



Close the Gap response to the Scottish Government’s call for views on the review into the effectiveness of the Public Sector Equality Duty in Scotland (Stage 2)

INTRODUCTION

Close the Gap welcomes this opportunity to respond to this questionnaire and looks forward to further consultation on a detailed set of proposals to reform the Scottish Specific Duties. We are committed to continued engagement with Scottish Government on the development process. It is difficult to comment on issues on an individual duty without reflecting on its connection to the others, therefore responses to each question should be read as interdependent and a reflection on the duties as a whole.

The SSDs are intended to support public bodies to respond to the general duty (PSED) and to place the use of evidence at the heart of policymaking and equality outcome-setting. However, successive assessments by Close the Gap and other equality bodies¹, and the Equality and Human Rights Commission², have highlighted that this has not been achieved. While PSED has created a framework for action on inequalities, including women’s inequality in employment, public bodies have consistently failed to take effective action or deliver change. It is reasonable to expect that public bodies’ competence and performance of the duties would improve over time, however assessments consistently show a decline in performance. Nine years on from the enactment of the duties, this is deeply concerning. The Covid-19 crisis has further exposed the ineffectiveness of the duties as public bodies have failed to adequately respond to the differential impact on women as both service users and employees.

¹ Close the Gap (unpublished) Internal PSED assessment 2017; Close the Gap (2015) *Making Progress? An assessment of public sector employer performance of the public sector equality duty*; Close the Gap (2014) *Monitoring Scottish public bodies’ compliance with the public sector equality duty*

² Equality and Human Rights Commission’s *Measuring Up?* Programme. Available at <https://www.equalityhumanrights.com/en/public-sector-equality-duty-scotland/scotland-public-sector-equality-duty-projects/measuring>

We support the ambition to improve both the regulations and the implementation environment, however it is necessary to give appropriate weight to each of these aspects. There is a need for substantial capacity building across the sector, but this alone will not improve performance. The investment of resources in these activities will show limited returns if they are not supported by the strengthened regulations necessary for improved compliance. Evidence shows that employers are unlikely to take action on equality unless they are compelled to do so by law³.

Both the First Minister's National Advisory Council on Women and Girls (NACWG)⁴ and the Social Renewal Advisory Board (SRAB)⁵ have also recommended substantive changes to the duties. Scottish Government must show leadership in delivering a bold and radically reformed set of duties if we are to see much needed improvements in leadership across the public sector. Given the impact of the pandemic on women's employment and the risk of gender equality being rolled back decades⁶, meaningful reform of the duties should not be further delayed.

Close the Gap and other national equality organisations remain concerned that the PSED review process may not be ambitious enough to create meaningful change. The SSD regulations currently in place have not resulted in meaningful progress for people with protected characteristics, and so require fundamental revision. 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 level of involvement, we could support Scottish Government to create a set of duties which are both more effective and more enforceable than the current regulations. We therefore urge Scottish Government to develop a revised set of duties in co-production with equality stakeholders.

IMPROVEMENT PROPOSAL 1

³ Close the Gap (2013) *Missing out on the benefits: Summary of research on the reporting of the gender pay gap in Scotland*; and IFF Research (2015) *Company Reporting: Gender pay data*, Government Equalities Office

⁴<https://onescotland.org/wp-content/uploads/2020/01/NACWG-2019-Report-and-Recommendations.pdf>

⁵ <https://www.gov.scot/publications/not-now-social-renewal-advisory-board-report-january-2021/>

⁶ Close the Gap (2020) *Disproportionate Disruption: The impact of COVID-19 on women's labour market equality* and Close the Gap (2021) *One Year On: How COVID-19 is impacting women's employment in Scotland*

Making better use of evidence and data

Close the Gap welcomes the broad themes of the *Understanding equality data collection in the Scottish public sector* report on what works best as a starting point for enabling better use of evidence and data. The report's recognition of the importance of mainstreaming equality and its suggestion of a "go-to" place for organisations with less specific equality data collection expertise" are particularly important.

Close the Gap's reviews of PSED performance have consistently identified a lack of gathering and use of data and a marked decline in performance of this, in connection to employee data, gender pay gap information and the use of data to develop equality outcomes⁷. Many public bodies acknowledged problems gathering data on both service delivery and employment, citing system limitations and committing to make improvements. Despite this, in our 2017 review 87% bodies were assessed as having made poor or no use of employee data and we were unable to identify an evidence of work to improve data collection and use.

Data gathered must be gender-sensitive and sex-disaggregated. This entails competence building so public bodies know what data to gather. For example, the duty to gather data on the development of staff has been interpreted differently by different public bodies. Where data has been published it is insufficient to identify the differential experience of women in workplace development. Intersectional gender competence would enable public bodies to understand women's experience of training and development, and other factors, facilitating better data collection and analysis. The dearth of data on pregnancy and maternity in particular is likely to be driven by a poor understanding of how this impacts women's employment and, a misunderstanding among some public bodies about the data that can be legitimately gathered around the experiences of pregnant women and women returning from maternity leave.

The gathering and use of sex-disaggregated gender-sensitive data is central to the performance of all aspects of the duties. While there is a need for significant programme of capacity building across the public sector, this must

⁷ Close the Gap (unpublished) Internal PSED assessment 2017; Close the Gap (2015) *Making Progress? An assessment of public sector employer performance of the public sector equality duty*; Close the Gap (2014) *Monitoring Scottish public bodies' compliance with the public sector equality duty*

be supported by a change to the duties to ensure such an investment delivers meaningful action.

1.1 In your view, which elements of the proposed programme are most important for driving improvement?

Close the Gap welcomes the Equality Data Improvement Programme (EDIP) draft action plan, which contains many actions that may support improved capacity on data gathering and use in public bodies. However, we note that there gender expertise or equality organisations represented on the project board and are concerned that represents an important gap. We call on the board to ensure engagement with gender expertise is integrated into its work.

