

Review of the operation of the Public Sector Equality Duty in Scotland: Consultation paper

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Ministerial Foreword

The people of Scotland have experienced unprecedented challenges since the beginning of the COVID-19 pandemic in early 2020. It has exposed deep-rooted structural inequalities in our society and exacerbated the disproportionate impact on individuals and groups who already experience structural disadvantage. Public authorities have had a vital role in supporting individuals and communities, particularly those who may be experiencing disadvantage. Those experiences during the pandemic and our commitment to build back better during recovery have emphasised the importance of our work to mainstream and embed human rights in everything that we do.

In order to do so, we must have a strong legislative underpinning. Within the Equality Act 2010 sits the Public Sector Equality Duty (PSED) which requires the public sector to embed and promote equality throughout their processes with a view to advancing equality, tackling discrimination and fostering good relations. This has been supported through Scottish Specific Duties, introduced in 2012, designed to ensure that Scottish Ministers and public bodies give better effect to the PSED. As we approach 10 years since the creation of these duties, it is time to take stock and consider what more we can do to support a more effective regime in Scotland.

That's why we have been reviewing the effectiveness of the regime. In March this year, we published a stage one report which identified the current issues with the regime and areas for improvement. Building on that thinking, this consultation contains ambitious proposals for change both relating to the Scottish Specific Duties, as well as the wider environment for implementation so that we can make the regime tangible for the people of Scotland. It sets out our thinking on commitments made in this year's Programme for Government to embed inclusive communication and expand gender pay gap reporting duties to ethnicity and disability.

Taking stock and proposing these changes gives us an opportunity to create an effective regime and wider implementation environment that will make a stronger contribution to improving the lives of people in Scotland, by embedding equality considerations at the very heart of the public sector. I am grateful to those who have supported the development of this work to date, and I would like to call again on the public sector, equality advocacy groups, and people with lived experience to provide their unique perspective and expertise to help us continue to shape these proposals together, through this consultation.

Together we can create a Scotland that is inclusive, safe and empowering, a Scotland that celebrates the diversity of people, and where we protect, respect and fulfil human rights and live free from discrimination.

Shona Robison

Cabinet Secretary for Justice, Housing and Local Government

Introduction

Purpose of this consultation:

Scottish Ministers are committed to reviewing the effectiveness of the Public Sector Equality Duty (PSED) in Scotland. After months of research and engagement to identify issues within the Scottish Specific Duties (SSDs)¹, it has become clear that more could be done to improve the regime.

Drawing on our research so far, this consultation now sets out a series of detailed proposals both for legislative changes to the SSDs and changes to the wider implementation environment. The consultation will run from 13 December to 7 March. Due to the technical nature of the SSD regime and the purpose and effect of the regulations, this consultation is mainly targeted to the Scottish public sector and equality advocacy groups. However, we would also welcome responses from members of the public and the private sector, if you/your organisation wishes to. For the 12 week period in which this consultation is live, officials will engage with various equality advocacy groups and listed authorities to continue to develop our thinking and understanding of their views.

This consultation paper is also being published under regulation 12(1) of the SSD as it contains proposals that will ultimately enable listed authorities to better perform the PSED. As per regulation 12(2), we will subsequently publish a report on progress in relation to the development and implantation of these proposals.

Progress of the Review to date:

In March last year, we established that the review would be taken forward in two stages. The first stage involved an intensive programme of engagement with equality stakeholders and listed authorities to understand which aspects of the PSED were working well and where improvement was required. The first stage was completed when we published our Stage One report², setting out the learning from the engagement programme, reflection of equality mainstreaming over COVID-19 pandemic and key improvement proposals.

Based on a wide range of evidence, and valuable dialogue with equality stakeholders and networks over many months, the Stage One report concluded that the overall framework of the positive PSED duty, supported by the Scottish Specific Duties, is worthwhile and can be an effective driver for progress, but that its full potential has not yet been realised.

The report identified eight key cross-cutting issues:

- Making better use of evidence and data;
- Strengthening participatory policy making and hearing lived experience;
- Improving the links between equality and human rights frameworks;

¹ The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended)

² Scottish Government, Review of the Operation of the PSED in Scotland: Stage One Report, March 2021 [Equality outcomes and mainstreaming: report 2021 - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/consultation-papers/collections/documents/equality-outcomes-and-mainstreaming-report-2021.pdf)

- Strengthening leadership and resourcing;
- Reducing bureaucracy;
- Increasing clarity in relation to coverage, proportionality, and process;
- Improving support and capacity building; and
- Improving the cohesiveness of the regime.

Further to this, the report adds that more could be done to:

- Improve the understanding of and approach to mainstreaming;
- Consider new approaches to outcome setting;
- Strengthen the current approach to assessing policies;
- Support the gathering, use and reporting of a wider range of employee data;
- More effectively leverage purchasing power in procurement processes;
- Enhance the accessibility of PSED related publications, and consider the scope of the SSDs to advance progress on inclusive communication more generally; and
- Explore how best to use the duties relating to Scottish Ministers.

We are now in stage two of the review where we have been progressing work to further explore the key findings from stage one. This has included a questionnaire sent to listed authorities and some equality advocacy groups in July this year. This exercise has helped to progress our thinking and to develop the proposals outlined in this paper.

We would like to thank all stakeholders who have provided views on the operation of the PSED and suggestions to improve the regime.

Our consultation:

This consultation paper will build on our progress on the review to date and within the scope, as outlined above. We have split this paper into 3 parts:

- Part 1: Seeking views on specific and detailed proposals that we think will improve the current regime, based on evidence and views from stakeholders;
- Part 2: Using the opportunity of this consultation to seek further views from stakeholders and build our evidence base on key issues; and
- Part 3: Providing an opportunity for further and general reflections, and providing information on responding to the consultation.

Throughout this paper there are proposals and questions relating to individual SSDs, as well as key themes that are relevant across all of the SSDs. These include:

- Improving the overall cohesiveness and reducing perceived bureaucracy;
- Improving the use of lived experience and participatory policy making;
- Making better use of equality evidence and data; and
- Improving leadership, particularly from the Scottish Government.

This consultation contains both proposals that would likely require regulatory change as well as proposals to improve the wider implementation environment of the duties, including delivering on two key 2021-22 Programme for Government commitments:

“Later this year, we will consult on the operation of the Public Sector Equality Duty in Scotland and potential regulatory changes, including a new duty on relevant public bodies to develop accessible and inclusive communications, and expanding existing duties to include reporting on disability and ethnicity pay gaps.”³

Post-consultation:

The responses to this consultation will then inform our suggested improvements to the SSDs and implementation environment. We will continue to engage with stakeholders throughout this period. The suggested changes to the SSDs will be legislated for to the extent possible within the powers of Scottish Ministers. Subject to the Parliamentary timetable, regulations will be introduced to the Scottish Parliament in late 2022 subject to the affirmative SSI procedure to give effect to any proposals that require regulatory changes. This means that they will be scrutinised by the Equality, Human Rights and Civil Justice Committee and must be approved by a resolution of the Parliament.

It is our intention that any regulatory changes will come into force in 2025. This timescale will facilitate a lead in period, which will ensure that listed authorities understand what will be required of them under the new regulatory regime and for new guidance to be developed. This timeline would also align with the reporting cycle for most listed authorities under the current SSDs.

We recognise that regulatory change needs to be accompanied by implementation steps, and we will take forward work both generally and through the development of a wider mainstreaming strategy to ensure that new regulations are underpinned by an effective plan for implementation. This will be developed with public bodies and key stakeholders including the Equality and Human Rights Commission and equality advocacy organisations.

³ Scottish Government, A Fairer, Greener Scotland: Programme for Government 2021-22 [Programme for Government - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/documents/2021/06/Programme-for-Government-2021-22.pdf)

Context

Explaining the Public Sector Equality Duty:

The PSED is a duty on public bodies, and those carrying out public functions, which was created by section 149 of the Equality Act 2010 (the Act), and came into force in April 2011. It was developed in order to consolidate specific duties in respect of race, gender and disability that were all previously contained in separate Acts and extended it to other relevant protected characteristics. The PSED obliges public authorities, and those carrying out certain public functions, to have due regard, when exercising their functions, to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Although the subject matter of the Act is largely reserved to the UK Parliament, Scottish Ministers have the power (under section 153 of the Act) to supplement the PSED by placing specific duties on certain Scottish public authorities. Scottish Ministers used these powers to make the Scottish Specific Duties in 2012.

The SSDs are intended to provide a supporting framework to enable certain public authorities to better perform their PSED, through enhanced data collection and evaluation, and greater transparency and accountability. In this way, the specific duties help authorities to better perform their duty to have 'due regard' to the 3 needs of the PSED, and to mainstream equality in their everyday work.

Scope of the Review of the Operation of the PSED:

Scottish Ministers have committed to reviewing the operation of the PSED in Scotland, which in effect means reviewing:

- The effectiveness of the SSDs, for which Scottish Ministers have legislative competence; and
- The implementation environment for the PSED in Scotland, in recognition of the fact that regulations alone do not deliver equality, but that factors such as leadership and capacity are critical.

This review does not consider the scope of the general PSED as set out in section 149 of the Act or the role of the Equality and Human Rights Commission (EHRC) as the enforcement body, as these are matters reserved to the UK Parliament.

