

Review of the Operation of Public Sector Equality Duty (PSED) in Scotland

Introduction:

As you may be aware, as per commitments by Scottish Ministers work has been progressing on the review of the effectiveness of the PSED regime in Scotland. Work to date has included intensive programme of engagement with equality stakeholders and duty bearers to understand which aspects of the PSED were working well, and where improvement was required. Whilst substantive work was reduced in order to respond to the pandemic thinking continued and following a meeting with Ministers the decision was taken to recommence the review via a two-stage process.

A stage one report, setting out the learning from the engagement programme, reflection of equality mainstreaming over COVID-19 pandemic and key improvement proposals was [published on 24 March 2021](#).

Stage two – this stage – will now involve a programme of further engagement and consultation to progress the areas of focus identified in the stage one report. This questionnaire is a key part of this process and will provide an opportunity for you as duty bearers to shape the way ahead. We would therefore invite you to consider the proposals and questions that follow and to provide your answers by Friday 20th August.

Thank you for your support to the review.

IMPROVEMENT PROPOSAL 1	RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND	INFORMATION
Making better use of evidence and data	<p>Links across many of the regulations including:</p> <ul style="list-style-type: none"> - Regulation 5 – assessing and reviewing policy and practices; - Regulation 6 – gather and use employee information. <p>Key part of mainstreaming strategy and a Scottish Government equality outcome.</p>	<p>The Scottish Government in conjunction with key stakeholders are in the process of establishing an Equality Data Improvement Programme (EDIP) which will be designed to improve and strengthen data on the protected equality characteristics collected and utilised across the public sector. This programme will run for the next 18 months, to late 2022. We intend to use the Equality Data Improvement Programme to drive and co-ordinate improvement in this area.</p>

Questions:

- 1.1 In your view, which elements of the proposed programme are most important for driving improvement?
- 1.2 Are you aware of other public sector equality networks that this programme could link with?
- 1.3 Are there any additional actions, outwith the EDIP, that you believe would improve the quality of and use of evidence and data?

Answers:

- 1.1 We recognise the importance of all elements.
 - 1.2 We are aware of the NDPB Equality Forum network and organisations such as Close the Gap, Disability Confident, Stonewall and Inclusion Scotland.
 - 1.3 As an employer, Audit Scotland often uses data from <https://scotland.shinyapps.io/sg-equality-evidence-finder/> to benchmark employee data for analysis. It would be helpful to see data for the Scottish working population against all of the characteristics as well as the complete population.
- We are pleased that the Equality Evidence Strategy included commitments to looking for important intersectional evidence gaps, for example in relation to disabilities (including acquired disabilities). We also note that we await the output of the Working Group on Sex and Gender in Data, which may have a bearing on this question.

IMPROVEMENT PROPOSAL 2	RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND	INFORMATION
Strengthening participatory policy making: hearing lived experience	<p>Links across many of the regulations including:</p> <ul style="list-style-type: none"> - Regulation 4 – publish equality outcomes and report progress; - Regulation 5 – assessing and reviewing policy and practices. <p>Key part of mainstreaming strategy and a Scottish Government equality outcome.</p>	Regulation 4 (setting equality outcomes) states that listed bodies “must take reasonable steps to involve persons who share a relevant protected characteristic and any person who appears to the authority to represent the interests of those persons.” Regulation 5 (assessing and reviewing policies and practices) states: “In making the assessment, a listed authority must consider relevant evidence relating to persons who share a relevant protected characteristic (including any received from those persons)”.

Questions:

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

Answers:

Although Audit Scotland and the Accounts Commission are not policy making bodies, our public reporting on inequalities and human rights issues seeks to support effective strategic decision-making by public bodies to help them to address inequalities and protect human rights. We are committed to reflecting the experience of service users in our audit and reporting and we will support public bodies to focus their efforts on the areas that will have the most impact. We are very conscious, however, of the challenges in matching our resources with reporting effectively on such diverse needs and experiences of different communities (which can also be in conflict). Proportionality is an important principle that we need to apply. Such challenges affect all public bodies.