EDIP actions to support learning and good practice that Scottish Government should prioritise are:

- Undertake an intersectionality project which will include literature review of what is meant by intersectionality and how the concept of overlapping/interconnected protected characteristics can be utilised when analysing data. Additional research may be commissioned, where gaps are identified.
- Run workshops to discuss best practice in analysing protected characteristics for public sector analysts.
- Develop best practice guidance to help public sector data collectors to improve their response rate.
- Commission the production of case studies to showcase good practice in equality data collection in the public sector, based on findings from the recently concluded Public sector – understanding equality data collection commission.
- Update guidance on data collection and question wording to be used for collecting equality data.
- Identify and develop case studies of how improved equality data has led to changes in service outcomes from across the public sector.

These actions speak to a number of the capacity gaps evident in equality organisations' assessments of public bodies and in public bodies' own concerns regarding their ability to better perform the duties. There must be a recognition of the need to improve data collection systems across the public sector and ensure they are able to gather the data needed. Capacity building work should also support public bodies' understanding of the broad range of

equality evidence and expertise available that can help to fill in gaps in data and facilitate better analysis of the data available.

EDIP actions on data development and improvement that Scottish Government should prioritise are:

- The Equality Evidence Strategy is due for review in 2021 and the next iteration will cover the years 2022-25. Our aim is that the new Equality Evidence Strategy will re-examine key aspects, such as the vision and purpose, but this time will be accompanied by an Equality Data Improvement Plan which sets out key milestones and priorities to filling equality gaps rather than just identifying them.
- Analyse individual or household based NPF indicators to identify the extent to which equality breakdowns are available and for each indicator set out a plan to either allow analysis of the existing indicator by protected characteristic or to identify an alternative means to provide evidence.
- Produce an equalities dataset through the secure linkage of data from Scottish public bodies on protected characteristics from the 2010 Equality Act to understand the effect of services on different people with different protected characteristics.

Work to develop a equalities dataset could improve public bodies' work to gather data by identifying what data is and isn't already collected, thus identifying gaps to be filled. It may also assist with the development of national equalities outcomes and priorities (addressed later in this response). A stepped plan to fill these gaps should include a sectoral breakdown and build in accountability measures to ensure public bodies are clear on the action that is required of them.

The existence of data gaps is well-established and acknowledged, yet there has been very little meaningful action taken to address the problem.⁸ A significant concern of protected groups is the continued focus on research and data to the detriment of substantive action. This has been raised repeatedly by equality advocates and was a key finding of Close the Gap's engagement work with BME women.⁹ Many of the EDIP actions are to undertake further research

⁸ Close the Gap (2021) Response to the UK Statistics Authority Inclusive Data Consultation <https://www.closesthegap.org.uk/content/resources/Close-the-Gap-reponse-to-the-UK-Statistics-Authority-Inclusive-Data-Consultation---March-2021.pdf>

⁹ Close the Gap (2019) *Still Not Visible: Research on Black and minority ethnic women's*

around data issues on which there is already extensive information available, and which equalities organisations have been advocating on for several years. We therefore are of the view that the action plan could provide greater weight to be more solution-focused actions.

1.2 Are you aware of other public sector equality networks that this programme could link with?

The programme could usefully engage with the NHS Equality Leads network, which leads and informs the health sector's approach to the duties. It is essential that work to deliver the EDIP action plan includes engagement with gender equality organisations and other equalities experts. This will help ensure these actions are gender competent and intersectional and will assist with building intersectional gender competence in officials engaged in the EDIP.

1.3 Are their additional actions, outwith the EDIP, that you believe would improve the quality of and use of evidence and data?

It is critical that the work of the EDIP is informed by the aim of improving gender mainstreaming and equality impact assessment (EQIA). This should build in an end-to-end view of the purpose and process of data gathering, analysis and use. This will enable public bodies to build understanding of how the duties work in concert, alongside building capacity on working with data itself.

Close the Gap supports the recommendation made in the third report of the NACWG that there should be a new duty on public bodies to gather and publish a range of equality data including employment, service delivery and gender budgeting information¹⁰. Those duties that rely on data gathering and use, including EQIA and equality outcome setting, should be strengthened to require public bodies to specify the relevant points of the evidence they have used to discourage public bodies from simply listing reports or datasets.

IMPROVEMENT PROPOSAL 2

Strengthening participatory policy making: hearing lived experience

experiences of employment in Scotland and ongoing engagement with BME women participants in the research

¹⁰<https://onescotland.org/wp-content/uploads/2020/01/NACWG-2019-Report-and-Recommendations.pdf>

2.1 How can the SSD regime be used to strengthen participatory policy making and ensure lived experience is central within the policy making process? **and 2.2** Are these current requirements sufficient to ensure evidence of lived experience is taken into account in developing equality outcomes and/or impact assessments? **and 2.3** If not, what additional steps could achieve this intention?

Close the Gap welcomes the calls for improved involvement of lived experience, and the use of co-production, made by the NACWG and SRAB. The Poverty and Inequality Commission plans to trial a new approach to involving experts by experience in its work over the next year. It commissioned guidance from Poverty Alliance to inform this process, which will be useful to Scottish Government and public bodies in considering participatory policymaking.¹¹ A good practice model, which is intersectional and gender-sensitive, could be utilised by public bodies in involvement work.