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

Regulation 3: Duty to report progress on mainstreaming the equality duty	Requires listed authorities to publish a report on the progress it has made to make the PSED integral to the exercise of its functions so as to better perform that duty. This must be published every 2 years.
Regulation 4: Duty to publish equality outcomes and report progress	Requires listed authorities to publish a set of equality outcomes, every 4 years, which it considers will enable it to better perform the equality duty. Listed authorities must take steps to involve persons with relevant protected characteristics in setting these outcomes and must report on progress to achieve outcomes every 2 years.
Regulation 5: Duty to assess and review policies and practices	<p>Listed authorities must assess the impact of applying a proposed new or revised policy or practice against the three needs of the PSED:</p> <ul style="list-style-type: none"> • Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act. • Advance equality of opportunity between people who share a protected characteristic and those who do not. • Foster good relations between people who share a protected characteristic and those who do not. <p>When undertaking assessments, listed authorities must consider evidence relating to people with relevant protected characteristics, take account of the results of the assessment, and publish the assessment within a reasonable period. Listed authorities should make arrangements to review these policies and practices as necessary.</p>
Regulation 6: Duty to gather and use employee information	Requires listed authorities to take steps to gather information on the composition of their employees in relation to their relevant protected characteristics, and the recruitment, development and retention of those employees. Listed authorities must then use this information to better perform the equality duty, and include an annual breakdown of this information in their mainstreaming report, per regulation 3.
Regulation 6A: Use of member information	From time to time, Scottish Ministers must take steps to gather information on the relevant protected characteristics of members of a listed

	<p>authority, and provide information gathered by them to the listed authority in question.</p> <p>Listed authorities must then use this information to better perform the equality duty, reporting on the number of men and women who have been members of the authority, and the way in which the information provided by Scottish Ministers has been used to increase diversity in relation to protected characteristics amongst the authority's members.</p>
Regulation 7: Duty to publish gender pay gap information	Requires listed authorities with over 20 employees to publish information on the percentage difference among its employees between men's average hourly pay (excluding overtime) and women's average hourly pay (excluding overtime). This must be published every 2 years.
Regulation 8: Duty to publish statements on equal pay, etc.	<p>Every 4 years, listed authorities with over 20 employees must publish a statement which details their policy on equal pay between its employees, and the occupational segregation between its employees, in relation to:</p> <ul style="list-style-type: none"> • men and women; • persons who are disabled and persons who are not; and • persons who fall into a minority racial group and persons who do not.
Regulation 9: Duty to consider award criteria and conditions in relation to public procurement	Requires listed authorities to have due regard to whether the award criteria should include considerations to enable it to better perform the equality duty in procurement processes.
Regulation 10: Duty to publish in a manner that is accessible, etc.	Requires listed authorities to ensure that information published under regulations 3, 4, 7 and 8 are done so in a way that makes them accessible to the public.
Regulation 11: Duty to consider other matters	Gives Scottish Ministers a power to specify matters which listed authorities must consider when carrying out their duties under the other regulations.
Regulation 12: Duty of the Scottish Ministers to publish proposals to enable better performance	Requires Scottish Ministers to publish proposals for activity to enable a listed authority to better perform the equality duty. These proposals must be published, and progress reported on, every 4 years.

Glossary

Term	Description
Disaggregated data	Data disaggregation means breaking down large data categories into more specific sub-categories. When data is broken down and disaggregated by protected characteristic groups and sub-groups, they can show the unique differences among groups and reveal significant disparities.
Equality Act 2010	Legislation which consolidates and strengthens laws that protect people from discrimination and disadvantage. The Act set out the nine protected characteristics and created the Public Sector Equality Duty.
Equality and Human Rights Commission (EHRC)	An executive non-departmental public body, who monitor compliance with the Public Sector Equality Duty across the Scottish, and wider UK, public sector.
Equality and Human Rights Committee	Committee from the previous parliamentary session (session 5), which focused on human rights, equality (including the nine protected characteristics), and equal opportunities in the Scottish Parliament.
Equality and Human Rights Mainstreaming Strategy	The Scottish Government is currently developing a strategy to embed equality, inclusion and human rights across the public sector, improving how we centre equality, inclusion and human rights in all government policies, decisions and spending.
Equality Data Improvement Programme	A multi-phase programme of work that aims to strengthen Scotland's equality evidence base enabling policy makers to develop sound and inclusive policy.
Equality, Human Rights and Civil Justice Committee	A Scottish Parliamentary Committee established in June 2021 that focuses on equal opportunities matters, human rights matters, and civil justice matters including debt, evictions and family law.

Term	Description
Equality Outcomes	<p>An equality outcome is a result which a listed authority aims to achieve in order to further one or more of the needs mentioned in the PSED. In other words, an equality outcome should further one or more of the following needs: eliminate discrimination, advance equality of opportunity and foster good relations.</p> <p>Under regulation 4 of the SSDs, listed authorities are required to publish a set of equality outcomes every 4 years.</p>
Expert Reference Group on COVID-19 and Ethnicity	<p>This group was established in 2020 to consider and inform the Scottish Government's approach in relation to the impacts of COVID-19 on Minority Ethnic communities. This was in response to reports at a UK-wide and international level that some Minority Ethnic groups may be at risk of experiencing disproportionate effects, both in terms of adverse health outcomes and in a wider context, including economically.</p>
Fairer Scotland Duty	<p>Part of the Equality Act 2010, it places a legal responsibility on particular public bodies in Scotland to actively consider ('pay due regard' to) how they can reduce inequalities of outcome caused by socio-economic disadvantage, when making strategic decisions.</p>
First Minister's National Advisory Council on Women and Girls	<p>A council established in 2016 to advise the First Minister on what is needed to tackle gender inequality in Scotland.</p>
Gender Representation on Public Boards (Scotland) Act 2018	<p>Legislation which sets a "gender representation objective" for the boards of certain Scottish public authorities that 50% of the board's non-executive members are women, and it requires appointing persons and public authorities to take certain steps towards achieving the objective.</p>

Term	Description
Listed Authorities	The bodies subject to the Scottish Specific Duties are specified in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended).
Mainstreaming	The process of embedding equality and human rights considerations and practices in the course of all that we do when exercising public functions.
National Performance Framework	<p>A framework designed for all of Scotland, which aims to:</p> <ul style="list-style-type: none"> • Create a more successful country; • Give opportunities to all people living in Scotland; • Increase the wellbeing of people living in Scotland; • Create sustainable and inclusive growth; and • Reduce inequalities and give equal importance to economic, environmental and social progress.
Positive action	If a person reasonably thinks that people sharing a certain protected characteristic suffer a disadvantage connected to that characteristic or have different needs, or if their participation in work or other activity is disproportionately low, they can take any action (which would otherwise be discrimination against other people) which is a proportionate means of enabling or encouraging those people to overcome or minimise their disadvantage or to participate in work or other activities or meeting their needs.
Programme for Government	A report that the Scottish Government publishes every year at the beginning of September and sets out the actions we will take in the coming year and beyond. It includes the legislative programme for the next parliamentary year to drive forward change across all levels of society.

Term	Description
Protected Characteristics	The Equality Act 2010 made it illegal to discriminate against, victimise or harass someone because of a protected characteristic. These are: age, disability, race, gender reassignment, marriage and civil partnership, pregnancy and maternity, religion and belief, sex, and sexual orientation. We all have at least one protected characteristic.
Relevant Protected Characteristics	Protected characteristics relevant to the Public Sector Equality Duty. Defined in Section 149(7) of the Equality Act 2010 as all characteristics listed above except marriage and civil partnership.
Public Sector Equality Duty (PSED)	Set out in section 149(1) of the Equality Act 2010. It consists of a general equality duty, supported by specific duties which are imposed by secondary legislation, which aims to integrate considerations of the advancement of equality into the day-to-day business of public authorities.
Scottish Specific Duties (SSDs)	Created by secondary legislation in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, then amended in 2015 and 2016. These duties are intended to help those authorities listed in the regulations in their performance of the general equality duty.
Scottish Statutory Instrument (SSI)	A Scottish statutory instrument is subordinate legislation made by the Scottish Ministers or a regulatory authority in exercise of powers delegated by an Act of the Scottish Parliament.

Term	Description
Social Renewal Advisory Board	Established by the Scottish Government in June 2020 and featured a diverse range of people and voices tasked with developing recommendations to renew Scotland once we emerge from the pandemic.
Three needs of the PSED	<ul style="list-style-type: none"> • Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act. • Advance equality of opportunity between people who share a protected characteristic and those who do not. • Foster good relations between people who share a protected characteristic and those who do not.

Part 1:

Proposals to Improve the Scottish Specific Duty Regime

Seeking views on specific and detailed proposals that we think will improve the current regime, based on evidence and views from stakeholders

Proposal 1: Creating a more cohesive regime and reducing perceived bureaucracy

Background

The purpose of the SSDs as a whole is to enable listed authorities to better meet the three needs of the PSED: to eliminate discrimination; to advance equality of opportunity; and to foster good relations. All of the SSDs should clearly link to helping listed authorities achieve better outcomes for individuals and groups, across all of the protected characteristics and thus they should be seen as key levers to mainstream equality in listed authorities' everyday work.

Key aspects of the SSDs are data collection and publication, in order to encourage better evidence-informed decision making and increase transparency and accountability. It is therefore important that information collected and/or published on the basis of the duties is then used to inform decisions and action that will lead to real change.

In order for listed authorities to engage meaningfully with the SSDs as a whole, it is essential that they are straightforward and cohesive. Improving cohesiveness and reducing perceived bureaucracy relates to all of the SSDs, with a particular focus on regulation 3: Duty to Report Progress on Mainstreaming the Equality Duty.

