



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# EQUAL OPPORTUNITIES COMMITTEE

Tuesday 8 March 2011

Session 3

---

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2011

Applications for reproduction should be made in writing to the Information Policy Team, Office of the Queen's Printer for Scotland, Admail ADM4058, Edinburgh, EH1 1NG, or by email to:  
[licensing@ogps.gov.uk](mailto:licensing@ogps.gov.uk).

OQPS administers the copyright on behalf of the Scottish Parliamentary Corporate Body.

Printed and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by  
RR Donnelley.

---

**Tuesday 8 March 2011**

**CONTENTS**

	<b>Col.</b>
<b>SUBORDINATE LEGISLATION</b> .....	<b>2397</b>
Equality Act 2010 (Statutory Duties) (Scotland) Regulations 2011 (Draft).....	2397
Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2011 (Draft).....	2397

---

**EQUAL OPPORTUNITIES COMMITTEE**

**5<sup>th</sup> Meeting 2011, Session 3**

**CONVENER**

\*Margaret Mitchell (Central Scotland) (Con)

**DEPUTY CONVENER**

\*Marlyn Glen (North East Scotland) (Lab)

**COMMITTEE MEMBERS**

\*Malcolm Chisholm (Edinburgh North and Leith) (Lab)

\*Jamie Hepburn (Central Scotland) (SNP)

\*Christina McKelvie (Central Scotland) (SNP)

\*Stuart McMillan (West of Scotland) (SNP)

\*Hugh O'Donnell (Central Scotland) (LD)

\*Elaine Smith (Coatbridge and Chryston) (Lab)

**COMMITTEE SUBSTITUTES**

Rhoda Grant (Highlands and Islands) (Lab)

Tricia Marwick (Central Fife) (SNP)

Mary Scanlon (Highlands and Islands) (Con)

Margaret Smith (Edinburgh West) (LD)

\*attended

**THE FOLLOWING ALSO ATTENDED:**

Louisa McDaid (Deaf Action)

**THE FOLLOWING GAVE EVIDENCE:**

Graeme Bryce (Scottish Government Strategy and Performance Directorate)

Alison Coull (Scottish Government Legal Services Directorate)

Jatin Haria (Coalition for Racial Equality and Rights)

Wladyslaw Mejka

Alex Neil (Minister for Housing and Communities)

Yvonne Strachan (Scottish Government Strategy and Performance Directorate)

**CLERK TO THE COMMITTEE**

David McLaren

**LOCATION**

Committee Room 1



# Scottish Parliament

## Equal Opportunities Committee

*Tuesday 8 March 2011*

[The Convener *opened the meeting at 09:01*]

### Subordinate Legislation

#### Equality Act 2010 (Statutory Duties) (Scotland) Regulations 2011 (Draft)

#### Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2011 (Draft)

**The Convener (Margaret Mitchell):** Good morning and welcome to the fifth meeting of the Equal Opportunities Committee in 2011. I remind all those present that mobile phones and BlackBerrys should be switched off completely as they interfere with the sound system.

The first item on the agenda is oral evidence on two draft affirmative Scottish statutory instruments. I welcome the two witnesses: Mr Jatin Haria, executive director of the Coalition for Racial Equality and Rights, and Mr Wladyslaw Mejka. Liz Rowlett, who also wrote to the committee about the instruments, is unfortunately unable to attend today's meeting.

We move to questions. I begin by asking the witnesses to clarify their concerns regarding the draft Equality Act 2010 (Statutory Duties) (Scotland) Regulations 2011 and to offer their suggestions for how the Scottish Government can improve its handling of future consultations. Perhaps Jatin Haria would like to start.

**Jatin Haria (Coalition for Racial Equality and Rights):** Thank you. Our main concern is that the new proposals are a regression from what is currently in place. We do not think that what is in place has worked as effectively as it could have done, and there has been no analysis of why we should regress from the current requirements. It is almost like saying that we have done so much great work that we can now step back a little bit. That is not our opinion of how things are in Scotland.

**The Convener:** Do you want to answer the second part of the question, on how you think things could be improved?

**Jatin Haria:** We need to review what has and has not worked in the current requirements. When the first set of specific duties was put in place eight or nine years ago, I do not know whether a proper analysis was done. If we are now saying—which we are, by changing the duties—that the current

requirements have not worked as well as they could have done, we are in danger of making the same mistake again by just going with something new and different without undertaking a proper analysis of how the new system will work. We could be here in 10 years' time saying, "Well, we tried the second lot and that didn't work either".

Some of the responses, especially the response from Unison, which is at the coal face of activities in the public sector in Scotland, are a damning indictment of how equality impact assessments have—or have not—worked. We are in danger of doing the same thing—or something slightly different—to make us feel better. We are saying, "Well, we got it slightly wrong last time, so we'll do something different and that will be okay". I do not want to be here in 10 years' time saying, "We tried it again and it didn't work". We should have a proper analysis of what could and could not work.

With regard to the new concept of equality outcomes, for example, has anyone thought through how it might work in practice with a public body, and projected two or three years on to see what might have changed? I do not know whether that work has been done. I would rather take some time out and spend the next few months looking at that and getting it right as far as we can. We will never get it perfect, but we can certainly have a better consultation and better dialogue with public bodies and equality groups to try to get it a bit more right. Even if that means taking up to another year to get it right, I would rather do that than rush into something.

**The Convener:** So your main concern is that the lack of a review in the past might cause a problem for the future, too, if the regulations go ahead as they are.

**Jatin Haria:** It is partly about the lack of a review, but even what we have has not been working. Equality impact assessments have not been working, and the monitoring of employment has not changed employment practices—certainly as far as racial issues are concerned. We are regressing from the current requirements. How will that make anything better, given that the current system has not worked?

**Wladyslaw Mejka:** I will be boring for a wee while and talk about the process of how we have arrived at the position that we are in today and the difficult decisions that committee members face. Before I do that, I congratulate Scotland on international women's day. In particular, the Scottish Government published figures yesterday that showed progress being made with women in the police force—

**The Convener:** I will interrupt you there, because we will go on to look specifically at process. Is there anything else that concerns you

more generally? I remind all the witnesses that we are very pressed for time, so we do not have time for anything other than the evidence on the questions.

**Louisa McDaid (Deaf Action):** Sorry, but we are having some problems with the palantype equipment—the system has hung.

**Wladyslaw Mejka:** Bear with us.

**The Convener:** We will move on to question 2 and you can come back in if you have resolved the problems.

The Scottish Government recently published an analysis of its consultation, explaining its consideration of the responses that it received and how they influenced the regulations. What are your views on that document?

**Jatin Haria:** It depends on the questions that are asked, and this consultation asked a lot of questions about timescales rather than the substance of the duties.

As we say in our submission, if people are asked whether they are happy for a public body not to set objectives in relation to disability, which is one of the consequences of the proposals, the vast majority say no. However, if they are asked whether they are happy for public bodies to set equality objectives, it is no wonder that, if they do not think it through, they say yes.

In general, arguments have not been made for why certain issues that were raised in the consultation have not been addressed. For example, the Scottish Government states that it will not require public bodies to publish evidence on the issues that are considered in setting the outcomes, but it has not addressed why that is the case.

Some issues are missing from the consultation analysis document. A number of us have raised concerns that if certain outcomes are set, there will be prioritisation of the various equality characteristics. We raised the issue along with Unison, the Association of Chief Police Officers in Scotland and a number of others, but it does not feature in the document at all. When ACPOS says that the matter could lead to bad relations but the Government does not mention the issue in the document, let alone deal with the substance of the issue, the consultation is flawed.

**Marlyn Glen (North East Scotland) (Lab):** Can I check that Mr Mejka is catching up? It is very important for the committee to include everybody.

**The Convener:** Absolutely. We will give Mr Mejka the chance to answer the first question.

**Marlyn Glen:** If he has caught up, that is fine.

I congratulate the witnesses on their vigilance. They have emphasised for us the importance of partnership working, without which we cannot go forward properly and scrutinise things.