It is important to recognise that participatory policy-making is likely to have limited impact if it is not embedded within a strategic approach that is also informed by evidence and the expertise of equality organisations. Lived experience must be set within the context of research and evidence on related inequalities as women may not always identify the gendered inequalities impacting on their experiences of work due to the impact of internalised norms and stereotypes. Engagement that is limited to gathering the views of individuals who share protected characteristics may therefore fail to identify relevant issues, or result in public bodies focussing on issues that may be ‘easy wins’ and unlikely to drive change on a structural level.

A strategic response that embeds lived experience alongside equalities expertise and evidence, and includes capacity building on participatory policymaking, is crucial if co-production is to drive the change sought by its participants. Any duty or guidance concerning the use of lived experience evidence must also require public bodies to set out the key issues identified as a result of their engagement and how these have been used to perform connected duties including gender mainstreaming, equality outcome setting and EQIA.

¹¹<https://povertyinequality.scot/wp-content/uploads/2020/10/Guidance-on-involving-experts-by-experience-PIC-Guidance.pdf>

IMPROVEMENT PROPOSAL 3

Improving the links between equality and human rights frameworks

3.1 We would welcome your views on how the links between equality and human rights frameworks can be better understood across the public sector in order to support public bodies to better integrate equality and human rights into their business, and 3.2 We would welcome your view on how the intended new statutory framework for human rights can align with and fully support delivery of the public sector equality duty?

Engender's Scotland Shadow Report submitted to CEDAW in 2018 set out the impact of austerity on women's rights.¹² The Covid-19 crisis has exacerbated this; as Engender note "UN Women estimate that global public health measures including school closures and sector-wide service restrictions risk setting women's equality back 25 years."¹³ Covid-19 has particularly exposed the ineffectiveness of PSED as a driver for public bodies to consider gender, including a failure to use EQIA in developing their responses to the pandemic. The imperative for the incorporation of CEDAW into Scots Law is clear.

A reformed set of Scottish specific duties could support the effective incorporation of CEDAW. CEDAW could provide enhanced accountability for women's rights including the possibility that any woman can access a remedy for a breach of her rights in her local court. However, CEDAW could also mean rights could be better delivered without litigation because of requirements for public sector bodies to better embed equality and the jurisprudence of treaty articles into policy and practice.¹⁴

Close the Gap acknowledges that equality and human rights are deeply connected. It is a positive aspiration for public bodies to integrate both equality and human rights into their functions. However, we are concerned that many public bodies do not have sufficient gender or human rights competence to successfully do this.

¹² Engender (2018) CEDAW: Eighth periodic report of the government of the United Kingdom on measures taken to give effect to CEDAW. Available at <https://www.engender.org.uk/content/publications/Engender-CEDAW-report.pdf>

¹³ See BBC (2020) 'Coronavirus and gender: More chores for women set back gains in equality'. Available at <https://www.bbc.co.uk/news/world-55016842> citing data from UN Women (2020). Available at <https://data.unwomen.org/publications/whose-time-care-unpaid-care-and-domestic-work-during-covid-19>

¹⁴ Engender, Close the Gap, Scottish Women's Aid, Rape Crisis Scotland, and Zero Tolerance (2021) *Incorporating CEDAW into Scots Law*

As with the equalities sector joint response to the consultation on the socioeconomic duty¹⁵, we are cautious about the potential for confusion in layering different types of analysis and approaches on top of one another. Public bodies have taken an homogenised approach to the duties, treating protected characteristics in an undifferentiated way and neglecting the specific disadvantage and discrimination faced by different protected groups. Close the Gap is concerned that without adequate leadership, capacity building and resourcing, and a clear understanding of the links between the equality and human rights frameworks, there is a risk that public bodies' engagement with both will be ineffective.

IMPROVEMENT PROPOSAL 4

Strengthening leadership and resourcing

4.1 Do you agree with the position that this is best achieved through routes other than regulatory change?

No, we do not agree. Close the Gap welcomes the recognition of the need to strengthen leadership and improve resourcing on equality across the public sector, however it is of concern that no regulatory changes are envisaged for this improvement proposal. This does not align with the concerns raised by Close the Gap and other equality organisations during stage 1 of this process and previous engagement on the duties. A lack of leadership and resourcing are the two most significant factors driving public bodies' poor performance of the duties.

Equalities organisations have shared concerns that leadership within public bodies has been almost non-existent. It is reasonable to link the lack of prioritisation and resourcing of action on equality to a lack of prioritisation from public bodies' senior leaders. Close the Gap's assessments of public bodies' performance of the duties has highlighted a steady deterioration of even basic compliance: a recent scan of the reports of the 45 listed public bodies covered by our 2017 assessment¹⁶ found that 20% had failed to publish their gender pay gap information. In 2021, this has increased to one third.

Our experience of delivering bespoke support to public bodies on the duties has provided an insight into the attitude towards the duties of some public body leaders. In one example, we worked with the equalities lead of a public

¹⁵<https://www.closesthegap.org.uk/content/resources/Socioeconomic-duty-consultation-equality-sector-response-September-2017.pdf>

¹⁶ Further Education, Higher Education, Local Authorities, NHS Boards and NDPBs.

body to develop an equality outcome on the organisation's gender pay gap. When the equalities lead presented the equality outcome to senior leaders it was perceived to be too challenging, and there was discomfort on potentially having to report this publicly. The senior leaders ultimately decided the outcome would be redesigned around a target that the public body had already met in order to minimise the work required on the duties and to guarantee a positive report. Such an approach does not align with the purpose and requirements of the duties. Where the senior leadership of public bodies' prioritise image and risk management over ambition there will be progress on tackling women's labour market inequality, wider inequalities and discrimination will be significantly constrained.

