



Close the Gap response to the Consultation on Public Sector Equality Duty Specific Duties

1.0 Introduction

- 1.1 Close the Gap is a partnership project, which works across Scotland to promote positive activity to address the gender pay gap.
- 1.2 The project is principally funded by Scottish Ministers, and partners include the Scottish Government, Scottish Enterprise, Highlands and Islands Enterprise, Skills Development Scotland, Scottish Trades Union Congress (STUC) and Equality and Human Rights Commission (EHRC).
- 1.3 Close the Gap works with employers, economic development agencies and employees. The breadth of partnership recognises that equal pay is a productivity issue as well as an issue of fairness and equality, and that narrowing the gender pay gap would return aggregate productivity gains to the Scottish economy.
- 1.4 The Scottish Government funding model for equality initiatives has changed in the current round, and funding for the period April 2008 – March 2011 was awarded specifically to deliver outcomes identified by the Scottish Government. In Close the Gap's case, these are:
 - a) Improvement in general awareness amongst employers and employees about the gender pay gap in Scotland, and its various causes;
 - b) Improvement in employers' understanding about the business benefits of taking action to address the gap;
 - c) Increase in employers' activity – and capacity – to address the gap and its causes;
 - d) Compliance by public sector organisations with the specific duty in the Gender Equality Duty to publish, regularly review and report on equal pay statements; and

- e) Ideally, a reduction in the gender pay gap in Scotland, as evidenced by the Annual Survey of Hours and Earnings (published annually in November) – but recognising that the causes of the pay gap are varied and complicated and often outwith the project's sphere of influence.

2.0 Gender Equality Duty

- 2.1 Encouraging compliance with the specific duty on equal pay is a key priority of Close the Gap's. The project wrote guidance, in partnership with the Equal Opportunities Commission, on the Scottish specific duty on equal pay in 2007. This was disseminated to all public sector bodies, including those who did not require to produce an equal pay statement.
- 2.2 A number of bodies contacted Close the Gap following the dissemination of this guidance to seek individualised advice and support around the development of their scheme objectives and equal pay statements.
- 2.3 Schemes published in 2007 were the first gender equality schemes, and are therefore useful indicators of the helpfulness of guidance and awareness-raising events available to employers, and provide a baseline of scheme quality.
- 2.4 In September 2008, in order to scope further work around the gender equality duty, Close the Gap carried out an evaluation of gender equality schemes and equal pay statements. The evaluation found that:
 - a) There was significant variation in the quality of schemes and statements, between public bodies;
 - b) There was significant variation in the level of consultation and involvement, between public bodies;
 - c) The schemes and statements were not as outcome-focused as the guidance and Code of Practice had indicated that they should be, and there was some clear confusion in follow-up meetings with organisations around what having a focus on outcomes might look like;
 - d) The gap in publication deadlines¹ meant that Equal Pay Statements and gender equality schemes were often not linked effectively;

¹ Gender equality schemes were required to be published by 29 June 2007, and Equal Pay Statements were required to be published by 28 September 2007.

3.0 The Public Sector Equality Duty Specific Duties

3.1 Question 1: Do you think that it would be helpful to have in place specific duties to assist in the delivery of the Equality Duty?

Yes, the formulation of specific duties provides strategic direction around themes that public bodies should focus attention to, if seemingly intractable inequalities like the gender pay gap are to be successfully addressed. It also provides the opportunity for clarity around what public sector bodies should do to tackle inequalities, without being overly prescriptive about how this should be done.

3.2 Question 2: Do you think the criteria set out at paragraph 4.4 are the right criteria for considering whether a public authority should be subject to the new specific duties?

and

Question 3: Do you think the new specific duties should be imposed on all Scottish public authorities which are subject to the general duty, provided it is reasonable and practical for them to fulfil the requirements?

Close the Gap understands that public authorities not listed on the face of the Equality Bill will only be covered by the general duty in respect of their public functions, and that their function as employers, which is a 'private' function does not fall within the ambit of regulation.

This is of potential concern in the case of the creation of new public authorities, as only listed public bodies can be subject to the specific duties.

