

Agenda Item	4
Report No	CP/2/22

THE HIGHLAND COUNCIL

Committee: Communities and Place

Date: 23 February 2022

Report Title: Highland Council Response to the Scottish Government Review of the operation of the Public Sector Equality Duty in Scotland

Report By: Interim Executive Chief Officer – Communities and Place

1. Purpose/Executive Summary

- 1.1 The Scottish Government is currently consulting on a review of the operation of the Public Sector Equality Duty (PSED) in Scotland. The review considers the effectiveness of the PSED in Scotland and a consultation document now sets out a series of detailed proposals both for legislative changes to the SSDs and changes to the wider implementation environment.
- 1.2 The Council's draft response to the consultation questions is set out in **Appendix 1** which accompanies this covering report.

2. Recommendations

- 2.1 Members are asked to:
 - i. Consider the Council's draft response to the consultation questions;
 - ii. Agree a final response to be submitted to the Scottish Government.

3. Implications

- 3.1 **Resource implications** – there are no resource implications arising from this report.
- 3.2 **Legal implications** – the results of the review may result in changes to the regulatory equality duties placed on public bodies.
- 3.3 **Community (Equality, Poverty, Rural and Island) implications** – This is a consultation response and there are no direct implications, an impact assessment is not required. The consultation aims to improve and streamline specific equality duties and will inform the Council's continued equality commitments.

- 3.4 **Climate Change / Carbon Clever implications** – there are no climate change/carbon clever implications.
- 3.5 **Risk implications** – there are no direct risks arising from this paper. Non-compliance with equality duties on the public sector can incur enforcement action and reputational risk.
- 3.6 **Gaelic implications** – there are no Gaelic implications.

4. Consultation summary

- 4.1 It is almost 10 years since Scottish Specific Duties (SSDs) were introduced in May 2012 to support the Public Sector Equality Duty (PSED) within the Equality Act 2010. The Scottish Government is currently undertaking a review of the effectiveness of these duties in order to take stock and consider what more can be done to support a more effective regime in Scotland.
The full list of the current SSDs is attached at **Appendix 2**.
- 4.2 Scottish Ministers had made a commitment to review the effectiveness of the SSDs in Scotland prior to the Covid-19 pandemic. Following initial research at that time to identify issues within the SSDs, and subsequent engagement in recent months, it has become clear that more could be done to improve the regime.
- 4.3 Stakeholders, including the Equalities and Human Rights Commission (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.
- 4.4 Some stakeholders have said that the current mainstreaming reporting duty 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.
- 4.5 A number of proposals are now being consulted on to amend the SSD regime and better embed equality considerations at the heart of the public sector. There are proposals relating to individual SSDs, but also cross-cutting themes which 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.
- 4.6 The review does not consider the scope of the general PSED as set out in section 149 of the Act or the role of the EHRC as the enforcement body, as these are matters reserved to the UK Parliament.

- 4.7 The Scottish Government consultation now sets out a series of detailed proposals for legislative changes to the SSDs and also for changes to the wider implementation environment.
- 4.8 The intention towards a more prescriptive approach, particularly to the mainstreaming report could be a positive move and an opportunity to clarify and streamline reporting requirements. This approach could help improve benchmarking across listed bodies.
- 4.9 This consultation is split into 3 parts:
- Part 1: Seeking views on specific and detailed proposals that the Scottish Government considers will improve the current regime, based on evidence and views from stakeholders (Questions 1-7);
 - Part 2: Using the opportunity of this consultation to seek further views from stakeholders and build an evidence base on key issues (Questions 8-13); and
 - Part 3: Providing an opportunity for further and general reflection and providing information on responding to the consultation (Question 14).
- 4.10 The consultation included proposals and questions relating to individual SSDs, as well as relevant cross-cutting themes, which 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

