



# **Close the Gap submission to the Equality, Human Rights and Civil Justice Committee call for views on the operation of the Public Sector Equality Duty in Scotland**

**February 2025**

## **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.

The Scottish-specific duties (SSDs) of the public sector equality duty (PSED) are a core focus of our work. We have extensive experience of both policy engagement on the operation and reform of the duties, and delivering support to listed public authorities to enable them to better perform their duties, which comprises both one-to-one support and the production of guidance on the duties as they relate to gender and employment. We welcome the opportunity to submit evidence to the Committee on the operation of the PSED in Scotland.

Together with other third sector organisations, we have long highlighted the poor and declining standard performance of the duties across Scotland's public sector. The current set of duties are not fit for their intended purpose, which is to improve the lives of people with protected characteristics. People who experience structural discrimination and inequality, including women, Black and minority ethnic people, and disabled people, are the majority of those living in poverty and extreme hardship. Those who experience intersecting inequalities are amongst those most acutely affected by the cost-of-living crisis and ongoing austerity.

Reform of PSED has the potential to reposition equality at the heart of public sector operations. Current measures that aim to do this are not driving change at the pace and scale required. We have previously raised concerns about the PSED review process to date, culminating in the proposal put forward by Scottish Government in September 2023. This scaled back significantly on proposals consulted on in 2022,

which twenty-six equalities organisations had already collectively criticised for their lack of ambition.<sup>1</sup>

Whilst proposals have been scaled back, poverty, inequality and access to public services have worsened in Scotland. Concrete action to embed equality in decision-making and to build equalities competence across public bodies is therefore needed more than ever. Instead we have seen equality progressively deprioritised.

A government invests in what it values. Close the Gap believes that Scottish Government must re-engage with PSED reform on a more meaningful basis, and move beyond the minimalist approach it is currently taking.

## Responses to questions

### 1. To what extent do you think that listed public authorities understand the terms and the aims of the PSED in Scotland?

Compliance with PSED is poor, and public bodies' performance thereof has worsened over time from the already low standard evident in the first mainstreaming reports in 2013. It is very likely that part of this can be attributed to a poor understanding of the duties among listed public authorities. It is also important to examine the reasons for this.

It is reasonable to expect that public bodies' competence on and performance of the duties would improve over time, however successive assessments by Close the Gap, other women's organisations, equality organisations, and the EHRC consistently show a decline in performance.<sup>2</sup> It is unacceptable that many public bodies have not acted to improve their understanding of the duties, women's equality or equalities more widely, in the 12 years since they first reported under PSED.

There is no lack of guidance available on PSED: the EHRC has published detailed technical guidance, and 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. It is our view that the main issue with current guidance on the duties is

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<sup>1</sup> <https://www.closesthegap.org.uk/content/resources/PSED-review-equality-stakeholders-common-concerns-April-2022.pdf>

<sup>2</sup> 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*

that many public bodies do not adequately use it to guide their work on the duties, rather than the guidance itself being particularly deficient. Public bodies have had over 12 years to build institutional competence on the technical guidance, however as with performance of the duties as a whole this has not happened.

This lack of action can be attributed to the failure of public sector leadership to make the duties, and equality more broadly, a priority. This is deeply concerning given the first of the Scottish Specific Duties is that listed public authorities must mainstream equality in all of their functions. This is clear evidence that public bodies are unlikely to take action on equality without meaningful accountability for doing so.

Improving duty bearers' understanding of and compliance with the duties requires leaders within Scottish Government and public bodies to be willing to meaningfully engage with the mission of realising equality and human rights, to accept this as a core responsibility of theirs, and to be accountable for implementing mainstreaming.

## 2. Is the PSED in Scotland delivering on its aims to improve outcomes for people with protected characteristics?

The public sector equality duty (PSED), particularly the specific duties on mainstreaming and equality impact assessment, is Scotland's primary regulatory mechanism for ensuring Scottish Government and public bodies are mainstreaming gender and wider equality into all of their functions. Equalities organisations in Scotland have long highlighted the lack of mainstreaming by public bodies, despite this being a legislative requirement for more than a decade. The SSDs are intended to ensure public bodies use equality evidence to shape policy decisions and equality outcomes. However, successive assessments by Close the Gap and equality organisations, along with the Equality and Human Rights Commission (EHRC), have highlighted that this has not been achieved.<sup>3</sup>

Nowhere is this clearer than in policy responses to Covid-19; a key example of the failure of government and public bodies to mainstream equality in decision-making when it was needed most, which exacerbated the disproportionate impact of the pandemic on women, especially those who experience intersecting inequalities such as disabled women, women who are single parents, and racially minoritised women.<sup>4</sup> This failure was driven by years of limited or no investment by duty bearers in the