I have a follow-up question about outcomes.

**The Convener:** We can now go back to Wladyslaw Mejka on the first question. Other than process, were there any concerns? We will cover process specifically later. [*Interruption.*]

**Malcolm Chisholm (Edinburgh North and Leith) (Lab):** Where are we at?

**The Convener:** I have been advised that we will not cover process later, so I stand corrected. I ask Wladyslaw Mejka to give his evidence as he was going to.

**Wladyslaw Mejka:** Other than the process, which I look forward to getting into with you—

**The Convener:** Please talk about the process, too; apparently we will not cover it later.

**Wladyslaw Mejka:** One concern that I have, which has not been mentioned yet—I think that the committee needs to look at the matter and ask questions of ministers and officials about it—is that we are discussing the issue in a very narrow context. We are almost homing in on what the lawyers may want to check that the Equality Act 2010 and the draft specific duties may or may not say, but what is seriously lacking so far is the proper context for all of that—the impact of the measures on people's lives, to which my friend Jatin Haria has referred several times. If the discussion continues to have a quasi-legalistic focus on the 2010 act and the specific duties, we will lose sight of the fact that there are real opportunities for you, as elected members, to use your power to change things for the better for people in Scotland. That has been singularly lacking from the discussion that you have had so far. I hope that, during what is left of this morning's session, we will be able to help you to address the point in more depth.

**The Convener:** What are your views on the consultation document?

**Wladyslaw Mejka:** I suggest that there was a lack of context in how Government set out what it wanted us—by which I mean not only public bodies but organisations such as those that Jatin Haria represents and many others, as well as citizens such as me—to think about. We needed that context to understand and come to a view on whether what was being proposed was better than what we have been doing for the past 20, 30 and, in some cases, 40 years. That was not possible, because—as you will recall—Government did not give us what we needed at the start.

It was a joy to see the Government publish yesterday the figures on progress with the police. Why did we not have some of that information as context for the consultation document, to show what progress the existing equality duties have brought in Scotland in relation to the number of women police officers or the number of disabled people who are employed in the public sector? We lacked that kind of context, which made it difficult to make informed judgment calls on whether the proposed new specific duties will take us forward on equality faster, better and deeper, or whether they will take us backwards. That was the first flaw in the process. You will understand that I, Jatin Haria and others have expressed the view that we will drift backwards and lose the impetus of progress that we have built until today.

The second major flaw in process was in how the consultation took place. According to the head of the equality unit, which had a degree of responsibility for it, five meetings took place over the three-month period. I suggest that that is not the ideal way of reaching over the heads of the usual suspects to get views that you need to hear, to be aware of and to take into account. When deciding whether to approve the specific duties, you need to hear the views of people who will really have an interest in the matter, as it will affect the outcome of their lives when they use public services or go about living their lives beyond the reach of public services. There was no really innovative, exciting, original attempt to reach over the heads of the usual people who tell you what they think to find out the views of people who will be directly impacted by what you decide today.

There was a final major flaw. Government and its officials conducted two analyses of the consultation. It paid someone else to do one of them; I understand that it did the other internally. Those analyses are part of the evidence that you already have to help you to make up your mind about whether the minister and his officials should persuade you to adopt the specific duties that are proposed. I believe that you are being misled by the second analysis, which was conducted by the Scottish Government and its officials. In effect, they are telling you that everyone—or the vast majority of people—agreed with what they said. That is a shallow, misleading analysis that does not give committee members what they really need to know.

There are three major issues that bring us to the position that we have reached today. I suggest that it is in your interests to consider seriously giving yourselves more time, more depth and more views than Jatin Haria and I can provide, to allow you to hear what will really work in future, before you tell Government that it has the right idea.

09:15

**Marlyn Glen:** I am interested in what you said about what I thought was mainly a statistical analysis. This should not be done on a counting-of-heads basis. If 99 per cent said no but 1 per cent said yes, and the 1 per cent had proper arguments, we should go with the 1 per cent if it is the right way to go. I agree with you entirely about that analysis of the consultation.

**Jatin Haria:** I agree totally. The large number of public sector respondents had a vested interest in the consultation but the analysis has not been properly broken down into what the public sector said and what others said.

To back up what Wladyslaw Mejka just said, the committee has correspondence on the consultation from Unison, the Scottish Trades Union Congress, ACPOS and us—some major players—in which we say, “Don’t do this now. Take some time and rethink it.”

**Hugh O'Donnell (Central Scotland) (LD):** Some respondents to the Government's consultation raised concerns about requiring equality outcomes on all protected characteristics. Why do you consider it necessary to require public bodies to publish equality outcomes relating to each of the protected characteristics?

**Jatin Haria:** We do not. What we said in our response, and what a number of people have said, is that you should either have outcomes on all characteristics or show evidence of why you do not have outcomes on any one characteristic. If you do not need something—if it is not a priority—evidence that. However, if you just talk about outcomes on A or B without any analysis or consultation, there will be problems down the line. The Equality and Human Rights Commission's response said the same thing. If you decide not to have outcomes on all characteristics, you must publish the evidence for that decision.

**Wladyslaw Mejka:** Some submissions tried to find the most practicable way forward to achieve what we think was desired. Some suggested that we do not need an outcome for each characteristic—we accept that that is a real possibility—but that, taking the spirit of the duty as set out in the legislation and as roughly set out in the draft regulations, when you set outcomes you must involve and engage with the communities themselves and you have to evidence that.

Therefore, when you publish, saying, for example, that you will not set an outcome for transgender people accessing your service or entering your employment, you need to explain that. You need to say, “We sat down with the transgender community in Scotland and we decided it was not relevant to our services. Therefore, no outcome for that community is being

set by this organisation.” We feel that that is transparent, accountable and in the spirit of the practical application of the 2010 act.

**Hugh O'Donnell:** You seem to be following the Welsh model. Is that correct? Jatin Haria is nodding.

**Jatin Haria:** Yes.

**Marlyn Glen:** The STUC submission talked about outcomes as well. It is good to concentrate on outcomes because that is what we are looking for. We are clear that we do not want a paper-based exercise. However, the problem seems to be how that would all work in practice. It is quite challenging to say that you want X outcome and to identify whether you got it. Although tick-box exercises are not much good, people need guidelines on how to move towards the outcomes. Do you agree?

**Jatin Haria:** Yes.

**Malcolm Chisholm:** I will ask about equality impact assessments in a moment. However, it is relevant to the previous answers to point out that even the EHRC response stated:

“Where public authorities decide not to set outcomes in respect of one of more of the protected characteristics, they must be able to set out clear evidence to support such a decision.”

That is really an addendum to what we have been discussing. What the EHRC proposes seems to me to be a minimum requirement, but it is not in the draft regulations. We can argue about whether all the outcomes should always be followed or whether we should at least have the fall-back position that the EHRC and many others support.

Three concerns have been expressed about equality impact assessments. First, public bodies in England and Wales will be required to publish details of any equality impact assessment, but Scottish public bodies will not. Secondly, English and Welsh public bodies will be required to consult and engage with people who have protected characteristics, but Scottish public bodies will not. Thirdly, equality impact assessments are not required for existing policies and practices unless those practices and policies are being changed or revised.

We have had evidence from various people about those concerns, although Unison and the STUC express some wider concerns. Do the regulations need to be changed in regard to equality impact assessments? What will the impact be if they are not changed?

**Wladyslaw Mejka:** Those questions have to be treated as one because to address one positively and treat the rest negatively or leave the regulations as they stand would dilute the potential

that equality impact assessments bring to what you want to achieve with the specific duties.

Equality impact assessments have a chequered history in Scotland's public bodies so far. Some good work, some indifferent work and some positively bad work has been done on them. The good news, of which you should be aware, is that, when they are done well, they have a real impact on advancing and delivering measurable equality for people in Scotland.

