



Engender response to the Scottish Government's consultation on the operation of the Public Sector Equality Duty in Scotland

April 2022

1. INTRODUCTION

Engender welcomes the opportunity to respond to this consultation on the Public Sector Equality Duty (PSED) in Scotland. For many years we have advocated for substantial reform of the Scottish Specific Duties (SSDs) to ensure that PSED is fit for purpose in bringing equality considerations to the heart of public sector work, and that public bodies are supported in fulfilling their obligations. In light of the re-entrenchment of women's inequality that has been brought by Covid-19, particularly for women who experience multiple discrimination,¹ this need for vastly improved equality mainstreaming is even more pressing.

We share concerns with many other equalities organisations that the current proposals are not ambitious enough to create the meaningful change that is badly needed. The duties currently in place have not resulted in notable progress for people with protected characteristics and therefore require fundamental revision. The various stages of the review to date have been somewhat superficial and lack the comprehensive analysis of these limitations that we have called for alongside sector colleagues. Stakeholders within the equality sector have extensive expertise to offer, but the engagement process so far has not been designed in a way that makes best use of our expertise. Given an appropriate process that enabled fulsome and thoughtful sharing of expertise, equalities organisations could support Scottish Government to create a set of duties which are both more effective and more enforceable than the current regulations.

In our joint submission, from twenty-six equality stakeholders, we therefore urge Scottish Government to develop a revised set of duties in co-production with equality stakeholders; to strengthen proposals with a focus on outcomes for people with protected characteristics rather than simplifying the regime for compliance purposes; and to ensure that adequate time is now taken to undertake urgently needed research.

¹ Engender (2020) Women and COVID-19; Engender (2020) Gender and unpaid work: the impact of COVID-19 on women's caring roles

In preparing this consultation response, Engender worked to develop a set of draft regulations with Nicole Busby, Professor in Human Rights, Equality and Justice at Glasgow University's School of Law. Nicole is an expert in equality law. We refer to the solutions we have suggested in these draft regulations throughout this response, and attach them in full as an annex.

2. QUESTIONS

1. Creating a more cohesive regime and reducing bureaucracy

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

Engender strongly supports the proposal for the mainstreaming duty to be more prescriptive, with the aim of supporting listed authorities to fulfil their obligations. We have advocated for greater prescriptiveness across the regulations in our policy report on gender mainstreaming and in our response at stage 2 of this review,² and set out specifics relating to respective duties throughout this submission. We believe that this will help to make the regime more cohesive, by clarifying how different aspects of the regulations fit together throughout the cycle of policymaking and programme design, and therefore also bringing into focus the purpose and ambition of the requirements.

We strongly reject, however, the need to reduce bureaucracy and the notion that reducing reporting requirements to just once every four years will lead to improved performance of PSED. The framing of “perceived feelings” of bureaucracy and the “sense” that the system is process-driven throughout the consultation document highlights the problematic and widespread mindset regarding equality throughout the public sector. This idea that equality is a burdensome additional workstream, rather than a core element of an organisation's work that merits investment of resources and effort, is precisely what needs to be addressed if the SSDs are to drive better outcomes for people with protected characteristics in Scotland. The desire of listed authorities to reduce bureaucracy cannot be evenly weighted against the views of equalities organisations working specifically and strategically to analyse the impact of public policy on the lives of people with protected characteristics and structural inequality. Reducing reporting requirements would undermine urgently-needed efforts to build capacity and competence around equality, intensifying the last-minute scramble to produce reports that we already see. Conversely, regular reporting on activity that is sustained and embedded in the day-to-day business of an organisation should not be onerous if the right structures and support are in place.

We agree with the Scottish Government that “a stronger focus on how each of the duties are implemented” is needed, but do not agree with the premise that the production of a single report on a four yearly basis can help to achieve this, in the hope that listed

² Engender (2020) What works for women: improving gender mainstreaming in Scotland

authorities are “encourage[d] to explore and publish how they have implemented their duties to better meet the needs to PSED”. Whilst producing a strategic plan, reporting on implementation and publishing required information at the same time should increase understanding of the interconnectedness of the duties, as stated, the duties themselves must be tightened in a targeted way and accompanied by very clear guidance to achieve the goal of a stronger focus on the specifics of implementation.

Strategic plan

We are broadly supportive of the duty to publish a strategic plan and believe that if produced and implemented well this could improve listed authorities’ engagement with PSED. However, the purpose and substance of the strategic plan must be set out extremely clearly, including a timeline of how the duties interact across the cycle. Guidance must spell out that the process of setting equality outcomes must precede consultation on the production of a strategic plan that sets out how these outcomes will be achieved, how equality will be mainstreamed throughout the work of the organisation, how the other duties will be met and how progress will be monitored and impact assessed. This guidance must also be very clear on the process by which the strategic plan is created, ensuring meaningful and remunerated consultation with people with expertise by experience of each protected characteristic and with equality advocates with structural equality expertise. We are calling for revised guidance to be issued to Scottish Ministers under the regulations.

The mainstreaming duty and mandated guidance must also be explicit about the purpose and content of the strategic plan, spelling out that it will serve as the action plan for implementation of other requirements across the regulations. We reject the suggestion that duties with a reporting requirement under the proposed strategic plan “**could** be illustrated with case studies and examples” (our emphasis). These decisions around content should not be left to individual listed authorities but mandated in guidance. The prescriptiveness that listed authorities desire and that Scottish Government is proposing to augment will not be effective if inconsistently applied.

We also believe that review of the strategic plan, with revisions as necessary, should be built into the system. We recommend that listed authorities should have the option to make amendments as part of the reporting cycle (see question 1.2) and should proactively decide whether to do so every two years, at the midpoint between strategic plans.

Publishing of the information required by other SSDs

Reporting on listed authorities’ implementation of the SSDs over the previous four years

As below, Engender recommends annual reporting against the strategic plan, which we understand in large part as the action plan to implement the SSDs as a whole. In our view, the proposal to publish information required by the SSDs and to report on implementation only once every four years would be disastrous for ambitions to mainstream equality.

Further thoughts on this are set out in response to question 1.2.

In terms of a single report that covers all publishing and reporting requirements, there is also a need for careful sequencing that: allows for the proposed national outcomes to be consulted on; is published in good time for listed authorities to consult on and develop their own outcomes; factors in consultation and development of the strategic plan.

Lived experience

Engender welcomes intentions to strengthen participatory policymaking and “hearing lived experience” through the SSDs. Regarding the involvement of those with expertise by experience, we fully agree with the Coalition for Racial Equality and Rights’ (CRER’s) assessment that:

“this has to be done as part of a wider policy making process and delivered with purpose and care. Legislative requirements would need to be tightly worded in order to ensure this is the case, so that any new requirements do not result in a damaging process of involvement for involvement’s sake.”

The existing requirement to involve affected persons in the setting of equality outcomes is superficially useful, but currently uncoupled from practice. External experts are often called upon to contribute time and resource into fulfilment of the SSD obligations, often at short notice and with limited time to do so. However, this insight is rarely reflected in the final material and even less frequently leads to alternatives being explored within the process.

While participation and expertise by experience is increasingly recognised as vital to effective policy making, the measures in place to gather it and analyse it are still developing. Efforts such as the Christie Review to develop effective ideas around participation have not themselves considered gender, although have sought to enhance equality in an unspecific way. Additionally, lived experience is vital but must sit alongside comprehensive structural analyses that at present listed authorities do not have the capacity to undertake and do not attempt to systematically apply. One person’s experience is informed by structural oppression but is not alone reflective of it and individuals may not identify their own experience as gendered, racialised or impacted by other discriminations covered by the Equality Act. Integrating and balancing forms of expertise must be a priority across duties to consult within PSED. Reflection on the capacity for participatory processes to be representative is also vital, including the impact of caring responsibilities on the ability to donate time and when, or the use of digital engagement which excludes those without access. Finally, relying on individuals to relate their experiences of trauma and discrimination is ethically complex and must be adequately supported, financially and emotionally, in line with best standard practice. Participants must be kept informed regarding outcomes of the work being consulted upon, and where input does not lead to demonstrable change this must be explained.

