



Close the Gap response to the Public Sector Equality Duty: Consultation on Revised Draft Regulations

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 2010 – March 2011 was awarded specifically to deliver outcomes identified by the Scottish Government. In Close the Gap's case, these are:
 - Outcome 1: Improvement in general awareness amongst employers and employees about the gender pay gap in Scotland and its various causes, with a particular focus on occupational segregation, and the business benefits for taking action on the pay gap.

- Outcome 2: Increase in employers' activity – and capacity – to address the gap and its causes, with a particular focus on occupational segregation.
- Outcome 3: Compliance by public sector organisations with the requirements of the public sector duty on equality, including the requirement to publish, and explain, equal pay data.
- Outcome 4: Ideally a reduction in the gender pay gap in Scotland, as evidenced by the Annual Survey of Hours and Earnings – but recognising that the causes of the pay gap are varied and often outwith the project's sphere of influence.

1.5 This response does not represent the views of any one individual partner, but the experience of working across the public sector around women's labour market participation, and particularly on encouraging compliance with the gender equality duty.

2.0 Gender Equality Duty

2.1 Encouraging compliance with the specific duty on equal pay has been 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;

2.5 Close the Gap repeated its scan of gender equality schemes and equal pay statements in 2010-11, to capture direction of travel in public sector bodies, following the publication of the second set of gender equality schemes and equal pay statements. This found that:

- a) Organisations with which Close the Gap had contact were more likely to improve the quality of their published schemes and statements²; and
- b) Organisations with single equality schemes, rather than separate equality schemes, were likely to have poorer quality schemes, in terms of addressing the causes of pay inequality.

3.0 Regulation 3: Publication of Equality Outcomes by Listed Authorities

3.1 Question 1: Do you agree that if a public authority's equality outcomes do not cover all relevant protected characteristics, it should publish the reason(s) why?

Yes, this would be a helpful process in ensuring transparency within outcome setting, which is itself the high level articulation of a public body's equalities focus.

Close the Gap notes the Equality and Human Rights Commission's (EHRC) concerns about the difference between the definition of 'outcome' contained in the draft regulations, and in that commonly used across the public sector in other contexts, and welcomes the Commission's proposal that its guidance clarify this.

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.

² It is, of course, not possible to determine whether engagement with Close the Gap was a cause or consequence of the capacity to produce enhanced schemes and statements.

The specific duty on equal pay, that formed part of the gender equality duty, contained the requirement to ‘consider the need to have objectives that address the causes of any differences between the pay of men and women that are related to their sex’. Guidance, produced jointly by Close the Gap and the Equal Opportunities Commission, made clear that public sector bodies would need to objectively justify why such an objective did not require to be included in the scheme, which would include providing evidence on the size and causes of the pay gap in their organisations, including the impact of job segregation and the ‘glass ceiling’, or pay discrimination, and of women’s disproportionate share of caring responsibilities³.

Despite the formulation of the specific duty on equal pay, there remained a number of public bodies who did not have an equal pay objective, and did not explain why they did not consider there to be a need for one to be included within their scheme(s). The publication requirements of the gender duty made it possible to identify those authorities, and to provide guidance, support, and information that would enable them to move towards a more robust response to the gender duty.

This requirement is a proportionate way of ensuring that public bodies have considered all of the protected groups within their ambit, and the ways in which they experience the provision of services, and employment, in selecting their outcomes. Public bodies, will, of course, be subject to the general duty across all protected characteristics, and this process may also be helpful in determining how this will be delivered across those characteristics that are not the focus of specific outcomes.

4.0 Regulation 5: Impact Assessment

4.1 Question 2: Do you agree that a public authority should publish the results of equality impact assessment?

Yes, this is a helpful transparency measure. As the consultation paper notes, Freedom of Information legislation does provide a mechanism by which individuals and groups can access information around

³ Close the Gap (2007) *Gender Equality Duty: Guidance for Meeting the Specific Duty on Pay*
Close the Gap: Glasgow

equality impact assessment, but this erects an additional, unnecessary barrier to equalities groups' engagement with public bodies⁴.

The public sector equality duty places a requirement on public bodies to act proactively in tackling discrimination, and in delivering equality. It is entirely congruent with this proactivity, that an obligation for publication should itself rest with the public body.

This is also a far more helpful approach in terms of engaging protected groups, and in securing an evidence-based response to policy development. Even if protected groups are responding to an EQIA process which has concluded, their comments may be useful in identifying weaknesses in EQIA processes themselves, and therefore in driving best practice.

4.2 Question 3: Do you agree that a public authority's impact assessment should consider relevant evidence, including any received from people with relevant protected characteristics in relation to the policy or practice in question?

Yes. The value of an impact assessment which **does not** consider relevant evidence is questionable.