The draft duties that are before you attempt to continue that and keep the momentum going but, fatally, drop one bag. They say that public bodies will no longer be required to assess the impact of existing policies, functions or services—everything that they do. Witnesses who do not represent public bodies will argue that that is a retrograde step and that it gives up on the need to tackle the institutional, systemic discrimination that has been built into our public bodies for more than 40, 50 or 60 years.

Existing policies and functions form the heart of what a public body does; new policies, or changes to existing policies, are probably a thin shell round the totality of a public body. Therefore, if we adopt that specific duty, we will leave the solid centre untouched by the scrutiny of impact assessments that seek out, identify and design out structural and institutional discrimination.

For that reason, we feel that that duty is a seriously retrograde step for Scotland to take. We urge you seriously to address that in your consideration of the specific duties as drafted.

**Jatin Haria:** I agree with that point. The other two concerns that Malcolm Chisholm raised are also absolutely valid.

I fail to see why a requirement to publish details of any equality impact assessment was not put into the draft regulations. As one of the respondents to the consultation said, we can get that information through freedom of information requests anyway, but why not put it in?

It is worse that there is no requirement to consult and engage with affected communities. I fail to understand why that is not one of the duties. How can a public body do an impact assessment without consulting the communities that are affected by its policy?

The Scottish Government's response to the consultation says:

“Given the strong agreement ... for the proposal as drafted we have not moved to require publication.”

However, that was not my reading of the consultation responses. A number of people said that EqlAs should be published.

I totally agree with Mr Chisholm.



**Stuart McMillan (West of Scotland) (SNP):**

There appear to be some differences between Scotland, England and Wales in the employment information that public bodies will be required to collect. What employment data is it realistic for public bodies to collect, given that there are potential difficulties with collecting such information for some of the protected characteristics?

**Jatin Haria:** It is an incremental thing. Where there are new characteristics or where monitoring for certain characteristics has not happened in the past, you could have a process where you begin to collect the information over time—it does not have to be done immediately. At the moment, the requirement is just to publish three different figures: the employment rate for ethnic minorities, the employment rate for gender and the employment rate for disability. All that a public authority has to do under the current regulations is publish three stats—that is it. That is much less.

We in CRER are not arguing for everything that happened in the past. However, if you no longer require to monitor your job applicants and those who are shortlisted, and all you have to do is publish information on your ethnic minority workforce at any one time, you will not know the process; you will not know whether people are applying. Ten years ago, we kept being told that black people do not apply for jobs in the public sector. The data that we have now, through applicant monitoring, show that that is not the case. In a number of public bodies that I looked at, the number of applicants from black groups was as high as it should be, according to the population. The problem was at interview stage. You will not get any of that information if all you have to do is publish your figure of 0.5 per cent at the end of the year.

**Wladyslaw Mejka:** I am intrigued by the sense that was conveyed in one of the official consultation analysis documents—document 2—in which the Government talked about the difficulties surrounding obtaining the data. Take the national health service—a major part of the public sector in Scotland—and, in particular, the Information Services Division, which does nothing but number crunch on behalf of the NHS. Any member of the public can look at the ISD website and find information on the NHS workforce. NHS boards currently collect data on all the six major equality communities, as they used to be called; they are now called protected characteristics—religious faith, sexual orientation, age, disability, gender and ethnicity. The NHS already does that. I cannot tell you about other major public sector bodies, but I assume that they are roughly in the same place.

Although there are difficulties, public bodies have been collecting information for some time

now, because it is good practice, in order to ascertain, as Jatin Haria explained well, whether applicants are being treated properly, whether people can develop a career, whether black people are reaching senior levels and whether disabled people are all stuck in the lower grades of the public sector. The NHS already gathers that information, but the duty that you are being asked to approve will in effect tell the NHS to stop doing that, which I think is an act of madness. I urge you not to accept the argument that the Government and officials are making. You should be looking to continue the current good practice and enshrine it in the wording of a new specific duty.

**Stuart McMillan:** Thank you for those answers. The analysis that has taken place says that only 18 per cent commented on the need to monitor beyond the three characteristics. That being the case, and bearing in mind the public sector's use of resources, perhaps only analysing and collecting the data for the three strands is a worthwhile step.

09:30

**Wladyslaw Mejka:** I was going to go into detail on that when I talked about the process. Paragraph 29 on page 9 of the analysis report that you refer to states:

"The majority ... agreed that a public authority should be required to consider the impact on equality of new policies".

However, the majority is clearly explained in another place in that report as being public bodies—they were the natural in-built majority when the analysis was done. What you require is an analysis that sets aside the in-built majority of public bodies and looks at what we might call the dissenting view that does not buy into the duties. It is not that other people oppose them; it is that they dissent from the precise wording of what is proposed.

When we look at the figure that you quoted, paragraph 30, if I recall correctly, states:

"Some respondents ... commented on the need to consider the impact on equality of existing policies".

However, that was actually close to 100 per cent of those who dissent from the prevailing view of the public bodies. There was a need for the analysis to give you the underlying pictures, trends and patterns. You have been told that the majority support the current draft of the duties, but what you have not been clearly given to understand is that that majority is always the public bodies, which would rather that they did not have any specific or general duties anyway. They would rather not have to do this.

**Marlyn Glen:** That was a very clear answer from Mr Mejka. We were told at one point that

numbers matter, and we have been looking for data for the whole of the current session. That seems to be the underlying issue for us. However, it is how you weight the responses that come in that is really important.

What is your view on further support on employment data being available to public bodies in the EHRC guidance, and what is your view on the threshold of 150 employees for collecting that data?

**The Convener:** Jatin, would you like to kick off?

**Jatin Haria:** Guidance is always useful. We obviously are not getting things right, despite having had the duties for the past eight or nine years, so further guidance is needed, but more than that, we need the regulation. The work is not difficult, and many of the bodies have full-time staff dealing with the issues, but if there is no regulation it will not be a priority. That is our main concern.

CRER has not commented on the threshold, but we support some of the comments that others have made. If we were really thinking outside the box—we believe that that is important, which is why we are asking for a big rethink of the duties—perhaps we would have a number of thresholds. Public bodies with more than 1,000 employees could have more onerous duties for collecting data on employees, and we could then go down to organisations with more than 150 employees and those with fewer than that. I have not seen any analysis of that thinking going on. There is more turnover in bigger organisations that have more than 1,000 staff, and they can do things such as setting targets for recruitment, whereas it is difficult to do that in an organisation of 150 people. Why not at least consider having different thresholds?

The other thing to say about employment monitoring is that it is linked to service provision monitoring. If an organisation's staff are used to monitoring, they will be able to monitor their service users. If staff are not monitored, why should they monitor service users? Whatever we think about employment monitoring and its difficulties, I hope that we all want to have a fair service for all protected characteristics in service usage, so we need that monitoring to go on.

**Wladyslaw Mejka:** In that context, I believe that this is not so much about the precise wording of a specific duty. It is more about being aware that this is part of the battle in identifying, tackling and removing discrimination.

The staff of public bodies, most of whom are good people trying their best, will tell you that collecting the data is difficult, which it is; I do not deny that. However, if we just said that we would not try it now and we left it for another 20 years, that would leave people in the protected

characteristics and equality community facing poor services and employment opportunities, and being permanently outside the good society that we are trying to create. The fact that it is difficult means that is vital that we do it. If it was not difficult, it would not be a big part of tackling discrimination.

I can only return to the NHS as an example. For the past two years, the NHS has put a major effort into gathering equalities data on service users, which is not easy. For example, a lot of patients are reluctant to reveal their religion or ethnicity and a lot of NHS staff—nurses on the front line—are uncomfortable about having to ask patients such questions. The nurses need to be supported and trained, and their capacity needs to be developed to understand why it is so important that we gather the information, which we use to redesign health services so that the experiences of certain people using those services are the same as when you and I use them.

Likewise, we need to do more work for service users, who are citizens like you and me. They need to be made to understand that in all our engagements with them there are good reasons why we ask the questions that we do. If we put in that kind of work over the next five years, the next time that this committee meets to consider such issues there will no longer be a difficulty. The problem is not insurmountable; it is simply a piece of hard work that can be done.