The Poverty and Inequality Commission's intention to trial new approaches to involvement of people with lived experience offers some opportunity for an intersectional good practice model which secures the involvement of diverse groups.³ Genuine co-production will require work and investment to ensure meaningful involvement from the most marginalised, and a 'duty to involve' should not be met by listening to the most vocal, but by investing in diverse forms of community engagement.

There is an urgent need for analysis on how to maximise the effectiveness of co-production, embedding lived experience in a strategic approach and recognising the value of other forms of system expertise, including that of external experts. We recommend that this analysis is undertaken as part of the development of relevant regulatory change.

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

We believe that a move to report on the implementation of the SSDs only once every four years would be a terrible mistake. Not only would this be inadequate in driving improvements, it would likely contribute to the 'box ticking' mindset that exists around PSED at present, and undermine efforts elsewhere to strengthen the duties. The requirement to produce one behemoth report two or three times a decade would not provide the opportunities for the engagement and learning that are so vital if equality is to be truly mainstreamed at the heart of the public sector. Accountability is correctly identified in the consultation document as a major issue that urgently needs to be addressed. However, reducing the outputs required from listed authorities would further weaken accountability and opportunities for scrutiny.

In our previous advocacy during this review, we have called for listed authorities and Scottish Government directorates to produce annual outcome-focussed policy statements. The thinking behind this is for listed authorities to regularly engage with the substance of equality mainstreaming, to elevate the visibility of specific issues and help to embed PSED within the annual rhythms of an organisation. We think this need for regular reflection and update could be met instead by annual progress reporting against the proposed strategic plan. If the work to mainstream equality is being done, then reporting on that activity should be straightforward and comparatively light-touch. Arguably, it would be much more straightforward to locate, analyse and publish information required from the previous twelve rather than 48 months, particularly given the rate of staff turnover that is seen in the public sector. This would also help create a virtuous circle, with regular reporting contributing to increased equalities competence and subsequently to a higher standard and degree of ease of reporting.

³ Poverty and Inequality Commission (2020) Guidance for the Poverty and Inequality Commission: Involving experts by experience

We fundamentally do not believe that the issue here is the need to reduce bureaucracy or with the core elements of the duties PSED obliges, but rather with how they are perceived, prioritised, handled and resourced. If organisations and personnel had a better understanding of the objectives of PSED and the broader business case for effective intersectional equality mainstreaming, if the work was undertaken by staff that had been trained in equalities issues, and if the importance of this work was reflected in commensurate resources, then equalities would be seen as core work as opposed to bureaucratic red tape. As identified in the consultation document, for outcomes that advance equality and improve the lives of people with protected characteristics there must also be huge attention on creating enabling environments for the implementation of PSED and the SSDs. The regime must start to accept that there are pockets of active resistance to equality mainstreaming throughout the public sector,⁴ and begin to address this. Without a programme of capacity-building to shift understanding and acceptance of equalities work as central to the functioning of an effective public sector, duties under PSED will always be seen as a bureaucratic, box-ticking exercise by some. Given the poor performance of PSED to date,⁵ it is extremely optimistic to hope that reducing obligations whilst relying on softer accompanying measures to create an enabling environment will result in improvements. We therefore recommend statutory obligations around capacity building, as set out in response to question 11.

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

We agree that one set of consolidated regulations would be helpful.

Our recommendations for regulatory change regarding the mainstreaming duty include:

- Reframing as the ‘duty to mainstream the equality duty’ as opposed to report on it
- An introductory clause that explains how the duties are connected
- A duty to consult with experts in equality policy and lived experience panels for all protected characteristic groups in development of the strategic plan
- A requirement to review the strategic plan and revise as necessary as part of every other annual reporting process
- Statutory guidance on the production and content of the mainstreaming report and the strategic plan, including a set of indicators and a measurement framework to assess progress against national outcomes
- Annual progress reports against the mainstreaming report and strategic plan, including

⁴ Cavaghan (2017) Making gender equality happen: Knowledge, change and resistance in EU gender mainstreaming

⁵ Close the Gap (2015) Making progress? An assessment of public sector employer performance of the public sector equality duty

- Progress against indicators set by Ministers or the authority's own metric
- Expenditure against each equality outcome by protected characteristic
- A list of EQIAs undertaken and an account of the impact on the policy or programme in development
- A list of procurement processes undertaken and an equality statement covering prescribed indicators
- A statement detailing involvement and impact of people with protected characteristics and experts in equality policy in meeting requirements

2. Embedding inclusive communications

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

We welcome the proposal to embed inclusive communication across the work of listed authorities. If executed well, this would have a positive impact on respective groups of disabled women in Scotland. We support Inclusion Scotland's position on the detail of these proposals, noting in particular their rejection of proportionality within this and the need for inclusive communication to apply across the breadth of a listed authority's work.

3. Extending pay gap reporting to include ethnicity and disability

3.1 What are your views on our proposal to require listed authorities to publish ethnicity and disability pay gap information?

3.2 Should the reporting threshold for ethnicity and disability pay gap reporting be the same as the current reporting threshold for gender pay gap reporting?

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

Close the Gap are Scotland's expert organisation on women and work, and have engaged extensively with public bodies' performance under PSED. Engender supports the positions that they have set out with regard to pay gap reporting, and have reflected their suggestions for regulatory change in our draft regulations.

4. Assessing and reviewing policies and practices

4.1 What are your views on the proposal outlined above?

4.3 What are your views on the current scope of policies that should be assessed and reviewed under regulation 5?

Equality impact assessments (EQIAs) hold the potential to transform policymaking and deliver real change for women and girls in Scotland. At present, however, the system is simply not working. The consultation document covers a set of critical issues that have been of major concern to Engender for many years: a focus on process, or box-ticking, over the substantive aim of creating more inclusive policy; timing, whereby EQIAs are undertaken as an adjunct to the development of policy, or even retrospectively; the limited use of evidence and data; the lacking ambition and missed opportunity to proactively advance equality; and the lack of transparency.

This summary, however, does not explicitly cover the inextricably linked point that the general quality of EQIAs is alarmingly low, and glosses over integral issues with capacity, leadership and accountability that have been repeatedly raised by stakeholders. We have written extensively on the capacity building, development and scrutiny work that is sorely needed to drive up standards of EQIA, both within and outwith the scope of regulatory change. We agree with the Scottish Government's view that many of these pressing issues relate to implementation rather than to the intention of the regulation on paper. However, we believe that more can and must be done to tackle the woeful underperformance of EQIA that has become customary, both within regulations and statutory guidance.

Engender proposes that listed authorities are required to follow a prescribed set of criteria that must be met in undertaking an EQIA. As the consultation document describes, many listed authorities have indicated that such an approach would be welcome. We have developed the set of steps below following years of being approached for views on or support with developing EQIAs, as well as regular analysis of those relating to key policy areas for women's equality.

1. Relevant qualitative and quantitative evidence relating to women (and all other protected characteristics) is described
2. Gaps in evidence are identified and needed additional research is outlined
3. Existing evidence is analysed from a gender equality perspective (and from the perspective of all other protected characteristics)
4. This analysis is applied to identify where gender inequality and discrimination against women can be reduced and where women's equality can be advanced
5. Policy is developed or adapted to address the inequalities and opportunities to advance equality that have been identified, including steps to fill gaps in the evidence base.