See our response to question 3 for more detail.

IMPROVEMENT PROPOSAL 3	RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND	INFORMATION
Improving the links between equality and human rights frameworks	Key aspect of equality and human rights mainstreaming strategy	The Scottish Government recognises the strong links between current equality and human rights frameworks and is committed to building a more integrated approach towards embedding equality and human rights in policy and delivering for the people of Scotland. While this is outwith the scope of the SSD regime, we will be using the equality and human rights mainstreaming strategy to drive improvement in this area.

Questions:

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

Answers: 3.1 and 3.2

Strengthening communications about the inextricable links between human rights and the PSED would be beneficial. This would help to emphasise – and aid understanding of - their complementary aims. It would also highlight the importance of considering them together, rather than regarding them as separate areas for examination. For example, there will be significant benefit in ensuring a read-across between this work and ongoing work by the Scottish Government on human rights legislation.

There is scope for our audit work to build understanding and knowledge. Our public reporting on inequalities and human rights issues seeks to support effective strategic decision-making by public bodies to help ensure they address inequalities and protect human rights.

For the Accounts Commission, reporting of councils' and IJBs' duty of Best Value is at the core of our work. To this end, it is helpful that the revised Best Value statutory guidance published in 2020 has fairness and equality as a cross-cutting theme, with its particular requirement on bodies that "equality, diversity and human rights are embedded in (their) vision and strategic direction and throughout all of (their) work, including (their) collaborative and integrated community planning and other partnership arrangements. It is important to note the benefit in this being a cross-cutting theme, thus applying to all other aspects of the Best Value duty such as leadership, governance, working in partnership and engaging with and empowering communities.

We are also mindful of the potential of councils using their power of wellbeing, which allow them to consider anything likely to promote or improve the well-being of its area, persons in that area, or both of these.

Our audit-focussed [equality outcome](#) for the period 2021-25 states that *‘our work supports the public sector to address inequalities including protected characteristics and socio-economic disadvantage, and to protect human rights’*, emphasising that human rights and equalities considerations must be central to how we assess the delivery of public services. In support of this,, we have commenced activity to build our knowledge and understanding of the Human Rights Based Approach.

In our [Mainstreaming Equality and Equality Outcomes Progress Report 2019–21](#) we highlight examples of how public bodies are meeting the diverse needs of all citizens and communities. We also provide insights into the improvements public bodies need to make to meet their equality duties. In doing so, we are seeking to inform what action is needed to help reduce inequalities within our society.

A core principle of the joint work programme of the Accounts Commission and the Auditor General for Scotland commits us to ensuring that the experience of service users is reflected in our audit and reporting will help us to shine a light on the most important issues, supporting public bodies in Scotland to focus their efforts on the areas that will make the most difference to our lives.

The reports we produce will continue to consider how Scotland’s public bodies address human rights and inequalities within their own organisations and where gaps exist. We want our work programme to reflect wide-ranging aspects of human rights and inequalities, such as relating to disabilities or children with additional support needs. We are also considering carefully links with socio-economic inequality. We will work with other scrutiny bodies and external stakeholders to maximise our collective impact.

To ensure continuous improvement, we will develop our approach to capturing learning in real time and factoring that into our action planning. A flexible joint work programme between the Accounts Commission and the Auditor General for Scotland - that takes account of inequalities and human rights risks and issues - will allow us to respond more effectively to the prevailing context.

IMPROVEMENT PROPOSAL 4	RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND	INFORMATION
Strengthening leadership and resourcing	Key aspect of equality and human rights mainstreaming strategy	The Scottish Government recognises the importance to strengthen leadership and adequate resourcing on equality across the public sector. While no regulatory changes are envisaged for this improvement proposal, we would welcome views on how this could be better achieved.

Questions:

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

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

Answers:

4.1 For the reasons stated in response to question 8, we note the potential disadvantages to extending the regulatory framework.

4.2 Throughout this response we have highlighted ways in which understanding of the regime and its practical application might be enhanced. Such activity will help to demonstrate that effective leadership and appropriate resourcing are both critical to delivering the desired outcomes.