**Elaine Smith (Coatbridge and Chryston) (Lab):** CRER indicated a concern about the lack of a duty on procurement. The Scottish Government did not propose specific duties relating to procurement

“given the need for a consistent procurement equality framework across GB and the decision by the UK Government not to take forward a procurement duty for English and GB public authorities.”

However, the Welsh Assembly Government proposed that where a public authority enters an agreement on the basis of an offer that is the most economically advantageous, it must have due regard to

“whether the award criteria should include considerations relevant to its performance of the general duty.”

Some respondents to the consultation were disappointed that no duty on procurement was proposed for Scotland. The Scottish Government reiterated that that was because of the need for consistency across GB. However, it seems that that consistency may not include Wales, if it does things differently. What are CRER's concerns about there not being a duty on procurement in the Scottish regulations, and could you tell us what the impact of that might be?

**Jatin Haria:** The Scottish Government's argument has been blown out of the water. There

could be some logic in having a consistent United Kingdom or GB approach. However, Wales does not share that approach and is proposing duties on procurement. I fail to see why that was not addressed in the consultation. We pointed out in our response that Wales was going a different way, so the GB argument is blown out of the water.

As the committee will know, more and more services are being procured externally by public authorities. That strengthens the reason for building in procurement duties. Maybe this is an area where Scotland and Wales can unite and force England to have better procurement duties as well. I am not sure that I can say much more than that, because the Government's argument is just nonsense.

**The Convener:** Do you have anything to add, Mr Mejka?

**Wladyslaw Mejka:** I had not intended to say anything, but two things occur to me. First, one of the consequences of a major speech that the UK Prime Minister made in the past couple of days is that the existing understanding of procurement activity in the UK is going to be torn up. He wants to get rid of all the Westminster civil servants who are hindering the Government's ability to use procurement to encourage entrepreneurs, and the clear message is that UK Government procurement as we know it will change. Given that, I have to say that, if the minister and his officials are going to tell the committee that they are trying for GB or UK uniformity, I just do not think that that will apply any longer. What is happening at Westminster suggests that the situation is changing weekly, and I do not think that there is much strength in the argument for having a degree of uniformity across the country.

For me, the issue of whether procurement as we call it should be UK-wide or follow this or that model is an example of an area where we can get bogged down in trying to look at things from a legal perspective or from a high-level strategic policy point of view. We lose sight of the reality that when properly practised, procurement can be used to bring disabled people out of unemployment, poverty and a marginalised existence, to recognise the entrepreneurial talents in the black and minority ethnic community and to give those people an opportunity to take that route into public services in order to improve and change their life experiences. It is not just about whether we buy the small amount of printer paper that we use from this or that source; it is also about whether we can use procurement sensitively to improve the equalities experience of people in Scotland. I do not think that we have done that very well with the existing procurement duties

under the existing regulations, but that is not a good enough reason for ditching the system.

**Elaine Smith:** Your responses to all of our questions suggest that we in Scotland have been ahead of the game on equalities since the Parliament's establishment, but that agreeing to these instruments in their current form might actually set us back. I take your point about not getting bogged down in legalities, but we need to consider the implications of not agreeing to these instruments today. What would be the impact of delaying these instruments? If we do not agree to them today and they do not proceed within the proposed timescales, will Scotland be left in a better or worse position for the future?

**Wladyslaw Mejka:** I think that you have a slight advantage over me, in that I saw only at 10 minutes to 9 the paper that you received from the EHRC setting out the implications of what would happen if the committee did not agree to the instruments. I apologise in advance for repeating myself, but I point out that that is a quasi-legal analysis of what will happen. I was disappointed—but then I am regularly disappointed—to find that the EHRC does not talk about the impact on people's lives; instead, it talks about how public bodies will struggle. I do not think that those bodies will struggle. They are currently struggling as they get their heads round the new culture that the Equality Act 2010 has introduced, never mind the specific duties. The EHRC should therefore focus on helping them to get out of that struggle and to be clearer about what they should be doing under the general duty—which, I have to say, spells out very clearly what public bodies should be doing. As for the specific duties, they are what I would call the kind of road map that you would want if you were travelling from here to Glasgow on a day like today and you wanted to take a more scenic route rather than the motorway.

We have lots of time between now and, at the very earliest, April 2012 before many of the specific duties start becoming practical realities for public bodies. As a disabled person living and working in this country, I do not think that, if the adoption of these instruments were to be delayed, I would suffer. I passionately believe—I have to—that if I and other people can persuade you to improve these instruments, my life and the lives of others will improve. That is the difference. We are talking about the impact on people, not what will happen to public bodies.

09:45

**Jamie Hepburn (Central Scotland) (SNP):** I think that Mr Mejka might have misread the paper. We do not have until 2012 to look at the issue; we have only until 6 April 2011. The EHRC is quite clear that if the legislation is passed, no specific

duties will be incumbent on public bodies after that date. The EHRC says:

"We do not believe that this would be in the best interests of the Scottish people."

Why is that wrong?

**Jatin Haria:** You are right that, if the legislation is passed, it will kick in in April 2011, but the first publication requirement is April 2012, so we have a whole year to get it right. The EHRC is saying—and I agree—that there will be no legal requirement on public authorities to impact assess their policies. Given that the legislation is for new policies and practices only, that is not a major loss. Does anyone here really think that, if the regulations are delayed, public bodies will say, "Right, we are going to stop doing our EqlAs tomorrow because we don't need to do them any more"?

**Jamie Hepburn:** Mr Mejka made that very suggestion. He said that public bodies cannot be bothered to do the assessments and they have to be forced to do them.

**Jatin Haria:** The Unison response is damning about EqlAs. What would we really lose by having a delay and making the duties stronger? I do not think that the EHRC's position on that is credible. If a public body says that it is not going to do equality impact assessments because there is no legal requirement to do them, that says something about the public sector in Scotland, and it says to me that we need to have much stronger regulation than is currently in place.

**The Convener:** Thank you. That completes our questioning. I thank Wladyslaw Mejka and the electronic note-taker for their forbearance with the initial problems that we experienced.

I will suspend the meeting briefly to allow for a change of witnesses.

09:47

*Meeting suspended.*

09:48

*On resuming—*

**The Convener:** I welcome the second panel of witnesses, who are Alex Neil MSP, the Minister for Housing and Communities, and his officials. Yvonne Strachan is head of the equality unit, Graeme Bryce is policy co-ordinator of the equality unit, and Alison Coull is deputy director of the legal department of the Scottish Government. You are all very welcome.

Minister, do you wish to make a brief opening statement?

## **The Minister for Housing and Communities**

**(Alex Neil):** Thank you. I welcome the opportunity to discuss the draft SSI with the committee.

Public authorities in Scotland provide services and support to millions of people on key matters such as housing, education, policing, social work and health. They also employ thousands of people. What they do and how they do it is therefore important and influential and, during this period of constrained public spending, it is particularly important that equality is given due regard.

The public sector equality duty will help us to promote equality, tackle prejudice and discrimination, and support the building of a fairer and more inclusive Scotland. I am presenting two Scottish statutory instruments for the committee's agreement, the first of which is the Equality Act 2010 (Statutory Duties) (Scotland) Regulations 2011. The regulations provide a suite of specific duties to be placed on public authorities in order to assist in the delivery of the general duty. The regulations contain the listed bodies that are to be subject to those specific duties.

I will say a few words of introduction about the regulations. We believe that we have secured appropriate coverage for the specific duties, and that the proposed suite of duties provides a strong and effective framework for delivery while being flexible, proportionate and focused on outcomes.

We have consulted twice in the process of developing the duties, initially in 2009 on their broad scope, and again in 2010 on the draft order and regulations. Although there was considerable support for the proposals from those who responded to our consultation, the respondents also provided a range of valuable and helpful comments and insights. We have captured some of those in the changes that we have made to the regulations, and we will draw further on that input in developing guidance and implementing the duties.