It seems sensible that bodies to which the existing race, gender and disability duties apply, should be covered by the new duty. It may also be helpful to consider whether the duty should apply to arms-length organisations (ALMOs) that are carrying out a public function. ALMOs are of particular interest to organisations working around the gender pay gap, as they entrench occupational segregation and remove access to equal pay comparators within the contracting body. The impact of the rise in the creation of ALMOs will therefore be to widen the gender pay gap.

3.2 Question 5: Should public authorities be encourage to mainstream equality, with reference to all the proposed protected characteristics, across their services and functions?

and

Question 6: How might public authorities best demonstrate they are mainstreaming equality in relation to all the proposed protected characteristics? For example, through reporting on progress.

and

Question 7: with reference to the relevant evidence and to wider public authority general Equality Duty obligations, do you think that setting equality objectives would help public authorities to focus their response to the general duty? Should equality objective setting cover all protected characteristics, or not?

and

Question 8: Do you think equality objective setting should be linked to the corporate and/or business planning mechanisms of public authorities?

A mainstreaming approach, according to a definition similar that of the European Commission's, in which mainstreaming does not "restrict efforts to promote equality to the implementation of specific measures, but mobilis[es] all general policies and measures specifically for the purpose of achieving equality."

From its work with a range of employers, Close the Gap is aware that there is a range of understanding of what mainstreaming is and should be, and the encouragement of mainstreaming by specific duties should take cognisance of this spectrum of comprehension.

Close the Gap agrees with the statement in the consultation document that it may not be possible to have generic equality objectives which cover all characteristics. Indeed, attempts to genericise equality schemes and to develop objectives that cut across the three existing equality duties, have not, in the opinion of Close the Gap, been successful.

Although it is clearly important for public authorities to be aware of intersectional issues, the specific equality duties were designed and implemented to address institutional racism, sexism and exclusion of disabled people. The system inequalities that provoked the establishment of these duties have not been dismantled.

Consequently, it is essential that public bodies identify the inequalities that could be tackled by changes to their existing or future employment practice or service delivery, and make effective changes. Setting objectives for themselves is a critical part of this process.

In much the same way as employers are recommended to include equalities outcomes within key performance indicators for individual staff, it is important for the mainstream business planning processes of an organisation to reflect equalities considerations. There are strong business arguments for equality. Addressing inequalities in employment practice and service delivery improves services, provides good value, and enhances efficiency.

However, it is important that reporting on equalities is not diffused over too many documents and plans to be accessible by employees and service users.

3.3 Question 9: How do you think public authority equality objectives should be publicised?

and

Question 36: What documentation do you think should be required of public authorities to publicise their equality objectives?

and

Question 37: Do you think that the mechanism(s) – whether through a scheme or otherwise – for public authorities to publicise their equality objectives and report on progress should be left to each individual authority?

Although some are unwieldy, the gender equality schemes that listed public bodies were required to produce set out the evidence base for action, priorities for action, and an action plan to deliver against identified priorities.

The meetings that Close the Gap had with individual organisations suggest that where organisations struggled to identify appropriate, outcome-focused objectives, this was apparent in their schemes. A lack of appropriate objectives is not necessarily indicative of a failure to act on persistent inequalities, and there were instances where the project spoke with employers who were delivering innovative equalities practice without this being evident in their schemes. However, the lack of a document that is accessible, clear and comparable with those produced by other public bodies may render the new public sector duty an ineffective lever for change, as individuals and stakeholders may struggle to find details of objectives among a myriad of business planning documents.

Close the Gap, therefore, would support the requirement on public bodies to produce a scheme, or other similar document, that clearly sets out the evidence base for action (including engagement with stakeholders), equalities objectives, and an action plan of delivery. These should be relatively uniform, or at least contain the same core elements, so that they can be compared across organisations. Some employers that Close the Gap spoke to expressed a preference for a template.

Close the Gap is aware, through its work on encouraging compliance with the gender equality duty, that some public bodies perceived gender equality schemes to be private documents that were only able to be distributed following a Freedom of Information (Fol) request. Others had not published these on their websites, and were slightly reluctant to provide them to external agencies or bodies.

The duty, and guidance, must be clear that public bodies require to publish information around their objectives, preferably on their websites.

3.4 Question 11: Do you think public authorities should be required to report on progress?

and

Question 12: How frequently should public authorities be required to report on progress?

and

Question 13: Should reporting on progress be linked to existing processes such as business planning?

and

Question 14: Do you think the Scottish Government should prescribe in legislation how Scottish public authorities should report?