Considerations

The Stage One report and general stakeholder engagement identifies issues relating to the cohesiveness of the SSDs. Stakeholders, including EHRC, believe that the duties can sometimes seem disparate, and that they can appear to drive separate but disconnected processes. For example, the setting of equality outcomes is not always informed by the data gathered under the data related SSDs. Many stakeholders see the perceived disconnect between the different parts of the SSDs as adding to a sense that the regime is at present too bureaucratic and process-driven.

Another issue identified in this context is that some of the SSDs are not seen to be prescriptive enough. For example, some stakeholders have said that the current mainstreaming reporting duty (regulation 3), is too vague and not prescriptive enough. This can then lead to listed authorities producing long and bureaucratic reports which provide dense, less relevant information that does little to drive change. Some listed authorities have stated that reporting every two years adds to a feeling of bureaucracy and there are concerns that meeting this requirement becomes the focus, rather than meeting the ambitions of the SSDs in delivering better outcomes for the people of Scotland. It is also recognised that the requirement to report can drive action, including around data collection which may not necessarily have happened without the reporting requirement which can act as an important foundation for dialogue and accountability.⁴

⁴ Scottish Government, Understanding Equality Data Collection in the Scottish Public Sector, March 2021 [Public sector - understanding equality data collection: executive summary - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/understanding-equality-data-collection-executive-summary-2021/pages/10-to-12.aspx)

Potential Solutions

Some stakeholders are of the view that the regime could be strengthened to make the interconnectedness of the duties clearer. For example, some consider that this could be done by requiring listed authorities to demonstrate how their collection and/or publication of data (through regulations 6, 7, and 8), and the relevant inequalities identified, has subsequently informed listed authorities' decisions and actions.

In looking at practice elsewhere, stakeholders have noted that the Welsh Specific Duties require listed authorities in Wales to publish a Strategic Equality Plan.⁵ In this plan, authorities are required to set out their strategic approach to the Welsh Duties as a whole and their arrangements for performing each of them. EHRC's Review of the Implementation of the PSED in Wales found that public bodies were positive about the requirement to develop a strategic equality plan as it assisted authorities in thinking about their duties in a more joined-up way and improved the coherence of the overall regime.⁶

A key theme from stakeholders was that the principle of using lived experience could be strengthened across the SSDs. It was considered that this could help shift the perception that the current regulations are "too process driven", as it would reemphasise that using lived experience across compliance with the other duties should be undertaken in order to make better policy decisions and to better mainstream equality and human rights.

Other suggestions put forward, primarily from listed authorities, included allowing listed authorities the ability to satisfy multiple SSDs through one report. There have been calls for this report to be published every 4 years; aligning reporting under the SSDs to operational cycles of public bodies; and decoupling reporting timescales which currently align with the financial year end, to allow listed bodies to spread the workload across the year.

The current regulations already allow for this flexibility; for example, regulation 10(2) states: "A listed authority must, so far as practicable, comply with its duty to publish under regulations 3, 4, 7 and 8 by employing an existing means of public performance reporting". This approach is already encouraged by EHRC. However, based on the feedback received, this may not be well understood. While listed authorities can publish at any time throughout their current reporting cycle, it is clear from practice that the "30 April" date given - for example, in the mainstreaming reporting duty (regulation 3) - is treated as a deadline by many organisations. This may have driven some of the calls for this to be changed.

Stakeholders strongly support improving the cohesiveness of the regime by consolidating previous sets of amending regulations into one new set.

⁵ The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, regulation 14.

⁶ EHRC Wales, Review of the Public Sector Equality Duty (PSED in Wales, November 2014 [review_of_psed_in_wales_full_report_english_nov2014.pdf](http://equalityhumanrights.com/review_of_psed_in_wales_full_report_english_nov2014.pdf) (equalityhumanrights.com))

Our proposal

The Scottish Government believes we can improve the cohesiveness of the SSDs and minimise the perceived feeling of bureaucracy, by putting a stronger focus on how each of the duties are implemented to help meet the PSED and assist listed authorities' efforts to mainstream equality.

In terms of the substance of reporting, we think that this can be achieved by making the mainstreaming reporting duty more prescriptive and require listed authorities to produce a report every 4 years, which would include:

- Publishing a strategic plan that sets out how the listed authority intends to meet all of the SSDs;
- Publishing all of the information required by other SSDs;
- Reporting on listed authorities' implementation of the SSDs, over the previous 4 years; and
- Reporting on how listed authorities have used lived experience, or the organisations representing people with lived experience, throughout their implementation of the duties.

The intention would be to assist listed authorities in seeing all of the SSDs in an interconnected way, and to encourage listed authorities to explore and publish how they have implemented their duties to better meet the needs of the PSED. This would include duties that previously did not have a publication element to them. For example, this would cover the duty relating to procurement (regulation 9), so listed authorities would have to demonstrate how they have implemented this duty. This could be achieved by publishing case studies and examples.

The revised mainstreaming reporting duty would also cover any new or revised duties introduced as a result of this review of the operation of the PSED.

In relation to the reporting process, we propose to:

- Simplify the regime so that there is only one reporting cycle for all of the duties;
- Allow listed authorities to satisfy all of their reporting duties in one report, reinforce the flexibility of reporting requirements and encourage listed authorities to report on their duties as part of their own operational reporting cycles;
- Ensure that reporting deadlines do not align with the end of the financial year; and
- Require reports to be published at a minimum of every 4 years.

We believe the reduction of the reporting requirement to every 4 years and the ability to satisfy all of the publication duties through one report should reduce the perceived feeling of bureaucracy. We also believe that emphasising the flexibility of the regime will encourage the notion that listed authorities' compliance with the SSDs should be embedded in their everyday business.

Finally, the Scottish Government proposes to consolidate all previous sets of regulations relating to the SSDs, in one new all-encompassing and clear set of regulations.

Question 1.1:

What are your views on the proposal outlined above in relation to the substance of reporting?

Question 1.2:

What are your views on the proposal outlined above in relation to the reporting process?

Question 1.3:

What are your views on consolidating the previous sets of amending regulations?

Proposal 2: Embedding Inclusive Communications

Background

The Scottish Government is committed to improving and embedding inclusive communication within Government and across the public sector. In March 2021, we published our suite of Equality Outcomes for the current 2021-25 reporting period under the SSDs, which focus on tackling significant inequalities in society. One of those outcomes is focused on inclusive communication and states:

‘By 2025, inclusive communication will be embedded in the approaches of public bodies, with an increased proportion of people in Scotland reporting that their communications needs are being met when accessing public services.’⁷

The Scottish Government committed to several actions to enable us to meet this duty, including:

- Using the review of the PSED as an opportunity to explore the value of using legislation to strengthen duties on the public sector in relation to inclusive communication;
- Working in partnership with other public bodies and stakeholders including third sector organisations and people with lived experience, to co-produce a set of common principles and set national expectations with a long term plan of action;
- Building on the approach progressing in Social Security Scotland for external and internal two way communications to establish a system for monitoring the use of inclusive communication across the public sector;
- Considering all of the above develop national standards, best practice and guidance, and shared resources for public bodies on inclusive communication.

Regulation 10 currently requires that listed authorities undertake their SSD reporting obligations in a manner that makes the information published accessible to the public. In our Programme for Government, we committed to consulting on placing a new duty on listed authorities to develop accessible and inclusive communications more widely.⁸

There are existing examples of where inclusive communication requirements have been part of legislation. The Social Security (Scotland) Act 2018⁹ and the Consumer Scotland Act 2020¹⁰ both contain provisions which state that Scottish Ministers and Consumer Scotland, respectively, “must have regard to the importance of communicating in an inclusive way”. Within these Acts, there are also provisions which state that “communicating in an inclusive way” means “communicating in a way that ensures that individuals who have difficulty communicating (in relation to

⁷ Scottish Government, Equality Outcomes 2021-25, March 2021 [Equality outcomes and mainstreaming: report 2021 - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/consultation-papers/collections/documents/Equality-outcomes-and-mainstreaming-report-2021.pdf)

⁸ Scottish Government, A Fairer, Greener Scotland: Programme for Government 2021-22 [Programme for Government - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/consultation-papers/collections/documents/Programme-for-Government-2021-22.pdf)

⁹ Social Security (Scotland) Act 2018, s4

¹⁰ Consumer Scotland Act 2020, s7(7)

speech, language or otherwise) can receive information and express themselves in ways that best meet each individual's needs.”

Inclusive communication is relevant to everyone as it is about ensuring effective engagement with people who understand and express themselves in different ways.

Considerations

The importance of communicating in an inclusive way was highlighted further during the COVID-19 pandemic, which led to a number of calls for the Scottish Government to take further steps to improve inclusive communications. The Scottish Parliament’s Equalities and Human Rights Committee’s Report on the Impact of COVID-19 on Equalities and Human Rights called for the Scottish Government to make “a national commitment to inclusive communication while the country is recovering from the pandemic”.¹¹

The Social Renewal Advisory Board’s report states: “We have seen the importance of clear and accessible communication during the pandemic, making sure everyone - including those who are visually impaired, British Sign Language users, and those whose first language is not English - can get the information or support they need when they need it. Public bodies should improve their approach to make sure communications are as inclusive as possible.”¹²

Listed authorities have identified some barriers that currently exist in relation to embedding the use of inclusive communication across the public sector. These include:

- The costs associated with producing documents in an inclusive and accessible manner;
- Insufficient understanding of the wide range of communication needs within communities;
- Capacity, resourcing and training; and
- Timing and practicality, as reports can often be finalised at a later stage before publication and can therefore mean it is difficult to publish alternative formats at the same time.

