



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# EQUAL OPPORTUNITIES COMMITTEE

Tuesday 1 May 2012



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**EQUAL OPPORTUNITIES COMMITTEE**

**8<sup>th</sup> Meeting 2012, Session 4**

**CONVENER**

\*Mary Fee (West Scotland) (Lab)

**DEPUTY CONVENER**

\*Stuart McMillan (West Scotland) (SNP)

**COMMITTEE MEMBERS**

\*John Finnie (Highlands and Islands) (SNP)

\*Annabel Goldie (West Scotland) (Con)

\*Siobhan McMahon (Central Scotland) (Lab)

\*Dennis Robertson (Aberdeenshire West) (SNP)

\*Jean Urquhart (Highlands and Islands) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Mark Eggeling (Scottish Government)

Yvonne Strachan (Scottish Government)

Nicola Sturgeon (Deputy First Minister and Cabinet Secretary for Health, Wellbeing and Cities Strategy)

**CLERK TO THE COMMITTEE**

Douglas Thornton

**LOCATION**

Committee Room 4



## Scottish Parliament

### Equal Opportunities Committee

*Tuesday 1 May 2012*

[The Deputy Convener *opened the meeting at 14:04*]

### Decision on Taking Business in Private

**The Deputy Convener (Stuart McMillan):** Good afternoon, ladies and gentlemen, and welcome to the Equal Opportunities Committee's eighth meeting in 2012. Our convener, Mary Fee, has been unavoidably detained, but she hopes to get to the meeting at some point. I remind members that mobile devices should be turned off completely. We have received no other apologies from members.

I will start with introductions. To my left, we have our clerking and research team, together with the official reporters. Opposite me, we have our witnesses. We are also supported by broadcasting services and the security office. We have a number of people in the public gallery, whom I warmly welcome.

I ask members to introduce themselves. I am the deputy convener of the committee.

**Dennis Robertson (Aberdeenshire West) (SNP):** I am the MSP for Aberdeenshire West.

**John Finnie (Highlands and Islands) (SNP):** I am an MSP for Highlands and Islands.

**Annabel Goldie (West Scotland) (Con):** I am an MSP for West Scotland.

**Jean Urquhart (Highlands and Islands) (SNP):** I am an MSP for Highlands and Islands.

**Siobhan McMahon (Central Scotland) (Lab):** I am an MSP for Central Scotland.

**The Deputy Convener:** Agenda item 1 is a decision on taking business in private. Are members content to take agenda item 4 in private?

**Members** *indicated agreement.*

## Subordinate Legislation

### Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 [Draft]

14:05

**The Deputy Convener:** Agenda item 2 is oral evidence from the Scottish Government on the draft Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. The text of the draft regulations and an accompanying briefing and written submissions can be found in papers EO/S4/12/8/2, EO/S4/12/8/3 and EO/S4/12/8/4.

I welcome our witnesses and ask them to introduce themselves.

**The Deputy First Minister and Cabinet Secretary for Health, Wellbeing and Cities Strategy (Nicola Sturgeon):** I am the health secretary.

**Yvonne Strachan (Scottish Government):** I am the head of the equality unit.

**Mark Eggeling (Scottish Government):** I am from the Scottish Government legal directorate.

**The Deputy Convener:** You are most welcome. Before we go to questions, I invite the cabinet secretary to make some brief opening remarks.

**Nicola Sturgeon:** I thank the committee for the opportunity to be here to discuss the regulations. We listened carefully to what the Equal Opportunities Committee in the previous session of Parliament said last year and, as members will have seen, we have made a number of changes to the draft regulations that reflect that committee's concerns. I will say a little more about those changes before I answer questions.

At the forefront in all our considerations has been consideration of the type of duties that will have the biggest impact on tackling inequality and promoting equality in Scotland and the role of public authorities in that work. In our response to the Christie commission, we have set a direction of travel for public sector reform that challenges public services to reshape and better integrate and to deliver improved outcomes for people. Our proposed specific duties are designed to chime with and support that approach. They are deliberately focused on outcomes and encourage the integration of equality considerations into the core business of public authorities.

The public sector equality duty in the Equality Act 2010 requires us to have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations. The specific duties will enable the better performance of the public sector equality duty,

build on progress that has already been made and help to force the pace of change. Importantly, the specific duties bring equality from the margins into the main stream and, as I said, into the core business of public authorities.