The components of these standards should be summarised in regulation – we have done so under regulation 5 and regulation 12 in our draft – and set out in detail in statutory guidance.

Further to this, we are calling for the wording of regulation 5 to be strengthened to reflect its driving purpose, including a clause that reiterates the duty to identify where equality can be advanced as well as where discrimination should be mitigated. Our proposals to this end can be seen in full in the draft regulations that annex this paper. We believe that Scottish Government should consider a duty on Scottish Ministers to make provision for the development and operation of an EQIA improvement programme within a new duty on capacity building, which can be found in our draft at regulation 16. Under our proposals for annual reporting, public bodies would be required to provide details on each EQIA undertaken during the reporting period, including all relevant data collected and analysed in the process, along with a summary of how analysis was taken into account in the resulting policy or programme.

Finally, we support recommendations brought forward by CRER to introduce a schedule of review relating to existing, new or revised policies, and a requirement to indicate whether the policy or practice being assessed will be:

- a) continued without amendment as no equality impact was identified
- b) continued with amendment to address the inequality(ies) identified
- c) withdrawn temporarily in order to identify and make any amendments necessary to address the inequality(ies) identified, or
- d) withdrawn completely as no amendments which would address the inequality(ies) identified are possible.

Scottish Government proposals on EQIA

We agree that an adjustment to emphasise that assessments must be undertaken as early as possible would be helpful and that the testing of ideas prior to decisions being taken would have significant potential in creating better policy for people with protected characteristics. However, these proposals would need to be carefully worded to convey and mandate their intent. Based on performance of the duties to date, we believe that requiring listed bodies to 'aim' to test ideas would have very limited impact. Likewise, 'as early as possible' is subject to interpretation and would benefit from a precise formulation in the drafting of legislation. We urge Scottish Government to ensure that wording around this is as strong as possible. Our suggestions can be found in the box below and in the annex to this paper.

We support the proposed requirement to involve people with lived experience in strategic level decisions, as well as those with strategic equality expertise. Detailed comments on integrating and balancing forms of expertise within participatory policymaking are set out in response to question 1.1. We also note here that there is a clear distinction between organisations that directly represent people and organisations that undertake structural

analyses of equality issues. Our draft regulations make suggested amendments to the ‘duty to involve’ accordingly.

In terms of reporting on equality impact assessments, we strongly oppose the proposed system of a single report every four years. We do not see how this could be an effective lever to address the significant and deeply-rooted issues with the quality of EQIAs. We are recommending annual reporting against the strategic plan that would include a list of each EQIA undertaken during the reporting period, accompanied by a summary of what impact the process of gathering and analysis of evidence had on decision-making. The substance of progress reporting must be clearly delineated in guidance; we reject the notion that reporting on implementation of EQIAs “**could** be illustrated by case studies and examples” (our emphasis).

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?

A renewed and resourced approach to ensure that EQIAs function as intended is vital. This would see EQIA actually embedded in the policy design process at the effective point, and supported by a comprehensive programme of capacity building on all equality strands and on the process of intersectional gender mainstreaming. Engender is calling for a well-resourced EQIA improvement programme that addresses the fundamental weaknesses that have been identified throughout the review of PSED in Scotland. Details on the content of the programme could sit within the Scottish Government’s forthcoming equality and human rights mainstreaming strategy. However, sustainability must be a key consideration in attempts to transform the use of EQIAs. Whilst the First Minister’s Advisory Council on Women and Girls (NACWG) and welcome policy developments over recent years⁶ point to a relatively positive environment for women’s equality within the policy landscape in 2022, other strands including race equality have not received the same attention in recent years,⁷ and future political leadership in Scotland may not prioritise equality at all. Further, the chronically poor performance and low level of compliance with the basic requirements of the duty to assess and review policy and practice indicates a clear need for leadership and scrutiny. We recommend that the EQIA improvement programme itself is legislated for under a new duty to build equality competence, signalling high-level commitment to securing much needed changes.

Within the improvement programme, responsibility for implementing and approving EQIAs must be clearly established. EQIA should be made an ‘essential’ component of job descriptions for policy analysts, researchers and others routinely conducting this work. In other contexts, where staff undertake EQIAs on an ad-hoc basis, we recommend a ‘buddy

⁶ For instance, the Domestic Abuse (Scotland) Act 2018 and A fairer Scotland for women: gender pay gap action plan

⁷ CRER (2022) Response to the PSED consultation from the Coalition for Racial Equality and Rights

system’ of peer support and development. As an interim measure, a ‘double stamp’ system of approval should include sign off by a manager within the team developing the activity and the designated gender equality expert for that team. Over time, as capacity is built, the need for quality assurance by a gender specialist would recede. The quality of EQIAs should be incorporated in performance management frameworks. Engender also advocates for creation of a Scottish Government EQIA review panel, with the authority to compel EQIAs to be revisited within the policymaking process. This would allow wider expertise to be brought to bear more effectively within the process and allow concerns to be identified and resolved within a timescale that is compatible with policymaking. Once established, coverage for listed authorities could be explored.

Finally, along with colleagues across the equalities sector, we continue to call for research and evidence building on the effectiveness of the duties regarding mainstreaming, EQIA and procurement. Twenty-six organisations signed the joint equalities sector submission to this consultation, which advocates for such research to be undertaken after consultation responses have been analysed and used to inform the next stage of developing revised SSDs.⁸ If necessary, the timescale for drafting revised regulation should be amended to allow for this research to take place.

Our recommendations for regulatory change regarding assessment and review of policy and practice include:

- A requirement to follow a set of steps set out in regulations 5 and 12
- Within this, requirements to gather, record and use disaggregated data and intersectional data in fulfilling the duty
- A clause explicitly stating that EQIA should aim to identify where equality for each protected characteristic group can be advanced
- A requirement to publish information on all EQIAs undertaken in the annual report, including all relevant data, a status categorisation, and the impact of analysis on decision-making
- A requirement to publish EQIAs at the same time as the policy or practice being assessed
- A requirement to undertake EQIA at earliest point in the process

5. A new equality outcome setting process

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?

⁸ Joint submission (2022) Equality stakeholders’ submission on common concerns

Engender has been broadly supportive of national outcome setting, as a means to focus this duty towards proactively advancing key equality concerns. We believe that overarching outcomes that are adapted to the local/domain context could help to target public bodies' equalities work at a strategic level, as well as in response to the landscape at a given point in time. Such a process could also help to create leadership and profile for outcomes setting. Clearly, however, a one size fits all approach would be inadequate to capture the locally-specific needs of respective protected characteristics groups.

We are therefore advocating for Ministerial sector-specific national outcomes to be developed for each protected characteristic. These would be targeted at relatively broad key inequalities for each group, identified through a process of consultation, with directions in regulation for public bodies to select and tailor these accordingly. In turn, this would be undertaken in local-level or domain-specific consultation with people with protected characteristics and with equality advocates. In adapting a national level outcome to the local/domain context, authorities would be required to seek to contribute to reducing the overarching stated inequality for a given group. Alternatively, listed authorities would be able to create their own outcomes or a hybrid of shared/individual outcomes, but would be required to set out the rationale for doing so. Whether adapting the national outcomes or setting their own, listed authorities should set at least one outcome for each protected characteristic. Listed authorities should also be encouraged to set additional equalities outcomes tailored to their specific contexts where this is relevant, whether overarching or 'generic' outcomes, or those identified by and targeted at specific groups.

We are also calling for a requirement to publish details of resourcing for equality outcomes, specifying the budget that has been allocated for work towards each outcome and breaking this down by protected characteristic where relevant. Progress reporting under the mainstreaming duty should include details of expenditure for the reporting period in question.