Potential solutions

From our engagement to date, we have learned that stakeholders are broadly supportive of improving inclusive communication. Views from stakeholders include calls for:

- Clearly defining what ‘accessible’ and ‘inclusive’ communication means;
- Publishing reports and documents using clear and straightforward language;

¹¹ Equality and Human Rights Committee, Scottish Parliament, Report on the Impact of the COVID-19 Pandemic on Equalities and Human Rights, 1st Report 2021 (Session 5) [Report on the impact of the COVID-19 pandemic on equalities and human rights \(azureedge.net\)](#)

¹² Social Renewal Advisory Board, If not now, when? January 2021, [If not now, when? - Social Renewal Advisory Board report: January 2021 - gov.scot \(www.gov.scot\)](#)

- Centralised translation service, to avoid disproportionate burden on smaller organisations;
- Ensuring proportionality, for example by making sure alternative versions are made available within a reasonable timeframe or upon request;
- Improved guidance and national standards; and
- Sharing best practice across the public sector.

Our proposal

The Scottish Government is of the view that a new duty should be placed on listed authorities that goes beyond publications under the SSD regulations, and that seeks to ensure inclusive communication is embedded proportionately across the work of listed authorities when they are communicating with the public. We will also provide a clear definition of what communicating in an inclusive way means, recognising that inclusive communication is about ensuring effective engagement with everyone, including those who understand and express themselves in different ways.

As per Proposal 1, listed authorities would be required to report on how they have met this duty as part of their overarching mainstreaming reporting duty.

To create the conditions for effective implementation of the new duty, the Scottish Government intends to progress work to support this duty through our equality outcome on inclusive communication. This will include working in partnership with other public bodies, stakeholders and people with lived experience, to co-produce a set of national standards and a robust monitoring system. We will also develop best practice guidance and shared resources for public bodies on inclusive communication. This work will also consider cost-effective ways to communicate inclusively. This will seek to assist listed authorities to prepare for the proposed new duty on inclusive communication coming into force.

Question 2.1:

What are your views on our proposal to place a duty on listed authorities to embed inclusive communication proportionately across their work?

Proposal 3: Extending pay gap reporting to include ethnicity and disability

Background

Regulation 7: ‘Duty to publish gender pay gap information’ requires listed authorities to publish information, every 2 years, on the percentage difference among its employees between men’s average hourly pay (excluding overtime) and women’s average hourly pay (excluding overtime).

The purpose of the duty on gender pay gap reporting is to deliver transparency and accountability and to encourage listed authorities to make more evidence-based decisions based on the information they have published. Furthermore, a key theme of the proposals outlined in this paper is to ensure that listed authorities see each of the SSDs as key levers to mainstream equality, and to therefore use all of the duties to meet the needs of the PSED, which in turn can lead to meaningful change for people across Scotland.

In our Programme for Government, we committed to consulting on extending the duty outlined, to require listed authorities to also publish ethnicity and disability pay gap information. The disability pay gap represents “the difference in average hourly pay of disabled and non-disabled people...expressed as a percentage of non-disabled people’s pay”.¹³ Likewise, the EHRC has defined the ethnicity pay gap as “the difference in average hourly pay of ethnic minorities and White British People...expressed as a percentage difference, with White British people’s earnings representing 100%.”¹⁴ For the purposes of the SSDs and to ensure consistency with regulation 8 (explained below), we would define the ethnicity pay gap would be defined as “the difference in average hourly pay of people who belong to a minority racial group and people who do not...expressed as a percentage of people who do not belong to a minority racial group’s pay”.

It is important to note that regulation 8: “Duty to publish equal pay statements, etc.” requires listed authorities to publish an equal pay statement and occupational segregation statement, every 4 years, in relation to their employees between:

- “Women and men;
- People who are disabled and people who are not disabled; and
- People who belong to a minority racial group and people who do not.”

While this is different to publishing pay gap information, some listed authorities have reported that they already voluntarily report on their ethnicity and disability pay gaps through the mechanism of their equal pay statements.

¹³ Equality and Human Rights Commission, Research Report 117, Measuring and Reporting on Disability and Ethnicity Pay Gaps, August 2018 [measuring-and-reporting-on-ethnicity-and-disability-pay-gaps.pdf \(equalityhumanrights.com\)](https://www.equalityhumanrights.com/research-reports/measuring-and-reporting-on-ethnicity-and-disability-pay-gaps.pdf)

¹⁴ See footnote 12

Considerations

As there is already an existing duty in relation to gender pay gap reporting, we intend to use learning from this – where possible – in our approach to extending the duty to ethnicity and disability pay gap reporting. A key issue identified with the current duty to publish gender pay gap information, is that the duty is not prescriptive enough on the formula that should be used to calculate the pay gap, and therefore there is a lack of standardisation and comparability in the methods and results of pay gap calculations across the public sector.

Concerns have been raised by some listed authorities that their very small numbers within the overall workforce could provide “skewed results” once the calculations are done, or individuals could potentially be identified.

In a related vein, some equality advocacy groups raised concerns that an ethnicity pay gap could not be produced robustly (for example, in a way that would provide sufficient insight into the pay disparities between white and people who belong to a minority racial group) in the vast majority of public sector organisations due to the under-representation of people who belong to a minority racial group in the workforce. Those groups tend to advocate that the priority should be on progressing measures to address the under-representation of people who belong to a minority racial group in the workforce.

The Scottish Government considers that publishing intersectional and disaggregated pay gap information would provide a more in-depth evidence base to assist listed authorities in meeting the needs of the PSED. However, we note that there are barriers that would prevent listed authorities from being able to do this effectively. This is explored in more detail in Section 8 on intersectional and disaggregated data analysis.

Potential Solutions

In relation to the current gender pay gap reporting regulation, a number of stakeholders were in agreement that there should be more standardisation in relation to reporting methods, which would in turn lead to improved comparability across the public sector. This would also be relevant to ethnicity and disability pay gaps. Standardisation in this context could include:

- Being specific in the duties as to what formulas listed authorities should use to calculate pay gaps;
- Agreed data gathering questions and answer options; and
- A template for reporting which could enable better consistency of presentation and comparability, enable improved progress monitoring and minimise bureaucracy.

In looking at practice elsewhere, the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 that apply in the UK¹⁵ are more prescriptive in relation

¹⁵ These Regulations have only a limited application in Scotland in respect of certain cross-border authorities and non-devolved Scottish authorities.

to the formulas that should be used to calculate gender pay gaps. Some stakeholders have suggested that this has resulted in both higher rates of publication and more consistent data. They have therefore suggested that the SSDs should use a similar model across gender, disability and ethnicity pay gap calculations.

There have also been calls from some stakeholders to create a Scottish public sector portal which enables public bodies to upload consistent, comparable information that enables the public to examine and compare public sector pay gap information in a single place. This is explored further in section 12.

In relation to the concerns expressed around the potentially small number of employees for some organisations, the need for a reporting threshold was advocated for consistent with the current reporting threshold for gender pay gap reporting which only applies to a body that has at least 20 employees.

Our proposal

The Scottish Government proposes to extend the current duty on gender pay gap reporting to include ethnicity and disability, with an appropriate reporting threshold to ensure that individuals cannot be identified on the basis of their protected characteristics. This would require listed authorities to publish information on their pay gap between disabled people and non-disabled people, and people who fall into a minority racial group and people who do not.

The Scottish Government will also encourage listed authorities to publish disaggregated pay gap information where possible. We also propose to improve standardisation by prescribing the formulas listed authorities should use to calculate each of their pay gaps.

As per Proposal 1, listed authorities would also be required to report on how they have met and implemented this duty as part of their overarching mainstreaming reporting duty.

Another key driver will be the development of the ethnicity pay gap strategy, which was committed to in our Programme for Government and will be published next year.

<p>Question 3.1:</p> <p>What are your views on our proposal to require listed authorities to publish ethnicity and disability pay gap information?</p>
<p>Question 3.2:</p> <p>Should the reporting threshold for ethnicity and disability pay gap reporting be the same as the current reporting threshold for gender pay gap reporting (where a listed authority has at least 20 employees)?</p>

Question 3.3:

What are your views on the respective formulas that should be used to calculate listed authorities' gender, ethnicity and disability pay gaps?

Proposal 4: Assessing and reviewing policies and practices

Background

Regulation 5: 'Duty to assess and review policies and practices' requires listed authorities, where and to the extent necessary to fulfil the PSED, to assess the impact of applying a proposed new or revised policy or practice against the needs mentioned in that duty, i.e. the need to advance equality of opportunity, eliminate discrimination and foster good relations.

In making the assessment, a listed authority must consider relevant evidence relating to persons who share a relevant protected characteristic and take account of the results of their assessment when developing the policy. Listed authorities must also publish the results of the assessment "within a reasonable period".

The regulation is not prescriptive about how this process of assessing the impact of a proposed new policy or practice should be carried out. However, in practice, it has given rise to a regime of conducting equality impact assessments (EQIAs), via various templates and forms in use across different listed authorities.

Considerations

Throughout our engagement to date, we have received substantial feedback on this regulation, allowing us to identify key issues with the current implementation of the duty:

- **A focus on process** – this duty can be seen as being centred around completing a form or a template as opposed to essential considerations for the development of better, more inclusive policy;
- **Timing** – impact assessments are often carried out too late in the policy development process, with some even being undertaken after the policy is in practice. Assessing and reviewing policies and practices must be carried out as early as possible to allow them to meaningfully shape and inform policy;
- **The use of evidence and data**, including qualitative evidence based on lived experience of inequality – assessments can sometimes use little evidence, or involve limited engagement of people with lived experience;
- **Ambition** – often being used to check on possible discrimination but too rarely to identify opportunities to positively advance equality, as per the spirit of the PSED;
- **Strategic Policy Assessment** – an issue which came to light during COVID-19 was whether assessments are routinely completed for strategies, as well as the policies that fall under such strategies. Often a strategy is not impact assessed with an expectation that the individual policies will be assessed in due course. This could be considered to undermine the fact that a strategy is a decision that will impact on people, and should be reviewed and assessed for its likely impact on people with protected characteristics. However, the guidance on this is felt to be unclear; and
- **Transparency** – impact assessments are sometimes published sometime after a policy is implemented and can be hard to access. Some are not published at all.

