



Close the Gap submission to the Scottish Government Consultation on the Review of the operation of the Public Sector Equality Duty in Scotland

March 2022

1. Introduction

Close the Gap is Scotland's policy advocacy organisation working on women's labour market participation. We have been working with policymakers, employers and employees for over 20 years to influence and enable action that will address the causes of women's labour market inequality.

Close the Gap welcomes this opportunity to respond to this consultation on the reform of the Scottish Specific Duties. We are committed to continued engagement with Scottish Government on the development of a reformed set of duties. As with our previous submissions on the reform of the duties, 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 Scottish Specific Duties 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 bodies, and the Equality and Human Rights Commission, 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. Ten years on from the enactment of the duties, this is deeply concerning.

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 law¹. This has been borne out in public bodies' response to the duties.

Close the Gap and other national equality organisations remain concerned that the PSED review may not be ambitious enough to create meaningful change². We therefore call on Close the Gap calls on Scottish Government to show leadership in delivering a bold and radically reformed set of duties that can deliver the much needed improvements in action on tackling inequality and discrimination across the public sector. Stakeholders within the equality sector have extensive expertise to offer and are keen to support Scottish Government to create a set of duties which are both more effective and more enforceable than the current regulations. We look forward to continued engagement on this important work.

2. Answers to Consultation Questions

1. Creating a more cohesive regime and reducing perceived bureaucracy

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

Close the Gap broadly welcomes the proposals set out around the substance of reporting. We particularly welcome the ambition of the proposal to require public bodies to produce a strategic plan that sets out how they plan to meet each of the Scottish Specific Duties. This requirement has the potential to support greater coherence in public bodies' approach to compliance with the duties, however this is not a given. A duty to publish a strategic plan must be explicit on what public bodies must include and report on as part of this plan.

The key shortcomings in public bodies' performance of the duties include an absence of a competent and consistent gender mainstreaming³ approach, failure to use relevant evidence to develop action, and a lack of specificity and measurability in

¹ 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

²<https://www.closesthegap.org.uk/content/resources/PSED-review-equality-stakeholders-common-concerns-April-2022.pdf>

³ Gender mainstreaming is a strategy to proactively embed gender analysis in all policy and legislative development. This gives gender concerns prominence throughout policymaking and facilitates policy coherence across the work of government departments.

outcomes and actions. These issues go hand-in-hand: requiring a single report that draws the duties together in a strategic plan may help tackle them if the link is made explicit. We therefore call for the duty to specify that the strategic plan should include:

- The action the public body plans to take to meet each duty, including who is responsible for each part of the plan.
- How the public body has used the evidence required by duties on employee data, gender pay gap and occupational segregation information, and other relevant evidence, to develop the outcomes and actions set out in their plans.
- How progress will be measured and subsequent progress updates at the relevant reporting intervals.
- A link to equality impact assessments that have been carried out.
- An explanation of how the public body has mainstreamed equality into each of its functions, including examples of how this has influenced policy and practice.
- A report on the public body's gender budget analysis and detail of how this has influenced budget decisions.

Public bodies should be required to publish the data required by the duties, including employee data, and gender pay gap and occupational segregation information, in an annex to the strategic plan. This should also include any data the public bodies has used to develop its equality outcomes and any actions it has planned.

It is critical that Scottish Government use the reform of the duties, and wider action to improve performance thereof, to address the failure of public bodies to embed gender mainstreaming, and the mainstreaming of equalities more broadly, into their functions. The mainstreaming duty is arguably the most important duty, with the greatest transformative potential. Public bodies must make equality central to how they carry out their work in order to meet their obligations to their employees and service users. If equality is not mainstreamed into policymaking, public bodies are not developing good policy, not delivering value for public money and not fulfilling their purpose.

The wording of the duty – to report progress on mainstreaming the equality duty – is a key contributor to public bodies' failure to do mainstreaming. The duty is focussed specifically on the reporting aspect, as opposed to the mainstreaming function itself. Despite it being very clear that public bodies must do mainstreaming in order to be able to report on it, the duty has not resulted in effective mainstreaming. Close the

Gap has undertaken four biennial assessments of public body compliance with the public sector equality duty. This work has identified that many public bodies still do not understand what mainstreaming is and require significant capacity building on both the process of mainstreaming and on the inequalities affecting each protected groups. It is essential that the mainstreaming duty itself is improved in order that the aim of proposal one is achieved. The mainstreaming duty should be explicit that public bodies must mainstream equality into all of their functions, and provide evidence of how they have done this in their strategic plans.

The issue with the mainstreaming duty is evident across the duties as a whole. Close the Gap's work on the duty identified that the key issue underpinning public bodies' difficulty reporting is there being a lack of activity to report on. We do not believe that public bodies face reporting challenges due to a lack of coherence between the duties or existing reporting requirements being overly burdensome⁴. There is evidence that many public bodies are not substantively engaging with the duties or the guidance as set out. A requirement for public bodies to publish how they will meet each of the duties is welcome, but if a duty simply asks for information to be published, then public bodies will be unlikely to go further than this, as with, for example, the gender pay gap duty, and the mainstreaming duty⁵. Each duty needs to have an explicit requirement on action, in order that public bodies act, and subsequently report on this action and related outcomes. We are concerned that a duty on a strategic plan cannot be specific enough to ensure public bodies take adequate action on each duty. Evidence suggests that many public bodies have done the minimum possible to comply with the regulations and have failed to engage with the purpose of those regulations⁶. Public bodies therefore need clearer direction to perform the duties as intended. Close the Gap has therefore made recommendations throughout where reform of the individual duties is required to secure meaningful action.

We agree that strategic plans should include detail on how public bodies have used lived experience to shape relevant work to meet the duties. However, there are a number of issues with public bodies' use of lived experience that must be addressed

⁴ Close the Gap (2021) *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)*

⁵ Ibid

⁶ Close the Gap (2021) *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)*; 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*

to ensure this requirement results in meaningful engagement and output. As set out in our response to the Stage 2 call for views, engagement that is limited to gathering the views of individuals who share protected characteristics may 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 level⁷. Public bodies have often demonstrated a lack of competence on gender and other protected groups. This undoubtedly limits their ability to engage effectively with lived experience work. Lived experience must be set within the context of, and used alongside, research and evidence to shape public bodies’ outcomes and actions under the duties. If possible, the duty should be specific on this requirement. At a minimum this should be stated as a requirement in guidance. Additional competence-building work will also be necessary, as set out throughout our response to this consultation.

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

While Close the Gap supports allowing public bodies to satisfy all of their reporting duties in a single report, we do not support a move to a single reporting cycle for all duties with a requirement to report a minimum of every four years. As we have set out in our stage 2 response and above, we do not believe that the reporting requirements, or the duties as a whole, are overly bureaucratic. Reporting on work to meet the duties should be a straightforward process: public bodies are required to describe what they have done. Public bodies routinely produce reports that describe what they have done in relation to other pieces of work. However, if public bodies do not deliver a programme of activity to meet the duties that includes measurable outcomes and actions it means there is little to report on. Changing the reporting schedule will do little to address this critical issue.