It is recognised that public sector budgets are stretched and that the pandemic has placed increased pressure on public spending. Public bodies are required to deliver value for money and the business case for delivering gender equality in employment is well-rehearsed. In taking action on gender inequality in their organisations, public bodies as employers could improve employee morale, motivation and innovation and thus harness associated productivity improvements and efficiencies in their workplaces. Further, employee loyalty could be boosted meaning reduced costs associated with staff turnover, such as recruitment and training costs. Similarly, there is overwhelming evidence that equality and diversity can drive excellence in service design¹⁷. There is therefore a clear business case for improving performance of the duties.

Where public services and employment policies are developed without taking account of equality, public resources are directed inefficiently, as they are not responding to the different needs of different groups. Public sector leaders responsible for ensuring value for money should recognise the value of the duties in supporting this. Despite this, there is a continued lack of resource allocated to action on inequality.

Close the Gap agrees with Engender's assessment that "even legal requirements are insufficient to drive action where there are no significant consequences for non-compliance".¹⁸ If after a decade of the duties the leaders of Scotland's listed public bodies have not adequately resourced work to perform the duties, it is difficult to envision how this will be achieved without regulatory change and increased accountability of public sector leaders.

¹⁷ Close the Gap (2016) *Gender Equality Pays: The economic case for addressing women's labour market inequality*

¹⁸ Engender (2020) *What Works for Women: Improving gender mainstreaming in Scotland*

4.2 If so, then what do you feel is needed?

The EHRC has questioned whether the standard of performance of the duty is linked to “resource, commitment or capability”¹⁹ It is clear that all three factors require consideration. Evidence shows that organisations are unlikely to take action on equality unless they are compelled to do so by law²⁰. That the duties are still seen by public sector leaders as a “competing priority”²¹ demonstrates that they are unlikely to prioritise action on equality unless they are legally required to do so. Close the Gap therefore calls for a duty for each public body to appoint an accountable officer. The responsibilities of this role would include providing internal advice, guidance and competence building. The officer would also be responsible for monitoring the organisation’s compliance with the duties. An accountable officer would report to the CEO or another senior leader and have adequate resources to carry out their duties. This would help address the issues of resource, commitment and capability and support greater accountability for performance of the duty.

We also call for a new duty on public bodies to publish a Strategic Equality Plan, in line with the Welsh specific duties. This should set out their approach to the duties as a whole and their arrangements for performing each of the specific duties. As Engender note, “Strategy, policy and even mainstreaming architecture can be exemplary, but without funding to implement change, progress will be limited.”²² To this end strategic equality plans should also include a commitment to set aside the resources necessary to do so. It is suggested that this could be published alongside public bodies’ corporate strategic plans to align reporting timelines and enable equality to be embedded into the development process of these.

The EHRC’s Review of the Public Sector Equality Duty (PSED) in Wales found that public bodies were positive about the requirement to develop a strategic equality plan duty²³. Public bodies felt they assisted performance of the duties as they brought all of the strands of the duty together in one place and laid out

¹⁹ [Public authorities’ performance in meeting the Scottish Specific Equality Duties 2017: Measuring Up? Report 7 | Equality and Human Rights Commission \(equalityhumanrights.com\)](#)

²⁰ Close the Gap (2013) *Missing out on the benefits: Summary of research on the reporting of the gender pay gap in Scotland*; and IFF Research (2015) *Company Reporting: Gender pay data, Government Equalities Office*

²¹ Scottish Government (2021) *Review of the Operation of the Public Sector Equality Duty in Scotland: Learning from Mainstreaming Equality during the Covid-19 Pandemic*

²² Engender (2020) *What Works for Women: Improving gender mainstreaming in Scotland*

²³ Equality and Human Rights Commission (2014) *Review of the Public Sector Equality Duty (PSED) in Wales: Full Report*

a clear plan. Introducing such a duty in Scotland could facilitate greater coherence by setting out roles and responsibilities for implementation, clear objectives and a monitoring framework. This would also make reporting easier as the plan itself would provide a clear structure to report against. A duty to produce a Strategic Equality Plan could facilitate greater buy-in from public sector boards and leadership and ensure greater accountability.

Close the Gap supports the NACWG's recommendation that there be an additional duty on public bodies to do gender budget analysis. In identifying the gender impact of spending decisions this could help public bodies identify areas of priority for gender mainstreaming work and provide an impetus for greater resourcing of work to meet the duties. Gender budgeting has been successfully implemented in Austria, Belgium and several other EU countries.²⁴

These steps to increase accountability of public sector leaders could also be supported through the Scottish Ministers' duty. If Ministers use this duty to set an expectation that work to meet the duties must be adequately resourced this will demonstrate leadership and encourage public body leaders to follow suit. This could be achieved through the inclusion of a resourcing expectation in Ministerial letters of guidance.

IMPROVEMENT PROPOSAL 5

Reducing bureaucracy

5.1 What do you feel drives the feeling of the bureaucracy of the SSD regime? and 5.2 What would be the best method of reducing the bureaucracy of the regime while ensuring the regime still prioritises meaningful outcomes and impacts?

Close the Gap does not view the duties as excessively bureaucratic, nor particularly complex. The reporting required is essential in order to ensure public bodies can be held to account on their performance of the duties. Public bodies are already required to publish a range of reports, outcomes, data and progress updates across their functions, most notably for their corporate plans. The reporting requirements of the duties are no more onerous than this.