It will also remain important that public sector bodies assess and review their organisational development activity on an ongoing basis to ensure that leadership on equality is a central tenet.

IMPROVEMENT PROPOSAL 5	RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND	INFORMATION
Reducing bureaucracy	Links across many of the regulations, but mainly relevant including: <ul style="list-style-type: none"> - Regulation 3 - report progress on mainstreaming the equality duty; - Regulation 4 - publish equality outcomes and report progress. 	The Scottish Government is keen to consider ways in which to enhance the regime in ways that lessen burden, and support public authorities to get the best possible value out of their engagement with the regime in a way that prioritises delivering meaningful outcomes and impacts rather than processes.
<p>Questions:</p> <p>5.1 What do you feel drives the feeling of the bureaucracy of the SSD regime?</p> <p>5.2 What would be the best method of reducing the bureaucracy of the regime while ensuring the regime still prioritises meaningful outcomes and impacts?</p>		
<p>Answers:</p> <p>5.1 Building public sector bodies' understanding of the regime will support them to apply good judgement about what information will most meaningfully contribute to its aims. In turn, this may reduce the focus on process and associated feeling of bureaucracy.</p> <p>5.2 Current reporting deadlines might limit the scope for public bodies to fully integrate PSED reporting into their annual reporting timelines. In turn, this could impact the time and resource allocated to activity in support of the PSED. There may be scope to consider how greater flexibility on publication dates could support alignment with other reporting activity. A further example of where flexibility may have benefitted Duty Bearers relates to the resourcing issues resulting from the Covid-19 pandemic.</p> <p>Promoting a focus on impact/outcomes rather than actions – including in terms of what is reported – would reduce the reporting burden and enhance the value of relevant reports.</p>		

IMPROVEMENT PROPOSAL 6	RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND	INFORMATION
Increasing clarity re: coverage, proportionality, and process	Relevant across most regulations.	One of the aims of the Scottish Government's review of the operation of the PSED is to increase the clarity of the SSD regime, particularly around coverage, proportionality and process.

Questions:

6.1 How could the clarity of the regime be improved?

6.2 How could the proportionality of the regime be improved?

Answers:

6.1 See our responses throughout this document which focus on the role of public audit and action which might support understanding and consistency of approach, including the use of case studies and engagement with existing public sector equality groups.

Focussing on identifying ways in which public sector bodies can learn from one another/develop shared approaches would support understanding of the regime and its practical application. Such an approach would also support an effective balance between assurance and improvement.

6.2 One proportionality consideration might be the size of organisations which are subject to the regime. A more tailored approach could support smaller bodies to provide the most impactful responses possible. Areas which may benefit from flexibility include the nature of the 'output' required of smaller public sector bodies as well as associated reporting timescales.

Capacity and supporting resources may be a particular challenge for smaller organisations. So, there may be benefit in considering the scope to enhance the range of centrally held reference materials which can be accessed by Duty Bearers. This would also support consistency of approach.

Questions:

6.3 How can smaller listed authorities be supported to meet the duties under the SSDs?

6.4 How could the process for adding new bodies to the Regulations be improved?

6.5 Would consolidating all previous sets of regulations into one new set improve the clarity of the regime?

Answers:

6.3 Points highlighted in relation to **6.1** will be relevant in terms of supporting smaller listed authorities to apply the current regime. Shared outcomes (per question **9**) would also be a positive step by supporting bodies to collaborate and share the load.

6.4 When new bodies are being designated as Duty Bearers, it would be helpful if they were notified of the applicable regulations under the PSED regime. Proactively connecting them with representatives from well-established listed bodies could support them to develop mechanisms through which to meet their obligations. See also, response to point **6.1** above.

6.5 In principle, consolidation would seem a positive step towards streamlining the regime, thus supporting clarity and shared understanding. It would help to reduce the risk of misunderstanding which can arise from amending regulations, rather than repealing and passing new ones.

Any legislative change would also provide a good 'promotion' opportunity across the public sector and beyond.