5. Implementation of the current SSDs

- 5.1 There are ten specific duties set out in the SSD Regulations. These are set out in full in **Appendix 2** and summarised below:
(Regulations 1 and 2 cover commencement dates and interpretation of key terms).
- Reg. 3 Duty to report progress on mainstreaming the equality duty
 - Reg. 4 Duty to publish equality outcomes and report progress
 - Reg. 5 Duty to assess and review policies and practices
 - Reg. 6 Duty to gather and use employee information
 - Reg. 7 Duty to publish gender pay gap information
 - Reg. 8 Duty to publish statements on equal pay, etc.
 - Reg. 9 Duty to consider award criteria and conditions in relation to public procurement
 - Reg. 10 Duty to publish in a manner that is accessible, etc.
 - Reg. 11 Duty to consider other matters
 - Reg. 12 Duty of the Scottish Ministers to publish proposals to enable better performance.
- 5.2 The SSD Regulations came into force on 27 May 2012 and have been subsequently amended. Many of the specific duties require information to be reported upon and published on a reporting cycle of either two or four years. As some listed authorities (for

example, Joint Integrated Boards which is not applicable in Highland) have become subject to the specific duties at different times, the cycles on which they report are different.

- 5.3 For the Highland Council, the approach to Regulations 3, 4, 6, 7, 8 and 10 has required reporting to the Communities and Place Committee on a two and 4 yearly cycle, most recently in [May 2021](#). Gathering information for the mainstreaming equality and equality outcome reports result in lengthy, text heavy, documents.
- 5.4 Regulations 5 and 7 are ongoing duties. The duty to assess and review policies and practices for equality impact is an area that requires strengthening.
- 5.5 The annual [Procurement Performance Report 2021/22](#) provides examples of how the Council has taken account of the duty to consider award criteria and conditions in relation to public procurement.
- 5.6 Regulations 11 and 12 apply to Scottish Ministers,

6. Draft Council response

- 6.1 The Council's proposed response has been drafted by officers involved in the cross-service Fairer Highland Working group and other officers with specific areas of interest including Procurement, Performance and Corporate Communications.

A summary of the key proposals and the Council's response is outlined below:

- 6.2 **Part 1 (Questions 1-7):** Seeks views on specific and detailed proposals that the Scottish Government considers will improve the current regime, based on evidence and views from stakeholders.

6.3 How to create a more cohesive regime and to reducing bureaucracy

In relation to the reporting process the proposals include:

- 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
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- The response welcomes moves towards a simplified and streamlined regime. There are considerations about changing the current 2-yearly and 4-yearly reporting cycles to a single 4 (or 3) yearly cycle. However, a four-year period may result in minimal scrutiny of equality work outside that period. Encouragement should be given, and examples provided, of best practice to embed equality in organisation, for example in annual reports, or

within other reporting regimes – this links to the questions about strengthening leadership and accountability.

The response suggests that consideration be given to better embedding reporting related to equality duties in Council reporting, which can then be used to inform a 4-yearly report.

6.4 **Embedding Inclusive Communications**

The Scottish Government seeks to ensure inclusive communication is embedded proportionately across the work of listed authorities when they communicate with the public. Scottish Government will 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. Listed authorities would be required to report on how they meet this duty as part of their overarching mainstreaming reporting duty.

- The response highlights that a focus on this area of work is very welcome, although further details are required to inform whether it should be a specific duty or be strengthened by central resources and guidance where bodies need to meet the needs of people with specific communication needs. Improving how we communicate clearly with citizens, and within organisations, can go a long way to ensuring information is provided in an inclusive manner.
- There will always be customers with specific communication needs, and we should ensure they are able to access our information and services. While some of this can be delivered at little cost, some inclusive communication can be costly and requires lead in time to arrange. We recommend consideration is given to national support to improve consistency and access to certain services.
- While we agree in principle to a requirement to embed inclusive communication across the work of listed bodies, at this point it is not possible to determine whether this should become a duty. We would suggest that further specific details of this approach should be considered so there is a better understanding as to how a duty would apply in practice, to determine what resource is required, and to inform a decision whether this should be a specific duty. Further consultation on what this duty might look like may be needed

6.5 **Extending Pay Gap reporting to include ethnicity and disability**

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.