Public bodies must be required to report on progress on outcomes and action plans biennially. This is essential to ensure accountability. A four year reporting schedule for all duties is insufficient to ensure public bodies maintain focus on their work to meet the duties. Close the Gap’s experience of working with public bodies on the duties, and our work with other equalities organisations who do the same, is that public bodies often do not allocate sufficient time to deliver work on the duties, routinely only a few months before the reporting deadline. A four year reporting

⁷ Close the Gap (2021) *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)*

cycle is unlikely to drive public bodies to take a different approach. It may instead exacerbate the problem by unintentionally signalling that there will be diminished oversight of their work due to the longer intervals between reporting.

Regular reporting is essential in order to ensure public bodies can be held to account on their performance of the duties. Close the Gap recommends that existing reporting schedules are retained and that new duties are aligned with these as appropriate. We have recommended reporting schedules for new duties below where relevant.

Close the Gap agrees with the proposals to reinforce the flexibility of reporting requirements and encourage listed authorities to report on their duties as part of their own operational reporting cycles, and to ensure that reporting deadlines do not align with the end of the financial year.

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

Close the Gap welcomes the proposal to consolidate the previous sets of duties into one new set. This has the potential to maximise cohesiveness and effectiveness, contingent on there being adequate reforms to the individual duties. There must be clear links between data-focussed duties and action-focussed duties to ensure that public bodies are clear on the purpose of the former and use these to shape and support their work to meet the duties as a whole.

3. Extending pay gap reporting to include ethnicity and disability

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

Close the Gap supports the principle that public bodies should be required to examine their ethnicity and disability pay gap information. However, we have concerns about the ability of the proposals as laid out to drive action on the inequalities faced by Black and minority ethnic (BME) people and disabled people in employment.

We do not have specific expertise on these protected characteristics, however we are aware of concerns among organisations that are experts. In their response to the stage 2 call for views, Coalition for Racial Equality and Rights stated that they are

“not convinced that an ethnicity pay gap could be produced robustly in the vast majority of public sector organisations due to the under-representation of minority ethnic people in the workforce” and that they would “instead prioritise measures to address the severe under-representation of minority ethnic people”⁸. We therefore call on Scottish Government to work with expert organisations to develop any new duty.

Whichever approach is taken, public bodies must be required to identify intersecting inequalities in their pay and grading systems, the distribution of staff across the organisation, and wider employment practice. This is essential in order that they can develop action to address the inequalities experienced by marginalised women in the workforce. To do this, public bodies will need capacity building along with support to tackle the significant data gaps that exist. However, this should not preclude a requirement that public bodies take an intersectional approach. The duty itself could reflect the capacity issues and data gaps present, and we have provided further detail on this in our response to question 8.1. There is an urgent need for a duty to require public bodies to tackle the employment inequalities affecting their BME and disabled women. Such a duty must be action-focussed, and not just a requirement to publish pay data.

Close the Gap considers that a central flaw in the current duties is that there is insufficient direction on how public bodies must use their data to develop action to meet the duties as a whole, and move closer to taking a mainstreaming equalities approach in their day-to-day work. This is particularly relevant to the proposal to introduce ethnicity and disability pay gap reporting. It is clear that the current duty to report gender pay gap information is not driving public bodies to take action on their gender pay gaps. The majority of public bodies are not using the data they publish to develop action. Close the Gap found in 2017 80% of public bodies had published their pay gap, however this has delivered few tangible results with 69% of public bodies providing poor or no analysis of their pay data, and 58% taking no action despite reporting a gender pay gap.⁹ If a requirement to report ethnicity and disability pay gaps is simply added to the existing duty it will replicate this problem.

A 2020 analysis of international gender pay gap reporting regimes found that, in order to be effective, reporting requirements must include mandatory, measurable

⁸ Coalition for Racial Equality and Rights (2021) *Response to the Review of the Operation of Public Sector Equality Duty (PSED) in Scotland Stage 2 Questionnaire*

⁹ Close the Gap (unpublished) Internal PSED assessment 2017

action plans and clear mechanisms for accountability and transparency.¹⁰ The Global Institute for Women's Leadership recommended that employers should be required to create time-bound targets to redress pay gaps, setting out clear and measurable goals¹¹. Close the Gap strongly urges that regulation seven is reformed in line with the evidence on international good practice.

Regulations six, seven and eight are clearly very closely linked. These duties ask public bodies to gather a range of data that should be used to understand the gendered inequalities that are present in their workforces and develop action to address them. However, many public bodies have failed to recognise or act on this. This represents an enormous missed opportunity.

Close the Gap recommends that a new duty is created that draws together reporting of pay gap information and occupational segregation information. This would involve relocating the requirement to publish occupational segregation from regulation eight on publishing equal pay statements. The duty should specify that public bodies must analyse and use this information, together with their employee information – explicitly referencing the duty to gather and used employee information – to develop a gender pay gap action plan. This would be published as part of the public body's strategic plan, with progress updates every two years. If the proposal to add ethnicity and disability pay gaps to regulation seven is taken forward, these could form part of this consolidated duty alongside the occupational segregation information public bodies already publish for these protected characteristics.

Close the Gap recommends that this new duty requires public bodies to publish mean and median pay gaps as follows:

- Whole organisation pay gap.
- Full-time pay gap.
- Part-time pay gap (comparing women's part-time hourly pay to men's full-time hourly pay – for comment on the formula please see our response to question 3.3).

Close the Gap calls for this new duty to set out explicitly that public bodies must:

- Use their gender pay gap, occupational segregation and employee data to develop an action plan to close their gender pay gap.
- Report progress on this action plan, biennially.

¹⁰ The Global Institute for Women's Leadership et al (2021) *Bridging the gap? An analysis of gender pay gap reporting in six countries*

¹¹ Ibid

Regardless of whether occupational segregation information reporting is included in a new duty on pay gap reporting, or a new duty on equal pay review, or it is retained as part of a duty to publish an equal pay statement, public bodies should be required to publish the following:

- Numbers and/or percentage of women and men in each grade, and in each job type/cluster.
- Distribution of male workforce, and separately of female workforce, by grade and by job type/cluster.

Close the Gap's view is that the current duty to publish an equal pay statement is having minimal effect. A policy on its own does not drive action, and public bodies' equal pay statements are largely commitments to principles with no real-life action attached to them¹². Equal pay is different from the gender pay gap, but they are interconnected. Rather than tackling the pay gap and equal pay separately, public bodies should take an holistic and action-based approach to tackling gendered inequalities in their workforce.