A further concern, which became more apparent during our response to COVID-19, was the speed at which policy in particular contexts (such as an emergency response to a global pandemic) may be developed and implemented, as this does not always lend itself well to the current process-style approach to equality impact assessments. Although COVID-19 was an exceptional emergency situation, there are many other situations where policy responses across Government and the public sector must naturally be swift. It is therefore important to improve EQIA capability so that when quick policy development is required, impact assessment can still be done meaningfully. This also highlights the need to continue to review policy after its commencement.

From practice, it is also clear that there can be uncertainty over which policies should be assessed and reviewed, and at what level. As per the current regulations, the EHRC guidance states: “The duty to assess impact applies to new or revised policies as well as to existing policies. However, this does not mean that everything an authority does requires a detailed assessment of impact. The extent to which policies should be subject to assessment will depend on questions of relevance and proportionality.”¹⁶ This is a broad definition, and can be contrasted with for example the Fairer Scotland Duty which is more specific and focusses explicitly on strategic level decisions.

Potential Solutions

The current regulation states that “in making the assessment, a listed authority must consider relevant evidence relating to persons who share a relevant protected characteristic (including any received from those persons)”. There have been some calls from stakeholders to strengthen this duty, for example, by requiring the involvement of people with lived experience in certain circumstances, like where the policy being assessed is a strategic level decision (of the type that engages the socio-economic duty in part 1 of the Equality Act 2010).

Some organisations would also like to see the review of the operation of the PSED address requests for integrated impact assessments. Work is underway in government to explore the potential enhancement of the system for all required impact assessments. However, the Scottish Government is aware that some stakeholders are not supportive of an integrated approach, and a recent review of impact assessments in other countries has highlighted the issues involved in integrated approaches.¹⁷

Many of the concerns raised by stakeholders stem from how equality impact assessments are carried out in practice, rather than the purpose or intention of the regulation. We are therefore not convinced that many of the issues highlighted above are best addressed through regulatory change. A cultural shift in terms of how equality impact assessments are viewed across Government and the public sector is needed in order to highlight the importance of engraining equality considerations at

¹⁶ EHRC, Assessing the Impact and the Public Sector Equality Duty, July 2016 [assessing-impact-public-sector-equality-duty-scotland.pdf \(equalityhumanrights.com\)](https://www.equalityhumanrights.com/equalityhumanrights/assessing-impact-public-sector-equality-duty-scotland.pdf)

¹⁷ Scottish Government, Impact Assessment in Governments: Literature Review, February 2021 [Impact assessment in governments: literature review - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/documents/2021/02/Impact-assessment-in-governments-literature-review-gov-scot.pdf)

the start of the policy development process. This is a key focus of our capability and capacity work which is an important strand of our wider equality and human rights mainstreaming strategy which we continue to develop.

Our proposal

The Scottish Government proposes to adjust the duty to assess and review policies and practices to emphasise that assessments must be undertaken as early as possible in the policy development process and should aim to test ideas prior to decisions being taken to ultimately make better policy for people.

The Scottish Government also proposes to strengthen the duty to assess and review policies and practices to require the involvement of people with lived experience, or organisations who represent them, in certain circumstances, like where the policy being assessed is a strategic level decision (of the type that engage the socio-economic duty in part 1 of the Equality Act 2010). This is also explored in proposal 7.

As set out in Proposal 1, the Scottish Government proposes to require listed authorities to report on how they have implemented all of their SSDs as part of their overarching mainstreaming reporting duty. This will include assessing and reviewing policies and practices. This could be illustrated through case studies and examples.

Question 4.1:
What are your views on the proposal outlined above?
Question 4.2:
The Scottish Government recognises that improving the regime around assessing and reviewing policies and practices will take more than regulatory change. How else could improvements be made?
Question 4.2:
What are your views on the current scope of policies that should be assessed and reviewed under regulation 5?

Proposal 5: A new equality outcome setting process

Background

Regulation 4: ‘Duty to publish equality outcomes and report progress’ requires each listed authority to publish a set of equality outcomes which it considers will enable the authority to better perform the general equality duty. The regulation specifies that an authority must publish a report on the progress made to achieve its equality outcomes every two years and publish a fresh set of equality outcomes within four years of publishing its previous set. These outcomes should aim to tackle significant inequalities in society, and authorities must take reasonable steps to involve persons who share a relevant protected characteristic and any person who appears to the authority to represent the interests of those persons; and consider relevant evidence relating to persons who share a relevant protected characteristics.

Considerations

Analysis conducted for the EHRC of the outcomes published in 2018 found that many lacked a focus on producing change for people with protected characteristics. The report says, “In most cases, these equality outcomes were largely administrative and aimed at changing policies or processes within the authority. In other cases, they were very broadly expressed, and this may have led to a lack of clarity or focus during implementation.” The report found “very limited evidence of positive change directly impacting people with protected characteristics available from progress reporting on equality outcomes for the 2013-2017 cycle.”¹⁸

Engagement with listed authorities and equality advocacy groups indicated that the lack of clarity and focus continues to be a concern. There is concern about outcomes touching on every protected characteristic, which it attributes to public authorities not wishing to exclude any groups, even where it would be more effective to point to local evidence of a specific need. It may be that outcomes which seek to advance equality for everyone are too broad and too unspecific, diluting their effectiveness.

Overall, a key theme in our engagement to date, was that more leadership could be shown from the Scottish Government in relation to the equality outcome setting process.

Potential Solutions

As part of our initial engagement exercise during the summer of 2021, we asked key stakeholders about the prospect of shared equality outcomes across the public sector. Stakeholders were broadly supportive of this suggestion, if there was sufficient leadership in place to drive this at a strategic level.

Suggestions were put forward on how this could work in practice. These included:

¹⁸ EHRC, Research Report, Effectiveness of the PSED Specific Duties in Scotland [Effectiveness of the PSED specific duties in Scotland \(filesusr.com\)](https://filesusr.com)

- Scottish Ministers could set national equality outcomes based on the most significant inequalities (some went further suggesting that sector-specific outcomes should be set by portfolio Ministers for each protected characteristic);
- National equality outcomes should be clearly linked to the National Performance Framework;
- Requiring the Scottish Government to involve people with lived experience, or the organisations who represent them (this is explored in more detail in Proposal 6);
- The third sector could have the opportunity to submit suggestions for equality outcomes to the Scottish Government for consideration; and
- Listed authorities could meet their own equality outcome setting duty through adopting the national equality outcomes and set their own agenda for tackling the identified inequality.

However, some concerns were raised in relation to the Scottish Government setting national equality outcomes. These mainly focussed around the idea that organisations (even in the same sector) often have specific or local issues to address and they would like the freedom to focus on addressing the needs of their communities. Some listed authorities were also concerned that setting national outcomes for local incorporation could have a disproportionate burden on smaller bodies who may not be well placed to deliver these outcomes. However, we believe that the Scottish Government taking a leadership role in this space could support bodies to progress equality outcomes in a more effective way.

Beyond the suggestion of shared or national outcomes, some further suggestions have been put forward by stakeholders. For example, some stakeholders have called for the regulations to be strengthened to reinforce that equality outcomes should be measurable.

There were calls to simplify reporting cycles and for the regulation on outcome setting to become more action-focussed, for example, by requiring listed authorities to set out how they plan to meet their equality outcomes. We believe these would be addressed through Proposal 1 in relation to creating a more cohesive regime and reducing perceived bureaucracy.

Our proposal

We propose to take on board the suggestions for the Scottish Government to take on more of a leadership role in setting national equality outcomes, which listed authorities could then adopt to meet their own equality outcome setting duty. If a listed authority chose not to adopt the national equality outcomes, they would still be required to set their own equality outcomes. This would require the Scottish Government to:

- Set national equality outcomes, taking a collaborative approach ensure that outcomes were pertinent to the ambitions of relevant listed authorities;
- Ensure the national equality outcomes are measurable and link to the National Performance Framework; and
- Involve people with lived experience, and work with the organisations who represent them, when developing national equality outcomes, providing

information on how they have taken account of that involvement in their development.

As stated above, listed authorities would retain scope to set their own equality outcomes, and in this event, they too would be obliged to involve people with lived experience, or the organisations who represent them, when developing their equality outcomes, and to provide information on how they have taken account of that involvement in their development. Listed authorities would also be required to ensure their outcomes link to the National Performance Framework. Whether listed authorities decide to use national equality outcomes, or set their own, as per the first proposal set out in this paper, they would be required to set out how they plan to meet the equality outcomes, then to subsequently report on how they have progressed towards them, through their overarching mainstreaming reporting obligation.

Question 5.1:

What are your views on our proposal for the Scottish Government to set national equality outcomes, which listed authorities could adopt to meet their own equality outcome setting duty?