Listed authorities would be required to publish pay gap information 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 publication of disaggregated pay gap information where possible.

- This proposal is welcomed but we recognise there maybe challenges in the gathering and analysis of data.

6.6 **Assessing and Reviewing (equality impact assessments)**

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. It also proposes to include people with lived experience in the review of policy in certain circumstances.

- We recognise the comments about a need for a cultural shift to highlight the importance of engraining equality considerations and to do so at the start of policy development processes, and that consideration is given to lived experience. Otherwise, it is not clear if this proposal suggests a more prescriptive approach which is not effectively defined.
- The response notes that it would be more helpful to focus on supportive rather than regulatory approaches and suggests improvements could be made by an effective national guidance and training programme and that this is designed to also reach senior management and members and emphasises their scrutiny role

6.7 **A new equality outcome setting process**

Scottish Government proposes 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.

- The response welcomes the suggestion for the option to link local outcomes to national equality setting and feel this approach would better tackle deep rooted disadvantage.
- The consultation documents implies an 'either/or' approach – that bodies use the national outcomes or decide not to and develop their own. We suggest that listed bodies:
 - are asked to adopt a set of national equality outcomes and show how they contribute to them
 - if they don't wish to contribute to any/all national outcomes there is an explanation (eg. not relevant locally or to a sector)
 - there remains scope to develop local outcomes, either separately or in addition to the national outcomes.

6.8 **Procurement**

Scottish Government proposes to require listed authorities to set out how they plan to meet all of their duties, including the duty on procurement. It suggests satisfying suggestions to strengthen the procurement duty by implementing a publication aspect.

- The response agrees that procurement can be an effective lever to influence positive change but recommends caution with implementing full revised proposals and regulation. There are already requirements for annual reports on Procurement – we recommend that meeting the equality duties are reported there and a four yearly equality report should evidence this has been done.

6.9 **Part 2 (Questions 8-13):** Uses the opportunity of this consultation to seek further views from stakeholders and build an evidence base on key issues. A summary of key feedback areas includes:

6.10 **Intersectional and disaggregated data analysis**

Intersectional data describes how multiple factors, such as gender, race and socio-economic status interact to produce different outcomes for some groups. The Scottish Government are aiming to gather more views on feasibility of mandating intersectional and disaggregated data analysis throughout the SSDs.

- The response agrees this can be a beneficial approach to understanding disadvantage (recognising how multiple factors, such as gender, race and socio-economic status interact to produce different outcomes for some groups).
- However, our response highlights that without more clarity on expectations, including this as a duty may be an overly cumbersome / complex requirement on listed bodies, and for some more than others. Local demographics vary between geographies (and differing boundaries, eg Council, health etc). Data is rarely collected at a level that enables analysis across smaller geographies or communities of interest and much of the data used by local authorities comes from national sources. Establishing new sources of local data, collecting and analysing it will be time consuming and expensive. Significant work and resource would be required at national level in the first instance to deliver on this approach.
- The response is not supportive of a mandated duty at this point.

6.11 **Intersectional gender budget analysis**

Intersectional gender budget analysis 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 and women of different socio-economic statuses. This should draw on analysis undertaken at the options scoping and appraisal stages of policy development, so that it is embedded in the decisions reflected in the budget. The Scottish Government are aiming to gather more views on the feasibility of mandating intersectional and disaggregated data analysis throughout the SSDs.

- The first part of this question relates to Scottish Ministers and the second to how listed bodies would view an additional duty to integrate this into their budget setting procedures. The response suggests greater clarity and understanding is needed between such an analysis and the impact assessment requirement, and that there would be a need for dialogue with Finance Directors prior to any duty being applied in relation to intersectional gender budget analysis.
- The response is not supportive of a mandated duty at this point.