As such, Close the Gap proposes that regulation eight is reformed to require public bodies to undertake regular equal pay reviews. This would not be unprecedented as section 22 of the Scottish National Investment Bank Act 2020 requires the Bank to undertake regular equal pay reviews, and report to Scottish Ministers on the findings of those reviews as follows:

- (1) The Bank must, from time to time, conduct a review to ensure that it is providing equal pay for equal work (an "equal pay review").
- (2) The Bank must report to the Scottish Ministers on the findings of an equal pay review.
- (3) A report under subsection (2) must set out—
 - (a) what the scope of the review was,
 - (b) how the Bank has collected data to inform the findings of the review,
 - (c) whether the review has found any differences in pay between any members of staff of the Bank doing equal work,
 - (d) what the reasons are for any such differences, and
 - (e) what steps the Bank will take as a result of the findings of the review.

¹² Close the Gap (2021) *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)*

The SNIB regulations are an example of gender competent legislation. The review of PSED should take account of this good practice model, and include a new duty on public bodies to undertake regular equal pay reviews. Public bodies could use the findings of their equal pay reviews to shape their gender pay gap action plan. This would facilitate greater coherence and progress on tackling the gendered inequalities in Scotland's public sector workforce.

A set of reformed duties on the reporting and use of gender pay gap, occupational segregation and employee information, along with a duty to do equal pay reviews, would enable public bodies to act in line with the purpose of the duties, instead of driving a process-focussed response. However, capacity building and improved enforcement is also necessary. The duty to gather gender pay gap information is arguably one of the more straightforward duties on data, however compliance fell from 80% in 2017 to 67% in 2021¹³. Compliance with the duty to report occupational segregation information compliance is even poorer. In 2017 only 36% of bodies met this duty, compared to 53% in 2013¹⁴. 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. The duty is clear on this, and yet compliance is still poor.

It should be expected that public bodies' competence and performance of the duties would improve with experience, however Close the Gap's assessment work shows a consistent decline in performance. It is clear that improving public bodies' performance of the duties must go further than making the duties themselves more explicit and directive. Close the Gap considers that this includes a range of issues described throughout our Stage 2 consultation response, such as improving leadership, resourcing and accountability, and effective enforcement. We have provided further comment on these issues in our response to questions 8.1b, 11.1 and 12.1.

Close the Gap has published specific guidance on the duties as they relate to gender and employment which provides extensive detail on how to gather and analyse employee, gender pay gap and occupational segregation information. We would welcome the opportunity to work with Scottish Government to support the development of capacity building work in this area.

¹³ Close the Gap (2021) *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)*

¹⁴ Ibid

Q 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)?

We recommend that Scottish Government engages with experts on the employment inequalities faced by people who share these protected characteristics when developing any approach to this pay gap reporting.

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

Close the Gap does not have the necessary expertise to advise on the formulae that should be used to calculate ethnicity and disability pay gaps.

We would welcome a standardised method for calculating public bodies' gender pay gaps to enable comparison across the sector, and to ensure consistency over time so public bodies can track their own progress using the same calculations. The UK Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 require large private and third sector employers, and a small number of Scottish public bodies not covered by the Scottish specific duties, to report a range of gender pay gap information¹⁵. This is different from the information required by the Scottish specific duties, as follows:

1. percentage of men and women in each hourly pay quarter
2. mean (average) gender pay gap using hourly pay
3. median gender pay gap using hourly pay
4. percentage of men and women receiving bonus pay
5. mean (average) gender pay gap using bonus pay
6. median gender pay gap using bonus pay

For each of these six figures, the regulations set out a specific formula that must be used. This enables both inter- and intra-sectoral comparison over time, with the caveat that the accuracy of individual employer gender pay gap reports are not assessed by the regulator.

In line with our calls on amending the duty to publish gender pay gap information listed in our response to question 3.1, we recommend the following formulae to calculate public bodies' gender pay gaps:

Whole organisation pay gap

¹⁵ <https://www.legislation.gov.uk/ukdsi/2017/9780111152010>

For the mean, whole organisation gender pay gap, public bodies should use the formula $A-B/A$, where A = mean hourly rate of pay of male employees and B = mean hourly rate of pay of female employees.

For the median, whole organisation gender pay gap, public bodies should use the formula $C-D/C$, where C = median hourly rate of pay of male employees and D = median hourly rate of pay of female employees.

Full-time pay gap

For the mean, full-time gender pay gap, public bodies should use the formula $E-F/E$, where E = mean hourly rate of pay of male full-time employees and F = mean hourly rate of pay of female full-time employees.

For the median, full-time gender pay gap, public bodies should use the formula $G-H/G$, where G = mean hourly rate of pay of male full-time employees and H = mean hourly rate of pay of female full-time employees.

Part-time pay gap

For the mean, part-time gender pay gap, public bodies should use the formula $E-I/E$, where E = mean hourly rate of pay of male full-time employees and I = mean hourly rate of pay of female part-time employees.

For the median, part-time gender pay gap, public bodies should use the formula $G-J/G$, where G = median hourly rate of pay of male full-time employees and J = median hourly rate of pay of female part-time employees.

4. Assessing and reviewing policies and practices

Q 4.1. What are your views on the proposal outlined above?

Close the Gap acknowledges the need for a cultural shift to ensure equality impact assessments are prioritised and embedded across Government and the public sector, however we are not persuaded that this can be achieved without regulatory change. It is over 20 years since the first equality duty was brought in. This is ample time for public bodies to have built capacity and embedded equality impact assessment in their work. That this has not happened cannot be justified.

It is clear that the failure to prioritise and embed equality impact assessment is driven by the key issues around implementation of the duties: the lack of leadership,

resourcing and accountability. It is Close the Gap's view that leaders in the public sector are unlikely to respond to these issues unless compelled to do so; the performance of the duties thus far, and evidence on employer action on equality, supports this view¹⁶.

We welcome the proposal to require public bodies to report on how they have used equality impact assessment to shape policy as part of their strategic plans. However, this is insufficient to transform public bodies' approach to policymaking. While we consider the wording of regulation five to be clear as to public bodies' obligations on equality impact assessments, it is evident that a strengthened duty is necessary.

Close the Gap recommends that the wording of regulation five is strengthened to provide clarity on the purpose and process of equality impact assessments, and to enable greater accountability and enforcement. A new regulation should set out minimum standards that public bodies must comply with in how they use equality impact assessment. For each assessment, public bodies should be required to:

1. Set out the equality impacts identified along with opportunities to tackle discrimination, advance equality and foster good relations.
2. Set out how these have shaped the development of or changes to the policy being assessed.
3. Provide justification if changes to the policy have not made, with reference to the to the impacts and opportunities identified.

In their strategic plan, public bodies should publish a list of equality impact assessments carried out in the reporting period. They should also be required to set out in their plan how they have made equality impact assessment integral to their strategy and policy development process.

The consultation makes reference to the speed at which policy is required to be developed in certain contexts, including during the pandemic. It is the case that public bodies have largely failed to use the duties to shape their responses to the pandemic. Women's pre-existing inequality meant that they were disproportionately impacted by the pandemic¹⁷. School and nursery closures saw women step in to

¹⁶ 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*; Close the Gap (2013) *Missing out on the benefits: Summary of research on the reporting of the gender pay gap in Scotland*; IFF Research (2015) *Company Reporting: Gender pay data*, Government Equalities Office

¹⁷ 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*

provide additional unpaid childcare, often having to reduce their hours or leave their jobs to manage this. Women were also disproportionately affected as the majority of key workers and women's incomes took a greater hit. The inequalities experienced by women will have widened as a result. Public bodies' failure to consider equality in their responses to the pandemic will undoubtedly have contributed to this.