Our advocacy for such an approach is based in the manifest need for equality outcomes to be geared towards positive change for oppressed groups in Scotland. By mandating a sectoral focus for the national outcomes and by giving listed authorities the option of selecting from and adapting these to local need, the aim would be to move away from meaningless equality outcomes (e.g. "there is a culture in which women's lives, opportunities and confidence are improved") that are not focussed at a specific inequality and cannot be measured. Similarly, we echo points made by CRER that equality outcomes must not merely replicate existing legal duties and should clearly express a desired change for people with protected characteristics. We believe that a sector-specific approach, broken down by protected characteristics would go some way to achieving this, but these principles should also be adhered to by authorities setting their own outcomes.

We wholeheartedly agree with Scottish Government's assessment that the national equality outcomes must be measurable but do not support linkage with the National Performance

Framework (NPF). The NPF contains no metric that relates directly to gender equality, and only two of its 81 indicators relate specifically to women - the gender pay gap, and the difference between women's and men's labour market participation rates (named 'organisational gender balance'). Other indicators are disaggregated by sex but are not gendered. Although there is supposed to be a link between the NPF to the global Sustainable Development Goals (SDGs), there is no direct read across from SDG5 on gender equality and women and girls' empowerment. It is our view, therefore, that the NPF is not well-gendered. It is possible, and indeed likely, that progress will be made towards NPF outcomes in a way that entrenches and deepens women's inequality.⁹ We are calling for Scottish Ministers to develop and publish a set of tailored indicators and a measurement framework alongside the national outcomes. Where a public body develops independent equality outcomes, part of this process must be to produce relevant metrics against which to measure progress.

The setting of any national outcomes must be in line with an established standard of co-production that involves equalities experts as well as people with lived experience of inequality across the protected characteristics. The process should entail the use of all available evidence and data to identify gaps and priorities; the publishing of details, including how input was taken into account in decision-making; remuneration for lived experience panels; and feedback on decision-making to those involved in the consultation. We note that the consultation document suggests the involvement of organisations that "represent" people with lived experience and reiterate the need for a form of wording that ensures structural equalities expertise is included in any 'duty to consult'.

Guidance on the process and production of equality outcomes, both nationally and by listed authorities, would need to be comprehensive. This should set out and illustrate with examples the level at which equality outcomes should be pitched, as well as the relationship between overarching and supporting outcomes. Close the Gap's concept of 'feeder outcomes' that contribute to the realisation of an overarching national goal is helpful here.

Finally, a revised approach to outcome setting must be considered holistically. There are clear risks that providing template equality outcomes could undermine the development of gender and broader equalities competence, and the scope for positive change, unless the process of adaptation to the work of a particular organisation is robustly undertaken. It is absolutely vital that a national outcomes process be coupled with significant investment and attention to developing equalities capacity across the public sector. We also note and share Close the Gap's concerns that national equality outcomes that are adopted at local level may exacerbate existing issues with accountability regarding this duty. Measurement frameworks against which to measure progress and be held to account, as well as the

⁹ Engender (2020) Engender submission to the Office of the Chief Statistician on: Sex/gender: Gathering and using data to advance women's equality and rights in Scotland

importance of transparency around the resourcing of equality outcomes, would go some way to strengthening the prospects for scrutiny.

Our recommendations for regulatory change regarding equality outcomes include:

- A requirement to prepare as well as publish equality outcomes
- A requirement to consider and seek to contribute to the national outcomes published by Scottish Ministers in preparing equality outcomes
- If not proceeding in this way, a requirement to set out steps to address specific inequalities locally / in context
- Linking preparation of outcomes to specific actions to achieve them in the form of a strategic plan
- Amend to oblige listed authorities to 'take account of' rather than 'consider' evidence relating to protected characteristics
- A duty to specify allocated budget for each outcome broken down by protected characteristics and to report on expenditure in the annual progress report
- Requirements to ensure that outcomes:
 - do not replicate existing duties
 - express a desired change for people with protected characteristics
- A duty to consult with people from all protected characteristic groups and experts in equality policy, and specify how consultation was taken into account
- A duty to annually publish progress against the indicators and measurement framework set by Ministers or against a listed authority's own metric
- A duty to apply intersectional gender budget analysis in setting equality outcomes

6. Improving duties relating to Scottish Ministers

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

We have no specific comments to make on this proposal.

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

Analysis of PSED and the SSDs often points to lack of leadership as a factor that undermines the intent and implementation of the duties. We agree that there is clear related potential for regulations 11 and 12 to be utilised by Ministers in setting out proposals for improved delivery of PSED by public bodies.

On regulation 11, we recommend that listed authorities may be required to consider specific issues where failure to meet their legal duties under PSED are identified. This is in line with a recommendation made by the Coalition for Racial Equality and Rights.

We agree with Scottish Government’s proposal to retain flexibility within these regulations, and have added a regulation 12A setting out proposed requirements regarding national equality outcomes. These include: sector-specific outcomes in line with Cabinet Secretary portfolios at the time of publication, which are broken down by protected characteristics; the duty to consult with experts in the field of equality policy, listed authorities’ equality officers or their designates, and lived experience panels for all protected characteristic groups; the clear articulation of key inequalities that the national outcomes aim to address and that listed authorities must consider in preparing their own equality outcomes; and the publishing of relevant information, including disaggregated data for each protected characteristic group, to help enable listed authorities prepare their outcomes and related measurement framework where relevant. Further details on equality outcomes are set out in response to question 5.

We have also recommended that a duty on Scottish Ministers to publish a standard template for EQIA (see our response to question 4) is folded into regulation 12A, along with the requirement for a schedule of EQIAs to be planned and published.

Question 6.3 What are your views on the below?

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”

Engender has previously advocated for an annual statement on intersectional gender policy coherence and gender mainstreaming to be delivered by the First Minister.¹⁰ This is based on searing policy incoherence that we routinely see across Scottish Government, and the need to drive existing equality frameworks and policy to the top of the political agenda. We welcomed NACWG’s recommendation, but cannot support the prospect of this being reshaped into a general debate on the implementation of PSED in Scotland, covering nine protected characteristics and undertaken only once every four years. This would render the NACWG proposal unrecognisable. Further thoughts on the need for a mandated focus on individual protected characteristics are set out in response to question 14.

Nor do we agree that this proposal “builds on the spirit” of this recommendation from NACWG, which derived from the ambition to truly drive forward women’s equality and to pick up the pace of change. Thoughtful and constructively developed policy efforts are currently undermined by a lack of gender and broader equality mainstreaming across government. However, the Scottish Government’s ambitions to mainstream equality would

¹⁰ Engender (2020) What works for women: improving gender mainstreaming in Scotland

not be greatly advanced by a statement and debate on PSED compliance little more than once every parliamentary cycle.

The only merit we see in this proposal would be the weight afforded by a statutory footing, and the positive signals this would send in terms of import and leadership. However, we do not think genuine scrutiny and accountability could be improved through so irregular and diffuse a mechanism.

Our recommendations for regulatory change regarding duties relating to Scottish Ministers include:

- Empowering Ministers to direct consideration of specific issues where failures to meet duties are identified
- A duty to set national equality outcomes for each Cabinet Secretary portfolio broken down by protected characteristics
- A duty to consult on proposals to for activity and on national equality outcomes with lived experience panels for each group and with equality policy experts
- A requirement to review proposals and national outcomes and amend as necessary every two years
- A requirement for national outcomes to address specific key inequalities
- Requirements to publish alongside the national outcomes:
 - Relevant disaggregated data for each protected characteristic group
 - A set of indicators and a measurement framework
 - Related guidance to enable fulfilment of the equality duty

7. Procurement

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

Engender is amongst stakeholders that have advocated for a publication aspect to the procurement duty. We do not, however, agree that this will be automatically satisfied by the proposal to cover the implementation of all SSDs within the strategic plan. In line with the need and desire for prescriptiveness in supporting compliance with PSED, we recommend further mandates on listed authorities in terms of procurement.