6.12 **Coverage**

- The Council has no view on whether additional bodies should be subject to the SSD but would welcome clarity about the relationship between Local Authorities,

Licencing Boards and Education Authorities – all currently separate listed bodies.

6.13 **Strengthening leadership and accountability and enhancing capability, capacity, and culture**

- The response agrees that a range of different support to strengthen leadership and accountability, and increase capacity is required in addition to revised guidance.
Revised guidance should be clear, practical and accessible.

6.14 **Positive action**

Is a useful means 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.”

The Scottish Government is proposing to require listed bodies to report on any positive action measures.

- The response does not object to a requirement for reporting positive action, but highlights guidance should ensure that listed bodies have a clear understanding of what constitutes positive action.

6.13 **Part 3 (Question 14):** Provides an opportunity for further and general reflection and providing information on responding to the consultation.

6.14 **Overall reflections**

- As noted earlier in the response, the draft welcome any moves to streamline how public bodied can demonstrate effective compliance with the SSDs and remove bureaucracy and the commitment to ensure that new regulations are underpinned by an effective plan for implementation.
- The response notes that care needs to be taken that the existing regime is not replaced with one that is more complex, as may be the case if an additional duty on listed authorities to integrate intersectional gender budget analysis into their budget setting procedures is required.

7. **Next Steps**

7.1 Responses to this consultation will inform suggested improvements to the SSDs and their implementation. Subject to the Parliamentary timetable, regulations will be introduced to the Scottish Parliament in late 2022.

7.2 It is intended that any regulatory changes will come into force in 2025 to allow a lead in period which will ensure that listed authorities understand what will be required of them

and for new guidance to be developed. This timeline would also align with the reporting cycle for most listed authorities under the current SSDs

- 7.3 If members agree, the Council's response will be submitted to the Scottish Government by the 11 April deadline.

Designation: Interim Executive Chief Officer, Communities and Place

Date: 2 February 2022

Author: Rosemary MacKinnon, Principal Policy Officer

Background Papers:

¹ [Public sector Equality Duty in Scotland: consultation - gov.scot \(www.gov.scot\)](http://www.gov.scot)

² [The Equality Act 2010 \(Specific Duties\) \(Scotland\) Regulations 2012 \(legislation.gov.uk\)](http://legislation.gov.uk)

Highland Council Draft Response to the Review of the operation of the Public Sector Equality Duty in Scotland: Consultation paper

Please note that the text in red below outlines the key proposals in the consultation document for the Communities and Place Committee.

[Read the consultation paper here](#)

Part 1: Proposals to Improve the Scottish Specific Duty Regime

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

Key proposals:

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

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

Any move towards simplifying and streamlining the SSD regime is to be welcome.

In principle, we would agree to the proposal for a Strategic Plan, however we would wish further details of what will be the required components will be.

The intention towards a more prescriptive approach, particularly to the mainstreaming report could be a positive move and an opportunity to clarify and streamline reporting requirements. This approach could help improve benchmarking across listed bodies.

The proposed new mainstreaming duty would include listed bodies reporting on how they have used lived experience, or the organisations representing people with lived experience, throughout their implementation of the duties. Many authorities, including our own, will already use lived experience as part of their evidence base for equality work. We would welcome information on the level of the expectation of how we will gather and use such information on a 4-year basis.

It is understood that there has always been an option to align reporting with internal requirements, eg some authorities report annually or align with other strategic reporting. This should remain and if anything strengthened by examples of effective approaches.

Question 1.2: What are your views on the proposal outlined above in relation to the reporting process?

- Like other Councils, we find the 2 yearly progress report cycle comes around very quickly, as does the cycle to review outcomes, engaging with communities and gathering evidence. Resulting reports are often lengthy and text heavy.