Close the Gap accepts that developing policy during the pandemic has been extremely challenging, however public bodies are able to gather other evidence and complex financial information and impact assessments in order to develop policy and make decisions at pace. There is no reason they cannot do the same for equality impact assessments. It is clear that in many cases public bodies do not include equality impact assessment in this process because they do not see it as core to their functions, despite the clear regulatory requirement for them to make it so. Other factors limiting the use of equality impact assessments include low levels of equalities competence in decision-making and policy development roles in public bodies; a persistent view that equality considerations are an 'add-on' and optional; and, a lack of clarity and thus enforceability of the duty itself.

This reinforces our view that regulation five must be strengthened, however it is clear that public bodies need capacity building and support in order to realise the ambition of a new set of Scottish specific duties.

Q 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?

Close the Gap believes that guidance on compliance with the Scottish Specific Duties should be statutory. On assessing and reviewing policies and practices this guidance should specify minimum standards for an equality impact assessment as developed by Engender¹⁸ as follows:

1. Relevant qualitative and quantitative evidence relating to women (and all other protected characteristics) is described.
2. Gaps in evidence are identified and needed additional research is outlined.

¹⁸ Engender (2022) Response to the review of the operation of the Public Sector Equality Duty in Scotland

3. Existing evidence is analysed from a gender equality perspective (and from the perspective of all other protected characteristics).
4. This analysis is applied to identify where discrimination against women can be reduced and where women's equality can be advanced.
5. Policy is developed or adapted to address the inequalities and opportunities for equality that have been identified, including steps to fill gaps in the evidence base.

We recognise the tension between developing a template for equality impact assessment and public bodies' focus on the process rather than the purpose and application of equality impact assessment. However, we believe that provision of a template approach could be helpful to public bodies, if used in conjunction with the minimum standards as set out above, and a requirement to provide justification if impacts and opportunities identified during an equality impact assessment do not result in changes to the policy being assessed. Many public bodies already use a template they have developed for equality impact assessment and an improved duty would not prevent them from doing so. It is likely to be preferable that a good quality template is available for public bodies to use in order to support improved compliance. If the duty to assess and review policy and practice is properly reformed, and standards are set for equality impact assessment, the use of a consistent approach should be desirable.

As with the rest of the duties, public bodies require significant capacity building in order to improve their approach to equality impact assessment. We feel this should take a multi-pronged approach. In line with our response to question 11.1, Close the Gap recommends that public bodies should be required to appoint an accountable officer, whose role would be to provide internal advice, guidance and competence building. The officer would also be responsible for monitoring the use of equality impact assessments within the organisation, ensuring they adhered to the standards set out in the duties and guidance. Public bodies should be required to ensure that people with decision-making roles around policy development, and people who are involved in the development of equality impact assessment, have the delivery of high standard equality impact assessments included in their job descriptions and performance management profiles. These individuals should receive the requisite training in order to fulfil their roles in this regard. Scottish Ministers should secure the provision of this capacity building for public bodies as part of their duties under regulation 12.

Close the Gap supports the NACWG recommendation on the creation of a set of “Policy-makers National Standards”¹⁹ and considers these could apply across the public sector to provide a benchmark for the use of equality impact assessment. We also support Engender’s call for an approval process for equality impact assessment involving senior, domain specific decision-makers and gender experts.²⁰

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

Equality impact assessment should be integral to how public bodies develop all strategy and policy. As policy is downstream of strategy it is critical that all strategy has equality embedded in its design. This is in line with regulation 3, which requires public bodies to make the equality duty integral to the exercise of its functions. It is difficult to envisage how public bodies could do this without making equality impact assessment integral to the development of all strategy and policy.

The perception that equality impact assessment is an optional extra, or that equality is an ‘add-on’ to the work of a public body, is a key barrier to the proper and consistent use of equality impact assessment. A reformed duty on assessing and reviewing policies and practices must make clear that it is not an optional extra. It is certainly the case that improving equality impact assessment will take time and that public bodies require adequate capacity building as set out in our response to question 4.3. However, once capacity has been increased and public bodies have greater experience of using equality impact assessment it should become embedded in their processes.

5. A new equality outcome setting process

Q 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?

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

¹⁹<https://onescotland.org/wp-content/uploads/2020/01/NACWG-2019-Report-and-Recommendations.pdf>

²⁰ Engender (2020) *What Works for Women: Improving gender mainstreaming in Scotland*

characteristic, including sex, to provide greater clarity and focus about key issues.²¹ 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 wider inequalities.

We welcome the proposal to work with equalities organisations and people with lived experience in order to develop any national outcomes. However, it is critical that engagement is structured and meaningful and that the decision-making process on outcome-setting is transparent. In line with our recommendation on the use of equality impact assessments at questions 4.1, 4.2 and 4.3, Scottish Government should be required to set out what issues and opportunities have been identified as a result of engagement on national outcome setting. Crucially, Scottish Government must also be required to set out how engagement has shaped any national outcomes, and set out why particular issues and opportunities as identified have not been included.

There is also a need for careful consideration regarding public bodies' ability to meet or contribute towards meeting national outcomes, and to demonstrate how they have done so. While we note the proposal suggests that public bodies could choose to set their own outcomes, we feel it is unlikely that some would do so as adopting national outcomes would be less labour-intensive for them. However, it is clear that, in order to contribute towards the delivery of national outcomes, it would be necessary for public bodies to set their own outcomes that feed into the national outcomes. Further, their own 'feeder' outcomes would have to be measurable in their own right, as public bodies could not accurately attribute any national progress to work that they themselves had done.

In order to do this, each public body would need to understand how its own context relates to the inequalities reflected in each national outcome. They would need to use this understanding, alongside their analysis of their own evidence and data, to develop their own outcomes and actions to meet the national outcomes. Close the Gap is concerned that many public bodies do not have sufficient capacity to do this. Public bodies' current performance on equality outcomes supports this concern. Setting national outcomes may relieve public bodies of the burden of deciding which inequalities to focus on, however it will not on its own create the conditions that will improve public bodies' work on equality outcomes. Public bodies will require

²¹ Engender (2020) *What Works for Women: Improving gender mainstreaming in Scotland*

significant capacity building to enable them to link their own context to national outcomes and to develop work accordingly.

Close the Gap is also concerned that national outcomes may make accountability even less possible. Unless public bodies are required to set their own ‘feeder’ outcomes and actions, and measure progress against these, it will be difficult to identify each public body’s responsibility in relation to the national outcomes. This issue has already arisen in cases where groups of public bodies in a local authority area have chosen to set shared outcomes. In a number of such cases Close the Gap has observed a lack of clarity as to what action each public body is taking to deliver on the shared outcomes, and difficulty in measuring overall progress due to a lack of a shared action plan²². 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 national outcomes.