Public procurement that takes account of gender equality considerations has significant scope to leverage public spending to buy gender-sensitive goods and services and mandate gender-sensitive employment practice. However, the available evidence suggests that, despite the inclusion of procurement in the SSDs as a standalone requirement in Scotland, very few public bodies have taken concrete, or indeed any action to consider gender equality in their use of procurement. The studies that have taken place have identified that only a small proportion of public bodies have plans to use procurement to tackle inequality

as part of their work to meet the duty.¹¹ Furthermore, a lack of gender competence in public bodies presents a clear barrier to good quality action in this area.

Gender mainstreaming has never been systematically applied to procurement processes in Scotland, although toolkits for doing so have been developed at the European Institute for Gender Equality and elsewhere.¹² Integrating gender equality considerations into procurement may enable public bodies to mitigate some of the disproportionate negative impacts of competition-based tendering on women. As a result of occupational segregation, where women and men are clustered into different types of work, this contributes to the undervaluation of women's work and de-skilling.¹³ Public bodies must also be supported to build the necessary gender competence to do this. The procurement duty is currently a clear missed opportunity to progress women's equality and to ensure that public bodies are using a gender analysis to develop better policy and practice.

Our revised draft duty on procurement includes requirements for public bodies to follow the steps below in procurement processes, and to produce an annual statement, to be published within reporting against their strategic plan, setting out how they have done so.

- Involve the users of goods and services and/or other data and analysis to identify potential impacts on protected characteristic groups and to advance equality;
- Incorporate equality as a specified objective of the contract, including the requirement of equality competence on the part of the contractors;
- Ensure equality within the workforce of a specific contract, for example by including targets for the employment of women or men in works contracts;
- Include weighted equality criteria for the evaluation of the submitted tenders, which will award contracts to those who can demonstrate superior equality competence, including product and service design;
- Incorporate equality clauses into the conditions for implementation of the contract, and measure and monitor these during the delivery of the contract.

We also recommend that a list of procurement processes undertaken is published within the annual progress report (see question 1), accompanied by details of equality considerations required under the procurement duty and the impact this process had on decision-making.

¹¹ Work by Katherina Sarter found that only a small number of local authorities were engaged in procurement activity that would build knowledge or identify impact with regard to equalities. E.K. Sarter (December 2016) Public procurement and the public sector equality duty: equality sensitive tendering in Scotland

¹² <https://eige.europa.eu/gender-mainstreaming/methods-tools/gender-procurement>

¹³ E.K. Sarter (December 2016) Public procurement and the public sector equality duty: equality sensitive tendering in Scotland

Guidance should be strengthened, in line with commitments on procurement in relation to PSED set out in the gender pay gap action plan. *A Fairer Scotland for Women: Gender Pay Gap Action Plan* commits to develop sustainable procurement tools, guidance¹⁴ and ultimately an exemplary case study of how public sector equality duties can be met with regard to gender and procurement.

Finally, we are very interested in CRER's suggestion that other financial processes such as grant funding and service level agreements be subject to requirements under the SSDs. We did not, however have the capacity to explore this in developing our draft regulations.

Our recommendations for regulatory change regarding procurement include:

- Requirements to follow the steps below in procurement processes:
 - Identify potential impacts on protected characteristic groups and to advance equality
 - Incorporate equality as a specified objective of the contract, including the requirement of equality competence on the part of the contractors;
 - Ensure equality within the workforce of a specific contract, for example by including targets for the employment of protected characteristic groups in contracts
 - Take weighted account of the equality competence of contractors in awarding contracts
 - Incorporate equality clauses into the conditions of each relevant agreement, and measure and monitor these
- A duty to publish an equality statement covering how it has met these requirements in the annual progress report
- A duty to publish a list of procurement processes and details of equality considerations on decision-making in the annual progress report

8. Intersectional and disaggregated data analysis

The First Minister's National Advisory Council on Women and Girls (NACWG) 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".

8.1

(a) What are your views on this?

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

¹⁴ In relation to the sustainable procurement duty set out in the Procurement Reform (Scotland) Act 2014.

Engender strongly supports this ambition and recommends that significant resources and energy are invested in developing the conditions that would enable this duty to be put in place. In addition to the gathering and use of intersectional data, we recommend that this should be published wherever data protection concerns allow.

Improved gathering and use of intersectional equality data throughout the SSD obligations must be driven at a systemic level. Public bodies are working with wholly inadequate data. They are not systematically collecting and utilising data regarding sex and other protected characteristics to fulfil their mainstreaming obligations under PSED. At present, in each and every policy area that we work in, a lack of gender-sensitive sex-disaggregated data undermines the potential for legislation and policy to improve women's equality and to meet women's needs.¹⁵ As such, Engender has advocated for a regulatory requirement for public bodies to gather, publish and use data that is gender sensitive, sex disaggregated and enables intersectional analysis.¹⁶

In order to maximise the effectiveness of such a duty and related obligations, however, a suite of enabling measures would be needed to support public bodies in understanding and gathering effective data. Engender has advocated for a set of principles for 'gender data', including those enumerated by the UN and European Institute of Gender Equality, to be operationalised in Scotland as the default.¹⁷ This means going beyond disaggregation by sex and ensuring that data is gathered on gendered issues and from a perspective that adequately reflects the diversity of women and men.

The revised Equality Evidence Strategy must include a focus on creating leadership and ownership over the drive to improve equality data, including accountability mechanisms for the quality, use and in/exclusion of data in policy and programme design. Engender has suggested a new duty on data be directly connected to the performance indicators for specific bodies or policies. For example, the Scottish National Investment Bank is legally required to gather information and data in relation to the performance of the Bank's investments, outcomes and development of services, in order to report on its Gender Equality Strategy and other indicators.¹⁸ Meanwhile, existing performance tools at national level including the National Performance Framework (NPF) are not well gendered.¹⁹ The NPF contains no metric that relates directly to gender equality, and only two of the 81 indicators in the NPF relate specifically to women - the gender pay gap, and the difference between women's and men's labour market participation rates (called 'organisational gender balance'). Other indicators are disaggregated by sex but are not gendered.

¹⁵ In recent years this has included care, economic development, employability, hate crime, health, housing and homelessness, mainstreaming, planning, social security, transport

¹⁶ Engender (2020) What works for women: improving gender mainstreaming in Scotland

¹⁷ Engender (2021) Engender response to "sex and gender in data: collection and publication"; guidance from the Chief Statistician to Scottish Public Bodies

¹⁸ Scottish National Investment Bank Act 2020

¹⁹ Long (2019) The SDGs and Scotland: a discussion paper and initial analysis

The next Equality Evidence Strategy must also set out how gender competence,²⁰ and competence across the protected characteristics, will be significantly built across the public sector. This is a crucial element of improving both the collection and use of data and evidence. Without design and development of data that has been informed by an intersectional gender analysis, women will not benefit from interventions in a targeted way. This will require financial investment and the strategy must therefore be explicitly pegged to expenditure. It should also be fully integrated with the equality and human rights mainstreaming strategy as it is developed.

