater transparency of the work underway to improve Scotland’s board diversity, creating an opportunity to share good practice and also providing a method of tracking progress amongst this cohort of public authorities, thus increasing the accountability of a large number of Scotland’s public authorities. The new duty will:
 - cover all relevant protected characteristics: age; disability; gender reassignment, pregnancy and maternity; race; religion or belief; sex; and sexual orientation;
 - apply to public authorities, listed in the regulations with a board structure that includes at least some appointed members. Listed authorities whose boards are comprised wholly of elected members will be exempt from the duty.

Amending the Figure of “150” Employees for Publishing Gender Pay Gap and Equal Pay Statements etc. to “20”

7. The most recent Programme for Government, published on 1 September 2015, included a commitment to extend the duty on public authorities to publish gender pay gap information and statements on equal pay, including occupational segregation. These duties currently apply to authorities listed in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (“the 2012 Regulations”) which have at least 150 employees. We propose to lower the threshold so that the duty applies to listed authorities with at least 20 employees.
8. The requirements to publish gender pay gap information and an equal pay statement are designed to promote transparency and to help an authority gather and use relevant employee information in order to advance equality.
9. Previous consultation on the specific duties in 2010 and 2011 showed support for the gender pay gap and equal pay statement proposals. However, some respondents to those consultations questioned the threshold of 150 employees and argued that it was too high.
10. The 2012 Regulations were therefore made with a provision that Scottish Ministers must review from time to time whether the figure of 150 should be amended. The Scottish Government considers that lowering the threshold will increase transparency across the public sector and promote the gathering and use of relevant information by a wider range of organisations.

Public Sector Equality Duty

11. The public sector equality duty in section 149(1) of the 2010 Act requires public authorities to have due regard, when exercising their functions, to the need to:
 - eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
 - advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
 - foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
12. Those bodies and office holders subject to the public sector equality duty are listed in Part 3 of Schedule 19 to the 2010 Act.

The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012

13. Section 153(3) of the 2010 Act enabled Scottish Ministers to impose specific duties on a listed public authority by regulations. The 2012 Regulations came into force on 27 May 2012. These set a robust and proportionate supporting framework for the duty in the 2010 Act, based on data collection and evaluation, transparency and accountability. In this way they help public authorities to perform the public sector equality duty better. The new framework required listed public authorities to:

- publish a set of Equality Outcomes and report on progress;
- publish a mainstreaming report to show how authorities are integrating the equality duty into their core business activities;
- undertake equality impact assessment of new policies and practices;
- publish information on the gathering and use of employment information
- consider equality within public procurement, where relevant and proportionate;
- publish their gender pay gap and an equal pay statement (if they have over 150 employees).

The Scottish Ministers must also set out proposals to assist Scottish public authorities to better perform the public sector equality duty.

14. The required reports are cyclical and were first required by April 2013 with initial progress reports due by April 2015.
15. In consequence of the establishment of new authorities, the Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2015 (“the 2015 Regulations”) added the following public authorities and office holders to the coverage of the 2012 Regulations:
 - Historic Environment Scotland
 - An integration joint board
 - A regional board under the Further and Higher Education (Scotland) Act 2005
 - Children’s Hearings Scotland
 - Revenue Scotland
 - Foods Standards Scotland
16. The 2015 Regulations also substituted references to “post-16 education body” for existing references to “fundable body” in the Schedule to the 2012 Regulations.

New Regulation 6A

17. New regulation 6A being inserted in the 2012 Regulations provides for the Scottish Ministers to take steps to gather information, ensuring compliance with data protection legislation, on the diversity of board membership across relevant protected characteristics.
18. The information will then be issued to relevant authorities to enable the authority to publish information on the gender composition of their boards and demonstrate how they will use the information to increase the diversity of their board through succession planning and therefore better perform the equality duty. This succession plan must be included in the mainstreaming report under regulation 3.
19. New regulation 6A does not apply to the bodies recently listed under regulation 2A above in relation to reports required before 1 May 2016.

Regulations 7 and 8

20. Amendments to regulations 7 and 8 enable a change to the reporting threshold to be set out under new regulation 8A together with relevant periods for publication of gender pay gap information and statements on equal pay etc.

New regulation 8A

21. New regulation 8A sets out the relevant periods and intervals for publication of gender pay gap information and statements on equal pay etc.
22. Regulation 8A(1) sets 30 April 2016 as the first relevant publication date for Food Standards Scotland; 30 April 2017 for Historic Environment Scotland or an authority listed in Schedule to the 2012 Regulations and 30 April 2018 for authorities recently listed by way of the 2015 Regulations, with 20 or more employees.
23. Regulation 8A(2) sets out the intervals for publication of gender pay gap information and statements on equal pay etc.
24. Regulation 8A(3) amends the threshold figure of “150” to “20” so that authorities who had at no time 20 or more employees during a relevant period are exempt from publication.
25. Regulation 8A(4) sets out the relevant intervals for publication where an authority has 20 or more employees.

Consultation and Consent

26. In keeping with provisions at section 153(4) of the 2010 Act, the Equality and Human Rights Commission (EHRC) was consulted on the draft Regulations. This engagement formed part of the wider consultation on the draft Regulations undertaken by the Scottish Government between 5 October and 29 November 2015. All bodies who are listed public authorities for the purposes of the 2012 Regulations, and who will be directly impacted by the proposed Regulations, received a copy of the consultation document.
27. The consultation received 38 responses from a range of interested organisations including listed public authorities, equality stakeholders, the Equality and Human Rights Commission, the Commissioner for Ethical Standards in Public Life in Scotland, Scottish Enterprise and Highlands and Islands Enterprise.
28. More than half of all respondents (60.5%) were supportive of the introduction of succession planning, 9 respondents (24%) didn't know and 4 (10.5%) were not in favour, with 2 (5%) respondents not giving an answer to the question. In relation to lowering the threshold for publishing gender pay gap and equal pay statements etc. 18 (47%) were in favour, 5 (13%) were against, 4 (10.5%) didn't know and 11 (30%) didn't answer.
29. Of the responses received, only the Equality and Human Rights Commission made specific reference to the drafting of the Regulations themselves, suggesting that the wording could be strengthened to ensure that listed public authorities used the information gathered on their board diversity to assist them to develop succession plans for future board appointments.

30. The Scottish Government have strengthened the wording of the draft Regulations to reflect the points raised by the EHRC. The revised wording has subsequently been agreed with the EHRC.
31. Other issues raised in responses included concerns relating to data protection when gathering small levels of information covering employees and board members, and the need for guidance, including good practice/case studies to support boards with their succession planning. Both of these issues have been accepted by the Scottish Government as fundamental to the successful implementation of the Regulations and work will be undertaken to address them in partnership with the Equality and Human Rights Commission.

Impact Assessments

32. An Equality Impact Assessment and Privacy Impact Assessment have been undertaken.

Financial Effects

33. The Cabinet Secretary for Social Justice, Communities and Pensioners' Rights confirms that no BRIA is necessary, as the instrument has no financial effects on the private or third sector.

Scottish Government
15 January 2016