We welcome the proposal to require public bodies to set out how they plan to meet their equality outcomes, then to subsequently report on how they have progressed towards them. However, in order to ensure public bodies comply with this, either the new duty arising from proposal one or the existing regulation 4 would have to explicitly state these requirements. Regulation 4 currently does not require public bodies to set out how they plan to meet equality outcomes.

If such an approach is taken, Close the Gap would recommend that public bodies are required to set out how they plan to meet the national outcomes by setting their own ‘feeder’ outcomes and action plans. The regulation must state that these should be specific and measurable. Public bodies must also be required set out how they have used relevant data and evidence on their own context to shape their outcomes and actions. This could be included as part of their strategic plan.

6. Improving duties relating to Scottish Ministers

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

²² 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*

Close the Gap is broadly supportive of this proposal.

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

Close the Gap notes that regulations 11 and 12 have not been used to their fullest extent to date. These regulations have significant potential to address many of the problems identified with public bodies' performance of the duties. We support the retention of these duties for this purpose.

It is critical that Scottish Ministers fulfil their duties under regulations 11 and 12 by taking concrete action to improve performance of the duties. Two practical steps Scottish Minister could take are:

1. Direct public bodies to set leadership objectives to drive action and accountability on performance of the duties, and
2. Allocate resources to the development and delivery of a substantial capacity building programme.

Close the Gap is broadly supportive of the proposal for Scottish Ministers to set priority areas for public bodies to address as part of their equality outcomes, as set out in our response to question 5.1. This is likely to secure more buy-in from public boards and senior leaders, as outcomes will be seen as a national priority. However, it is our view that this will be insufficient to create the level of change needed. Two key drivers of poor performance of the duties are the lack of prioritisation of equalities by public sector leaders and the lack of accountability. If Ministers set a specific directive for public sector leaders this will send a clear message that they are expected to be accountable for the delivery of their organisation's obligations under the duties.

It is also critical that Scottish Government use regulation 12 to put in place a resourced programme of action to support public bodies' performance of the duties. This programme should include the development and delivery of:

- A suite of resources on the duties
- A suite of resources on each protected characteristic, including content on intersecting inequalities
- Training for senior leaders
- Training for equalities leads

Action under regulation 12 could also include a commitment to appoint Compliance Advisers within Scottish Government (as set out in our response to the Stage 2 review questionnaire²³), 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 could also highlight performance issues to the EHRC. This would go some way to addressing the lack of PSED-dedicated resource within the EHRC and contribute to a collaborative approach to support and compliance.

In using regulation 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.

In dedicating Scottish Government resources to a programme of support for public bodies this will send a strong message to the leadership of public bodies that mainstreaming is a Ministerial priority. However, as we have highlighted throughout, public sector leaders are unlikely to prioritise work on equalities without a clear directive to do so. Ministers should therefore use regulation 11 to set an expectation that work to meet the duties must be adequately resourced and prioritised. This could be achieved through the inclusion of a resourcing expectation in Ministerial letters of guidance.

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.

Q 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".

²³ Close the Gap (2021) *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)*

What are your views on this?

Close the Gap supports the recommendation of the First Minister's National Advisory Council on Women and Girls, that Scottish Ministers deliver an Annual Statement, followed by a debate, on Gender Policy Coherence to the Scottish Parliament. We do not agree with the proposal to include this within the delivery of a regular statement to and debate in the Scottish Parliament on mainstreaming equality and progress in meeting the public sector equality duty. We know that work to meet the duties has resulted in a homogenised approach to work on equalities, with protected characteristics treated in an undifferentiated way²⁴. There is a risk that including an Annual Statement and debate on Gender Policy Coherence within a debate on the duties will result in the specific focus on gender being lost. It is crucial that the Annual Statement and debate recommended by the NACWG is implemented separately. . We also call on Scottish Government to ensure that a separate regular statement and debate on the duties gives sufficient focus to the most pressing inequalities facing each protected group, including the substantial barriers and discrimination affecting women, BME people and disabled people.

Such a statement would also be an opportunity to reinforce the accountability of public bodies on meeting the duties. The statement could include a reflection on positive examples of work and progress in the relevant period, and highlight areas of concern across public bodies as a whole, directing public bodies to respond to those issues where improvement is required. While this would require dedicated work to gather evidence, it would send a clear message to public sector leaders that their commitment to the duties will be subject to public scrutiny. Scottish Government could use engagement with equalities organisations working on the duties to support this work, as they are likely to have identified good practice and areas for improvement in the course of their work.

7. Procurement

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

²⁴ 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*

Integrating equality in procurement has the potential to ensure public expenditure on goods and services is used as a lever to achieve women's equality. There are a number of ways public bodies could do this, including by:

- Incorporating gender equality in the subject of the contract itself, including the requirement of gender technical competence on the part of the contractors. This will enhance the gender-sensitivity of the goods and services themselves, as well as acting as a driver of gender competence in the goods and services providers.
- Fostering equality within the workforce of a specific contract, for example by including targets for the employment of women or men in works contracts.
- Including gender criteria for the evaluation of the submitted tenders, which will award contracts to those evincing superior gender competence, and the most gender-sensitive product and service design.
- Incorporating gender equality clauses into the conditions for implementation of the contract, and managing these during the delivery of the contract. This will ensure gender-sensitive monitoring, evaluation, and performance management.²⁵

Integrating gender equality considerations into procurement may enable public bodies to mitigate some of the disproportionate impacts of competition-based tendering on women's employment. As a result of occupational segregation, where women and men are clustered into different types of work, this contributes to the undervaluation of women's work and de-skilling²⁶.

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. In our most recent assessment we were only able to identify one public body that 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: we were unable to identify any evidence of equality being considered in procurement.²⁷ This is of particular concern given that local authorities are the biggest users of procurement in the public sector, with this procurement having the potential to influence significant inequalities, for example the undervaluation of women's work in social

²⁵ Adapted from <https://eige.europa.eu/gender-mainstreaming/methods-tools/gender-procurement>

²⁶ E.K. Sarter (2016) *Public procurement and the public sector equality duty: equality sensitive tendering in Scotland*

²⁷ Close the Gap (2018) Internal assessment of local authorities' performance of the public sector equality duty (Not published)

care and childcare. This issue was identified in the report of the Independent Review of Adult Social Care, which was highly critical of local authorities' approaches to commissioning and procurement in relation to social care and made recommendations to address this through the development of an ethical commissioning approach²⁸. Such an approach is an example of how the duties could meaningfully influence procurement and one of the most significant gendered inequalities in society.

Close the Gap calls for the specific duty on procurement and its accountability mechanism to be strengthened and supported by statutory guidance. We support Engender's call to require public bodies to report on how they have built gender considerations into their procurement exercises, including detail on how gender equality has been incorporated into the subject of the procurement exercise and the subsequent contract awarded, and into the evaluation of that contract²⁹. Equality should be weighted within the procurement decision-making process such that it has a meaningful influence on the scoring of tenders. Scottish Government should collaborate 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.