Proposal 6: Improving duties relating to Scottish Ministers

Background

Under the current regulations, there are three duties which are focused on actions to be taken by Scottish Ministers. These duties are:

- Regulation 6A which requires that Scottish Ministers from time to time to take steps to gather information on the relevant protected characteristics of members of a listed authority and to provide that information to the authority. An authority must use information received to better perform the PSED and certain authorities must set out specified details in any report on progress on mainstreaming the equality duty (under regulation 3 of the SSDs);
- Regulation 11 which gives Scottish Ministers the power to require a listed authority to consider specific matters from time to time, while carrying out its duties under the SSDs; and
- Regulation 12 which places a duty on Scottish Ministers to publish proposals for activity to enable a listed authority to better perform the equality duty. Proposals must be published at intervals of not more than 4 years, and Scottish Ministers must report on progress within 2 years of publishing their first proposals and at subsequent intervals of not more than 4 years.

Considerations

In relation to regulation 6A, the policy rationale behind this regulation was to increase board diversity across the public sector. Since 2016, when this regulation was introduced, the Gender Representation on Public Boards (Scotland) Act 2018 has been passed and implemented.¹⁹ The intention of the Gender Representation on Public Boards (Scotland) Act 2018 is to help address the historic and persistent underrepresentation of women in public life.

The Scottish Government is currently working to gather the information from public boards required by this duty. However, there have been barriers to this, due to the challenges around how the data collection requirement is framed and the process for Scottish Ministers to collect information directly from board members. One key concern is that due to the small number of members on some boards, there are concerns that individuals could be identified on the basis of their protected characteristics via the publication of mainstreaming reports.

Regulation 11 allows for Scottish Ministers to direct listed authorities to consider other matters, when carrying out their duties under the SSDs. This regulation has never been used by Scottish Ministers. The policy rationale behind this regulation was to enable Ministers to take a leadership role and direct listed authorities to consider matters that Ministers viewed as important, but were not already covered specifically by the duties.

¹⁹ This Act is currently subject to judicial review proceedings in the Court of Session.

Regulation 12 again allows for the Scottish Government to take a leadership role and drive continuous improvement in relation to listed authorities' performance of the general equality duty. In 2013, the Scottish Government published a set of proposals to enable better performance of the Public Sector Equality Duty²⁰, and reported on progress in 2015.²¹ To assist with the implementation of proposals under the regulation, the Scottish Government established the Scottish National Equality Improvement Project (SNEIP) in 2014. The Scottish Government had intended to publish a revised set of proposals in 2017, however we took the decision to use the proposed consultation on reforming the operation of PSED in Scotland which at that time was planned to be published in early 2018. Due to circumstances relating to EU exit and COVID-19 there has been a significant delay in publishing this consultation and achieving compliance with this regulation. The Scottish Government acknowledges the requirement to meet all its legal obligations and will reflect on effective compliance with this regulation going forward, in addition to the feedback received through this consultation on how this regulation can be leveraged to improve leadership and drive improvement.

Potential solutions

Overall, the Scottish Government believes these duties could be improved to make them more effective, and to strengthen the interconnectedness with the rest of the SSDs.

Stakeholder views on these regulations have also been limited. However, in 2019, the First Minister's National Advisory Council on Women and Girls recommended that Scottish Ministers deliver an Annual Statement, followed by a debate, on Gender Policy Coherence to the Scottish Parliament.²²

In our response to this we said we would: "consider the merits of aligning delivery of a statement and debate with the existing legal duty on Scottish Ministers to publish a report on progress to better perform the PSED under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012". Building on the spirit of this recommendation, we wish to seek further views on whether a regular statement and debate in the Scottish Parliament on mainstreaming equality and the PSED could be another mechanism through which Scottish Ministers could take on a leadership role, drive continuous improvement and contribute to an increased focus on these crucial issues. For example, this could be undertaken through a statement and debate in Parliament when the Scottish Government sets national equality outcomes every 4 years.

²⁰ Scottish Ministers' proposals to enable the better performance of the Public Sector Equality Duty 2013-2017, December 2013 [Scottish Ministers' Proposals to Enable the Better Performance of the Public Sector Equality Duty 2013-2017 \(webarchive.org.uk\)](https://web.archive.org/web/20131201000000/http://www.gov.scot/Resource/0044/0044_0001.pdf)

²¹ Making Progress: Scottish Ministers' equality duty, December 2015 [Making Progress: Scottish Ministers' Equality Duty \(www.gov.scot\)](https://www.gov.scot/Resource/0044/0044_0001.pdf)

²² Scottish Government's Response to the First Minister's National Advisory Council on Women and Girls, 2019 Report Recommendations, December 2020, see recommendation 2.1 [scottish-governments-response-first-ministers-national-advisory-council-women-girls.pdf \(www.gov.scot\)](https://www.gov.scot/Resource/0044/0044_0001.pdf)

Our proposal

The Scottish Government proposes to simplify the regulation 6A process to require listed authorities to gather information on the relevant protected characteristics of members of a listed authority, as part of their own duties on data collection. Listed authorities would then be required to set out how they plan to use the information they have required as part of their overarching mainstreaming reporting obligation (see proposal 1). Listed authorities would not be required to set out the breakdown of the board by protected characteristic, unless they could do this without individuals being identified on the basis of their protected characteristics.

The Scottish Government intends to take more of a leadership role in relation to the equality outcome setting process. This would therefore create a mechanism where the Scottish Government could direct listed authorities to consider what we see as significant inequalities. However, through this system, the Scottish Government proposes to retain key elements of the current regulations 11 and 12 to ensure we have scope to direct listed authorities to consider other matters, or to propose activity to enable better performance, so that we and listed authorities can respond to any arising issues that may not have been foreseen when, for example, setting national equality outcomes.

Question 6.1:

What are your views on the Scottish Government's proposal to simplify the regulation 6A process?

Question 6.2:

What are your views on the proposal in relation to regulations 11 and 12?

Question 6.3:

In 2019, the First Minister's National Advisory Council on Women and Girls recommended that Scottish Ministers deliver an Annual Statement, followed by a debate, on Gender Policy Coherence to the Scottish Parliament. In our response to this we said we would: "Consider the merits of aligning the delivery of a statement and debate with the existing legal duty on Scottish Ministers to publish a report on progress to better perform the PSED under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012".

What are your views on this?

Proposal 7: Procurement

Background

Under regulation 9, listed authorities are subject to a duty to consider award criteria and conditions in relation to public procurement. The regulation sets out:

- Where a listed authority is a contracting authority and proposes to enter into a relevant 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 to enable it to better perform the equality duty;
- Where a listed authority is a contracting authority and proposes to stipulate conditions relating to the performance of a relevant agreement, it must have due regard to whether the conditions should include considerations to enable it to better perform the equality duty;
- Nothing in this regulation imposes any requirement on a listed authority where it would not be proportionate to the subject matter of the proposed agreement.

The Scottish Government believes that procurement is an effective lever to influence change, and could be utilised further across the public sector.

Considerations and potential solutions

In relation to the current regulation, some stakeholders have highlighted that requiring listed authorities to publish information in relation to their procurement duty could strengthen the regime, as it would improve transparency and accountability in relation to meeting this duty, and thus make it easier to enforce by EHRC.

Some stakeholders have also recommended that award and tender specifications should stipulate that all outputs of any work must meet the requirements of the PSED and specify examples. The Scottish Government recognises the importance of proportionality and encouraging listed authorities to consider the risks and opportunities of specific procurement exercises on a case by case basis to ensure listed authorities do what will have the greatest impact, rather than encouraging a blanket approach or “tick-box” exercise which risks placing a disproportionate burden on suppliers and may discourage smaller and third sector enterprises from bidding.

Proposal

As per proposal 1, the Scottish Government proposes to require listed authorities to set out how they plan to meet all of their duties, and then subsequently to report on how they have met and used all of their duties, as part of their overarching mainstreaming reporting obligation. This would include the duty on procurement, and therefore satisfy the suggestions put forward by stakeholders to strengthen the procurement duty by implementing a publication aspect.

The Scottish Government would welcome views on the call from stakeholders to require that award and tender specifications should stipulate that all outputs of any work must meet the requirements of the PSED and specify examples.

Question 7.1:

What are your views on our proposal and call for views in relation to procurement?

Part 2:

Exploring Further Areas

Using the opportunity of this consultation to seek further views from stakeholders and build our evidence base on key issues

8. Intersectional and disaggregated data analysis

Background

The Scottish Government recognises that national and local policy makers must have access to a wide-ranging and robust equality evidence base in order to develop inclusive policies and to measure the impact of policies on equality groups. However, we acknowledge there are barriers and challenges to collecting, analysing and reporting intersectional equality data and, despite improvements in recent years, there remain significant gaps in Scotland's equality evidence base.

There is widespread recognition of the importance of improving the collection and use of intersectional data from stakeholders. For example, the Expert Reference Group on COVID-19 and Ethnicity stated that: "Intersectionality is important and consideration should be given to reporting social characteristics separately and in combination, whenever possible. For example, this would include also considering religious groups, migrant status, gender and the multiple dimensions of socio-economic position".²³

In their 2020 Report and Recommendations, the First Minister's National Advisory Council on Women and Girls called on the Scottish Government as part of the current review of the SSDs to place an additional specific duty on listed authorities to: "Gather and use intersectional data, including employment and service-user data, to advance equality between protected groups, including men and women".²⁴

In this report, the National Advisory Council on Women and Girls define intersectionality as "a framework for understanding how multiple categories of identity (such as gender, race and class) interact in ways that create complex systems of oppression and power". This means recognising how multiple factors, such as gender, race and socio-economic status interact to produce different outcomes for some groups.

If the SSDs were to reference "intersectionality", it is likely that a slightly narrower definition of "intersectionality" than the ones set out above would be required. This is because Scottish Ministers have powers to place duties on listed authorities to help them better perform their PSED. The PSED's focus is the relevant protected characteristics (age, disability, race, gender reassignment, pregnancy and maternity, religion and belief, sex, and sexual orientation). Therefore, considerations such as socio-economic disadvantage would likely be outwith competence, however this is addressed through the Fairer Scotland Duty.