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<sup>3</sup> Close the Gap (2022) *Close the Gap submission to the Scottish Government Consultation on the Review of the operation of the Public Sector Equality Duty in Scotland*, available at: <https://www.closesthegap.org.uk/content/resources/Close-the-Gap-submission-to-the-SG-consultation-on-the-review-of-the-operation-of-the-PSED-in-Scotland.pdf>

<sup>4</sup> Close the Gap (2021) *One Year On: How Covid-19 is impacting women's employment in Scotland*, available at: [https://www.closesthegap.org.uk/content/covid-19/1617267711\\_One-Year-On---How-COVID-19-is-impacting-womens-employment-in-Scotland.pdf](https://www.closesthegap.org.uk/content/covid-19/1617267711_One-Year-On---How-COVID-19-is-impacting-womens-employment-in-Scotland.pdf)

development of intersectional gender competence and action to embed equality in their functions. While PSED has created a framework for action on inequalities, including women's inequality in employment, government and public bodies have consistently failed to take the necessary action to deliver meaningful change.

Public bodies have taken an increasingly homogenised approach to the duties, treating protected characteristics in an undifferentiated way, and neglecting the specific disadvantage and discrimination faced by women. The impact is that focus on women and the inequalities they face has become increasingly diluted, with any gender analysis harder to see. Close the Gap has seen little evidence of mainstreaming or of substantive work to deliver equality outcomes. Mainstreaming reports frequently present a Panglossian picture of work on equality within public bodies that is at odds with the lack of progress there has been in performing the duties.

At present public bodies are required to gather, analyse, and use employee data as part of the SSDs; however they often fail to get beyond the gathering stage, resulting in unutilised data that could be used to improve outcomes for women and other marginalised groups. For example, analysis by Close the Gap found that in 2023, 82% of public bodies published a pay gap of over 5%, and only 9% of these had published an equality outcome or action that addressed its causes. Many public bodies are also still not gathering the data mandated by the duties, for example in 2023, only 38% of public bodies had published their occupational segregation information as required by the duties. A further 29% of public bodies had published this data in part, one third of public bodies failed to publish any data at all.<sup>5</sup> The failure to meet even the most straightforward of the duties is therefore widespread.

#### *Key drivers of listed public authorities' poor performance of the PSED*

Leadership and accountability are two essential conditions for effective compliance with the duties. The third is investment. These are deeply interconnected, and they have been absent. The lack of resource and investment that has been allocated to work on equality and human rights, and women's equality and rights specifically, is a direct result of a lack of prioritisation by leaders in government and the wider public sector. This failure of leadership is enabled by an absence of accountability: there is no imperative for leaders to devote resource to this work, in increasingly straitened times, when there are no consequences for not doing so.

Close the Gap works extensively with public bodies, and it is our experience that leaders often seek to dilute action on equality in their organisations, for example by agreeing equality outcomes that their organisation has already met and by ignoring

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<sup>5</sup> Close the Gap briefing on the PSED gender pay gap duty (Forthcoming)

the recommendations of their equality leads. The statements made by public body executive officers in their PSED reports frequently present a rosy picture of the performance of their organisations, despite these reports showing a clear lack of action or progress. This demonstrates not only complacency but also obstruction to engaging substantively with equality work.

Senior leaders set the culture of an organisation, decide how resources are distributed, and are responsible for ensuring their organisation meets their legal obligations. If a senior leader made PSED a priority in their organisation, it is reasonable to conclude that this would improve performance. Where the senior leaders of public bodies prioritise image and other areas of work perceived to be more important, progress on tackling women's labour market inequality, wider inequalities, and discrimination will be significantly constrained.

3. Do you think the Scottish Government's proposed reforms will assist listed authorities in embedding an equalities focus and in turn improve outcomes for people with protected characteristics?

No, we do not. The poor standards of compliance with PSED were a key driver for Scottish Government commitments to reform the duties. However, despite the wealth of evidence that substantive reform is a necessity, these commitments have progressively diminished in scope and ambition, with only two minor reforms to the duties being proposed. This is a significant departure from the original proposals in the public consultation in 2022, which were themselves criticised as lacking in ambition and scope.<sup>6</sup> The current proposals for reform fall far short of what is required to secure improvement, and do not represent a solution to the most stubborn problems with public bodies' performance of the duties.

Concerningly, rather than work constructively to improve duty bearers' performance of PSED, a narrative has developed which asserts that the duties, mainstreaming, and equality impact assessments do not work, therefore there is no point in pursuing reform. It is not that they do not work but rather they have been ineffectively done, or not done at all, for more than a decade because of a lack of prioritisation, investment and competence.