Inevitably there are areas in which respondents would have liked us to respond differently, some of which may be explored during our discussion today. The duties are designed in the Scottish context: they reflect the wider focus and outcomes rather than process, and they run with the grain of public sector reform, best value and the continuous improvement approach. The requirement to set outcomes and report on progress towards them gives a strong signal that the duties are there to help us achieve change, and to achieve improvements in the life experience and life chances of individuals and communities.

There has been a long-standing desire to bring equality from the margins into the mainstream and

the core business of what public bodies do. The regulations will assist that process, and the requirement to report under existing arrangements—where they exist—will help to embed the process more firmly in the core business of public authorities. The introduction of a mainstreaming duty will enable public authorities to report on the progress that is made in embedding the equality duties across all their functions with regard to the protected characteristics.

The regulation that relates to the assessment of impact will contribute to good policy making and sound decision taking across the range of authorities' interests. Our approach will strengthen the application of equality analysis from the outset of policy development and ensure that authorities take into account the result of impact assessment.

We have emphasised the need to consider relevant evidence and incorporated a requirement to involve equality groups in the preparation of outcomes, as we recognise the importance which, for example, disabled people attach to that aspect of the current disability equality duty.

We have strengthened the requirements around the gender pay gap, which now include a requirement to publish information on occupational segregation. We will introduce a minister's duty that will require the publication of proposals that are designed to help the delivery of the equality duties across the public sector.

We have amended our original proposition to increase the flexibility of what might be considered within the duties with a view to adding value. I look forward to discussing those issues with the committee this morning as part of our wider discussion on the regulations.

**The Convener:** Thank you, minister. What is your response to the concerns that we heard from witnesses with regard to the Government's handling of the consultation on the instruments?

**Alex Neil:** We have consulted twice on the duties, first in 2009 on their broad scope, and again in 2010 on the draft order and regulations. During our second consultation we undertook five consultation meetings with local authorities, non-departmental public bodies and the NHS, and we held two events with equality organisations. We also took steps to make the documentation accessible in Braille, audio tape and EasyRead formats. We published two consultation analysis reports: a full analysis, which was undertaken by independent consultants and published on 10 February 2011, and a report that showed how consultation shaped policy, which was published on 24 February 2011. We have gone out of our way to consult very widely on the regulations.

**Elaine Smith:** Will the minister respond to Unison's point? The union states in its submission to the committee:

"We understand there was a meeting of key stakeholders to discuss the draft regulations. We received no invite to this meeting and as the largest public sector trade union in Scotland, it is not unreasonable to be concerned that none was forthcoming."

**Alex Neil:** As I said, there was a range of meetings and not everyone was invited to every one. Unison has been fully involved in the consultation and until today it has raised absolutely no objections to being excluded in any way.

**The Convener:** Was the Scottish Trades Union Congress consulted?

**Alex Neil:** They were all invited to appropriate meetings. As I said, we had wide-ranging consultations across the board in both sets of consultations, in 2009 and again last year.

**Yvonne Strachan (Scottish Government Strategy and Performance Directorate):** Unison did not receive an express invitation to the consultation meeting, but the STUC did. There were a number of stakeholder meetings. Invitations to those meetings were not issued to absolutely everyone. There were invitations for specific groups of stakeholders, over and above the consultation exercise, which involved Unison and wider bodies.

**The Convener:** That clarification is helpful.

**Marlyn Glen:** Can the equality unit check the matter? There are definitely rumblings that the consultation invitations were not as open and wide as would have been expected. Although it is too late for the consultation that has passed, it is important that arrangements are improved for the next time.

**Christina McKelvie (Central Scotland) (SNP):** This morning I received a message from Peter Hunter, a Unison legal officer, who contributed to the consultation. I do not know whether he was speaking for Unison, but he is Unison's legal officer. He told me that he had concerns that there was a real danger of throwing out the baby with the bathwater.

**The Convener:** We are on the specific issue of consultation. Why were the regulations laid before the analysis was published and why were the consultees not given any feedback or told that the regulations had been laid? Is that standard practice?

**Alex Neil:** I will explain exactly what the position is. There has been criticism of the consultation analysis reports being published after the regulations were laid before Parliament. There was a tight timeframe within which to consider and

analyse the consultation responses and to finalise and lay the SSIs. If we had missed the parliamentary deadlines, we would not have been able to lay the SSIs until much later this year. However, I assure the committee that the consultation responses were fully considered. All responses were read, and an interim report on the consultation responses was provided to us by the consultants on 3 December, with a full first report on 17 December and a first draft of the final report on 11 January. There was clearly time for the issues that respondents had raised to inform the revision and drafting of the final regulations.

**Elaine Smith:** Why was there such a tight timescale?

**Alex Neil:** Because of the election—we finish here on 22 March. To get the SSIs laid within the timeframe, we had to move quickly.

**The Convener:** The UK Government published all its key documents on the same date—12 January. Why did the Scottish Government take a staggered approach to dealing with those documents? The instruments were laid on 31 January, the analysis was published on 10 February and the paper describing the action that had been taken as a result of the responses was published on 24 February.

**Alex Neil:** I will ask Yvonne Strachan to give you chapter and verse on everything that happened, *seriatim*.

**Yvonne Strachan:** The regulations were laid on 31 January. As the minister explained, there was a tight timeframe in January to finalise both the consultation analysis for publication and the regulations for laying. Because of that, we were not in a position to publish the documents at the same time as the regulations or prior to that. We acknowledge that that might have been preferable, but there was a reason for our not being able to do it. The analysis of the consultation was published after the regulations were laid but within the timeframe for consideration by the committee. The consultation document was published after that. Both documents were circulated to all the respondents to the consultation.

**The Convener:** Ideally, had there been more time, you would have done things differently, but the documents were published within the period that was allowed for that and all the consultees were informed.

**Yvonne Strachan:** Yes.

**Marlyn Glen:** I want to emphasise this point. We are talking about a timeframe and about getting things right. I suggest that everyone wants to get things right. In my view, that is the issue for us today. It is really important that we get things right. If the timeframe is wrong, it must go.

10:00

**Alex Neil:** We think that we have got it right. Despite the slight difference in sequence in publication, the reality is that all the responses that were received were independently analysed; that analysis was published; and, as we can show, we have taken account of the input to the consultation. That is the substantive point.

**Marlyn Glen:** A statistical analysis is one thing, but with something like this consideration must also be given to what one of our previous witnesses called the dissenting view. Obviously, it is important to give different weighting to different responses. We are trying to regulate public bodies; if they ask for lighter regulation, that might not necessarily be the right way to go, just because there are many of them.

**Alex Neil:** Before ministers took a decision on finalising the draft regulations for presentation to Parliament, we obviously took into account dissenting views, of which there were many. However, we have to reach a decision at some point and, basically, we think that we have got this broadly right.

**Hugh O'Donnell:** At what stage did you discuss the draft regulations with the EHRC? Did you consult it prior to last week's aborted evidence session or has your department been in touch with it subsequent to that? Given that this has been on the radar for a couple of weeks, I am a little concerned that we did not get any communication from the EHRC until 6 o'clock last night. What was the process that led to its becoming involved at such a late stage?

**Alex Neil:** We are discussing what is largely UK legislation and our implementation of the consequences of the UK Equality Act 2010. I must emphasise that the EHRC is the statutory body with primary responsibility throughout the UK for the implementation of that act and that, as such, we have consulted it at every single stage. Officials have regular meetings with it and, indeed, had such a meeting at the tail end of last week. I point out, though, that I am not responsible for what the commission decides to write and when it decides to write it.

**Hugh O'Donnell:** I am aware of the commission's statutory obligations.

In the draft regulations for Wales, public bodies will be required to explain why a protected characteristic has not been included in their equality objectives. Why do you consider regulation 3 in this proposed set of regulations to be sufficient for public bodies in Scotland?