Close the Gap has been consulted on a variety of specific equality impact assessments, and those that were most robust considered evidence from a wide range of sources. A failure to consider relevant evidence is usually a strong indicator of a weak impact assessment, which does not lead to a successful mitigation of unintended impacts on women or men, or which fails to deliver equality outcomes, where this would have been possible with some relatively straightforward amendments to the policy in question.

The process of evidence gathering has also been useful for some public authorities, in identifying knowledge gaps, whether occasioned by its own data gathering practices, or in statistics produced by Scottish Government, the Equality and Human Rights Commission, or other authoritative bodies.

⁴ While Freedom of Information Act (Scotland) may provide de jure accessibility to information, there remain de facto challenges. Of a recent FOI exercise in which Close the Gap was a partner, there was a 34 per cent response rate within the timescales set out in the Act, and the responses that were obtained required substantial skilled analysis.

There are a range of equality organisations, which frequently work with, and represent, one specific protected group. Engaging and consulting with protected groups is helpful in providing information about the lived experience of those groups, which complements other sources of qualitative and quantitative data that Government, the Commission, and equality organisations may be able to make available.

4.3 Question 4: Do you agree that a public authority should make arrangements to review, and where necessary, change or revise existing policies and practices to ensure that these do not have a detrimental effect on its ability to fulfil the general duty?

Yes. Although there is a clear case for ensuring that new policies be robustly impact assessed, there is also a need for existing policy to be reviewed.

The reasons for this are twofold:

- a) Changes in the external environment. Organisations that established a policy, for example, of offering part-time posts at a standard 16 hours, to enable post holders to claim Working Tax Credit, and thereby addressing a gendered barrier to employment, may need to amend this policy in light of welfare reform. If they do not, there may be an unintended gendered impact on their employment. If the policy is overlooked for a number of years, this may have a long run impact on the representation of women at senior levels within the organisation.
- b) Policy drift, and unintended consequences of policies. Within a large, complex organisation, unintended consequences can arise from the interaction of a range of different policies, and from the aggregation of small, low-impact changes to policies over time. It is important to check policies periodically, and to check them against practice, to ensure that the intended outcomes are being realised.

In Close the Gap's experience, there is often considerable difference between employment and pay policy and the ways in which that operates at the front line. Regular and proportionate impact assessment can mitigate the unintended gendered impacts of this.

An example of the unintended consequence of the interrelationship between policies might be that of an organisation, which has a flexible

working policy that enables staff members to request part-time working, a customer service policy with numerical targets set at the team and business unit level, a performance management framework that gives more weight to customer service than equalities, and a recruitment freeze which has placed an absolute cap on headcount increases in most roles. Although each of these policies is reasonable, and, in the case of the flexible working policy, a positive driver of gender equality in employment, the cumulative effect is to incentivise managers to refuse requests for part-time working. Impact assessment that involves a recognised trade union, or which captures the views of the workforce in another way, is likely to identify this unintended consequence, and enable amendments to one or more of the policies, to remove the perverse incentive.

4.4 Question 5: Do you agree that a public authority should not be required to undertake an impact assessment where the policy or practice in question has no bearing on its ability to fulfil or otherwise the general duty (e.g. purely technical or scientific matters)?

Close the Gap share's the Equality and Human Rights Commission's concerns about Clause 5 (5).

The Clause states that the need to carry out an assessment of impact will not apply where the policy or practice in question "*has no bearing on the listed authority's ability to fulfil or otherwise the Sc. 149(1) duty*".

We would welcome clarification, in the clause or in guidance materials, to the criteria or process for deciding that a policy of practice 'has no bearing'. It is our experience that some public bodies have struggled significantly with determining which policies are relevant with regard to gender, and have therefore not mitigated significant, and well-researched, gendered impacts of those policies.

Many seemingly technical or scientific policies may require impact assessment. A policy on publication formats will need to be impact assessed to ensure that an organisation's style guide, and technical specifications for the production of documents, do not render materials inaccessible to people with sensory impairments. A policy on handling cytotoxic drugs will need to be gendered, because many cytotoxic drugs are teratogens. Without a screening process, it may not be obvious to public bodies which policies are so narrowly drawn that they do not have any equalities impacts.

Close the Gap therefore echoes the Equality and Human Rights Commission's observations about the usefulness of screening for all policies. In our experience, this is existing practice within most public authorities.

5.0 Regulations 6, 7 and 8: Employment Information

5.1 Question 6: Do you agree that authorities subject to the specific duties should be required to take reasonable steps to gather information on the relevant protected characteristics of employees, including information on the recruitment, retention and development of employees?

and

Question 7: Do you agree that authorities subject to the specific duties should be required to use the employment information which they have gathered to assist progress on the general duty?