IMPROVEMENT PROPOSAL 7	RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND	INFORMATION
Improving support and capacity building & improving the understanding of and approach to mainstreaming	Relevant across most regulations	The Scottish Government is keen to work with stakeholders improve support and capacity building under the PSED regime, including improving the understanding of and approach to mainstreaming.

Questions:

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

Answers:

7.1 and 7.3 There may be scope to enhance [this](#) 'landing page' to help users navigate the available information.

Provision of example templates might help to support a consistent and proportionate approach to reporting across the public sector.

7.2 A focus on bringing the theory to life will help organisations to understand what they can do to support mainstreaming activity. Case studies which capture positive examples, share insights into challenges and capture related learning would be one way of doing so. Other shared learning opportunities, such as facilitated events, would also help to build knowledge and understanding. (See answer to questions 3 and 6).

Maximising engagement with existing public sector equalities groups - including the NDPB Equality Forum - would provide opportunities to discuss the statutory requirements and share learning to enhance understanding and support consistency.

IMPROVEMENT PROPOSAL 8	RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND	INFORMATION
Improving the cohesiveness of the regime	Relevant across most regulations	The SSD regime should be seen as a suite of interconnected duties which collectively help public authorities to better perform the PSED.

Question:

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

Answer:

Our responses to the various questions within this document provide insights into what might be done to help public sector bodies apply the existing legislation in the most impactful way possible.

There are risks associated with adding to existing statutory provisions, in terms of volume of information and the resourcing/scheduling challenges associated with ensuring that these remain current/relevant (not least due to the busy Parliamentary schedule).

Where necessary, use of statutory and non-statutory guidance would provide greater flexibility than legislative change, while still achieving a reasonable degree of status and emphasis.

IMPROVEMENT PROPOSAL 9	RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND	INFORMATION
Consider new approaches to outcome setting, including the setting of shared outcomes	Regulation 4 - publish equality outcomes and report progress.	n/a
<p>Question:</p> <p>9.1 Do you support the principle of shared outcomes? In your view, how they would be set and implemented; and how could an improved regulatory regime support this?</p>		
<p>Answer:</p> <p>Such an approach would help to promote collaboration and support strong alignment across the public sector, both of which are critical to maximising public sector bodies' collective impact. It would also help underline the spirit and intended impact of community empowerment and community planning duties on public bodies, who are expected to work together and with communities to deliver improved outcomes for those communities. These duties are important to the Accounts Commission in holding local government to account by reporting their progress against improving outcomes.</p> <p>This needs to be balanced, however, with ensuring that there is clear responsibility and accountability to balance the risk of ownership being 'diluted' or unclear with resultant negative impacts on delivering outcomes.</p>		

IMPROVEMENT PROPOSAL 10	RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND	INFORMATION
Support the gathering, use and reporting of a wider range of employee data	<p>Regulation 6 – Duty to gather and use employee information</p> <p>Regulation 7 – Duty to publish gender pay gap information</p> <p>Regulation 8 – Duty to publish statements on equal pay etc.</p> <p>New regulations also required.</p>	In their manifesto, the SNP committed to expanding “the specific duties that require a listed public authority to publish gender pay gap information to disability and ethnicity reporting and ensure these are included within equal pay statements.

Questions:

- 10.1 Could the regulation on “gathering and using” employee information be strengthened?
- 10.2 Is there anything we have learned from practice and compliance with the existing regulation on gender pay gap reporting that we can apply to proposed new duties on ethnicity and disability pay gap reporting?
- 10.3 How can we ensure that pay gap reporting is carried out in a consistent way across the public sector, so that different methods are not used and reports are easier to compare?

Answers:

Regulation 6 could detail what the “composition of the employees” should include as a minimum.

Gender pay gap reporting guidance is available via ACAS, CIPD, Gov.uk, Close the Gap and many more avenues online. If the regulations could direct public bodies to one authority for guidance and calculation methods this may help. A basic report template could also be provided to ensure consistency in how the gender pay gap is reported for easier comparison.

In future the same principle for one template and guidance note might be helpful for disability and ethnicity reporting.