**Alex Neil:** Before we get into the detail of this, I point out that this whole thing has to be looked at as a package underlined by the mainstreaming of

these duties. That is essential. Obviously there are differences between the approaches taken in Scotland, England and Wales. For example, the approach in Wales is much more prescriptive whereas our emphasis is much more on outcomes, impacts and performance. In fact, when the Auditor General for Scotland examined these matters, he suggested that that very area needed to be strengthened.

When you prepare policy and look at outcomes, you have to gather evidence on every single characteristic. There is no dubiety about that. As for the outcomes themselves, an outcome target does not have to be set for every characteristic; if the evidence did not support such a move, that would clearly not be the right thing to do. Similarly, in response to the previous witnesses' point about the involvement of relevant groups in the community, I point out that evidence cannot be robust without the active involvement of such groups and our guidance will spell out in detail that they must be involved in the gathering of any evidence that forms the basis for deciding the outcome targets for each public authority.

**Hugh O'Donnell:** I am interested in the minister's distinction between different parts of the UK. That approach is not necessarily reflected in the Government's position on procurement. I am sure that others will address that point.

**Alex Neil:** May I just correct that, convener? The procurement process is also subject to the equality duties. There should be no hesitation about that whatsoever. The difference between the three nations that I mentioned is whether a prescriptive approach is taken to procurement. I emphasise that every public procurement process throughout Great Britain is subject to the public equality duties.

**The Convener:** Thank you for that clarification, minister.

**Malcolm Chisholm:** Far be it from me, minister, to suggest that you should follow what happens in England and, indeed, Wales for the sake of it, but it is interesting in this and other policy areas to compare and contrast. The fact is that, if something appears to be better in another part of the UK, we should not reject it just because it comes from elsewhere.

There are a lot of concerns about the equality impact assessment of the regulations. Unison and the STUC speak particularly strongly about that, as do CRER and others. I will point out three areas of concern and try to get your comments on them.

First, public bodies in England and Wales will be required to publish details of equality impact assessments, but there is no similar requirement in Scotland. Secondly, there is no requirement in

Scotland to consult or engage with people who have protected characteristics as part of the equality impact assessment process, but that is a requirement on English and Welsh public bodies. Thirdly, there is no requirement to analyse existing policies and practices, but again English public bodies will have to do so. I suppose that there is a particular concern about that because existing policies and practices have been considered only in terms of the race, gender and disability duties that have existed hitherto.

Those are three substantial areas of concern. It seems rather odd that Scotland appears to be taking a much weaker approach to the issue. Again, some of that is about reining back on what has happened hitherto. There is a genuine sense of bewilderment around that and the thinking behind it.

**Alex Neil:** I will deal with each of those concerns, but there is an underlying theme, which is that other countries have decided to put a lot of the requirements into a detailed prescriptive format in regulations, whereas we are putting a lot of that into guidance. In practice, there will be no difference between what we and the others do in that regard. However, I believe that our system of publication will be better.

First, the guidance will state that the equality impact assessment and, indeed, the evidence that is gathered to decide outcomes should all be published. At the moment, the racial equality duty is a statutory requirement, but that was legislated for prior to the introduction of freedom of information legislation. However, we are in no doubt that every body should publish and we will reflect that in the guidance. That is standard practice in Scotland anyway, and it will be reflected in the guidance.

The second point is that the publication in England will be on an annual basis and will not be as the policy is decided; in Scotland, the publication will be as the policy is decided so that not just the equality impact assessment but all the evidence behind it can immediately be seen. That is a much more robust system than that which is being introduced south of the border.

On consultation, I have already said that the evidence must be gathered, which cannot be done without proper consultation and involvement of the key stakeholders, covering all the characteristics. Again, that will be emphasised in the guidance that will be issued after the regulations—I hope—are passed. The same will apply to analysis. Clearly, the whole point is to analyse what has happened in the past, learn the lessons, see where gaps exist and then fill those gaps. We will ensure that that happens in Scotland, as it does at present. That will be done through guidance.

At the end of a year or two, if it is felt that some authorities are not following the guidance sufficiently robustly, I would be quite happy—if I am still in this job—to lay supplementary regulations to put things into regulations as well, but the bottom line is that we will be doing the same in practical terms as England is doing.

**Malcolm Chisholm:** That is quite an odd answer in a way. I suppose that some comfort can be taken if you are saying that you basically accept all the criticisms but that you do not think that these things need to be put into regulations. However, do you not accept that it would be very easy to put them into regulations, given that they are in other regulations in other parts of the UK?

**Alex Neil:** If it proves necessary, I would be happy to lay supplementary regulations at a later date to include these matters. If the committee agrees to these regulations today and feels that there should be a stronger commitment to lay supplementary regulations in order to put these matters into regulations and not just in guidance, we would obviously take that extremely seriously.

**Marlyn Glen:** I am still concerned, and not convinced. If you are accepting the criticisms, why wait for a year or two for people not to come up to scratch? Why not just put these matters into regulations now? I am really struggling because, on the face of it, it sounds plausible to put things into guidance, but I do not understand why you would not just put them into regulations. Twenty-three per cent of the respondents said that existing policies and practices should be assessed and 13 per cent said that assessments should be published. Given what we said about the need to take account of dissenting views and to weight responses, I question why regulation 5 was not amended in light of those responses.

We are putting a huge burden on the EHRC and on public authorities: they must be very clear about how important the guidance is, rather than just being able to look at the regulations. Also, given the reduction in resources for the EHRC, which is definitely the principal scrutineer, how can the Scottish Government ensure that public authorities enact and evidence their commitment in practice?

**Alex Neil:** First, as I said earlier, I do not accept the criticism, which I think is ill founded. We will publish, consult and analyse. The only difference is that in England they will put these matters into regulations, while we will put them into guidance. If the committee felt in future that it was necessary to put them into regulations, we would take that recommendation very seriously, but I do not think that it is necessary. There is no doubt that we will do all these things and, in fact, particularly in relation to publication, we will do them better than England, because they will be done not on an

annual basis, but as each policy is revisited. I do not accept the criticism—quite the opposite. The criticism is ill founded.

I will, however, listen to the committee. If the committee says that it thinks that these matters should be built into regulations then, rather than revisiting the draft regulations, which would create a real gap in terms of specific duty provision—they cannot be reintroduced until September or October at the earliest—the straightforward thing to do would be to lay supplementary regulations at a later date.

In any case, it is all happening. Publication is happening and will happen. Analysis is happening and will happen. Consultation is happening and will happen. The bottom line will be the same. In practice, there will be no difference, despite the fact that one lot is in regulations south of the border and the other lot is in guidance north of the border.

**Marlyn Glen:** If the regulations as they stand are approved, I hope that you are right, but I am not sure that the witnesses accept that assertion. I still do not see why we cannot get it right first time.

10:15

**Alex Neil:** I find it unlikely that the committee could reach conclusions on the basis of two witnesses, given the number of people who responded to the consultation, attended the meetings and so on.

It is fair to say that people are under the misapprehension that there will not be publication. There will be publication and the only difference between us and England is that that requirement is not in our regulations, although it will be in our guidance. If the committee feels strongly that the requirement to publish needs to be in the regulations, I am happy to lay supplementary regulations to include it.

**The Convener:** You have made that point clear, minister. We would probably say that it is the substance of the concerns that matters as opposed to the numerical issue, but we have covered that point quite conclusively. Do members have anything to add?

**Malcolm Chisholm:** First, it is unfair to say that only two witnesses have concerns. You must have seen the written evidence from Unison, the STUC, the Scottish women's budget group and others.

**Alex Neil:** I am sorry if I am wrong when I say that only two witnesses have concerns, but my point is that a large number of people have been involved in the consultation.

**Malcolm Chisholm:** Secondly, it may be that I did not hear the appropriate part of your answer—I



apologise if I did not—but did you answer the point about existing policies and practice? There is a substantial difference between the regulations in Scotland and those in the rest of the UK as to whether existing policies and practices should be subject to equality impact assessment.

**Alex Neil:** My view is that as councils revisit their policies and the implementation of those policies—including existing policies, which should be reviewed regularly—they should undertake, as appropriate, an equality impact assessment, because that should inform any development of or change in policy. My understanding is that that is what happens in Scotland now.