Accordingly, we support an expansive duty on listed authorities with regards to data, with the aim of supporting them to embed the collection, collation, use and publishing of intersectional data in a cyclical way throughout their operations. Our draft regulations require public bodies to:

- Publish data that is gender-sensitive and sex-disaggregated, and directly related to the performance indicators for specific bodies or policies, in line with international standards on ‘gender data’²¹ that are set out in guidance along with equivalent standards for all other protected characteristics;
- Use this data throughout the fulfilment of public bodies’ equalities duties;
- Collect data that enables intersectional analysis, by ensuring it can be sub-divided by other protected characteristics;
- Use evidence collected and analysed in monitoring and impact assessing fulfilment of the SSDs in its duty to mainstreaming equality throughout the work of the organisation.

This should be supported by improved, comprehensive statutory guidance that includes step-by-step instructions on gathering, collating and using data across the requirements of the regulations.

We recognise the concerns of stakeholders that current obligations around data are not being met by public bodies and that capability in the short-term may mean they would not be equipped to meet a new legal requirement on intersectional data. We also note that Scottish Government is seeking views rather than proposing regulatory change at this juncture. We therefore recommend that Scottish Government commits to introducing a mandatory requirement on intersectional data, but that development work is included within the programme of research that many equalities organisations have called for.²²

²⁰ Gender competence is individual and organisational capacity to apply gender analysis to policy or programme development with the aim of advancing gender equality. It refers to the skills, knowledge and analytical capability to develop statistics, data, policy, or programmes that are well-gendered; that take account of the socially constructed difference between men’s and women’s lives and experiences.

²¹ UN gender statistics manual and European Institute of Gender Equality Statistics database

²² Joint submission (2022) Equality stakeholders’ submission on common concerns

Our recommendations for a new duty on intersectional data include:

- Investment of significant resources and energy into creating enabling conditions, including through Scottish Government’s forthcoming Equality Evidence and Equality and Human Rights Mainstreaming strategies
- A requirement to collect, record and use gender-sensitive data as well as data that is disaggregated by sex
- Requirements to collect data that:
 - Enables intersectional analysis, by ensuring it can be sub-divided by other protected characteristics
 - Is directly linked to the performance indicators for specific bodies or policies
- A requirement to use this data throughout the fulfilment of public bodies’ equalities duties
- A duty to publish, as well as gather and use, intersectional data
- Supported by comprehensive statutory guidance in line with international standards on ‘gender data’²³ along with equivalent standards for all other protected characteristics

9. Intersectional gender budget analysis

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.

9.1 What are your views on this?

As established in the consultation document, gender budget analysis (GBA) is a methodology that mainstreams gender equality as a decision-making factor in budgeting processes. It weighs up the impact of spending decisions on women and girls, men and boys, and the inequalities between them. GBA should act as a guide against unequal investment in terms of gender. Ultimately, gender equality will not be achieved without significant financial commitment, and alignment between policymaking and resource allocation is vital.

Engender supports the NACWG recommendation to create a statutory footing for integration of intersectional GBA in Scottish Budget processes. Since devolution, Scotland has made some progress towards gender-responsive budgeting, primarily in the form of the Equality and Budget Advisory Group (EBAG) and Equality Budget Statement (EBS), now the Equality and Fairer Scotland Budget Statement (EFSBS). Published in parallel to the Draft Budget, the EFSBS assesses the Ministerial Portfolios’ proposed spending plans for their impact on equality and socioeconomic inequality. However, the analysis in the EFSBS still

²³ UN gender statistics manual and European Institute of Gender Equality Statistics database

does not inform spending decisions in an integrated way. Rather, it sits alongside the Draft Scottish Budget as a commentary on its contents.

In Engender's 2017 Gender Matters Roadmap, we called for the Scottish Government to extend the Equality Budget Statement into a full gender analysis of the Scottish Budget process, where the cumulative impact of spending decisions on women's equality is considered. We continue to believe that the EFSBS needs a clearer purpose and revised timing to substantively inform the development of the Scottish Draft Budget. Engender has also called for reform of PSED to put GBA on a statutory footing to make clear the requirements on Scottish Government to integrate GBA in all public spending and revenue-raising decisions.²⁴ We have not engaged extensively or developed detailed thinking about intersectional GBA and how this would work in practice, and note that capacity to apply an intersectional model hinges on issues with data collection identified in the consultation document.

In line with thinking from Scottish Women's Budget Group, we have set out certain details in our draft regulations that must be specified if intersectional GBA is introduced. We recommend that Scottish Ministers make provision for intersectional gender budget analyses in:

- All central budget-setting processes relating to the Scottish budget
- All devolved budget-setting processes relating to the Block Grant and related budgetary matters including arrangements made under the Internal Market Act 2020
- All budgetary arrangements between Scottish Government and public bodies funded through the Scottish Budget
- All revenue raising processes

We are also calling for a duty that requires reporting on intersectional GBA to be published by spending portfolio as part of the budget reporting process, and for Scottish Ministers to publish related guidance.

However, as with our response to question 8, we recommend that further research and development work is undertaken – within the broader programme of research recommended by equality stakeholders²⁵ - before revised regulations are developed.

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?

²⁴ Engender (2021) Engender submission to the Scottish Parliament Equality and Human Rights Committee call for evidence on delivery of national equalities and human rights priorities as part of its scrutiny of the Scottish Government's Budget for 2020-21

²⁵ Joint submission (2022) Equality stakeholders' submission on common concerns

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

We fully support the ambition of this recommendation. As above, equality considerations must be embedded in spending decisions and resource allocation, or else efforts to mainstream equality in policymaking will fall short. We have included a duty on local authorities to integrate intersectional gender budget analysis in their budget setting processes in our draft regulations. This would need to be supported with significant investment in capacity building on implementing intersectional GBA across listed authorities, and work to ensure buy-in from senior leadership and management. As above, further research and development work are needed in the short-term.

Our recommendations for a new duty regarding gender budget analysis include:

- Investment in initial development work and capacity building for listed authorities
- Provision for intersectional budget analyses in all:
 - Central budget-setting processes relating to the Scottish budget
 - Devolved budget-setting processes relating to the Block Grant and related budgetary matters including arrangements made under the Internal Market Act 2020
 - Budgetary arrangements between Scottish Government and public bodies funded through the Scottish Budget
 - Revenue raising processes
- Inclusion of reporting on intersectional GBA to be published by spending portfolio within the budget reporting process
- Supported by clear Ministerial guidance

10. Coverage

10.1 In your view are there any Scottish public authorities who are not subjected to the PSED or the SSDs that should be?

If yes, please give details

We endorse the recommendation of NACWG to mandate all Scottish regulators, ombudspersons and oversight bodies to advance equality and rights through the PSED and SSDs.

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?

Mainstreaming equality means that responsibility for equality outcomes should be embedded across and throughout organisations. We agree that, in theory, regulatory bodies should take a leading role in improving PSED performance within their sector. However, as noted by Close the Gap, significant capacity building within regulatory bodies will be needed

before this becomes a possibility.²⁶ Assessment of regulators' performance of PSED shows that regulatory bodies themselves are not adequately meeting their obligations at present.

In terms of regulation, we reiterate our significant concerns that compliance with PSED is underenforced and urge Scottish Government to be creative in exploring how this can be addressed.

Our recommendations regarding coverage include:

- Legislate to include all regulators, ombudsperson and oversight bodies within coverage of PSED and the SSDs
- Increase the capacity of regulatory bodies to undertake gender mainstreaming and to fulfil duties under PSED
- Be creative in addressing the underenforcement of PSED

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

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.