Yes, public authorities should be required to report on progress. It is important that authorities assess the impact that activity has had, and share this with stakeholders, including service users and employees. Reporting is a sensible way of achieving this.

Close the Gap accepts that tackling entrenched inequalities is not straightforward, and that some indicators that change has occurred can lag behind the operational changes that require to be made to make change possible. Culture change is particularly difficult, and requires long-term planning and activity. It can be demoralising to report too frequently when change takes time, but it is important that organisations do keep stakeholders informed and periodically undertake the type of significant review of activity that would allow for scheme refreshment.

Close the Gap suggests that interim reporting occurs on an annual basis and that a more significant round of reporting occurs three-yearly.

The requirements for reporting should be included in the regulation.

3.5 Question 15: The current gender specific duties require public authorities, with 150 or more employees, to publish an equal pay statement and report on that statement. So you think this requirement should continue in the new specific duties?

and

Question 16: Do you think that there would be value in public authorities with 150 or more employees reporting on their gender pay gap?

and

Question 17: If the gender pay gap is to be reported on, what method do you think should be used to calculate the gender pay gap?

and

Question 18: Do you think public authorities with 150 or more employees should be required to provide information on the concentration of women and men in particular grades and in particular occupations (occupational segregation)?

and

Question 21: How frequently should public authorities be required to publish information on the gender pay gap, their ethnic minority employment rate and their disability employment rate?

Following the dissemination of Close the Gap's guidance on meeting the specific duty on equal pay² and the code of practice³, many organisations contacted the project directly to discuss the equal pay statement.

There were different timescales for the publication of gender equality schemes and equal pay statements⁴. It is the perception of Close the Gap that the requirement to produce a statement focused the attentions of organisations in a way that the requirement to include an equal pay objective did not.

The gender pay gap is persistent and hard to shift, and forty years of the Equal Pay Act have not delivered pay parity to women. The Equalities Review⁵ observed that "more and different action is needed if we are to address those inequalities that are proving particularly hard to shift, where progress is very slow."

² Close the Gap (2007) *Gender Equality Duty: Guidance for Meeting the Specific Duty on Equal Pay* Close the Gap: Glasgow

³ Equal Opportunities Commission (2007) *Gender Equality Duty: Code of Practice (Scotland)* EOC: Glasgow

⁴ Gender equality schemes were required to be published by 29 June 2007, and Equal Pay Statements were required to be published by 28 September 2007.

⁵ Equalities Review (2007) *Fairness and Freedom: The Final Report of the Equalities Review* Cabinet Office: London

Removing the requirement for an equal pay statement may signal that the issue of equal pay no longer requires the specific focus that the gender equality duty afforded it. This would be misleading, and provide false comfort to many employers that their current activity was sufficient to address all of the causes of the gender pay gap.

The proposals in the consultation document that employers should be required to continue to publish equal pay statements is welcome. However, it is particularly important that this statement include specific, measurable, achievable, relevant, and time-bound objectives for action, and not vague aspirations around compliance with existing law. Transparency measures, such as reporting headline gender pay gaps, should exist alongside a requirement to take action to address identified gaps.

Reporting on pay gaps is helpful, although a very clear methodology should be used for identifying gaps in the first place, and these should be supported by narrative. Headline pay gap figures can obscure inequalities that persist in one particular area of an organisation, and it may be more helpful to require public sector bodies to publish a wider range of indicators.

With regards to averages, Close the Gap prefers the mean to be used, as opposed to the median. The mean is the international standard, which affords comparisons internationally. It is also the figure historically used by the Scottish Government, the Equality and Human Rights Commission, and Close the Gap. The arguments in favour of using the mean are well-rehearsed: it avoids the problem of the median, which does not capture the difference in men's and women's pay caused by the exceptionally high earnings of a small number of (almost exclusively) male workers.

Horizontal occupational segregation was, in the opinion of the project, the cause of the gender pay gap that was least substantively addressed by the gender equality schemes and statements that we reviewed. Placing a requirement on employers to publish information around this would be extremely helpful in focusing attention on identifying areas of persistent segregation, and creating transparency around these.