**The Convener:** Marlyn, are you content?

**Marlyn Glen:** No, I would not say that I was content, because this is a particular problem. If we are talking about long-standing institutional racism, sexism and so on, there is a massive concern that looking only at new policies and practices will not touch that at all.

**Alex Neil:** That is not what I am saying. If there is a concern in an organisation then there is a need to look at policy, because people are not satisfied. For example, yesterday Strathclyde Police released figures on the number of women employed as police officers. Clearly, those figures were produced because the police were concerned that not enough women were being recruited and serving as police officers. Strathclyde Police are now looking at the policies that they have implemented and require to implement in order to increase the proportion and number of women who are police officers. The equality impact assessment clearly has a major role to play in the development of that policy.

I ask Yvonne Strachan to provide some additional information.

**Yvonne Strachan:** It is important to stress two points on the issue of existing policies versus proposed policies or changes. First, the provision is strengthened, because from April 2011 authorities will have a duty to assess the impact of proposed policies, changes and revisions of policies. That is distinct from what is currently in the regulations, which is stated as making the arrangements for and setting out the methodology for impact assessing. The distinction is that, under the existing regulations, it is for an authority to lay out how it will go about doing that impact assessment and make the application appropriate to whether we are dealing with existing policies or proposed policies.

The draft regulations apply policies from 2011. You can see that by creating this strong requirement, if a public authority is in the position—say, two or three weeks' later—that it has not undertaken or is not undertaking an

impact assessment on an existing policy, then it is not meeting the requirements of the regulation. The requirement is to look at new, proposed and changing policies with a view to driving forward an agenda that allows the development of policy properly to reflect an impact assessment.

Sitting beneath that is also the general duty, which makes it clear that an authority should have due regard to the equality duty and its responsibilities across all its functions, including policy. If an authority deems that the evidence so dictates, or it is concerned about an existing policy, it would be required to and should consider impact assessing that policy. We are requiring that the actual undertaking of impact assessments should be focused on proposed policies and those that are undergoing change, as a mechanism for ensuring that it is done at the outset and that that is the focus that an authority should give for moving forward and ensuring that the policy development that it undertakes and the decisions that it makes are to ensure the best outcomes for all the protected characteristics.

**The Convener:** Jamie Hepburn, you will have to be very quick.

**Jamie Hepburn:** I will be as quick as I can be, convener.

I am quite taken with the point that has been made about the difference between the regulations and guidance. Is the minister satisfied that the concerns that have been raised about there being a gap in the regulations will be covered by the guidance? If so, is that not a fairly prosaic argument about what goes into regulations and what goes into guidance? If we were to reject the instrument, would we not be throwing the baby out with the bath water?

**Alex Neil:** It is better to approve the regulations and not leave a gap. The regulations cannot be reintroduced until September or October, in order to meet all the necessary requirements. Going back out to consultation and reintroducing a new SSI cannot be done until a new Government has been formed after the election. If the committee's view is that some of the issues should be included in the regulations, the sensible thing to do is not to have a gap, but to agree to the regulations as they stand, with a view to committing to supplementary regulations, which could be put in place by September or October.

**Stuart McMillan:** Minister, can you outline the difficulties with collecting employment data across all the protected characteristics and say what the rationale is behind the 150-employee threshold before collecting employment data?

**Alex Neil:** The rationale behind the 150-employee threshold, which is required across the UK, is a view that was held by the previous Labour

Government and is held by the current UK Government. It is that if we go below a figure of 150 employees, we are in danger of disclosing individuals because people could be identified by the information that is published. So the 150-employee threshold is really to protect individuals. The UK Government reached a figure of 150 and, given that that figure has been backed up by research, we are happy to accept it. Every jurisdiction in the UK accepts that figure.

On the point about collecting employment data across all the characteristics, experience has shown that people are not keen to disclose certain characteristics. I think that I am right in saying that religion and sexual orientation are two of those. It is therefore felt that it would be meaningless to collect those characteristics because people are not always willing to give that information.

**Stuart McMillan:** One of our earlier witnesses gave the example of ISD in the health service and the different and detailed information that it collects. What is there to stop other elements of the public sector from undertaking similar methods of data collection, including data on religion and sexual orientation?

**Alex Neil:** At the end of the day, there is no law against collecting that information as such. However, in terms of the statutory requirements under the regulations, we must be judicious and learn from our previous experience. The view that I am expressing about which characteristics are recorded was shared by the previous Labour Government and is shared by the current UK Government and, I understand, the Welsh Assembly Government. I think that it is fair to say that the approach was considered reasonable by people who responded to the consultation. That is why we reached our view.

**Stuart McMillan:** Given what is currently required under the race duty, it seems that the proposed approach will reduce the amount of information on race that is required. In addition, the duty on employment data seems to put emphasis on gender inequality, in that information on the gender pay gap, an equal pay statement and information on occupational segregation will be required. Can you explain the rationale behind that?

**Alex Neil:** We must look at the issue in context. We are putting the emphasis on outcomes as well as on impact and performance, and how and in what detail organisations collect and monitor their information is up to them. The key point is that they must collect and monitor all the relevant information that they need to collect the evidence that is needed to decide what their outcome targets will be.

It is our view, and that of the Equality and Human Rights Commission, that the regulations are drafted in such a way as to reflect strongly the emphasis on outcomes, and that because of that and the emphasis on impact and performance, the kind of detail that is collected can be decided by each organisation. The approach must be robust; if it is not robust the organisation will not be able to fulfil the obligations that are set out in the regulations.

**Jamie Hepburn:** It has almost been suggested—in the discussion with the witnesses and in questions to you, minister—that there is unwillingness on the part of public sector bodies to be involved in data collection on employment monitoring. That is quite a big claim to make. Is there evidence that that is true?

**Yvonne Strachan:** I think that the issue is that when Audit Scotland did its study on how well work on the race duty had been undertaken, the indications were that public authorities were undertaking employment monitoring but there were problems with the quality of the data and the coverage—in other words, how much of the workforce was being covered—

**Jamie Hepburn:** But there was no lack of willingness to be involved in the process.

**Yvonne Strachan:** It is difficult to say whether there was a lack of willingness, but there was no indication that there was a lack of willingness. What was indicated was that the collection of information was undertaken but there were gaps in relation to how the information was used and therefore in relation to what outcomes there were as a result of some of the activity. There was not particular evidence to suggest unwillingness.

**Malcolm Chisholm:** A main concern that has been expressed is about the failure to insist on information about applications, because if we have information only on the end of the process—on how many people from different groups are employed in the workforce—the information will be partial. If we are to make progress on the issue, it seems fundamental that there should be information about applicants, too.

**Yvonne Strachan:** The issue is that the regulations provide for high-level information, which is about employment rates and not about detailed issues to do with applications. However, as the minister said, employment monitoring needs to be undertaken. Although the 2010 act and the attendant code of practice do not expressly say that public authorities have to undertake employment monitoring, employment monitoring is recommended and there are recommendations on the detailed information that employers should consider as part of good practice. We support that.

A second issue, which the minister flagged up, is that the mainstreaming duty, which sits alongside the other provisions and the regulations, is about collecting information and reporting on progress across all the functions of a particular public authority. Employment is one of a public authority's responsibilities and functions and the expectation is that employment monitoring will be one of the areas on which a public body will want to report and demonstrate progress. The area will be covered in the guidance that will be attached to the provisions on mainstreaming.

10:30

**Hugh O'Donnell:** It is interesting that Yvonne Strachan mentioned that point. Am I right in recalling that the Commissioner for Public Appointments in Scotland has to detail the listing of applications for public appointments made by the Scottish Government? That seems to be at odds with what Yvonne Strachan just said about people keeping track of things in the natural course of events, given that—if my memory is correct, as I said—the Government is obliged to undertake employment monitoring in relation to its own public appointments.

**Alex Neil:** We will need to write to you on that. I am not familiar with the rules that govern the Commissioner for Public Appointments to that degree of detail.