I am grateful to the people who contributed to our consultation last year. It is good to know that there is now strong support for the approach that we propose. We believe that we have secured appropriate coverage for the specific duties and that the proposed suite of specific duties provides a strong package of requirements and an effective framework for the better performance of the equality duty while remaining flexible and proportionate. The introduction of a mainstreaming duty will require public authorities to report on the progress that is made in embedding the equality duty across all their functions and with regard to all the relevant protected characteristics.

The requirement to set equality outcomes will enable authorities to focus on what matters and on where they can have the most impact. We listened to what the previous committee said to us in that regard and we have included a requirement that an authority must publish reasons if its set of equality outcomes does not cover all the relevant protected characteristics.

The duty relating to the assessment of impact will contribute to good policy making and sound decision taking across the range of an authority's interests. In response to previous concerns, we have added a requirement to make arrangements to review existing policies and practices. Where a new or revised policy or practice is adopted, the regulations require any corresponding impact assessment to be published.

We recognise the importance of public sector employment and have placed duties on authorities in relation to their employees. Those duties were substantially rewritten following discussions with the previous committee. The employee information duty now covers all relevant protected characteristics and all listed authorities. We have also included duties relating to public procurement and we will introduce a ministers' duty, which will require the publication of proposals that are designed to help the delivery of the equality duty across the public sector.

Overall, I believe that the proposed duties strike the right balance between prescription and flexibility. Although they are robust and challenging, they are sufficiently flexible to allow a proportionate outcomes-focused approach that will work for the very broad range of public authorities that the regulations cover. Our aim through the equality duty and our work on public service reform is to promote the successful transformation of communities by ensuring that people's life chances are improved and not diminished

because of the barriers that they face. We have a big opportunity to make a difference in the period ahead and I am optimistic that the creativity, the commitment and the care that characterise our public services, our equality groups, trade unions and others will be used to forge services that work effectively and help us to make progress.

That is a very brief outline of the regulations. I look forward to answering members' questions and discussing the issues with the committee.

**The Deputy Convener:** Thank you very much, cabinet secretary. Before I open up the meeting to colleagues' questions, I have a question of my own. What specifically did the Scottish Government do in the process that it undertook from March last year up to now to build in the wider public's views and make the regulations more robust?

**Nicola Sturgeon:** We listened very carefully to what the previous committee said and took care to consult and consider how we might best address those issues. Our consultation on revised draft regulations attracted a total of 140 responses and, as I hinted in my opening comments, a large majority of respondents expressed agreement with all aspects of the revised draft regulations.

I am sure that we will go into certain concerns that have been expressed in a bit more detail but, at this point, I will briefly cover a few that we have responded to. With regard to equality outcomes, the previous committee was concerned that authorities were not being asked to set outcomes for all relevant protected characteristics. In response, we have added a requirement for authorities to publish their reasons if their outcomes do not cover all characteristics.

On impact assessments, there was a concern that the original requirement covered only new policies and practices, not changes to existing policies and practices, and the desire was expressed for a requirement to publish impact assessments. We have kept the focus of impact assessments on new policies and practices, but in the revised regulations we have extended the requirement to include an existing policy or practice to which a change is proposed. We have also added a duty to make arrangements to review existing and future policies and practices regardless of whether any change to them has been proposed.

Finally, I should mention employment information. The previous committee was concerned that the original proposals required only authorities with 150 or more employees to publish employment information and felt that the information to be published was insufficient and implied some hierarchy between the different characteristics. As I said in my opening remarks,

we have completely rewritten the duty, which now requires all authorities, regardless of size, to take steps to gather, use and publish information across all characteristics and to report progress under the mainstreaming duty. In addition, organisations with upwards of 150 employees will have a duty to publish their gender pay gap and an equal pay statement. That requirement is extended to include disability and race for subsequent pay statements.

I hope that when members compare the draft regulations with the previous proposals and look at the comments that were made by the previous committee, they will see that we have taken the time and put a lot of effort into positively addressing those concerns. We certainly feel that what is before the committee today does that.

**Dennis Robertson:** I echo the cabinet secretary's sentiments with regard to the responses that were received and the evidence that has been gathered. From what I can gather, the main contributors have contributed very positively to the draft regulations that are before us. You mentioned the balance between prescription and flexibility. In which areas do you envisage there being greater flexibility?