It is noted that public bodies have raised concerns regarding the timescale of reporting on the duties, specifically that it does not align with their corporate

²⁴ <https://eige.europa.eu/gender-mainstreaming/countries>

planning timelines. It is Close the Gap's view that this is a misunderstanding as the duties set reporting deadlines only. Public bodies have always been free to publish their reports in advance of these to align with their own planning cycles. It would be preferable for public bodies to incorporate the planning of work to meet the duties with their corporate planning in order to facilitate gender mainstreaming. EHRC guidance states "Linking your equality reporting to existing public performance reporting systems will also help reduce the reporting burden by directly providing audit, scrutiny and regulatory bodies with the material they require."²⁵

Close the Gap's assessments of PSED identified a number of concerns around reporting. A key issue underpinning public bodies' difficulty reporting is there being a lack of activity to report on. The majority of reports reviewed as part of our assessments in 2013, 2015 and 2017 contained little evidence of mainstreaming or of substantive work to deliver equality outcomes. Reports were characterised by commitments to "consider", "develop" or "progress" action on various matters but subsequent reports often contained no evidence of work being progressed, or stated that deadlines for actions had been pushed back. It was not uncommon for mainstreaming reports and equal pay statements to be largely a copy-and-paste of the previous report.

Close the Gap's direct engagement with individual public bodies on the duties is demand-led and we are usually approached by public bodies in the four months running up to the duties' reporting deadlines. The bespoke work we have done with public bodies suggests that many public bodies are required to identify content for their reporting within a relatively short timescale, which is particularly challenging when there has been a dearth or no activity. A number of individuals we have supported have expressed frustration at a lack of engagement from colleagues across their organisations which further contributes to reporting challenges. Many equality leads are expected to develop their organisation's reports with little or no support from colleagues. This itself creates additional issues with reporting as public bodies are failing to create institutional memory on PSED. When an equality lead moves leaves the organisation, there is little information available to the person who replaces them due to an absence of a structured and resourced programme of work.

Reporting on activity should be a straightforward process. However, if public bodies do not deliver a programme of activity to meet the duties that includes

²⁵ <https://www.equalityhumanrights.com/sites/default/files/mainstreaming-public-sector-equality-duty-scotland.pdf>

measurable outcomes and actions it means there is little to report on. It is Close the Gap's view that this is one of two main drivers of public bodies' issues with PSED reporting. Addressing this requires a step change in public bodies' engagement with and commitment to the duties across the board, in ways that are set out throughout this consultation response.

A second key driver of reporting issues is the lack of a standard format for reporting on the various aspects of the duties. Our engagement with public bodies around PSED has revealed that most would prefer a more directive approach in this area. A standardised approach, supported by statutory guidance, would make reporting easier for public bodies and would also assist with planning by providing a clear template delineating the areas they must report on. It may also reduce the amount of resource required to develop reports. It could support the EHRC's enforcement work and make it easier for equality organisations to assess public bodies' performance and track progress at each reporting point.

Close the Gap is concerned that a focus on "reducing bureaucracy", without an full understanding of the substantive issues may simply lead to a weakened duty on reporting. If public bodies are not required to produce adequate reports on PSED it is difficult to see how else they could be held accountable by the regulator, by equality organisations or by the public.

IMPROVEMENT PROPOSAL 7

Improving support and capacity building & improving the understanding of and approach to mainstreaming

- 7.1 How could the guidance (and access to guidance) on SSD compliance be improved? What would you like to see in any new or revised guidance? and**
- 7.2 In addition to written guidance what approaches would you consider effective to develop the skills, knowledge and practice of duty bearers? and**
- 7.3 How can revised guidance be best developed to ensure that it fully meets the needs of all parties?**

Mainstreaming

Public bodies have been required to do gender mainstreaming since the Gender Equality Duty came into force in 2007. It is extremely concerning that

there has been such little progress in the 14 years since. Despite ongoing advocacy from equalities organisations there has been limited appetite from public bodies on improving mainstreaming. It is Close the Gap's view that substantive reform of the duties on mainstreaming, data gathering and use and equality impact assessment is necessary to remedy this, alongside a well-resourced programme of relevant capacity building and effective accountability mechanisms. New guidance on mainstreaming should be statutory in order to drive substantive action and facilitate enforcement. The development of the guidance should engage with gender expertise to ensure that it is both intersectional and gender competent.

Close the Gap has long advocated for the need for greater intersectional gender competence in public bodies and for capacity building on gender mainstreaming. Intersectional gender competence is essential to public bodies' ability to understand the gendered inequalities affecting women as workers and service users. It is fundamental to public bodies' ability to gather quality data, and do equality impact assessment and gender mainstreaming. This applies to competence in all protected characteristics. Building capacity here would greatly improve the ability of public bodies to perform the duties and to deliver change for protected groups.

It is difficult to separate what is needed to improve mainstreaming from the issues around performance of the duties as a whole, but is clear that public bodies require capacity building in both gender competence and gender mainstreaming. The Scottish Ministers' duty could be used to commit to the delivery of a programme of capacity building as a meaningful action to enable public bodies' better performance of the duties. This would send a strong message to the leadership of public bodies that mainstreaming is a Ministerial priority.

Ministers could also commit to introduce Compliance Adviser posts within the Scottish Government. These would provide public bodies with a point of contact for PSED-related enquiries and assistance requests, and provide the necessary gender and equality-competence, and expertise on the duties. The introduction of a quality assurance function to review and improve the quality of performance of the duties is critical, and could be built into the Compliance Adviser role. This could help shift public bodies from a compliance-focussed approach to a focus on delivering change for protected groups. This was a key issue identified in the stage 1 paper and something which Close the Gap has

long advocated for. Close the Gap calls on Scottish Government to develop a model for this approach.

It is also clear that capacity building on its own cannot address the lack of prioritisation and resourcing of equalities work by public bodies. A robust and action-focussed duty to mainstream equality, with a concomitant duty to report evidence of mainstreaming, is essential.

EQIA

As equality impact assessment is the key tool available for mainstreaming, this must also be considered. It is noted that there is no improvement proposal on EQIA in this questionnaire, however it is critical that the issues identified in the stage 1 paper²⁶, and by equalities organisations, be addressed in future reform of the duties.