The case for positive reform of the duties has been further undermined throughout engagement on PSED reform, as action on equality has been framed by Scottish

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<sup>6</sup> Close the Gap (2022) *Close the Gap submission to the Scottish Government Consultation on the Review of the operation of the Public Sector Equality Duty in Scotland*. Available at: <https://www.closesthegap.org.uk/content/resources/Close-the-Gap-submission-to-the-SG-consultation-on-the-review-of-the-operation-of-the-PSED-in-Scotland.pdf>

Government, and other public bodies, as a “resource burden”. This sends a strong message to public bodies that equality and human rights are not a priority, and that it is acceptable to devote minimum resources to the task. This messaging is a clear example of a lack of leadership from Scottish Government that raises significant questions about its commitment to equality and human rights. The systematic rolling back of PSED reform proposals suggests a cultural resistance to the prioritisation of, and adequate investment in, equality within Scottish Government and the wider public sector.

It is critical that Scottish Government revisits and use the reform of the duties, and wider action to improve performance, 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.

Scottish Ministers must be at the forefront of improved and improving action to meet the duties. This includes prioritising the resources necessary to perform PSED effectively within Scottish Government, alongside resourcing a substantive programme of support for public bodies to improve performance in their own organisations. If Scottish Government leaders fail to materially and visibly prioritise action to meet the duties, other duty bearers will follow suit.

### *National Advisory Council on Women and Girls*

In 2020, the First Minister’s National Advisory Council on Women and Girls (NACWG) made specific recommendations to Scottish Government calling for additional duties to be placed on public bodies as part of the PSED review. These were that public bodies should be required to gather and use intersectional data, including employment and service user data, to advance equality between protected groups, including men and women; and integrate intersectional gender budget analysis into their budget setting procedures. The NACWG is undertaking accountability and scrutiny work on the implementation of its recommendations by Scottish Government, and is currently scrutinising the implementation of the recommendations on PSED duties, which have yet to be implemented.<sup>7</sup> As part of

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<sup>7</sup> National Advisory Council on Women and Girls (2024) *The Third Focus of Scrutiny: Addressing gender inequality through the lens of care*, available at: <https://www.generationequal.scot/news/the-third-focus-of-scrutiny/>

this, NACWG has published evidence from a stakeholder roundtable<sup>8</sup> held with women’s equality organisations, anti-poverty organisations, trade unions and other civil society organisations to examine the effectiveness of the duties in relation to advancing equality for women, especially those who are most marginalised, in relation to childcare, social care and unpaid care. The evidence from these organisations highlights that PSED “is not delivering what it was created to do”, that current practice by public bodies is described as tickbox rather than taking action to tackle inequality. It is noted that the inadequacies in the delivery of social care and childcare, and support for unpaid carers act as examples of how PSED fails to recognise the reality of gender inequality.

#### 5. How effective do you think the Equality and Human Rights Commission is at regulating public authorities’ performance against the PSED?

The Equality and Human Rights Commission’s PSED compliance oversight has been increasingly under-resourced and therefore ineffective. Since its establishment in 2007, the Commission’s budget has been cut significantly from £70m to £17.9m in 2023-2024.<sup>9</sup> Even if their budget had stayed at £70m this would represent a significant real-terms cut due to the impact of inflation.

The result of this under-resourcing has been a diminishment in the Commission’s PSED compliance work. The Commission’s current workplan states that, on PSED compliance, its focus is on strengthening the use of the duties in health and social care settings. This included work in Scotland to assess the performance of IJBs, which found significant gaps in their performance.<sup>10</sup> This extremely narrow focus is insufficient to drive the level of change needed in PSED compliance across the public sector.

There is a need to consider what other accountability levels are available to improve public bodies performance of the duties. While the Scottish Government does not have enforcement powers on PSED, it does have the power improve the accountability of public bodies by using its powers under the duties more effectively. For example, Scottish Government could use regulation 11 to direct public bodies to set leadership objectives to drive action and accountability on performance of the duties. An additional or alternative mechanism for this could be Ministerial letters of

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<sup>8</sup> National Advisory Council on Women and Girls (2024) *Third Focus of Scrutiny Stakeholder Roundtable Reflections*, available at: <https://www.generationequal.scot/news/third-focus-of-scrutiny-stakeholder-roundtable-reflections/>

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<https://www.equalityhumanrights.com/sites/default/files/2024/Equality%20and%20Human%20Rights%20Commission%20Annual%20Report%20and%20Accounts%202023-2024.pdf>

<sup>10</sup> <https://www.equalityhumanrights.com/sites/default/files/consultation-response-a-national-care-service-for-scotland-26-october-2021.docx>

guidance. While these do not have legal standing in the same way as the SSDs, they do carry significant weight. Failure to adhere to ministerial guidance can result in risks to funding and reputational harm. Ministers may also hold public bodies accountable through oversight mechanisms, especially where funding, appointments, or other resources are tied to performance. 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.

Scottish Government could also improve performance by creating a programme of capacity building on the duties for listed public authorities, ensuring this is substantive and properly resourced.

A government invests in what it values. Close the Gap believes that Scottish Government must re-engage with PSED reform on a more meaningful basis, and move beyond the minimalist approach it is currently taking.