**The Convener:** We would appreciate clarification.

**Elaine Smith:** Minister, concerns have been raised about procurement, which was mentioned briefly earlier on—not least in the submission from Unison, which says:

"We are ... concerned that there is no mention in the draft regulations of procurement."

The current UK Government has said that it does

"not believe it is necessary to impose burdensome additional processes on public bodies".

The Scottish Government does not propose specific duties relating to procurement and has said that the reason is

"the need for a consistent procurement equality framework across GB",

but the Welsh Assembly Government proposes something rather different. It says that, when a public authority enters an agreement

"on the basis of an offer which is the most economically advantageous it must have due regard to whether the award criteria should include considerations relevant to its performance of the general duty."

The reason that you give—that you want to be consistent—does not seem to stack up. The Welsh are going to do things differently and, some

people believe, better. That raises concern and leads to the overall perception that Scotland, having been ahead of the game, is falling behind.

**Alex Neil:** As I said earlier, the public organisation that makes the procurement will be covered by the general and specific duties. In any aspect of its work, that public authority is governed by the specific duties. Therefore, we believe that it would not be necessary or necessarily effective to try to extend the specific duties to the contractors and sub-contractors. We also believe that, in the current economic climate, to do so may produce an adverse reaction that would not be particularly conducive to the policy objectives that we are pursuing.

**Elaine Smith:** If everything is covered by the general duties, which come into force in April, why can we not take time to consult further so that we can listen to people's concerns and get the regulations right on the specific duties?

**The Convener:** I will couple that with the last question, minister, because I know that you had hoped to get away at half past 10. The Coalition for Racial Equality and Rights has suggested delaying the regulations to allow for revisions to be made. It suggests that nothing would be lost, given that the duty to publish information on equality outcomes, mainstreaming and employment data requires publication by 6 April 2012. Will you take Elaine Smith's question along with that one?

**Alex Neil:** If the regulations are not agreed to, there will be a period of vacuum in relation to the specific duties that the regulations cover in Scotland. That would send entirely the wrong message to everybody who has been involved in the consultation.

Also, as I said, if I am still in this job after the election, I will be happy to accommodate any recommendation from the committee, particularly on the issues that Malcolm Chisholm raised, if there is a strong feeling in the committee that they should be included in the regulations. I suggest that, rather than not agree to the regulations on that basis, the committee agree to them with an undertaking that we would accept any recommendation from it that we introduce supplementary regulations on the issues that Malcolm Chisholm highlighted.

**The Convener:** Are you content, Elaine?

**Elaine Smith:** I am not particularly content. I still do not think that the question has been answered. If the general duties cover everything, why is there such a rush to implement the specific duties?

**Alex Neil:** Basically the specific duties will place particular obligations on how the general duties are advanced. If the specific duties are not laid, these things will advance much slower, certainly in

some public authorities, than would otherwise be the case.

**Elaine Smith:** I think that that answers my point that we have the time to get this right.

**The Convener:** That concludes our questions on the SSIs. The next item is formal consideration of the motions recommending approval of both instruments.

*Motion moved,*

That the Equal Opportunities Committee recommends that the Equality Act 2010 (Statutory Duties) (Scotland) Regulations 2011 be approved.—[*Alex Neil.*]

**The Convener:** Do members have any comments?

**Marlyn Glen:** I realise that the regulations are the result of a lot of work and good intentions but I am absolutely not convinced that they are right. We need to get them right first time and I would prefer it if they were amended and improved and then brought back to the Parliament.

**Jamie Hepburn:** As I said earlier—and I recognise that it is a bit of a cliché—this is just throwing the baby out with the bath water. I am convinced by the minister's argument that there is good reason to move ahead with this now. A bit of a distinction is being made between whether it is necessary to put everything in the regulations or whether it should be set out in the guidance, but I think that if we take the two together they actually cover everything. I am also concerned by the EHRC's comment that any delay would not be in the interests of the people of Scotland. The minister has made a commitment—in good faith, I think—that he will work with the committee on any changes that prove to be necessary further down the line and, on that basis, I think that we should proceed.

**Elaine Smith:** We have also heard evidence that it would not be in our best interest for these regulations to proceed as they are. I believe that we should not proceed with them and, indeed, that we should reflect on the matter, given that, from what the minister has said, no huge repercussions will arise from waiting and getting things right.

**The Convener:** The question is, that motion S3M-7858 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Hepburn, Jamie (Central Scotland) (SNP)  
McKelvie, Christina (Central Scotland) (SNP)  
McMillan, Stuart (West of Scotland) (SNP)  
Mitchell, Margaret (Central Scotland) (Con)

**Against**

Chisholm, Malcolm (Edinburgh North and Leith) (Lab)  
Glen, Marlyn (North East Scotland) (Lab)  
O'Donnell, Hugh (Central Scotland) (LD)  
Smith, Elaine (Coatbridge and Chryston) (Lab)

**The Convener:** The result of the division is: For 4, Against 4, Abstentions 0. I use my casting vote in favour of the status quo.

*Motion disagreed to.*

*Motion moved,*

That the Equal Opportunities Committee recommends that the Equality Act 2010 (Specification of Public Authorities) (Scotland) Order 2011 be approved.—[*Alex Neil.*]

**The Convener:** The question is, that motion S3M-7857 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Chisholm, Malcolm (Edinburgh North and Leith) (Lab)  
Glen, Marlyn (North East Scotland) (Lab)  
Hepburn, Jamie (Central Scotland) (SNP)  
McKelvie, Christina (Central Scotland) (SNP)  
McMillan, Stuart (West of Scotland) (SNP)  
Mitchell, Margaret (Central Scotland) (Con)  
Smith, Elaine (Coatbridge and Chryston) (Lab)

**Abstentions**

O'Donnell, Hugh (Central Scotland) (LD)

**The Convener:** The result of the division is: For 7, Against 0, Abstentions 1.

*Motion agreed to.*

**The Convener:** I thank the minister for his forbearance and the extra time that he has given the committee.

*Meeting closed at 10:39.*

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Members who wish to suggest corrections for the revised e-format edition should mark them clearly in the report or send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP.

#### PRICES AND SUBSCRIPTION RATES

##### OFFICIAL REPORT daily editions

*Single copies: £5.00*

*Meetings of the Parliament annual subscriptions: £350.00*

##### WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

*Single copies: £3.75*

*Annual subscriptions: £150.00*

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by RR Donnelley and is available from:

#### Scottish Parliament

**All documents are available on the Scottish Parliament website at:**

**[www.scottish.parliament.uk](http://www.scottish.parliament.uk)**

For more information on the Parliament, or if you have an inquiry about information in languages other than English or in alternative formats (for example, Braille, large print or audio), please contact:

#### Public Information Service

The Scottish Parliament  
Edinburgh EH99 1SP

**Telephone: 0131 348 5000**

**Fòn: 0131 348 5395** (Gàidhlig)

**Textphone users** may contact us on **0800 092 7100**.

We also welcome calls using the Text Relay service.

**Fax: 0131 348 5601**

**E-mail: [sp.info@scottish.parliament.uk](mailto:sp.info@scottish.parliament.uk)**

We welcome written correspondence in any language.

#### Blackwell's Scottish Parliament Documentation

**Helpline** may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

#### Telephone orders and inquiries

**0131 622 8283 or**

**0131 622 8258**

#### Fax orders

**0131 557 8149**

**E-mail orders, subscriptions and standing orders**  
**[business.edinburgh@blackwell.co.uk](mailto:business.edinburgh@blackwell.co.uk)**

#### Blackwell's Bookshop

**53 South Bridge  
Edinburgh EH1 1YS  
0131 622 8222**

#### Blackwell's Bookshops:

243-244 High Holborn  
London WC1 7DZ  
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

#### Accredited Agents

(see Yellow Pages)

and through other good booksellers

e-format first available  
ISBN 978-0-85758-588-2

Revised e-format available  
ISBN 978-0-85758-599-8