A culture that enables and prioritises equality mainstreaming has never been fostered in Scotland. This is intimately linked with the key issues of leadership, accountability, human and financial resources, capacity building, the need for an embedded equalities architecture and functional monitoring and compliance mechanisms. Without a sustained and well-resourced programme of work to address this, PSED and the SSDs can only achieve so much. The extent to which this set of issues has driven the significant underperformance of PSED to date cannot be overstated. We appreciate the intentions and logic behind parking these until the mainstreaming strategy is developed, however we are concerned that – given the ingrained nature of these issues and the pace of change usually seen with non-legislative equality issues – this will not have adequate weight to compel the sea change in attitudes that we need to see.

It is vital that every opportunity to address these well-rehearsed problems is also taken within this process of legislative reform. In general terms, duties must be worded as strongly as possible in the revised regulations, with the aim of tackling the shocking lack of compliance with PSED to date and latent attitudes that view equality as peripheral to the core functions of the public sector.

Leadership

²⁶ Close the Gap (2022) Submission to Scottish Government's consultation on the review of PSED in Scotland

The current lack of leadership and resourcing associated with PSED is at the very heart of its limited impact to date. Review of international evidence also shows that equality mainstreaming activities are undermined by a lack of leadership across public bodies and government departments.²⁷ It stands to reason that high-level commitment to gender equality, and policies on paper in pursuit of that goal, must be accompanied by willingness and a degree of personal belief from those in senior positions. Also absent from the current approach is recognition of the resistance to action on gender and other forms of equality, including at management level, and steps to incorporate this reality into mainstreaming efforts. This has contributed to process-driven reporting taking priority over action and outcomes, and ultimately to PSED being unfit for purpose in its current form.

Along with other stakeholders, we recommend that listed authorities are required in regulation to set equality objectives for senior leadership, and potentially management more broadly. We have included such a mandate in our draft regulations under a new duty on capacity building. As highlighted by CRER, this is an approach that has also been recommended by the Expert Reference Group on Covid-19 and Ethnicity.

Capacity-building

Globally, the limited successes of gender mainstreaming have largely hinged on poor gender competence.²⁸ In practice, the bulk of mainstreaming work often falls to under-resourced staff with an equality brief, rather than being undertaken by relevant colleagues with their support and guidance. This situation is underpinned by a widespread culture of resistance to the policy - ranging from unconscious bias to overt hostility - which training and capacity building must aim to address. These efforts should be guided by a training strategy, developed by practitioners that are expert in intersectional equality, that goes well beyond articulating a set of standards. Such a strategy should identify gaps in equalities competence, set out where best to make meaningful interventions, and analyse delivery of training itself to diagnose sites and the nature of resistance.

Currently, gender equality training in Scotland is very limited. The training programmes that Engender has observed across a range of public bodies are simplistic, often factually inaccurate, and could not equip policy staff to carry out gendered analysis as part of policy development. This prevents effective implementation of the mainstreaming duty and perpetuates poor analysis.

In preparing this consultation response we considered whether a statutory footing for equalities architecture, such as the expertise centres that are being piloted in Scottish Government, would be possible. For the time being, we have concluded that provision for

²⁷ Engender (2020) What works for women: improving gender mainstreaming in Scotland

²⁸ Gender competence is individual and organisational capacity to apply gender analysis to policy or programme development with the aim of advancing gender equality. It refers to the skills, knowledge and analytical capability to develop statistics, data, policy, or programmes that are well-gendered; that take account of the socially constructed difference between men's and women's lives and experiences.

equalities capacity within the regulations should be focussed on support for fulfilling duties and driving up performance under PSED. We have included a new duty on Scottish Ministers to make provision for listed authorities to recruit and train a proportionate number of PSED officers. The scale and rationale for this would be established in supporting documentation. Such officers would not be responsible for undertaking a listed authority's work to fulfil its equality obligations under PSED, but for supporting these efforts and helping to build internal equalities competence. This draft duty on capacity building also requires Scottish Ministers to provide budget to develop and deliver an organisational intersectional equality training strategy and to develop and implement an equality impact assessment improvement programme.

Resourcing

Critiques of equality mainstreaming architecture routinely point to under-resourcing as a key impediment to better outcomes. Strategy, policy and even mainstreaming architecture can be exemplary, but without funding to implement change, progress will be limited. This is a particularly pressing concern in times of government spending cuts. The UN CEDAW committee has highlighted this lack of financial investment in mainstreaming in its examination of various countries' compliance with international law on women's human rights.²⁹

Implementation of mainstreaming in Scotland has been categorically under-resourced. Public authorities have not been allocated the bare minimum of financial support that would enable them to meet the requirements of PSED. Significant investment will be needed to achieve a sustainable programme of change that is ably led across all government departments and public bodies, implemented by well-trained staff, and scrutinised by robust monitoring and accountability mechanisms.

In a public sector landscape characterised by increasingly constrained budgets, it is vital that work on gender and other equalities is no longer seen as expendable, and that public bodies are supported to recognise that investment in equality mainstreaming ultimately means more resource-effective policy for all.

We have drafted a duty for Scottish Ministers to provide resource for a network of PSED officers to be proportionally embedded across listed authorities, and for requirements on all listed authorities to set out projected and realised expenditure against each of their equality outcomes.

Our recommendations regarding leadership, accountability and capacity-building:

- Strengthen wording across the regulations to tackle lack of compliance
- A new duty on Scottish Ministers to make provision for equality competence building

²⁹ Engender (2020) What works for women: improving gender mainstreaming in Scotland

- Inclusion of equality objectives within performance objectives for senior leadership
- Budgetary provision to develop and implement an EQIA improvement programme
- Provide resources for listed authorities to recruit and train PSED officers, and to develop and deliver organisational intersectional equality training strategies
- Guidance setting out requirements regarding PSED officers, including scale
- A requirement for listed authorities to set out projected and realised expenditure against each equality outcome (under the duty to mainstream the equality duty)

12. Guidance

Question 12 What would you like to see in improved revised guidance for the SSDs?

There is clear need for a more coherent approach to the duties to be set out in statutory guidance. As noted above, the different elements of the duty are very poorly articulated in relation to one another. They do not create a clear and systemic approach in which data and evidence drives the selection of outcomes, which are then pursued through an appropriate action plan and subsequently reported on within a mainstreaming report. Instead, equality advocates have observed public bodies adopting an approach that is fragmented, incoherent, and overwhelmingly focused on producing lengthy publications, rather than delivering activity that will advance equality for women and other protected groups.

We propose that this is addressed with a more clearly specified process requirement for public bodies that would take them through naming the inequality they are aiming to tackle, describing the quantitative and qualitative evidence base for change and action, using that evidence to determine strategic equality outcomes, setting out appropriate actions and indicators for delivery of those outcomes, and measuring and reporting on progress. In contrast to the open publication requirements of the existing duties, this would involve reporting that was comparable between public bodies.

Improved statutory guidance should include step-by-step instructions on gathering data, identifying issues, creating outcomes, establishing action plans, monitoring progress, and subsequently reporting on activity. It must be accessible and include sufficient analysis to enable public bodies to focus on the specific inequalities associated with each protected characteristic. To do so, relevant equalities organisations should be involved in drafting revised guidance.

Specific issues that we recommend should be covered in revised guidance are integrated throughout this submission.

Our recommendations regarding guidance include:

- Guidance should be issued by Scottish Ministers under the regulations
- A more clearly specified process requirement that sets out step by step instructions regarding how the duties hang together
- Guidance must be accessible
- Equalities organisations should be involved in drafting guidance that includes key analysis related to each protected characteristic
- Specific information that should be covered in statutory guidance include:
 - Clear guidance on the production, purpose and content of the mainstreaming report and strategic plan
 - Clear guidance on the process and production of equality outcomes, including the relationship between any national and supporting outcomes
 - A set of indicators and a measurement framework to assess progress against national outcomes
 - Detailed key steps needed to undertake equality impact assessment and guidance on reporting on EQIA
 - Strengthened guidance on procurement
 - International standards on 'gender data' and equivalent standards for all other protected characteristics
 - Step by step instructions on gathering, collating and using data across the requirements of the regulations
 - Clear guidance on new requirements around intersectional data collection and intersectional gender budget analysis in due course

13. Positive action

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.