Close the Gap's engagement with public bodies indicates a need for improved guidance and capacity building on EQIAs. A central issue is that EQIAs rarely influence the development of policy or result in changes being made to policies. In our experience, it is extremely uncommon to see an EQIA which has resulted in a change to a policy.

Significant work needs to be done to improve the quality of EQIAs which are routinely poor quality, and carried out post hoc or too late in the process to make a difference. An effective quality assurance process should therefore be introduced to ensure EQIAs are carried out appropriately and effectively.

Close the Gap supports the NACWG recommendation on the creation of a set of "Policy-makers National Standards"²⁷ and considers these could apply across the public sector to provide a benchmark for EQIA use. We also support Engender's call for an approval process for EQIAs involving senior, domain specific decision-makers and gender experts.²⁸

Statutory guidance should be developed that includes step-by-step instructions and sets out issues for each protected characteristic. This could be supplemented with sector- and function-specific templates for EQIA, including

²⁶ Scottish Government (2021) *Review of the Operation of the Public Sector Equality Duty in Scotland: Learning from Mainstreaming Equality during the Covid-19 Pandemic*, Page 23

²⁷ <https://onescotland.org/wp-content/uploads/2020/01/NACWG-2019-Report-and-Recommendations.pdf>

²⁸ Engender (2020) *What Works for Women: Improving gender mainstreaming in Scotland*

sections where public bodies must list the relevant issues they have identified from the evidence used, and where changes made as a result can be recorded.

Reframing the duties as a set around a duty to publish a Strategic Equality Plan (as described on pages 11 and 12) could assist public bodies in taking a mainstreaming approach and building EQIA into policy development, particularly if the development of a strategic plan forms part of their own corporate planning. However, as with mainstreaming, capacity building on impact assessment is not enough to drive meaningful compliance. It is Close the Gap's view that there must be a duty to ensure corporate accountability for mainstreaming and EQIA.

Close the Gap agrees with the suggestion in the stage 1 paper for further consultation and engagement with public bodies, and with equality advocates, on mainstreaming and equality impact assessment²⁹.

IMPROVEMENT PROPOSAL 8

Improving the cohesiveness of the regime

8.1 Can this be improved through mechanisms such as guidance or other means, or do the regulations need strengthened in this respect?

Close the Gap recognises the concerns raised around the cohesiveness of the duties. There are clear connections between the duties, for example between the duties together and use employee data, to assess impact and to mainstream equality. However, these connections are not well articulated in the regulations themselves. It is also clear that public bodies' approach is to treat the duties as discrete items on a list and not as an interconnected mechanism to advance equality and tackle discrimination.

Our work on the duties indicates that this is due to public bodies' focus on compliance with the letter of the duties as opposed to the purpose of the duties. This results in poor performance of the duties not just because they are being used ineffectively, but because this approach results in disengagement as public bodies perceive the duties as tick box items with little intrinsic value. This drives disillusionment as public bodies see PSED as failing to deliver change.

²⁹ Scottish Government (2021) *Review of the Operation of the Public Sector Equality Duty in Scotland: Learning from Mainstreaming Equality during the Covid-19 Pandemic*

At present, Close the Gap does not have a position on the need for a new specific duty that connects the existing duties. There is already a duty to gather and use employee data, which has clear connections to the duties to do gender mainstreaming and equality impact assessment, and to set equality outcomes. Despite this, public bodies are still not fulfilling this duty, with 87% of bodies included in our 2017 PSED review assessed as having made poor or no use of employee data.³⁰

The process and purpose of the duties needs to be articulated clearly, including how each duty links to the others, to elicit a cohesive approach to implementation from public bodies. Specific guidance on the links between the duties may be helpful, however training may be a more useful way to build capacity in public bodies.

As discussed on pages 11, 12 and 17, a duty on public bodies to publish a Strategic Equality Plan, would require public bodies to set out their approach to the duties as a whole facilitating a more cohesive approach. The EHRC found that public bodies in Wales felt this helped them to respond to the Welsh specific duties as a whole³¹, therefore there is evidence that this could be a useful approach.

IMPROVEMENT PROPOSAL 9

Consider new approaches to outcome setting, including the setting of shared outcomes

9.1 Do you support the principle of shared outcomes? In your view, how they would be set and implemented; and how could an improved regulatory regime support this?

Close the Gap is broadly supportive of the principle of shared national or sectoral outcomes, set by Scottish Ministers. We share Engender's call that Ministers should be required to set sector-specific national outcomes for each protected characteristic, including sex, to provide greater clarity and focus about key issues.³² However the process by which these would be set is critical to the ability of this approach to tackle women's labour market inequality and

³⁰ Close the Gap (unpublished) Internal PSED assessment 2017

³¹ Equality and Human Rights Commission (2014) *Review of the Public Sector Equality Duty (PSED) in Wales: Full Report*

³² Engender (2020) *What Works for Women: Improving gender mainstreaming in Scotland*

wider inequalities. If this approach is adopted, we call on Scottish Government to take a meaningful co-production approach. Priorities for action must be guided by the expertise of equalities organisations alongside lived experience.

There is also a need to improve the availability of gender-sensitive, sex-disaggregated data to ensure that the process of outcome-setting is informed by a full picture of inequalities relevant to different sectors and to public bodies as employers. Public bodies have been required to gather and use employee data since the outset of the duties and despite many committing to improve data collection and use there has been little progress on this. A more strategic approach to improvement is therefore necessary.

Adopting a shared outcomes approach must address the lack of clarity, focus and measurability seen in public bodies' equality outcomes.³³ A set of broad national and/or sectoral outcomes is likely to be welcomed by public bodies, who have expressed a desire for a more directive approach, however there must also be clear action plans for the delivery of these outcomes. This review may wish to consider how public bodies would be expected and supported to develop a set of actions that would enable them to contribute to the delivery of shared outcomes, and monitor their performance and progress. As with mainstreaming, when responsibility for delivering equality is diffuse it is more difficult to secure meaningful and effective action. It will be necessary to consider how accountability will be established for the delivery of shared outcomes.