14:15

**Nicola Sturgeon:** I am not sure that we have built in greater flexibility than we had previously. We have tried, in addressing the predecessor committee's concerns, to retain the correct balance between prescription and flexibility.

One of those concerns was that authorities were not being asked to set equality outcomes for all relevant protected characteristics. We have not gone down the prescriptive route to the point of saying that they must do so, but we have put an onus on them to explain their reasons if they choose not to. There will be reasons why a particular authority may opt not to do that for every protected characteristic. That is an example of how we have gone a bit further down the prescriptive route than we had previously suggested, while still trying to retain a degree of flexibility.

As with anything, finding the right balance between prescription and flexibility is more of an art than a science, but that is what we have tried to do. We have built in a commitment to review certain aspects, particularly around the gender pay gap and the equal pay policy arrangements. We will continue to ensure that we are keeping those regulations and the requirements within them fit for purpose. I believe that, at present, we have struck the right balance.

**Dennis Robertson:** If my understanding is correct, you feel that the new draft regulations are

much more robust than the ones that were submitted to the predecessor committee.

**Nicola Sturgeon:** Yes, I do. The process has been useful in allowing us to reflect on the comments that have been made, not only by the predecessor committee but by some of the people who gave evidence to it. We have been open and frank in reflecting on some of those comments, and the improvements that we have made strengthen the regulations and make them more robust than they were previously.

**The Deputy Convener:** Before I bring in Annabel Goldie, Siobhan McMahon has a supplementary.

**Siobhan McMahon:** Cabinet secretary, you mentioned the pay gap and the equal pay requirements, and how those will be reviewed. At present, the regulations state that those matters will be reviewed "from time to time". Is there a reason why the regulations are not more specific on that point? Will they be more specific in the years to come?

**Nicola Sturgeon:** With regard to information on the gender pay gap, the regulations state:

"A listed authority must publish information on the percentage difference among its employees ... no later than ... April ... 2013; and ... each second year after that."

We are very clear on the reporting obligation.

We said specifically that we wanted to continue to review that area, because the predecessor committee raised it as a concern. We have addressed it in relation to another aspect of the duties, but in this case we have said that we want to keep under review the threshold of 150 employees. We think that that is appropriate for such a duty, because there must be a sufficient number of employees to provide the data that makes the reporting meaningful.

**Siobhan McMahon:** So, will it be constantly reviewed? At present, the regulations state that there is a requirement on Scottish ministers to review it "from time to time". I am wondering what that means.

**Nicola Sturgeon:** Are you talking about the duty on ministers?

**Siobhan McMahon:** Yes—the regulations state:

"The Scottish Ministers must review from time to time whether the figure of '150' in paragraphs (3) and (4) should be amended."

**Nicola Sturgeon:** We have not set specific timescales, but we would expect to carry out that review earlier than the more general reviews that are built into the regulations.

**Annabel Goldie:** Cabinet secretary, it may surprise you to learn that I listened with some

sympathy to your observation that finding a balance is more of an art than a science. I fully understand why that observation was made.

However, it seems that the new revised regulations are significantly more prescriptive than their Westminster counterparts. Is there any general cause for concern in that regard? The converse is that there is greater potential to impose burdens on public authorities in Scotland than there is elsewhere.

I was also slightly concerned by regulation 11, which gives to the Scottish ministers the power to require a listed authority to consider such matters as they may from time to time specify. How will that be done? What procedure or mechanism will be invoked?

**Nicola Sturgeon:** I will deal with Annabel Goldie's first point first. As I said earlier, it is always necessary to look to strike the correct balance. I recognise the danger of being prescriptive to the point that we put undue burdens on public authorities, but I do not think that we have run into that danger in the regulations; I think that we have struck the right balance by being clear about what we expect but leaving a degree of flexibility. Depending on the nature of the duty that we are talking about, that level of flexibility will vary to allow a public authority to ensure that it is discharging its duty appropriately, given its objectives and the nature of the authority. It is evident from the list of public authorities that are covered that they have a range of functions, so a one-size-fits-all approach would not be the right one.

The other point to make in that regard is that we must recognise the importance of promoting equality and challenging inequality. The purpose of the regulations is not academic. It has real meaning and relevance to the lives of very many people, so it is important that we have the degree of prescription that the regulations provide.