With the Gender pay gap reporting we carry this out when a body has more than 150 employees in the Public Sector. Everyone has a gender and so organisations are able to include all employees in the report.

Not everyone though has a disability and the number of those declaring one can be small for many organisations. On that basis, the reporting might be minimal. Should the basis for reporting change if, for example, a certain % of an organisation’s workforce has declared themselves disabled?

IMPROVEMENT PROPOSAL 11	RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND	INFORMATION
More effectively leverage purchasing power in procurement processes	Regulation 9 - Duty to consider award criteria and conditions in relation to public procurement	n/a

Question:

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

Answer:

It may be helpful for additional guidance around 'due regard' in the regulation. Careful consideration would be required here to support the policy intention while at the same time balancing that with other relevant policies and legislation. Considerations might include:

- Legislation – including:
 - the legal requirements on potential suppliers (for example noting the differences between the public sector and private sector suppliers)
 - whether any changes may be required to the [Procurement Reform Scotland Act 2014](#)
- Policy intent – balancing the equality related requirements with the policy objectives around encouraging diversity in the market and ensuring SMEs are not 'ruled out' of tendering for contracts
- Practicalities - careful consideration would be required around how this would work in practice at key stages in the procurement process (including how supplier's commitment to equalities is assessed and validated)

IMPROVEMENT PROPOSAL 12	RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND	INFORMATION
Enhance the accessibility of PSED related publications, and consider the scope of the SSDs to advance progress on inclusive communication more generally	New regulation required and also relevant to Regulation 10 - Duty to publish in a manner that is accessible, etc.	In their manifesto, the SNP committed to using the SSD regime to “place a duty on those public bodies that communicate with the public to ensure they have accessible, inclusive communications” and developing “national guidance for public bodies on inclusive communication”.

Questions:

12.1 What would you like to see this duty achieve?

12.2 What support is required for public bodies to improve practice on inclusive communication

12.3 What are the barriers to improving inclusive communication within the public sector?

Answers:

12.1 At a high level, enabling citizens and service users, and other stakeholders with relevant interests, to be able to access, understand and use public information in a straightforward manner, regardless of any potential barriers, and for public bodies to be clear on what is required.

At an operational level, public bodies having clear, detailed understanding and no ambiguity about what they need to do in order to achieve the aims of the Duty and to be fully compliant.

It would be helpful to have assurance that the PSED aligns with, and is in no way contradicts, the UK Parliament’s [The Public Sector Bodies \(Websites and Mobile Applications\) \(No. 2\) Accessibility Regulations 2018](#), as Scottish public bodies must comply with both. The UK legislation has resulted in significant workload to ensure we’re fully compliant.

12.2 Clear guidance, including specific detail on how to comply, and expert advice/support and practical case studies. Learning events and other centrally-held resources, including representatives of people with relevant conditions/disabilities and other barriers such as ESL to consult with and provide feedback and testing.

12.3 Most relevant software hasn’t fully caught up (eg, Adobe Creative Cloud applications, including most notably InDesign). Lack of clarity on requirements and good practice. Time. Also, from an aesthetic and creative point of view, most accessibility standards run counter to appealing visual design.

IMPROVEMENT PROPOSAL 13	RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND	INFORMATION
Explore how best to use the duties relating to Scottish Ministers	<p>Regulation 6A - Use of member information</p> <p>Regulation 11 - Duty to consider other matters</p> <p>Regulation 12 - Duty of the Scottish Ministers to publish proposals to enable better performance</p>	n/a
<p>Question:</p> <p>13.1 How could the duties under regulations 6A, 11 and 12 be strengthened and/or improved?</p>		
<p>Answer:</p> <p>Regarding Regulation 11, defining what is meant by ‘other matters’ may support public bodies to direct their attention appropriately, and support consistent interpretation/application.</p> <p>We have no other specific comments in terms of how the relevant regulations could be strengthened or improved.</p> <p>As with any other change to reporting requirements, it will be relevant to consider the potential impact on Duty Bearers (see also, comments in response to proposal 5 above).</p>		

END OF QUESTIONS