Data disaggregation means breaking down large data categories into more specific sub-categories. When data is broken down and disaggregated by protected characteristic groups and sub-groups, they can show the unique differences among groups and reveal significant disparities.

²³ Expert Reference Group on COVID-19 and Ethnicity: Recommendations to Scottish Government, September 2020 [Expert Reference Group on COVID-19 and Ethnicity: recommendations to Scottish Government - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/documents/2020/09/Expert-Reference-Group-on-COVID-19-and-Ethnicity-recommendations-to-Scottish-Government-gov.scot)

²⁴ First Minister's National Advisory Council on Women and Girls: 2020 Report and Recommendations [562006 SCT1120576152-002 NACWG.pdf \(onescotland.org\)](https://www.onescotland.org.uk/media/562006/SCT1120576152-002_NACWG.pdf)

Therefore, in practical terms, any duty which referenced intersectional and/or disaggregated data collection would require this on the basis of the relevant protected characteristics. For example, in relation to the proposal on pay gap reporting set out above (see proposal 3) intersectionality would require listed authorities to collect and publish multiple breakdowns of the pay gap on the basis of the relevant protected characteristics.

Specifically in relation to ethnicity pay gap reporting, disaggregation would also be key. This would require listed authorities to not just collect information and publish pay gap information on an aggregate basis (between people who belong to a minority racial group and people who do not), but require organisations to collect and publish more granular pay gap data on individual minority racial groups. In relation to disability pay gap reporting, care would need to be taken in both the collection and use of the data to ensure that it does not endorse a reductionist or deficit-based model of disability, and is consistent with the commitment to the social model of disability'.

However, as explored in more detail below, there are concerns around listed authorities' ability to improve intersectional and disaggregated data collection and use in the short term, due to barriers that exist, including the risk of identifying people on the basis of their protected characteristics through publishing granular data.

Equality Data Improvement Programme

To complement our work on this review, we established the Equality Data Improvement Programme in April 2021. This is a multi-phase programme of work that aims to strengthen Scotland's equality evidence base enabling policy makers to develop sound and inclusive policy. The Equality Data Improvement Programme is one part of a broader programme of mainstreaming equality and human rights within the public sector.

An Equality Data Improvement Programme Project Board has been established, chaired jointly by the Scottish Government's Chief Social Researcher and Chief Statistician, which reports to the Minister for Equalities and Older People. The Project Board brings together Scottish Government officials with representatives from a range of external partner public sector bodies. An internal network of lead analysts from each analytical area in the Scottish Government has also been established to support the programme.

The purpose of the first phase of the Equality Data Improvement Programme is to (1) build the knowledge and skills required to analyse, report and use equality data among policy makers and analysts and (2) increase the availability of robust equality datasets. We will work with equality stakeholders in drafting forward plans to ensure that we are identifying important gaps and prioritising the right data sets. The first phase will conclude with the publication of a revised equality evidence strategy in late 2022.

There are a number of actions within the first phase of the Equality Data Improvement Programme that aim to improve the collection, analysis and use of intersectional equality data, including:

- Producing a report to build knowledge of intersectionality among public sector analysts, covering what is meant by ‘intersectionality’, examples of how the concept of intersectionality has been used to identify and understand structural inequality, and statistical approaches to carrying out intersectional data analysis.
- Systematically examining key population survey and administrative datasets to identify where intersectional data breakdowns are already published and where intersectional breakdowns could be provided, noting the protected characteristic variables collected and available sample size.
- Producing a new equality dataset through the secure linkage of existing administrative and Census data, to support robust intersectional outcomes-based equality data analysis.
- Commissioning independent research with people with lived experience of different and intersecting protected characteristics to explore response issues, to investigate data fears and to understand what positive messaging would help to reduce fears and encourage participation in surveys. The research findings will be used to develop guidance for public sector data collectors.

The Scottish Government believes that the Equality Data Improvement Programme can be a key driver in improving the collection and use of intersectional and disaggregated equality data across the public sector in Scotland.

Stakeholder views

There are some concerns expressed around listed authority capacity and capability to improve data collection effectively in the short term. In March 2021, we published research which details the major barriers that exist in relation to the collection and use of equality and socio-economic disadvantage data across the public sector.²⁵ In our engagement, key barriers were highlighted by a listed authority who summarised: “The costs and challenges of collecting and analysing data and intersectional data in particular are considerable”. Furthermore, there are other concerns relating to privacy, because the more detailed the disaggregation of data is, then the risk of identifying individuals on the basis of their characteristics increases.

However, we do not yet have a strong sense of stakeholder views on this specific issue, and therefore we are seeking to use this consultation to gather more views from stakeholders on this issue and on the feasibility of mandating intersectional and disaggregated data analysis throughout the SSDs.

²⁵ Scottish Government, Understanding Equality Data Collection in the Scottish Public Sector, March 2021 [Public sector - understanding equality data collection: executive summary - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/understanding-equality-data-collection-executive-summary-2021/pages/10.aspx)

Question 8.1:

The First Minister's National Advisory Council on Women and Girls called for the Scottish Government to place an additional duty on listed authorities to "gather and use intersectional data, including employment and service-user data, to advance equality between protected groups, including men and women"?

(a) What are your views on this?

(b) How could listed authorities be supported to meet this requirement?

Question 8.2:

[Question directed specifically to listed authorities]

(a) If there was a requirement for your organisation to "gather and use intersectional data, including employment and service-user data, to advance equality between protected groups, including men and women", would you be confident your organisation could comply with it?

YES/NO

Routing depending on answer to part (a).

(b) If yes, why?

(b) If no, what would you need to ensure you could comply by 2025?

9. Intersectional gender budget analysis

Background

We have committed to take steps to further embed equality and human rights in all stages of the Budget process in the Scottish Government's Programme for Government 2021-2022, and in the Scottish Government and Scottish Green Party Shared Policy Programme. Interest in understanding budgets from various perspectives has grown in recent years, and a number of recommendations and proposals relating to budget analysis have been made to the Scottish Government, covering interests from equality, to human rights and children's rights.

Amongst these proposals, the First Minister's National Advisory Council on Women and Girls has recommended that the Scottish Government "integrate intersectional Gender Budget Analysis into the Scottish Budget process, and to give this a statutory footing". In relation to the SSDs, the National Advisory Council on Women and Girls called for the Scottish Government to "place an additional duty on listed authorities to integrate intersectional gender budget analysis into their budget setting procedures."

In our response to the National Advisory Council on Women and Girls, we committed to consulting on the proposals relating to intersectional gender budget analysis, in order to seek more views from stakeholders and build our evidence base.

Defining intersectional gender budget analysis

Gender budgeting, sometimes called gender-sensitive or gender-responsive budgeting, is a way of analysing the budget for its effect on gender equality. The National Advisory Council on Women and Girls defines it as "a means of preparing budgets or analysing them from a gender perspective".

Gender budgeting does not mean that there should be separate budgets for women, or that money should be divided equally between women and men, but acknowledges that spending and taxation can affect women and men differently because of their different situations, needs and priorities, including how they experience paid and unpaid work, access education, and use services. Gender budgeting can help to examine and restructure revenue and spending decisions in order to eliminate unequal outcomes between women and men.

In its recommendation, the National Advisory Council on Women and Girls places emphasis on intersectional gender budget analysis. An intersectional gender budgeting approach would involve analysing budgets by more than one category, for example, examining not only how a spending proposal might impact women and girls compared to men and boys, but additionally, how that proposal might impact disabled women compared to non-disabled women. The relevant intersectional breakdowns of groups would depend on the budget decision under consideration.

The exploration of the definition of "intersectionality" in the above section remains relevant here: That for the purposes of the SSDs any reference to the intersectional disaggregation of data would be on the basis of only the relevant protected

characteristics, and would not likely be able to encompass other factors such as socio-economic disadvantage, which is addressed through the Fairer Scotland Duty. Any steps to develop budgeting methods embedding relevant intersectional analysis would be dependent on progress on the gathering and use of intersectional data set out in (8) above, and agreement that it is gender intersectional data that should be prioritised.

Existing actions to analyse the Scottish budget from a gender and wider equality and human rights perspective

The Scottish Government already takes steps to analyse the Scottish budget from a gender and wider equality and human rights perspective, and we have sought to continually improve how equality is embedded in the budget process over a number of years. A key part of our work is the development and publication of the Equality and Fairer Scotland Budget Statement alongside the Scottish Budget. This statement assesses the impact of the Budget on groups of people who have and share protected characteristics and people experiencing socio-economic disadvantage. In more recent years it has started to consider and reflect human rights analysis.

Analysing budget proposals in this way is important because it helps the Scottish Government to make the best use of public money to deliver positive outcomes and help those who need it most. It also helps us to discharge our legal responsibilities under the PSED and the Fairer Scotland Duty, as set out in the Act.

In August 2019, the Equality Budget Advisory Group and the Scottish Government produced informal guidance for policy makers on equality and human rights budgeting.²⁶

We recognise that in order to improve the integration of equality including gender into budgeting both within the Scottish Government in the wider third sector and public sector, we need to build capacity and understanding of how this can be done in practice. We have awarded funding of £220K over three years (2021-2024) to the Scottish Women's Budget Group to work with civil society groups and local authorities to raise awareness of, and build capacity in gender budgeting. Using a combination of approaches, including mentoring support, the development of a toolkit, and training sessions, the Scottish Women's Budget Group aims to improve the quality of equality impact assessments to ensure that decision makers take into account how budget decisions could impact women and men differently and as a result either exacerbate or help to reduce gender inequality.