Regulation 11 is there because we may want to specify other matters, as a result of our experience generally or of our experience with particular listed authorities. I think that that would be done by further regulation.

**Yvonne Strachan:** I can clarify that, after which Mark Eggeling might want to say something.

The regulations will enable ministers to draw to the attention of public authorities and to ask them expressly to consider a piece of work, research or data that is relevant to the delivery of one of the duties. That would not require specific changes to the regulations. However, if it were necessary to change any of the duties, that would require us to introduce amending regulations.

**Nicola Sturgeon:** So, if we were to amend the detail of any of the regulations, we would have to do so through further parliamentary process, but if we were to ask a public authority to do something that was seen to be in pursuit of one of the existing regulations, that would not require further parliamentary process.

**The Deputy Convener:** Annabel, do you have any other issues that you wish to raise?

**Annabel Goldie:** Not broad ones, no. I have some specific ones.

**The Deputy Convener:** Do any other members have any broad issues to raise?

**Jean Urquhart:** With my local authority hat on, I wonder how we help public authorities to reach the hard-to-reach areas. How can we be inclusive?

**Nicola Sturgeon:** I guess that I would answer that in two ways. All of this is designed to ensure that public authorities are focused on harder-to-reach areas. That is often what dealing with inequality and promoting equality are about. I know from my experience of the health service how challenging it can be to put such duties on your own employees and how important understanding the nature of your workforce is to ensuring that you offer the right support and training to the people who work for you. In a sense, the very act of putting these duties on public authorities will help to ensure that they do that.

The second part of my answer relates to regulation 12, which deals with the Scottish ministers' duty. It puts on us a duty to set out proposals for activity that will assist public authorities to fulfil the general duty, which allows us not just to tell public authorities what they should be doing, but to support them in doing it.

**The Deputy Convener:** I know that some members have questions about procurement.

**John Finnie:** Good afternoon, cabinet secretary. You talked about the role of promotion, and I welcome the inclusion of public procurement in the revised regulations. What support will be given to those who win a contract under procurement, and who will provide assistance to them with equality obligations?

**Nicola Sturgeon:** In 2009 we published the "Scottish Sustainable Procurement Action Plan", which is intended to show public bodies how they can deliver more sustainable outcomes through their procurement activities. The plan refers specifically to equalities and emphasises that equalities should be considered at every stage of the procurement process. That advice and support is already there.



The forthcoming sustainable procurement bill will seek to introduce a legislative framework to promote the procurement of environmentally sustainable, socially responsible goods and services. The content of that bill will be subject to public consultation, which is another opportunity to try to assist public authorities in ensuring that they are fulfilling the duty of the regulations when it comes to procurement.

**John Finnie:** The trade unions play an important role in the promotion of equality in the workplace, certainly according to a representation that we received from Unison. Can you ensure that the trade unions are consulted in relation to the compilation of equality impact assessments?

**Nicola Sturgeon:** Yes. I would expect trade unions and others who work with or have an interest in any of the relevant protected characteristics to be consulted by public authorities on impact assessment.

On the fulfilment and monitoring of other duties under the regulations, you are absolutely right that trade unions have an important role to play—as do a range of other organisations—in supporting people and in helping and encouraging public authorities to live up to the standards expected of them.

**Annabel Goldie:** I have a general question about regulation 9. That is one example in which the UK Government subsequently decided not to include a public procurement regulation; indeed, the Scottish Government originally took the same decision,

“mindful of the value of a level playing field across GB”.

I am quite curious about why the Scottish Government is no longer mindful of that.

Secondly, I have a more specific question. I find the text of regulation 9 opaque and potentially rather confusing. Could regulation 9, as currently drafted, prevent a listed authority from accepting an offer that is the most economically advantageous?

**Nicola Sturgeon:** On the first part of your question, the short answer is that we were encouraged by the previous committee and by those who gave evidence to that committee to look again at a range of issues that they felt were missing from the first round of regulations—

**Annabel Goldie:** I am no doubt a primitive animal—I was not on the previous committee.

**Nicola Sturgeon:** I will not speculate on how different things might have been if you had been, Annabel.

The previous committee reached a range of conclusions, to which we have responded openly and frankly in an attempt to address those

concerns without, as I said earlier, going too far down the road of inflexible prescription.