- However, a four-year period may result in minimal scrutiny of equality work outside that period. Encouragement should be given, and examples provided, of best practice to embed equality in organisation, for example in annual reports, or within other reporting regimes – this links to the questions about strengthening leadership and accountability.
- The focus should be on what is reported. how that information should be provided and used, along with demonstrating performance and improvement.
- A move away from an April deadline when there can be overlap with budget setting on local authorities would be welcome.
- Guidance could cover whether there is an expectation that a strategic equality plan is a separate document (which might give more prominence) or could it be part of a listed bodies business plan (more embedded).

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

This would be a sensible approach for listed bodies affected by different reporting timetables. Advance lead in time for any proposed timescale changes would be needed.

Proposal 2: Embedding Inclusive Communications

Key proposals

The Scottish Government seeks to ensure inclusive communication is embedded proportionately across the work of listed authorities when they communicate with the public. SG will 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.

Listed authorities would be required to report on how they meet this duty as part of their overarching mainstreaming reporting duty.

SG will work 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?

While we agree in principle to a requirement to embed inclusive communication across the work of listed bodies, at this point it is not possible to determine whether this should become a duty. We would suggest that further specific details of this approach should be considered so there is a better understanding as to how a duty would apply in practice and to inform a decision whether this should be a specific duty. Further consultation on what this duty might look like may be needed. For example

- What consideration will be given to resources requirement for authorities to provide and access relevant services?
- Costs of accessing information in different formats can be high and on occasion take time to deliver. There is reference to a central resource for translation. Would there be an intention to go beyond this to create shared resources to supply alternative formats with an aim to reduce potential costs and duplication?
- Details of the SSS approach should be explained and consideration given to how (and whether) a similar approach could work across a wide range of listed bodies with different functions.
- Would there be an aim to tackle duplication, eg 32 local authorities providing translated information on similar topics, or in the case of BSL plans seeking providers in a specialist and limited market to film individual BSL translated information on plans?
- The meaning of inclusive communication can be interpreted differently, a common understanding is needed.

Further work and consultation is required before any decision is taken on whether this becomes a specific duty, or not, including what would be considered as proportionate – this in itself is open to interpretation. National approach to training should also be considered to support guidance and standards. As providing inclusive communication can be costly and sometimes mean delays in providing information, there should also be an emphasis on the use of plain English and increased use of digital (where appropriate) as means to improve inclusion in all communications, allowing a focus to be given to people with communication challenges.

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

Key proposals

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.

Listed authorities would be required to publish pay gap information between disabled people and non-disabled people, and people who fall into a minority racial group and people who do not. SG will also encourage publication of 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.

Listed bodies would need to report on how they meet and implement this duty as part of their mainstreaming reporting duty. Another key driver will be the development of the ethnicity pay gap strategy, which was committed to in SG Programme.

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

In principle, we agree with the proposal that listed bodies are required to publish ethnicity and disability pay gap information. Many local authorities already publish these details, although

Highland Council does not at present, however our systems to record and analyse this information is currently under review.

Clear guidance should be provided for all listed bodies on how to calculate and report on these statistics and data; standardisation would be welcome.

Consideration should be given to what happens with this information and are there opportunities to use it beyond internal analysis if a standard approach is taken? For example, can more be done to use this data at regional and national level?

There are also other issues to be recognised, eg equality reporting is not mandatory and we, like many authorities have incomplete equality monitoring data on staff in relation to some protected characteristics. Data on sex is gathered elsewhere, eg for pensions, so is comparatively quite comprehensive, as is information on age. Some authorities in Scotland have very small numbers of people identified for some protected characteristics which makes for added complexity in reporting and analysis.

This proposal needs to be considered alongside engagement on proposed Local Government Benchmarking Framework (LGBF) indicators to ensure they are appropriate for benchmarking and that all authorities are able to comply with the proposed metadata. There should also be alignment between the timescales for reporting (e.g. currently SSD gender pay gap reporting is every 2 years but LGBF is annual).

Question 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 (where a listed authority has at least 20 employees)?

This would be appropriate.

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?

Clarity will be required on how this will be on what formulas will be used for calculations. Clear guidance will be also required on interpreting definitions of 'ethnicity' and 'disability'.