The success or failure of a reformed specific duty on procurement is heavily contingent on the competence of officers involved in the process to apply a 'gender lens' to procurement³⁰. Dr Katharina Sarter, an academic specialising in gender and procurement, 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'³¹.

We know that public bodies do not have sufficient gender competence to perform the duties to a high standard. Given the complexity of procurement, and the lack of equality considerations in procurement thus far, it is certain that specific content on procurement must be included in the wider capacity building programme called for throughout this response. Scottish Government should also ensure that its own

²⁸ Scottish Government (2021) *Independent Review of Adult Social Care in Scotland*

²⁹ Engender (2022) Response to the review of the operation of the Public Sector Equality Duty in Scotland

³⁰ E.K. Sarter (2016) *Public procurement and the public sector equality duty: equality sensitive tendering in Scotland*

³¹ Ibid

policymakers, delivery agencies, and bodies that deliver its procurement agenda have sufficient intersectional gender competence to design policy and services that advance women’s labour market equality.

We note that the Procurement Reform (Scotland) Act 2014 requires public bodies that expect to have significant procurement expenditure in the forthcoming year to prepare a procurement strategy setting out how the authority intends to carry out regulated procurements, or review their existing strategy to ensure it is still appropriate³². Section 5a states that this strategy must set out how its procurements will “contribute to the carrying out of its functions and the achievement of its purposes” and “deliver value for money”. Section 5b states that this strategy must include a statement of the authority's general policy on:

- (i) the use of community benefit requirements,
- (ii) consulting and engaging with those affected by its procurements,
- (iii) the payment of a living wage to persons involved in producing, providing or constructing the subject matter of regulated procurements,
- (iv) promoting compliance by contractors and sub-contractors with the Health and Safety at Work etc. Act 1974 (c.37) and any provision made under that Act, and
- (v) the procurement of fairly and ethically traded goods and services.

It is our view that the public sector equality duty and Scottish specific duties have clear relevance to these parts of the Act in particular. In order to provide a strong lever to ensure public bodies use procurement to meet the duties, Close the Gap calls for Scottish Government to consider amending the Procurement Reform (Scotland) Act 2014 5a to require an authority’s procurement strategy to set out how procurements will help meet the duties, and sector 5b to include a statement of the authority’s general policy on the use of procurement to meet the duties.

8. Intersectional and disaggregated data analysis

Q 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”?

³² <https://www.legislation.gov.uk/asp/2014/12/contents>

(a) What are your views on this?

Close the Gap supports the recommendation made in the third report of the National Advisory Council on Women and Girls (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 information³³.

The fact that public bodies are still not publishing all of the required data, or good quality data, or using this data effectively, should not preclude the introduction of a requirement to gather and use intersectional data. Many public bodies are unlikely to put in place steps to gather and use intersectional data without a duty to require this. There should be a recognition that it will take time for public bodies to develop systems and capacities in order to meet such a duty, and adequate support and plans in place to enable this. This could be easily accounted for by the regulator in any compliance work and areas for improvement identified. The duty itself could also reflect the challenges around gathering intersectional data but including a clause that requires public bodies to state any data they are having difficulty gathering and why, and what steps they will take to address this.

Close the Gap notes however that the existing duty to gather and use employee data is not working. As highlighted in our response to Stage 2, Close the Gap's reviews of PSED performance have consistently identified a lack of gathering and use of data and a marked decline in compliance with duties on data gathering³⁴. 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 any evidence of work to improve data collection and use. If a duty to gather and use intersectional data takes the same form as the existing duty to gather and use employee data, it will replicate the issues with this duty and will be unlikely to drive better quality work by public bodies.

Any new duty on intersectional data must therefore be based on a reformed model. Those duties that rely on data gathering and use should be strengthened to require public bodies to specify the relevant points of the evidence they have used to

³³<https://onescotland.org/wp-content/uploads/2020/01/NACWG-2019-Report-and-Recommendations.pdf>

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*

discourage public bodies from only listing reports or datasets. This included duties on mainstreaming, equality impact assessment, setting equality outcomes, and a new duty to develop gender pay gap action plans.

Close the Gap recommends that regulation 6 be amended to specify what employee data public bodies should gather. The following data would represent best practice, but this list is not exhaustive, and improved competence on gender and other protected characteristics would enable public bodies to identify other useful data they could gather. We call for public bodies to gather and use employee information on the composition of their workforce, and the recruitment, development and retention of their workforce, as currently required. These categories should specify the following:

Workforce composition:

- Occupation of part-time posts
- Occupation of fixed term and/or temporary posts
- Flexible working applications and success rates
- Grievances
- Disciplinary incidents

Recruitment:

- Applications
- Shortlisted applicants
- Appointments

Development:

- Employees who access training
- Employees who request training and are denied, by gender and working pattern
- Type of training accessed by employees
- Employees who participate in other internal development programmes, such as those receiving coaching and mentoring
- Employees who are promoted

Retention:

- Uptake of shared parental leave

- Voluntary redundancies
- Compulsory redundancies
- Dismissals
- Retirement grounds
- Proportion of women returning to work after maternity leave
- Destination of women returning to work after maternity leave

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

At a minimum public bodies should have access to training and resources that are designed to build competence on the two key components required for better performance of the duties:

- gender and how it intersects with other protected characteristics, , and
- data gathering, analysis and use, including content on how this relates to each duty.

At a basic level, data gathered must be gender-sensitive and sex-disaggregated. For example, in addition to gathering headline numbers of employees who have participated in training, it is necessary to be able to identify what type of training employees have attended. This would enable public bodies to understand one of the key gendered inequalities in access to training and development, which is that men are more likely to participate in training that enables them to get a pay increase and/or progress in their career. For intersectional data to be useful in the same way, it must be informed by the same principles for all protected characteristics.

This entails competence building so public bodies know what data to gather. 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.

Public bodies should also have access to ongoing advice and guidance on performance of the duties as a whole, in particular on data gathering and use, equality impact assessment and mainstreaming, alongside expertise on the protected characteristics and intersecting inequalities. We believe this should be

provided by Scottish Government, in line with obligations that fall under regulation 12.

To this end, Close the Gap calls on Ministers to introduce Compliance Adviser roles within the Scottish Government. These roles could provide advice and guidance on performance of the duties, and could incorporate a quality assurance function as proposed in our response to the Stage 2 consultation³⁵.

It is also clear that capacity building on its own cannot address the lack of prioritisation and resourcing of equalities work by public bodies. An action-focused duty to mainstream equality, with a concomitant duty to report evidence of mainstreaming, is essential, as set out in our response to question 1.1.

9. Intersectional gender budget analysis

Q 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?