Question 13 What are your views on this?

Engender is broadly supportive of this proposal.

Part 3: Overall reflections

14. Overall reflections

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

Our main reflection is that current proposals are not ambitious enough to create positive change for people with protected characteristics. We share this view with the twenty-five other equality stakeholders that signed our joint submission to this consultation. We think

that the focus on reducing bureaucracy, at the behest of listed authorities, outweighs concrete action aimed at embedding PSED at the heart of their work. We accept that many of the deep-seated issues with understanding and performance of the SSDs cannot be addressed through regulatory change, but believe that creative solutions to some of these can and should be explored.

We welcome the commitment to explore new duties on intersectional data and intersectional gender budget analysis, and now urge Scottish Government to undertake further development work on these within a broader programme of research on EQIA, mainstreaming and procurement. If necessary, the envisaged timeline for drafting regulations should be amended to allow for this.

Finally, we echo calls made our joint submission for Scottish Government to adopt a fully-fledged collaborative process in working with equality stakeholders in next steps of this process.

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.

A duty to prevent sexual harassment

We are recommending an additional duty to prevent workplace sexual harassment is included in reform of the SSDs.

Sexual harassment in Scotland's workplaces is endemic. Over half of women have experienced this form of violence against women at work, and up to 80% of women do not report it due to chronic issues with normalisation, inadequate employer responses and the grave risks of doing so.³⁰ Sexual harassment is a cause and consequence of women's inequality and a violation of women's human rights under international law. Although yet to be recognised as such in Scottish or UK policymaking, sexist and sexual harassment is also a significant public health and safety issue. The impact of sexual harassment on women's lives is both insidious and far-reaching, with implications for women's health and wellbeing, earning potential, financial stability, income inequality with men, career progression and, ultimately, for gender equality across all spheres.

Under the Equality Act 2010, employers must take 'reasonable steps' to prevent the harassment and victimisation of individuals who work for them.³¹ Employers are liable for harassment committed by workers in the course of their employment unless they can demonstrate that they took all reasonable steps available to them to prevent it.

However, according to EHRC technical guidance, there is no prescribed minimum for what constitutes 'reasonable steps' to prevent sexual harassment.³² An employment tribunal

³⁰ Engender (2022) Enough is enough: Tackling sexual harassment in Scotland's workplaces

³¹ The Equality Act 2010 Section 109(4)

³² EHRC (2020) Sexual harassment and harassment at work: Technical guidance

would judge this based on the size and nature of the employer, its available resources, and specific risk factors pertaining to the employer or sector. However, EHRC's 'Turning the tables' report states that reasonable steps should include holding an available anti-harassment policy within the organisation and ensuring "appropriate procedures for reporting harassment and taking action" are in place.³³ They also recommend that employers take proactive steps to prevent harassment by addressing systemic inequality within organisations.

In response to an inquiry into workplace sexual harassment by the UK Parliament Women and Equalities Committee,³⁴ the UK Government has agreed to introduce a statutory Code of Practice for employers to prevent and respond to sexual harassment. The Committee also recommended a specific duty requiring relevant public employers to conduct risk assessments for workplace sexual harassment and put in place an action plan to mitigate those risks.³⁵

Prevention of workplace sexual harassment is in line with Equally Safe, Scotland's strategy to prevent and eliminate violence against women and girls, which takes a primary prevention approach to VAW. However, levers to tackle sexual harassment in the workplace are limited in Scotland, with employment law reserved to Westminster. Reform of the SSDs provides a rare opportunity to do so. In our recent policy report on workplace sexual harassment in Scotland, we set out the case for organisations to develop and implement a distinct sexual harassment policy that is rooted in understanding of structural and intersectional inequality for women, and details on what such a policy should look like. We published a model policy alongside the report. Other preventative recommendations include an organisational anti-sexism strategy and targeted intersectional training.

Scotland has a chance to lead the way within the UK by strengthening employers' obligations around sexual harassment. In our draft regulations, we have included a new duty for listed authorities to take all reasonable steps to prevent sexual harassment, including requirements to hold a distinct sexual harassment policy and develop an organisational anti-sexual harassment strategy.

Our recommendations for a new duty regarding prevention of sexual harassment include:

- Requirement to hold a standalone workplace sexual harassment policy
- Requirement to develop the policy in consultation with trade unions and/or employee representatives
- Annual monitoring and review of the policy
- Requirement to develop an organisational anti-sexism strategy

³³ EHRC (2018) Turning the tables: Ending sexual harassment at work

³⁴ Women and Equalities Committee (2018) Sexual harassment in the workplace

³⁵ Women and Equalities Committee (2018) Sexual harassment in the workplace

Focus on individual protected characteristics

Equalities organisations have critiqued PSED for a diluted focus on identity-based equality. Even prior to 2011 with only three duties to consider, public bodies immediately attempted to streamline and consolidate their obligations. Scotland’s equality regulators expressed concerns, warning public bodies against a generic approach, noting that “*differences in the general duties illustrate the differences in the nature of discrimination experienced by the different groups*”.³⁶

Since the PSED introduced duties regarding six additional equalities strands, accompanied by a complete lack of adequate support, a homogenised approach to tackling inequality has emerged. In 2017, a coalition of equalities organisations set out related concerns in a joint paper to the Scottish Government:

“The response from public authorities to the Public Sector Equality Duty has essentially been to treat protected characteristics in an undifferentiated way, glossing over or ignoring the specific disadvantage and discrimination faced by specific groups of people. Public bodies increasingly attempt to consider multiple characteristics at the same time, and without adequate data or characteristic-specific competence. There has been a trend away from characteristic-specific engagement and (co)production mechanisms such as women’s committees, race equality officers, and disability stakeholder groups. Instead, structures that cover multiple characteristics, such as equality advisory groups and internal ‘equality champions’ have been established.

[...] the publication and process requirements of the Public Sector Equality Duty are now almost universally carried out using a highly genericised approach that spans all of the protected characteristics.”³⁷

This diluted focus on individual, identity-based inequalities under PSED stems from a broad lack of recognition of the causes of inequality amongst practitioners that precludes the identification of effective solutions. Within this, the specific needs of people facing multiple forms of discrimination, such as disabled or Black and minority ethnic women, are crowded out entirely. Marginalised groups experience different forms of inequality that must be specifically addressed through an intersectional lens.

Engender has advocated for a mandated focus on individual protected characteristics to be integrated within revised duties under the PSED. We have integrated wording to this effect throughout our draft regulations at the annex. However, we did not have the scope to explore this to its full extent.

³⁶ Commission for Racial Equality, Disability Rights Commission, and Equal Opportunities Commission in Scotland (2007) Bringing Equality to Scotland: The Three Public Sector Duties.

³⁷ Equality Sector Response (2017) The socio-economic duty: A consultation (From Inclusion Scotland, Engender, Close the Gap, Coalition for Racial Equality and Rights, Equality Network, LGBT Youth Scotland, Scottish Women’s Aid, Scottish Women’s Convention, Stonewall Scotland, and The ALLIANCE)

FOR FURTHER INFORMATION

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ABOUT US

Engender is Scotland's feminist policy and advocacy organisation, working to increase women's social, political and economic equality, enable women's rights, and make visible the impact of sexism on women and wider society. We work at Scottish, UK and international level to produce research, analysis, and recommendations for intersectional feminist legislation and programmes.