As with the suggestion of a duty to publish a Strategic Equality Plan, and use of the Ministers' duty to set out clear expectations around the duties, setting shared outcomes may also secure more buy-in from public boards and senior leaders, especially if they are seen as a national priority.

IMPROVEMENT PROPOSAL 10

Support the gathering, use and reporting of a wider range of employee data

³³ Close the Gap (unpublished) Internal PSED assessment 2017; Close the Gap (2015) *Making Progress? An assessment of public sector employer performance of the public sector equality duty*; Close the Gap (2014) *Monitoring Scottish public bodies' compliance with the public sector equality duty*; Coalition of Racial Equality and Rights for EHRC (2018) *Effectiveness of the PSED Specific Duties in Scotland* available at https://864a82af-f028-4baf-a094-46facc9205ca.filesusr.com/ugd/7ec2e5_37ea60592ef145b8887a5b7ec473e130.pdf

10.1 Could the regulation on “gathering and using” employee information be strengthened?

Close the Gap’s reviews of PSED performance have consistently identified a lack of gathering and use of data and a marked decline in performance of this, in connection to employee data, gender pay gap information and the use of data to develop equality outcomes³⁴. In our 2017 review 87% bodies were assessed as having made poor or no use of employee data and we were unable to identify an evidence of work to improve data collection and use.

As stated in our answer to question 1, data gathered must be gender-sensitive and sex-disaggregated. Many public bodies are still not gathering data on all the categories, and data that has been published varies widely in format and quality. The categories of composition, recruitment, development and retention have not often resulted in the collection of useful data as they are open to interpretation, and public bodies lack the intersectional gender competence to understand what data they should be gathering. To help address this we call for a comprehensive strategy to build gender competence in key people in every public body.

As with other issues with the duties, competence alone is unlikely to secure improved performance. The duty to gather gender pay gap information is arguably one of the more straightforward duties on data: our review found that in 2017 80% of public bodies had published their pay gap³⁵. However, this has delivered few tangible results. In Close the Gap’s assessment, 69% of public bodies were assessed as providing poor or no analysis of their pay data, and 58% made no change to policy despite reporting a gender pay gap. As with other duties, we have also observed a decline in compliance 2021 scan of the 45 listed public bodies covered by our previous PSED assessments³⁶ found that only 67% had reported their gender pay gap. Assessing the reporting of occupational segregation information compliance is even poorer. In 2017 only 36% of bodies met this duty, compared to 53% in 2013. It should be expected that public bodies’ competence and performance of the duties would improve with experience, however our assessments show a consistent decline in performance. Close the Gap considers that this is due to a range of issues

³⁴ Close the Gap (unpublished) Internal PSED assessment 2017; Close the Gap (2015) *Making Progress? An assessment of public sector employer performance of the public sector equality duty*; Close the Gap (2014) *Monitoring Scottish public bodies’ compliance with the public sector equality duty*

³⁵ Close the Gap (unpublished) Internal PSED assessment 2017

³⁶ Ibid

described throughout this consultation response, including a lack of leadership, resourcing and accountability, and a lack of action-focus within the duties themselves.

Close the Gap considers that the reforms to the duties must set out how public bodies must use their data. In relation to employee data, and gender pay gap and occupational segregation information, there must be a duty that requires public bodies to use this information to set an action plan to tackle their gender pay gap. The evidence shows that regulations that require data to be published do not result in this driving action. This is true of PSED and of the UK Gender Pay Gap Reporting Regulations 2017. Close the Gap's 2019 assessment of Scottish employers' compliance with the UK regulations found that less than a third of employers had published actions to address their gender pay gap.

It is positive that the UK regulations had a 100% success rate in terms of large employers reporting their gender pay gap, however this was only achieved after enforcement activity on employers who had not reported by the reporting deadline. The regulations alone were insufficient to secure compliance: the EHRC took a collaborative approach to supporting employers to report, supplemented by publicly naming those employers who did not comply³⁷. Scottish Government may wish to consider whether a similar approach may be helpful in securing compliance and accountability from public bodies in meeting the duties. The Fawcett Society and Global Institute for Women's Leadership comparative analysis of gender pay gap reporting in 10 countries found that a lack of sanctions was found to be a barrier to action. Evidence from Germany found that the lack of sanctions for noncompliance meant that approximately only 20% of private companies have complied with their reporting obligations³⁸.

10.2 Is there anything we have learned from practice and compliance with the existing regulation on gender pay gap reporting that we can apply to proposed new duties on ethnicity and disability pay gap reporting?

The answers to 10.1 and 10.3 highlight issues with gender pay gap reporting that are relevant to proposed new duties on ethnicity and disability pay gap reporting. The most relevant issues are those on the need for:

³⁷ Fawcett Society and the Global Institute for Women's Leadership (2020) *Gender pay gap reporting: A comparative analysis*

³⁸ Ibid

- Intersectional ethnicity and disability competence.
- Improved ethnicity- and disability-disaggregated data.
- Clarity as to how public bodies must calculate and report their pay gaps.
- A duty to use pay gap information to develop and take action to tackle pay gaps.
- Effective accountability mechanisms.

10.3 How can we ensure that pay gap reporting is carried out in a consistent way across the public sector, so that different methods are not used and reports are easier to compare?

There are variances in how different public bodies calculate their gender pay gap, making it difficult to track progress across the public sector as a whole, or compare sub-sectors. We have also observed inconsistencies in how individual public bodies have calculated their gender pay gap information from one reporting period to the next. This makes it difficult for those public bodies to track their own progress and presents a potential barrier to accountability.