The duty in regulation 9 applies where an authority is a contracting authority, which is already defined by public procurement legislation; where the contract that is being tendered is already regulated by the Public Contracts (Scotland) Regulations 2012; and where there is consideration of the general duties relating to and proportionate to the subject matter of the contract.

When those conditions are met, the authority must have due regard to whether the contract can help it to better perform the general duty. The phrase “due regard” is not a blanket requirement to include equality within award criteria and contract conditions. It is deliberately a reasonably light touch to ensure that that due regard is given. I do not know whether Mark Eggeling wants to add anything from a legal perspective regarding Ms Goldie’s question.

**Mark Eggeling:** Regulation 9(1) deals with the situation when a tender is made and award criteria are being set for the tendering process. A level playing field applies in as much as the criteria are considered right from the outset. The duty is merely to consider the equality duty in setting the award criteria. The decision will still be based on the award criteria rather than on the duty itself.

14:30

**Annabel Goldie:** So the listed authority does not have to counterbalance the priority obligation of considering the most economically advantageous arrangement for it with its contracting party but, in making its decision, it must have due regard to equality issues.

**Mark Eggeling:** Yes—in setting the criteria.

**Annabel Goldie:** Regulation 9 is not intended to usurp the initial obligation.

**Nicola Sturgeon:** No. The due regard is to be paid in setting the criteria for making an award.

**Dennis Robertson:** Will the provisions enable public authorities to subcontract into the third sector, which would allow them to work more closely with the third sector on contracts and to engage properly with it more?

**Nicola Sturgeon:** I expect local authorities to engage properly with the third sector anyway. The duty in the regulations will not particularly change the relationship between local authorities and the third sector. In general, I expect local authorities to engage positively with the third and voluntary sectors.

**The Deputy Convener:** Following past consultations, did the Scottish Government give

any weighting to reflect whether responses came from organisations or individuals?

**Nicola Sturgeon:** We take into account all submissions that are made to a consultation and reach a balanced view as a result of the views that are expressed. A particular point is not necessarily given more weight because it comes from one source rather than another, but a range of factors is taken into account. If the committee is interested, I can break down the 140 responses into their different sources, but I suspect that that would be too much detail for the committee.

**The Deputy Convener:** I imagine that it would be.

**Siobhan McMahon:** I have a few final points. I note that the Government has pledged to amend the regulations

“if particular elements are not having the intended effect.”

I ask what the definition of “the intended effect” is, so that the groups that have to implement the provisions know what they are supposed to be doing.

**Nicola Sturgeon:** Different authorities will set different outcomes. They will have a responsibility to monitor outcomes and to assess whether the actions that they are taking are delivering their outcomes. More generally, the Scottish Government will go through an iterative and consultative process to determine over time whether we require to amend the regulations. I would expect the committee to have an important role to play in that.

**Siobhan McMahon:** How will we monitor what is going on? You have said that you will monitor

“how the Regulations work in practice”

and what is required to be amended. How will equality groups take part in that and how will we reach that position?

**Nicola Sturgeon:** In setting their outcomes, in monitoring, in undertaking impact assessments and in dealing with all aspects of the regulations that place duties on them, I expect public authorities to engage closely with equality groups. In the Government’s overview of the regulations generally, we will continue to engage with equality groups, as we have done in getting from the previous regulations to the stage that we are at today. As I said, I expect the committee to play a role in that.

**Siobhan McMahon:** What role will the Equality and Human Rights Commission play in monitoring, and—more important—enforcement, given the impact of its staff reductions from down south?

**Nicola Sturgeon:** I do not speak for the EHRC and I do not want to get into a debate about its

staffing levels, because that is not for today’s discussion. The EHRC has particular responsibilities and in my experience is robust and clear in its expectations and its ability to speak up and make the Scottish Government aware of areas to which it thinks that we need to pay attention.

**The Deputy Convener:** If there are no more questions, we move on to item 3, which is the debate on the regulations. I invite the cabinet secretary to move motion S4M-02612. If members do not then indicate that they want to speak, I will put the question on the motion.

*Motion moved,*

That the Equal Opportunities Committee recommends that the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 [draft] be approved.—[*Nicola Sturgeon.*]

*Motion agreed to.*

**The Deputy Convener:** I thank the cabinet secretary and her team.

14:36

*Meeting continued in private until 15:21.*

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