Proposal 4: Assessing and reviewing policies and practices

Key proposals

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.

SG 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 socioeconomic duty in part 1 of the Equality Act 2010).

Listed authorities would be required to report on how they implement this duty and could be illustrated through case studies and examples.

Question 4.1: What are your views on the proposal outlined above?

Like other listed bodies, we identify with the considerations arising from stakeholder feedback. We also recognise the comments about a need for a cultural shift to highlight the importance of engraining equality considerations at the start of policy development processes. However, guidance already states that assessments should be undertaken at an early stage and we question what will be different in this proposal?

It is unclear whether the intention here is for a more prescriptive approach to assessments and what that would be.

The involvement of people's lived experience should be highlighted as part of engagement and consultation elements of policy development generally, emphasising that time be allowed, and in some instances more time to involve groups less engaged with public sector.

Additionally, there should be reference to the importance of scrutiny when assessing and reviewing policies and practices.

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?

Improvements could be made by an effective guidance and training programme – again aiming to avoid duplication of effort and resource - and that this is designed to also reach senior management and members and emphasises their scrutiny role.

To support local authorities (who rely on a self-organised network), resources for a dedicated officer - similar to the Improvement Service post for the Fairer Scotland Duty should be considered.

Question 4.2: What are your views on the current scope of policies that should be assessed and reviewed under regulation 5?

There should be a clearer indication of the expected scope within any guidance – this is an aspect where a more prescriptive approach might be helpful. To an extent the approach in the Fairer Scotland guidance may be helpful, but with additional detail.

Proposal 5: A new equality outcome setting process

Key proposals

Scottish Government proposes 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 chooses 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.

Should listed authorities decide to set their own equality outcomes, they too would need 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. Listed authorities 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?

We would welcome the approach suggesting that listed bodies are able to use and show how they will contribute to national equality outcomes. This could strengthen how deep-rooted areas of disadvantage and discrimination are addressed while leaving scope for local solutions.

The evidence base for this should consider both qualitative and quantitative outcomes measures. Consideration of a set of equality outcome indicators within the National Performance Framework should be pursued.

The consultation documents implies an 'either/or' approach – that bodies use the national outcomes or decide not to and develop their own. We suggest that listed bodies:

- are asked to adopt a set of national equality outcomes and show how they contribute to them
- if they don't wish to contribute to any/all national outcomes there is an explanation (eg. not relevant locally or to a sector)
- there remains scope to develop local outcomes, either separately or in addition to the national outcomes.

Clear guidance would be required, for example would the use of lived experience to develop national outcomes mean listed bodies still need to include lived experience in the development of local responses?

For local authorities, we would welcome clarity over whether there will be one set of outcomes or will it be a requirement for separate sets for education, licensing (see later comments at Q14)?

A clear timeframe would be required for this approach to allow lead in time for public bodies to decide and define their contributions to national outcomes. This would mean that national and local reporting would not be aligned, but sequential.

Consideration might be given to a 'Direction' on equality outcome reporting requirements. Audit Scotland issues an Audit Direction and this is reviewed and updated regularly to ensure that there is effective public performance reporting by local government in Scotland. This provides an element of flexibility while focusing on using appropriate elements of the LGBF and qualitative evidence (e.g. cases studies on lived experience, self-assessment) of outcome measurement to meet the statutory duty of public performance reporting in the context of Best Value.

Proposal 6: Improving duties relating to Scottish Ministers

Key proposals

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. 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. SG 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?

The framing of this question should be clearer, that this applies to Board members, but not Scottish Ministers; a council; a joint board; a licensing board; an education authority; an individual holder of a public office.

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

We note that Reg 11 has not been used by ministers and that where Reg 12 has been used there have been delays.

It is not possible to comment on this proposal without a better understanding of what the implications are for listed bodies.

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?

There could be benefits to increased awareness and leadership on equality, at least at national level, if this approach is taken.