These inconsistencies are likely to be due to the lack of clarity in the current regulations on the gender pay gap information to publish and how to gather and calculate it. The UK gender pay gap reporting regulations are clearer on the information to report and sets out that employers should calculate both their mean and median pay gaps, including all full-pay relevant staff in their calculations. The low level of compliance with the duty to report occupational segregation information is in part a result of public bodies only publishing either vertical or horizontal segregation information, and not both as the duty requires.

While a majority of public bodies have published their gender pay gap this has not resulted in action to tackle it. Despite persistent pay gaps, few public bodies have set outcomes on gender and employment. Our 2013 assessment identified that 56% of public bodies had set an outcome on gender and employment. In 2021 this figure had fallen to 31%.³⁹ Public bodies have also failed to use equal pay statements to identify issues with equal pay or set out actions⁴⁰. Our 2017 review assessed 86% of equal pay statements as being of

³⁹ Close the Gap (unpublished) Internal PSED assessment 2017; and Close the Gap (2014) *Monitoring Scottish public bodies' compliance with the public sector equality duty*

⁴⁰ Close the Gap (unpublished) Internal PSED assessment 2017; Close the Gap (2015)

poor quality. The majority of statements observed were little more than commitments to principles and were often a copy and paste of previous statements.

Close the Gap agrees that public bodies are focused on compliance but not delivering on the purpose of the duties. Compliance is a key driver for public bodies, therefore improving the regulations must be central to improving performance. Close the Gap calls for changes to the duties to report gender pay gap and occupational segregation data. The duty should require public bodies to use this data to develop an action plan on the causes of their gender pay gap. To assist with compliance and reporting, a template action plan should be developed, along with capacity building and guidance to enable public bodies to develop good quality analysis and action plans.

The revised duties should set out clearly the gender pay gap and occupational segregation information public bodies should report and how to calculate and report it. A template for reporting this information would also assist with consistency of presentation, comparability and enable improved progress monitoring.

We could welcome work to reword the duties as a set so they are action-focused. There must be clear links between data-focused duties and action-focused duties to ensure the former has a clear purpose. A set of action-focused duties must also include a separate duty to report on all actions required.

IMPROVEMENT PROPOSAL 11

More effectively leverage purchasing power in procurement processes

11.1 How could Regulation 9 be better aligned with the procurement process to advance equality at every stage of the procurement process, including the use of award criteria and tender specifications, to encourage employers to focus on increasing opportunities for people with one or more of the protected characteristics?

There is no evidence that the procurement duty is ensuring a gender mainstreaming approach in Scotland, and there is very little evidence of

Making Progress? An assessment of public sector employer performance of the public sector equality duty; Close the Gap (2014) Monitoring Scottish public bodies' compliance with the public sector equality duty

positive outcomes for women as a result of the procurement duty. EHRC guidance on procurement is poor and contains minimal practical content on gender.

While the EHRC has not undertaken a review of the procurement duty, Close the Gap's PSED assessment work found that procurement has always been one of the weakest areas in public bodies' performance of the duties. 29% of public bodies assessed mentioned procurement, but they mostly simply reiterated the duty, without describing work they had done or planned to consider equality. Only one public body described an action they were planning to take on procurement, and it was assessed as poor quality. Local authorities were assessed as having the poorest performance here: only 20% of local authorities assessed had mentioned procurement, and none of them described any action planned or evidence of equality being considered in procurement."⁴¹

There is a clear lack of gender mainstreaming evident in procurement practice. Key reasons for this include a lack of gender competence in procurement practitioners and public bodies' failure to take a cohesive approach to performance of the duties. Dr Katharine Sarter carried out an analysis of local authority activity on procurement and equality in 2016, using the mainstreaming reports that public bodies are obliged to produce as a requirement of the public sector equality duty. Sarter notes that the number of local authorities involved in activity that would build gender competence (or equality competence) in procurement was particularly small, which 'limits the potential impact of public procurement for equality'⁴².

Close the Gap calls for the specific duty on procurement and its accountability mechanism to be strengthened and supported by statutory guidance. In order to identify how best to improve the duty Scottish Government should develop work in collaboration with gender experts to identify what gendered procurement means in practice for procurement in Scotland, and how gender mainstreaming might be integrated into the Scottish procurement model.

IMPROVEMENT PROPOSAL 13

Explore how best to use the duties relating to Scottish Ministers

⁴¹ Close the Gap (Not published) Internal PSED review October 2018

⁴² Sarter, E.K. *Public Procurement & the Public Sector Equality Duty: Equality Sensitive Tendering in Scotland*

13.1 How could the duties under regulations 6A, 11 and 12 be strengthened and/or improved?

The purpose of these duties is clear and it is critical the Scottish Government use the Ministers' duty to set the agenda for public bodies' performance of the duties, and to commit to a resourced programme of action to support this.

Such a programme could include a commitment to appoint Compliance Advisers within Scottish Government (as set out on page 15), whose role it would be to provide guidance and advice to public bodies on performance of the duties alongside a quality assurance function. The Compliance Adviser role would also highlight performance issues to the EHRC. This would go some way to addressing the lack of PSED-dedicated resource at EHRC Scotland and contribute to a collaborative approach to support and compliance.

In using duty 12 to deliver a substantive programme of support for public bodies Scottish Government would be sending a clear message regarding the importance of the duty. Through their own commitment of resources this would reinforce the message to public bodies that they must also resource action to meet the duty and deliver their own programme of substantive action. Scottish Government must show leadership in delivering a bold and radically reformed set of duties if we are to see the much needed improvements in leadership and action across the public sector necessary to deliver women's labour market equality.