It would be useful for employers to gather and publish this information on an annual basis, as part of their annual pay round.

3.6 Question 23: Do you think public authorities should be required to demonstrate how they have considered the impact on equality of their policies and services?

and

Question 24: Do you think a public authority should only be required to demonstrate equality impact assessment of key policies and services?

Close the Gap strongly supports the inclusion of a duty on public authorities to demonstrate that they have considered the impact of their policies and services on equality, and how they have done so.

Impact assessment that engages appropriate stakeholders should be intrinsic to a process that identifies how policies and practice should be changed to eradicate inequalities and achieve greater equality gains.

The project's practical experience of engaging with employers on impact assessment suggests that there are a wide range of views on the theory and practice of impact assessment. The relevant Code of Practice should be clear on the key features of impact assessment, without proposing a process that is unduly burdensome.

In our experience, weak impact assessment is largely a function of insufficient equalities knowledge or analysis, or an inadequate understanding of what equality might look like in the context of the policy being assessed.

Close the Gap welcomes the reference to spending decisions in the consultation. As expenditure (including that available for pay rounds) become tighter in the current climate of constrained public finances, it is important that the equalities impact of spending decisions is assessed.

We have concerns that requiring public authorities only to demonstrate that they have impact assessed 'key' policies and services will provide a reason not to impact assess policies that may be of relevance to specific inequalities. In the context of the activities of a whole local authority, for example, a flexible working policy is arguably not 'key'.

However, to the experience of women working for the local authority, a cultural presumption against flexible working may prove to be a significant barrier to progression.

3.7 Question 28: Do you think that imposing specific equality duties on contracting authorities in relation to their public procurement activities are needed, or are the best way to help deliver equality objectives? Do you think such an approach should be pursued at this time?

and

Question 29: Do you think that contracting authorities should be required to state how they will ensure equality factors are considered as part of their procurement activities to help contribute to the delivery of those objectives?

and

Question 30: Do you think that contracting authorities should be required to consider using proportionate equality-related award criteria where they relate to the subject matter AND performance of the contract?

and

Question 31: What would be the impact of a regulatory proposal aimed at dealing with suppliers who have breached discrimination law? What might be the benefits, costs and risks?

There is clear and incontrovertible evidence that procurement is an extremely effective tool for promoting positive action in employment and changing employers' practices.

The use of procurement to lever action around equalities in private sector companies has been cited often as the most proportionate and sensible way for the single equality duty to apply to the private sector.

As the single equality duty will not apply to the private sector, procurement is the only way in which substantive action on equality can be levered by the duty.

The gender equality duty took a similar approach, but employers that Close the Gap engaged with frequently found the advice on complying with the procurement provisions of the duty confusing. Procurement is undoubtedly a complex area of law and practice, which is why a robust duty on procurement is essential. A voluntary approach, or even a confusing mandatory approach, will not be sufficient to encourage public authorities to use the heft of the public sector purse to lever change.

Equality criteria must, of course, form part of the criteria when a service around equality is being provided by a contractor. The example given in the consultation document is for a public contract intended to help unemployed people back into work. It is suggested that, “in addition to making a competitive bid, the contractor might provide additional quality by offering tailored programmes for those who are particularly disadvantaged in the labour market, such as lone parents or certain ethnic minorities.”

This example highlights the complexity of taking an equalities approach to procurement. Close the Gap would argue that it is impossible for any back to work programme for unemployed people to be successful if it does not offer tailored programmes to the groups of individuals described. A better example might be around selecting one contractor because of their own employment practice, compared with other contractors who have lost race discrimination cases and have not addressed systemic racism within their organisations.

The project believes that contracting authorities should be required to include equality related contract conditions into their contracts. This would serve to highlight the significance that the authority has placed on equality considerations in the development of a public tender.

Close the Gap is aware that many public authorities ask for details of any judgment, finding or formal investigation of unlawful discrimination within the last three years, as well as an opportunity to explain what steps have been taken as a result of that finding or investigation, in pre-qualification questionnaires. This seems like a useful and proportionate way of identifying whether contractors are likely to, or have acted unlawfully. Additional guidance may be useful around this, to ensure that public bodies are able to interpret the results of these questionnaires, and act appropriately in response to them.