Yes.

It is our experience that employers across the public sector have been proactive in seeking to map their workforces, by protected characteristic, and many have conducted surveys, and other activity, to identify barriers to progression, and to a good employment experience. In delivering against the requirements of the specific duty on equal pay, and on the previous public sector disability, race, and gender equality duties, public bodies have gathered information about the employment of their workers.

Close the Gap has worked with some employers to identify barriers to women's progression, commonly called 'the glass ceiling'. Invariably, although the specific details varied between organisation, gathering information about the distribution of women throughout the organisation, about the number of women and men who participated in development activity, and about patterns of recruitment and retention, helped employers to identify gendered differences in the employment experience. This assisted in identifying unintended consequences of employment practice, of inconsistencies between policy and practice, and areas in which policy needed to be developed. Without such statistics, gathered in a consistent way over time, it is almost

impossible for employers to have a sense of the relative employment of women and men, or of the outcomes of changes to policy and practice they have made.

Although many good employers have already taken steps to gather this data, and despite its requirement as part of the gender equality duty⁵, some local authorities contacted as part of a recent piece of partnership work do not have **any** gender disaggregated employment statistics.

The paybill is a relatively large proportion of all public sector bodies' costs, and, in some geographical areas, the employment practice of public authorities shapes the local labour market. It is critical that public funds be used in such a way as to advance gender equality in Scotland, and not to exacerbate existing inequalities, however unintended. The capturing of employment data makes practice transparent, and will be a driver of comparison and of change.

Close the Gap is therefore supportive of the requirement to gather employment data, and of a requirement to use it to progress general duty activity.

5.2 Question 8: Do you agree that authorities subject to the specific duties should be required to report on progress on gathering and using employment information, including an annual breakdown of information gathered, within the mainstreaming report?

Yes. The existing practice of employers who have fully engaged with the equalities data agenda, is to publish information gathered within an annual, or periodic, report.

An example of this is Scottish Enterprise, who gather and report information, across six protected characteristics, on recruitment, promotion, disciplinary and grievance processes, performance, grade, position in pay scale, and contract type. This is reported in their annual equalities review⁶, which is a publicly accessible document.

⁵ Equal Opportunities Commission Scotland (2007) *Gender Equality Duty: Code of Practice Scotland* The Stationery Office: London s.3.16 – s.3.26

⁶ Scottish Enterprise (2010) *Equal Opportunities Annual Report 2010* Scottish Enterprise: Glasgow

In our experience, there is a spectrum of practice across the public sector, and a publication requirement will make this transparent. There are a range of equality bodies, including initiatives like Close the Gap, who can provide detailed support and guidance on gathering and using employment information.

5.3 Question 9: Do you agree that authorities with more than 150 employees should publish an equal pay statement, the first covering gender and the second and subsequent statement covering gender, disability and race?

Following the dissemination of Close the Gap's guidance on meeting the specific duty on equal pay⁷, which formed part of the gender equality duty, and the gender duty code of practice⁸, many organisations contacted the project directly to discuss the equal pay statement.

The introduction of the gender equality duty had different timescales for the publication of gender equality schemes and equal pay statements⁹. 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 Review¹⁰ 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."

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.

⁷ Close the Gap (2007) *Gender Equality Duty: Guidance for Meeting the Specific Duty on Equal Pay* Close the Gap: Glasgow

⁸ Equal Opportunities Commission (2007) *Gender Equality Duty: Code of Practice (Scotland)* EOC: Glasgow

⁹ 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.

¹⁰ Equalities Review (2007) *Fairness and Freedom: The Final Report of the Equalities Review* Cabinet Office: London

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.

6.0 Regulation 9: Public Procurement

- 6.1 Question 10: Do you agree that where a listed authority is a contracting authority and proposes to enter into a relevant agreement on the basis of an offer which is the most economically advantageous it must have due regard to whether the award criteria should include considerations relevant to its performance of the general duty?

and

Question 11: Do you agree that where a listed authority is a contracting authority and proposed to stipulate conditions relating to the performance of a relevant agreement it must have due regard to whether the conditions should include considerations relevant to its performance of the general duty?

Close the Gap welcomes the Government's further thoughts on procurement, in light of the specific duties operating in Wales.

Public sector contracts with the private sector are valued at over £9bn per year. In the absence of an equality duty focused on the private sector, giving regard to the equalities outcomes of procurement has been seen as a critical way of leveraging good practice, of transforming employment cultures, and of managing risk to public bodies¹¹.

Our work with public bodies suggests to us that public authorities were least confident when trying to reconcile the requirements of the gender equality duty, which applied to procurement as one of the functions of a public body, and other pieces of regulation around procurement. This was perceived to be a very technical area, which sat outwith the expertise of those leading on equalities within public bodies.