Close the Gap supports the NACWG's call to integrate intersectional gender budget analysis into the Scottish Budget process, and that this should be placed on a statutory footing. Gender budgeting has been successfully implemented in Austria, Belgium and several other EU countries, therefore there are existing models which can be built on to develop a Scottish approach.³⁶ The budget is one of the key tools that shapes the lives of women and girls. Gender budget analysis is therefore a critical step in ensuring that women and girls benefit equally from government spending and investment.

However, identifying the gendered impact of spending and investment is only the first step. If gender budget analysis is to result in change for women and girls it must play a meaningful part in influencing budget decisions. At present, the duties as a whole are meant to ensure that Scottish Government mainstream gender into its policymaking and decision-making processes with the purpose of shaping the policies and priorities of government. This is not happening to the degree necessary to influence those policy decisions with the greatest potential to create change in

³⁵ Close the Gap (2021) *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)*

³⁶ <https://eige.europa.eu/gender-mainstreaming/countries>

women's and girls' lives. A recent and key example of this is the new National Strategy for Economic Transformation, which is not gendered and represents a missed opportunity to put gender equality at the heart of a central and long-term government strategy. The statutory nature of the duties is therefore yet to ensure the consideration of equality is prioritised in and has a meaningful impact on policymaking at all levels. We therefore need more than a statutory requirement for gender budget analysis if it is to result in real change. Close the Gap therefore calls for a duty on Ministers to ensure that gender budget analysis has a meaningful impact on budgetary decisions. This could be structured in a similar way to a reformed duty on equality impact assessment, as set out in our answer to question 4.1. Ministers would be required to:

1. Set out the issues identified in the gender budget analysis process.
2. Set out how these have shaped the development of or changes to the budget being analysed.
3. Provide justification if changes to the budget have not made, with reference to the to the relevant issues identified.

Q 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?

Close the Gap supports the NACWG's recommendation that there be an additional duty on public bodies to do intersectional gender budget analysis as part of their budget setting procedures. 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 budget analysis will provide public bodies with a useful dataset that it can use alongside the other data and evidence it gathers to better understand how women and men are served by its budgetary and policy decisions. For example, completing a gender analysis of existing spend on employee training and development may identify that men benefit from greater spend than women as employees of a public body. An accompanying gender analysis of employee data on training and development would enable to public body to identify if this is down to more men than women receiving training, or men benefiting from greater access to higher

quality, resource-intensive training than women. This would enable the public body to develop action that targets the specific problem and therefore target its resources effectively.

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

As with the existing duties and any reformed or new duties it will be necessary for public bodies to receive significant capacity building in order to be able to integrate gender budget analysis into their budget-setting processes. This would include much of the same content as the wider capacity building that public bodies need in order to be able to better perform the duties, i.e. in-depth training on gender inequality, gender analysis, gathering data and understanding intersecting inequalities. Close the Gap would therefore recommend that gender budget analysis is built into a wider programme of capacity building as we have called for throughout our response to this consultation.

10. Coverage

Q 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?

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

Close the Gap notes that education authorities are listed separately from local authorities within the list of public authorities covered by the Scottish specific duties. However, in practice education authorities' reporting has been folded into the reporting of local authorities. While this is not an issue in principle, in practice it has led to a dearth of activity and focus on the duties within education authorities. The vast majority of local authority reports assessed by Close the Gap included no outcomes or actions that were relevant to or focussed within their associated education authority. In most cases separate employee data was the only content within local authorities' reports that related to education authorities. This has undoubtedly led to a lack of mainstreaming and substantive action on gender stereotyping and sexual harassment in schools.

Close the Gap calls on Scottish Government to consider how education authorities may be compelled to produce their own reports under a reformed set of duties. The

new education bodies that will replace Education Scotland and the Scottish Qualifications Authority must also become individually listed bodies.

Q 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?

In principle it seems clear that, as part of their own compliance with the duties, regulatory bodies should be including a consideration of equalities in their enforcement and support work. As an approach this has the potential to support compliance, for example through regulatory bodies providing support highlighting compliance issues to the EHRC. In practice however, Close the Gap has seen very little evidence of this happening. Where we have seen evidence of the inclusion of equalities in the reports of regulatory bodies, this has been minimal, of poor quality and has had no discernible impact on the work.

Further, Close the Gap included a small number of regulatory bodies within our assessment of public bodies' performance of the duties. We found their reports to be of poor quality with little substantive action planned to meet the duties, a lack of mainstreaming and protected characteristics treated in an undifferentiated way. We are concerned that this demonstrates a lack of understanding of both the duties and of inequality and discrimination. If regulatory bodies are to be required to make recommendations on equalities to those public bodies within their remit, they will require significant capacity building in order to do so. Without this, the involvement of regulatory bodies risks enabling and sustaining poor performance of the duties by failing to identify areas of concern and being unable to provide the necessary support to improve performance. Regulatory bodies cannot be expected to support public bodies to improve performance of the duties if their own performance is poor.

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

Q 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.

Close the Gap welcomes the recognition of the need to strengthen leadership and accountability and to enhance capability, capacity and culture. However, we are not persuaded that this can be achieved without regulatory change. The lack of leadership and accountability are two of the most significant factors driving public bodies' poor performance of the duties. It is Close the Gap's view that there must be a duty to ensure executive accountability for mainstreaming and equality impact assessment.

Close the Gap and other equalities organisations have consistently called for greater accountability of public bodies' senior leaders as a means of securing prioritisation of the duties as a central part of public bodies' work. The current duties are insufficient to achieve this as compliance has been consistently poor and public bodies have delivered little chance for protected groups. Senior leaders set the culture of public bodies, decide how internal resources are distributed and are responsible for ensuring their organisations meet their duties. If a senior leader made meeting the duties a priority in their organisation, it is reasonable to conclude that their performance of the duties would improve. However, our experience of delivering bespoke support to public bodies on the duties has highlighted a range of concerning attitudes among senior leaders³⁷. Where the senior leaders of public bodies prioritise image and risk management over ambition, progress on tackling women's labour market inequality, wider inequalities and discrimination will be significantly constrained.

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. There is overwhelming evidence that equality and diversity can drive excellence in service design³⁸. 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".³⁹ If after a decade of the duties the leaders of Scotland's listed public

³⁷ Close the Gap (2021) *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)*;

³⁸ Close the Gap (2016) *Gender Equality Pays: The economic case for addressing women's labour market inequality*

³⁹ Engender (2020) *What Works for Women: Improving gender mainstreaming in Scotland*

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.

Close the Gap would welcome a substantial and well-resourced programme of capacity building for public bodies. In order to be effective this should build understanding of the duties alongside building the necessary competence on each of the protected characteristics. We note however that equalities organisations have made available training and support to public bodies throughout the ten years that the duties have been in place. Close the Gap has worked with a number of public bodies in this time and developed guidance on the duties. However, we agree with concerns raised by Coalition for Racial Equality and Rights, that the impact of this work is “often limited by the influence of senior leaders and the tendency to favour vague, bureaucratic approaches as opposed to clear and impactful ones”⁴⁰.