Stakeholder views

In relation to the call for an additional duty on listed authorities to integrate intersectional gender budget analysis into their budget setting procedures, the concerns raised by some listed authorities in the previous section on intersectional and disaggregated data analysis are relevant here too. This is because, in order to successfully implement an intersectional gender budgeting approach, listed bodies

²⁶ Scottish Government, Tackling Inequality: Guidance on Making Budget Decisions, August 2019 [Tackling inequality: guidance on making budget decisions - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/documents/2019/08/Tackling_inequality_guidance_on_making_budget_decisions_-_gov.scot)

need good intersectional data and evidence to support analysis. As stated, we do not have a strong evidence base of stakeholder views on this specific issue, and therefore we are using this opportunity to gather more views on this issue. We are interested in the steps required to develop the culture and capability for these novel approaches, and on the feasibility and practicalities of placing intersectional gender budgeting on a statutory footing through the SSDs.

Question 9.1:

The First Minister's National Advisory Council on Women and Girls' called for the Scottish Government to integrate intersectional gender budget analysis into the Scottish Budget process, and to place this on a statutory footing.

What are your views on this?

Question 9.2:

The First Minister's National Advisory Council on Women and Girls' called for the Scottish Government to place an additional duty on listed authorities to integrate intersectional gender budget analysis into their budget setting procedures.

(a) What are your views on this?

(b) How could listed authorities be supported to meet this requirement?

Question 9.3:

[Question directed to listed authorities]

(a) If an additional duty was placed on your organisation to integrate intersectional gender budget analysis into its budget setting procedures, would you be confident your organisation could comply with it?

YES/NO

Routing depending on answer to part (a).

(b) If yes, why?

(b) If no, what would you need to ensure you could comply by 2025?

10. Coverage

This section relates to which public bodies are covered by the PSED and the SSDs.

In relation to the PSED, under section 149 of the Equality Act 2010, the list of Scottish public authorities subject to the Duty is contained at Part 3 of schedule 19 of the Act. However, section 149(2) of the 2010 Act provides that even a body not listed in schedule 19 is subject to the PSED to the extent that it exercises functions of a public nature.

The bodies subject to the SSDs are specified in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended) – which includes many, but not all of the bodies listed at Part 3 of schedule 19 of the 2010 Act.

Scottish Ministers have competence to add relevant Scottish public authorities to the SSDs who are already subject to the PSED. Further, Scottish Ministers could also add relevant Scottish public authorities to Part 3 of schedule 19 of the 2010 Act (so that they become subject to the general PSED), and could consequently make them subject to the SSDs.

There have been calls from the First Minister's National Advisory Council on Women and Girls and EHRC to mandate all Scottish regulators, ombudspersons and oversight bodies to advance equality and rights. Additionally, EHRC has also expressed the view that regulatory bodies, as part of their own compliance with the SSDs, should be encouraged to do more to improve PSED performance in their sector. However, this would not mean conferring any of EHRC's enforcement powers on these bodies.

The Scottish Government would therefore like to seek further views on which bodies should be covered by the PSED and SSDs and on the issues raised by the National Advisory Council on Women and Girls and the EHRC.

Question 10.1:

(a) In your view, are there any Scottish public authorities who are not subject to the PSED or the SSDs that you think should be?

YES/NO

(b) If YES, please give detail on which Scottish public authorities you think should be subject to the PSED or SSDs.

Question 10.2:

EHRC has expressed the view that regulatory bodies, as part of their own compliance with the SSDs, should be encouraged to do more to improve PSED performance within their sector.

What are your views on this?

11. Strengthening leadership and accountability and enhancing capability, capacity and culture

As stated previously, the Scottish Government views the PSED regime as an important lever to drive change, and sits as part of our wider agenda to mainstream equality and human rights. Strengthening leadership and accountability, and enhancing capability, capacity and culture will form part of the equality and human rights mainstreaming strategy currently being developed.

Throughout the proposals in this consultation paper, we believe we have put forward proposals in order to ensure the Scottish Government and Scottish Ministers are playing an effective leadership role. These include, the revised equality outcome setting process, and the proposed changes to the duties relating to Scottish Ministers. However, there is still more to do to improve leadership and accountability and enhance capability, capacity and culture.

Throughout our engagement to date, stakeholders have put forward the following suggestions which are relevant to this area:

- **Funding:** Ensuring there is long-term and protected funding for the public and third sectors for equality and human rights;
- **Protected budgeting:** Requiring the public sector to spend a certain percentage of its budget to advance equality and human rights;
- **Training:** Ensuring that there is effective and mandatory equality training, particularly for senior leaders and public appointments;
- **Equality accountable officers:** Requiring public bodies to appoint an accountable officer, who would provide internal advice, guidance and competence building;
- **Improved forums or portals to share best practice:** Improving existing forums to share best practice across the public sector, or establishing a new online portal to share consolidated guidance, best practice and publications.

The Scottish Government believes that these issues and suggestions need to be explored further, and we do not think a statutory footing is the best approach at this stage or whether the SSDs would be the appropriate vehicle to take them forward. We will consult further on these matters when we consult on the mainstreaming strategy in 2022. However, stakeholders are welcome to share views on how these aspects might be addressed through the PSED review.

Question 11.1:

The Scottish Government will consult on the issues in this section further through the mainstreaming strategy. However, if you think any of these matters could be addressed through the PSED review, please give details here.

12. Guidance

As the relevant enforcement body, EHRC provides guidance to assist listed authorities in complying with the SSDs. With revised duties, there will be a requirement for refreshed guidance which EHRC will produce.

Through our engagement to date, there have been calls for updated and improved guidance. These calls included:

- More prescriptive step-by-step technical guidance;
- Consolidating guidance and increased use of clearer language throughout all supporting documents; and
- Strategic guidance which reaffirms how compliance with the duties relates to the general PSED.

Throughout this consultation paper, we consider we have put forward proposals for more prescriptive regulations and a more cohesive regime; we hope that this, in turn, will make it easier for improved guidance to be created.

Furthermore, some listed authorities have also highlighted that they would find it useful to receive feedback on the mainstreaming reports and equality outcomes that listed authorities produce to strengthen their understanding.

However, we are aware that more than revised guidance will be required to enable an improved PSED regime, and therefore this section should be read along with the strengthening leadership and accountability, and enhancing capability, capacity and culture section above. We are also considering how toolkits, case-studies and other resources can be developed and used alongside the formal guidance produced by the EHRC.

Question 12:

What would you like to see in improved revised guidance for the SSDs?

13. Positive action

Section 158 of the Equality Act 2010 provides general provisions on positive action. This section applies “if a person reasonably thinks that:

- Persons who share a protected characteristic suffer a disadvantage connected to the characteristic;
- Persons who share a protected characteristic have needs that are different from the needs of persons who do not share it; or
- Participation in an activity by persons who share a protected characteristic is disproportionately low.”

Section 158 goes on to state that the Equality Act 2010 does not prohibit that person “from taking any action which is a proportionate means of achieving the aim of:

- Enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage;
- Meeting those needs; or
- Enabling or encouraging persons who share the protected characteristic to participate in that activity.”

This section applies to all fields within the Act, including education, the provision of services, and some aspects of employment. However, it does not apply where section 104 (selection of political candidates) or section 159 (positive action: recruitment and promotion) apply.

EHRC has provided a helpful summary of section 158: “If an employer reasonably thinks that people sharing a certain protected characteristic suffer a disadvantage connected to that characteristic or have different needs, or if their participation in work or other activity is disproportionately low, an employer can take any action (which would otherwise be discrimination against other people) which is a proportionate means of enabling or encouraging those people to overcome or minimise their disadvantage or to participate in work or other activities or meeting their needs. For example, an employer can put on training courses exclusively for workers with a particular protected characteristic.”

EHRC has said that it is not clear the extent to which listed authorities use the positive action provisions in the Equality Act 2010. They advise that they would expect to see this in existing mainstreaming reports or progress reports on outcomes (with the exception of the tie-break provision under section 159, which may risk identification of relevant people) but this is rarely the case. They believe there is a need both to encourage better use of positive action by listed authorities and subsequent reporting.

The Scottish Government would like to use this consultation to seek more views on this issue.

Question 13:

EHRC has expressed the view that listed authorities should report on how they have used positive action under section 158 of the Equality Act 2010, as part of their reporting obligations.

What are your views on this?

Part 3:

Overall Reflections

Providing an opportunity for further and general reflections, and providing information on responding to the consultation

14. Overall reflections

Question 14.1:

Overall, what are your reflections on the proposals set out by the Scottish Government and the further areas explored?

Question 14.2:

Please use this box to provide any further information that you think would be useful, which is not already covered in your response.

15. Responding to this Consultation

We are inviting responses to this consultation by 11 April 2022.

Please respond to this consultation using the Scottish Government's consultation hub, [Citizen Space](#). To access and respond to this consultation online, please see follow the link to the [consultation webpage](#) on Citizen Space. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 11 April 2022.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

Mainstreaming Policy Team
Scottish Government
Area 3H - NORTH
Victoria Quay
Edinburgh, EH6 6QQ

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our [webpage on privacy policy](#).

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public on our consultation hub, [Citizen Space](#). If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or email to joe.smith@gov.scot

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online by using the Scottish Government's consultation hub, [Citizen Space](#). Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

16. Respondent information form

Public sector Equality Duty in Scotland: consultation

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our [webpage on privacy policy](#).

Are you responding as an individual or an organisation?

Individual

Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
- Publish response only (without name)
- Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No



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