Proposal 7: Procurement

Key proposals

Scottish Government proposes to require listed authorities to set out how they plan to meet all of their duties, including the duty on procurement. It suggests satisfying suggestions to strengthen the procurement duty by implementing a publication aspect.

SG 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?

- Agree that procurement can be an effective lever to influence positive change but recommend caution with implementing full revised proposals. The Procurement Reform (Scotland) Act 2014 requires local authorities to comply with the sustainable procurement duty in all regulated contracts. Regulated contracts are those with a total ("whole of life" ex VAT) value of £50,000 in terms of goods and services and £2M in the case of works. The Procurement Reform (Scotland) Act 2014 specifically refers to "reducing inequality in the area" in the definition of "improving wellbeing"
- Procurement colleagues consider there is already a significant reporting burden under Procurement Annual Reports. Extracting elements relevant to equalities mainstreaming is considered to operate effectively under the present reporting regime.
- Guidance supporting regulation 9 could potentially refer to equalities being a factor in many community benefit/socio-economic considerations e.g. Fair Work, school visits, careers talks etc. It could also provide clear examples of proportionate and relevant activity - eg the accessibility of goods/services to disabled / disadvantaged / protected characteristic groups in terms of signage, menus, physical accessibility of buildings or public transport/taxis etc, including for vision/hearing impaired persons as well as other

forms of physical disability or mental health issues. Depending on requirement, this could be part of added value community benefits or part of the core requirement (specification) A parallel and context could be drawn and recognised explicitly in terms of the equality dimension to Fair Work/inclusion for instance.

- There is already a publication requirement in terms of i) Procurement Annual Reports and ii) Equalities Mainstreaming Reporting. Reporting requirement could explicitly link to the annual reports, rather than a new report.

Part 2: Exploring Further Areas

8. Intersectional and disaggregated data analysis

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, SG 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.

Key barriers were highlighted as “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.

There is not a strong sense of stakeholder views on this specific issue, and therefore we are seeking to gather more views on feasibility of mandating intersectional and disaggregated data analysis throughout the SSDs

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?

a) Ideally, yes, more use of intersectional data would be helpful. Some of the challenges around gathering and using intersectional data have been referred to earlier and in the consultation document, for example a lack of comparable complete data sets between PC; small number of people self-identifying.

New data sets linked to the Census will be welcome, but some may not be available until 2024, and then becomes outdated by the next census.

Without more clarity on expectations, including this as a duty may be an overly cumbersome / complex requirement on listed bodies, and for some more than others.

Local demographics vary between geographies (and differing boundaries, eg Council, health etc).

Data is rarely collected at a level that enables analysis across smaller geographies or communities of interest.

b) Improvements to national data and interpretation/availability of local level data. Work needs to be undertaken at national level in the first instance.

A significant issue with any available data has been the time lag in publishing. Data is needed to inform planning and improvement in closer to real time.

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?

NO

We are not confident that our organisation would be able to fully comply with meaningful results, although we would be able to provide some partial intersectional data.

Much of the data used by local authorities comes from national sources. Establishing new sources of local data, collecting and analysing it will be time consuming and expensive. This will need funded and national direction to ensure consistency. A national lead and funded approach is needed to deliver on this approach.

Training, guidance and support would be required, ideally developed nationally to reduce costs and duplication and ensure consistency of approach. Guidance should cover the types of intersectional data that can be meaningfully gathered and used.

9. Intersectional gender budget analysis

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, SG 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.

Key barriers were highlighted as “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.

There is not a strong sense of stakeholder views on this specific issue, and therefore we are seeking to gather more views on feasibility of mandating intersectional and disaggregated data analysis throughout 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?

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 and women of different socio-economic statuses. This should draw on analysis undertaken at the options scoping and appraisal stages of policy development, so that it is embedded in the decisions reflected in the budget.