Capacity building is welcome, but it is not enough. Evidence shows that organisations are unlikely to take action on equality unless they are compelled to do so by law⁴¹. That the duties are still seen by public sector leaders as a “competing priority”⁴² demonstrates that they are unlikely to prioritise action on equality unless they are legally required to do so. Close the Gap therefore recommends that the duties include a requirement that public bodies include details on how equality outcomes and actions will be resourced within their budget, and report on related expenditure as part of progress reports. We also note the agreement between Scottish Government and COSLA for local authorities to spend a minimum 1% of their budget through participatory budgeting. We agree with our colleagues at Coalition for Racial Equality and Rights that this demonstrates that “Scottish Government is prepared to leverage agreements on expenditure towards activity which would enable public bodies to better meet people’s needs”⁴³, and we call on Scottish Government to use a similar approach to secure prioritisation of work to meet the duties in public sector budgets.

⁴⁰ Coalition for Racial Equality and Rights (2021) *Response to the Review of the Operation of Public Sector Equality Duty (PSED) in Scotland Stage 2 Questionnaire*

⁴¹ 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*

⁴² Scottish Government (2021) *Review of the Operation of the Public Sector Equality Duty in Scotland: Learning from Mainstreaming Equality during the Covid-19 Pandemic*

⁴³ Coalition for Racial Equality and Rights (2021) *Response to the Review of the Operation of Public Sector Equality Duty (PSED) in Scotland Stage 2 Questionnaire*

Close the Gap also reiterates our call for a duty for each public body to appoint an accountable officer, as set out in our Stage Two response⁴⁴

12. Guidance

Q 12.1 What would you like to see in improved revised guidance for the SSDs?

Close the Gap is broadly supportive of calls for more prescriptive step-by-step technical guidance, the consolidation of existing guidance using clearer language, and the provision of new strategic guidance on the duties as a whole. It is our view that the main issue with current guidance on the duties is that public bodies do not use it to guide their work on the duties, rather than the guidance itself being particularly deficient. Public bodies have had ten years to build institutional competence on the technical guidance, however as with performance of the duties as a whole this has not happened. We feel the technical guidance available is clear, however the whole suite of guidance would benefit from greater prescriptiveness on some points and more use of illustrative examples and case studies to provide a step-by-step work through of some of the more complex aspects of the duties. Close the Gap calls for guidance on the duties to be made statutory in order that it can be a stronger lever for enforcement action.

A critical area that requires more guidance and support for public bodies is gender mainstreaming, including the use of equality impact assessment as the key tool for applying a mainstreaming approach. The mainstreaming duty is arguably the most important of the duties, with the greatest potential for transformation in public sector policy and practice, and for creating systemic change.

Close the Gap calls for statutory guidance to include standards for equality impact assessment and equality outcomes. This would help to drive up the quality of public bodies' work on these duties by providing an enforcement tool containing quality dimension. Standards for equality impact assessment could be based on Engender's recommendations as referenced in our answer to question 4.2. These standards represent the process that must be followed in carrying out an equality impact assessment, which is an additional benefit. The inclusion of a clear process to be followed should support public bodies to build competence on equality impact assessment, contingent on the process containing enough detail to elicit the key aspects of the work, namely analysis and the application thereof to the development

⁴⁴ Close the Gap (2021) *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)*;

of policy. We feel the standards set out by Engender provide this critical detail. Standards for equality outcomes should include the requirement for specificity and measurability.

The guidance as a whole would benefit from the inclusion of case studies that illustrate how the duties should be performed at a strategic level and at a policy level. Close the Gap also calls for the development of separate resources on the key functions of service delivery and employment in order to emphasise the need for public bodies to embed equality in all of their functions. However, guidance on performance of the duties must be supported by a programme of capacity building on the inequalities and discrimination experienced by the different groups of people who share protected characteristics.

Public bodies need significant support to develop the gender competence necessary for the to meet the duties. The absence of this competence only reinforces public bodies' process-focussed approach to the duties. If public bodies had a clear understanding of gender inequality and how it relates to their own work it could support them to understand the purpose of the duties, which is to tackle that inequality. It could enable them to better understand their data and identify the gaps therein, to make the links between the different duties, and to develop better quality actions.

Close the Gap calls for guidance to be developed on each of the protected characteristics in order to support a wider programme of competence building on this matter. Guidance should include foundational information on the protected groups and the inequalities they experience, including those intersecting inequalities experienced by different groups. It should include examples relating this to the different duties and the different functions of public bodies. Close the Gap would welcome involvement in the development of guidance on gender and employment and the wider causes of women's labour market inequality.

13. Positive Action

Q 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?

It is Close the Gap's view that positive action is significantly underused by public bodies. In our assessments of public bodies' performance of the duties we only identified only three instances of positive action⁴⁵. This represents a real missed opportunity. Positive action is a tool that can be used to develop targeted and straightforward actions to tackle gendered occupational segregation and other employment inequalities in public bodies. In one example of positive action we identified, a local authority had identified an issue in its education authority, where none of its secondary school head teachers were women. A recruitment programme including management support targeted at women, and a positive action statement in their recruitment process, resulted in a significant shift with five of the eight secondary schools recruiting female head teachers⁴⁶. This demonstrates the impact that a simple, resource-light initiative can have.

Close the Gap proposes that the duties to set equality outcomes and gender pay gap action plans should require public bodies to consider how they can use positive action under sections 158 and 159 of the Equality Act 2010 to achieve their aims. Public bodies should also be required to report on how they have used positive action in their work to meet these duties.

14. Overall reflections

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

Q 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.

Together with Engender, Close the Gap calls on Scottish Government to introduce a duty to prevent sexual harassment under the Scotland-specific regulations of the public sector equality duty, including the requirement to develop a standalone policy on sexual harassment.

A strong organisational anti-sexual harassment policy plays a key part in primary prevention and significantly increases the extent to which victim-survivors report

⁴⁵ 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*

⁴⁶ Ibid

having been harassed.⁴⁷ Sexual harassment is different from other forms of harassment and bullying due to its gendered nature and the power imbalances that underpin it. To tackle sexual harassment, employers should develop a standalone sexual harassment policy, which is separate from any existing anti-harassment and bullying policies.

Guidance on meeting the specific duties should set out that a sexual harassment policy must include:

- A definition of sexual harassment;
- A statement that sexual harassment is a form of violence against women;
- Examples of sexual harassment which are relevant to the workplace and reflect the diverse range of people it may affect;
- A statement that sexual harassment and victimisation won't be tolerated in the public body;
- Who the policy covers and responsibilities of managers and staff;
- Where and in what situations the policy applies;
- Information on possible sanctions;
- Information on aggravating factors, such as abuse of power over a more junior colleague, that will be taken into account in deciding what disciplinary action to take;
- An effective procedure for dealing with complaints of harassment;
- Information on addressing third party harassment;
- Information on protecting confidentiality; and,
- A commitment to review the policy regularly.

⁴⁷ Busby (2022) Anonymous reporting of sexual harassment: A literature review. Engender.