The principles contained within the draft regulations are to be welcomed. It is important that public authorities balance the economic advantage of contracts, with their equalities impact. Indeed, we would argue the two are interlinked¹². It is also important that contracting bodies include equalities considerations within the conditions of contract.

However, including the language 'on the basis of an offer which is the most economically advantageous' suggests that public authorities do not need to give regard to equalities considerations if they have not appointed the cheapest potential contractor. This, potentially, adds

¹¹ An example of risk to a public body might be that of a drift in terms and conditions of core staff compared with staff employed by an arms length organisation. Should a public body wish to, for reasons of efficiency or best value, employ staff directly, the gap between rates of pay, and other entitlements, may render this problematic.

¹² A contract to deliver care services, for example, that is of low cost to a local authority, but which reduces pay for a predominantly female workforce from a living wage, is economically advantageous in one sense, but economically damaging in another. In-work poverty places expensive demands on health and social services.

another element of complexity to public bodies' engagement with equalities and procurement, in providing a loophole for bodies who are selecting a contractor who is more expensive than another, but is presumably providing better value. As this better value may not relate directly to equality, it should not be an automatic assumption that the public body has no need to give regard to the inclusion of equalities elements in its award criteria. We would, therefore, welcome the removal of the 'most economically advantageous' language.

We would also welcome very clear guidance for contracting bodies on what they must do with regards to procurement, and what they are able to do. Close the Gap is frequently asked whether public authorities can require contracting bodies to conduct an equal pay review, or whether it should, or what role it should, or could, take in wage setting. Clarity on points such as these, clearly articulated in usable guidance, is essential if the procurement element of the duty is to deliver positive outcomes.

Close the Gap is particularly concerned that contracting out, whether to ALEOs, third sector organisations, or the private sector, will create silos of low-paid women, who lack comparators for equal pay purposes. This is disadvantageous in terms of Scotland closing its headline pay gap, and also to public bodies, who have to manage the risks associated with the possibility of future changes to the delivery of services.

Our concerns around this have been exacerbated by a recent piece of work, carried out with the STUC Women's Committee, to identify which organisations in Scotland are currently contracted by public authorities to carry out any of the functions for which the public authority has responsibility. This has identified wide variation in the information held by each local authority about which ALEOs it has established, and which it has contracted with. Challenges around the definition of ALEOs, and the consistency of information collected around these, are likely to exist across the public sector. Close the Gap will share a forthcoming paper on this with the Scottish Government, and other relevant stakeholders.

7.0 Horizontal and vertical activity

7.1 Question 12: Do you have any other comments on the proposed draft Regulations?

Close the Gap has been involved in ongoing discussions, in a range of forums, about the challenge of acknowledging the intersection of identities that is a reality for each individual, while tackling structural inequalities that function around a specific protected characteristic.

Our work with public authorities, particularly around the refresh of gender equality schemes that took place in 2010, suggested that some bodies are struggling to balance an ambition to recognise intersectionality with strand-specific work.

The single public sector equality duty, along with the creation of the EHRC, has been read as a signal that individual strands are now less relevant as a locus of equality work.

From a public body's 2009 equality report:

“[Public body] has chosen an integrated approach to its equality policy and annual report, in recognition of the interrelated nature of the equalities legislation. The validity of this integration has been nationally recognised with the creation of the Equality and Human Rights Commission and with the Government's plans to amalgamate the equalities legislation into a Single Equality Bill.”

This has had somewhat unintended, although anticipated, consequences with regard to delivery.

From a different public body's 2007 report:

“It is therefore envisaged that equality impact assessments will be approached in a holistic way, and that gender will not have separate impact assessments done.”

While producing single equality schemes have been entirely laudable from the perspective of reducing bureaucracy, and providing one clear process around equalities activity, the content has sometimes elided activity in such a way as to functionally ignore structural barriers. For example, a broadly-worded outcome about reducing harassment may require different types of activity around sexual harassment (proscribing the hanging of pornographic calendars in a workshop), disability harassment (providing guidance for reception staff on dealing with disabled people in a way that is not patronising), or harassment on the grounds of sexual orientation (training college staff on challenging

'banter' in the classroom), even if the root principles of dignity and respect are the same.

To tackle the differential impact of workplace culture, pay structures, and working arrangements, requires strand-by-strand analysis, even if this is carried out under the aegis of a multi-strand process. The need to take such an approach should be clearly indicated by the guidance.

The project will welcome the opportunity to comment on the forthcoming guidance, produced by the Equality and Human Rights Commission, on how public bodies can deliver outcomes for all protected groups within activity to comply with the public sector equality duty.

Close the Gap
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