<https://www.gov.scot/publications/scottish-government-response-first-ministers-national-advisory-council-women-girls/pages/4/> Dec 2021

Greater clarity is needed on the difference between this approach and the requirement to undertake equality impact assessments or Fairer Scotland Duty assessments.

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?

This would require more detailed consultation and discussion than allowed for here with Finance Directors in listed bodies for them to understand the proposals and consider the implications, and SG to consider the challenges for listed bodies.

Listed bodies would need a better understanding of how to undertake such analysis with clear guidance and training resource.

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?

No

Awareness raising, guidance and training would be required.

10. Coverage

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.

No

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?

No comments

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

Stakeholders have put forward the following suggestions:

- **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.

SG believes that these issues and suggestions need to be explored further. We do not think a statutory footing is the best approach at this stage. We will consult further on these matters when we consult on the mainstreaming strategy in 2022. However, stakeholders are welcome to share views.

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.

The stakeholder suggestions in the consultation document would be welcome and some of this suggested support is long overdue.

We agree these actions do not need to be on a statutory footing, but there needs consideration as to how any/all of it could be resourced?

Clarification on the role and expectations on an accountable officer would be needed.

- Funding: long-term/protected funding for the public and 3rd sectors for equality and human rights;
- Protected budgeting: public sector to spend a certain percentage of its budget to advance equality and human rights;
- Training - effective and mandatory equality training, including for senior leaders
- Equality accountable officers
- Improved forums or portals to share best practice.

12. Guidance

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. Some listed authorities have highlighted that they would find it useful to receive feedback on the mainstreaming reports and equality outcomes. 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?

We agree with the suggestion that a range of resources could usefully be developed towards strengthening leadership and accountability and improving understanding and capacity. We suggest that this is something SG and EHRC need to work on together along with key stakeholders such as COSLA. Guidance and other resources should include practical examples of good practice, be specific where required (eg formulas for pay gap information) and be provided in a clear and accessible manner.

13. Positive action

The Equality Act 2010 does not prohibit that person “from taking any (positive) 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.”

EHRC has said that it is not clear the extent to which listed authorities use the positive action. 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.

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?

- Most authorities undertaking positive action activities are likely to report on it in their mainstreaming – but may not label it as such.
- Any requirement would need listed bodies to have a clear understanding of what constitutes positive action (and what doesn't).
- An alternative approach could be a stronger encouragement to include examples of positive action in reports.
- Whether a requirement or a recommendation, this is something that should be included in the guidance and resources referred to in the previous question.

Part 3: Overall Reflections

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?

As noted earlier, we welcome any moves to streamline how public bodies can demonstrate effective compliance with the SSDs and remove bureaucracy. Care needs to be taken that the existing regime is not replaced with one that is more complex, as may be the case if an additional duty on listed authorities to integrate intersectional gender budget analysis into their budget setting procedures is required.

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.

For local authorities, we would welcome explicit clarification on the expectations on reporting for Licensing Boards and Education Authorities which are considered as listed bodies in their own right. This requires an acknowledgement that staff in these bodies are Council employees (for data purposes) and that there is not a necessity for separate reporting and development of equality outcomes – this is especially relevant if strategic plans are required.

Appendix 1

An indication of lead in times for changes and the development of guidance would be helpful, and whether there would be interim / transitional requirements. In particular, if the approach to give the option to work to national outcomes is adopted, lead in time (a year?) would be required to consider, engage and agree on how to contribute to these at local level.

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

<p>Regulation 3: Duty to report progress on mainstreaming the equality duty</p>	<p>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.</p>
<p>Regulation 4: Duty to publish equality outcomes and report progress</p>	<p>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.</p>
<p>Regulation 5: Duty to assess and review policies and practices</p>	<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>
<p>Regulation 6: Duty to gather and use employee information</p>	<p>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.</p> <p>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.</p>
<p>Regulation 6A: Use of member information</p>	<p>From time to time, Scottish Ministers must take steps to gather information on the relevant protected characteristics of members of a listed</p>

Appendix 2

	<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.