**Review of the Operation of the Public Sector Equality Duty in Scotland: Learning from Mainstreaming Equality during the Covid-19 Pandemic**

**March 2021**

***Ministerial foreword***

The Covid-19 pandemic has created unprecedented challenges for the public sector in Scotland. It has exposed deep-rooted structural inequalities in our society and exacerbated inequality through a disproportionate impact on individuals and groups who already experience structural disadvantage.

The Public Sector Equality Duty (PSED) has its origins in the race equality duty which was created in the wake of the 1999 Macpherson Inquiry, and which followed a racist murder which was poorly investigated, exposing institutional prejudice in certain public authorities. The race equality duty was followed by the disability equality duty and the gender equality duty.

The PSED was envisioned as a means of addressing those systemic inequalities related to race, sex and disability, and also those related to the other protected characteristics under the Equality Act 2010 (the Act); the Duty was created under section 149 of the Act and was intended to prompt public authorities to dismantle discriminatory practices in their systems and processes, and to actively promote equality within and between protected groups. It was always conceived as a positive duty, to shift the tide away from responding to individual cases of discrimination towards creating a culture of positively promoting equality.

However, we know that despite significant efforts to comply with the PSED and an increasing commitment across the public sector to equality and human rights, outcomes for people who share protected characteristics are still not where they should be. Inequality persists. We are not seeing progress go as far and fast as is needed to realise the ambition in the National Performance Framework (NPF) that we protect, respect and fulfil human rights and live free from discrimination. Now that this ambition is translated into a specific NPF outcome, it is right that we take stock and reflect on what needs to change to ensure our ambitions are better realised.

Scottish Ministers committed before the pandemic to reviewing the effectiveness of the PSED regime in Scotland, but this work was disrupted, with officials fully focussed on embedding equality and rights into our Covid-19 response, recovery and renewal work. However, an intensive period of seeking to mainstream equality in policy and practice during the Covid crisis has taught us much about how the PSED works, and added to the body of evidence we already have from previous and ongoing stakeholder engagement and research.

This report brings together that thinking and draws some initial conclusions, as a first stage of the review process, and suggests areas of focus for the next stage. Stage two is planned to take place later in 2021, subject to the views of Ministers after the upcoming election. It will form part of an underpinning programme of work around a new mainstreaming equality and human rights strategy. Stakeholder views on this report will be most welcome.

I want to see a Scotland that is inclusive, a Scotland that is a safe and prosperous place to live, a Scotland that recognises the value of and celebrates the diversity of its people, and where we protect, respect and fulfil human rights and live free from discrimination. By strengthening the PSED regime we can achieve that ambition.

**Shirley-Anne Somerville**

**Cabinet Secretary for Social Security and for Older People**

|  |  |
| --- | --- |
| **Contents**   1. [What is the Public Sector Equality Duty?](#WhatisPSED) 2. [Scope of the review of the operation of PSED](#ScopeOfReview) 3. [Stakeholder engagement](#StakeholderEngagement) 4. [Other evidence and research](#OtherEvidence) 5. [Findings](#Findings)   [**5.1 Cross cutting issues**](#Crosscutting)  5.1.1 Making better use of evidence and data  5.1.2 Strengthening participatory policy making: hearing lived experience  5.1.3 Improving the links between equality and human rights frameworks  5.1.4 Strengthening leadership and resourcing  5.1.5 Reducing bureaucracy  5.1.6 Increasing clarity re: coverage, proportionality, and process  5.1.7 Improving support and capacity building  5.1.8 Improving the cohesiveness of the regime  [**5.2 Findings related to particular duties**](#ParticDuties)  5.2.1 Mainstreaming  5.2.2 Outcome setting  5.2.3 Assessing policies  5.2.4 Gathering and reporting data  5.2.5 Procurement  5.2.6 Publishing in accessible manner  5.2.7 Duties relating to Scottish Ministers     1. [Interim conclusions](#InterimConclusions) 2. [Next steps](#NextSteps) 3. [Contact information](#ContactInfo) 4. [Bibliography](#BiblioRefs) | Page 4  Page 5  Page 6  Page 8  Page 8  Page 8  Page 16  Page 28  Page 29  Page 30  Page 30 |

***1. What is the Public Sector Equality Duty?***

**The general duty**

The Public Sector Equality Duty (henceforth referred to as the PSED or the general duty) is a duty on public bodies, and those carrying out public functions, which was created by section 149 of the Equality Act 2010 (the Act)[[1]](#footnote-1), and came into force in April 2011. The PSED replaced the race, disability and gender equality duties which had been created to shift the onus from individuals to organisations, placing for the first time obligations on public authorities to positively promote equality, not merely to avoid discrimination. The PSED was developed in order to harmonise the equality duties and to extend them across all the protected characteristics under the Act.

The PSED obliges public authorities, and those carrying out certain public functions, to have due regard, when exercising their functions, to the need to:

1. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
2. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
3. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

These 3 needs of the PSED, as set out in section 149, are known as the general duty. The Act created powers for devolved administrations and governments to develop specific duties, to support the achievement of the general duty.

**The Scottish Specific Duties**

Although the Act is largely reserved to the UK Parliament, Scottish Ministers have the power (under section 153 of the Act) to supplement the general duty by placing specific duties on certain Scottish public authorities.

The delivery of the PSED in Scotland is thus advanced by a suite of Scottish Specific Duties (SSDs), created by regulations made by Scottish Ministers (the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012) (as amended) (the SSD Regulations).

The SSDs are intended to provide a supporting framework to enable certain public authorities to better perform their PSED, through enhanced data collection and evaluation, and greater transparency and accountability. In this way, the specific duties help authorities to better perform their duty to have ‘due regard’ to the 3 needs of the PSED.

The SSDs were intended, when they were designed, to have three principal benefits:

* to help public authorities to better understand how they should respond to the general duty at section 149(1) of the Act;
* to help public authorities take account of evidence gained through the setting of equality outcomes and the evaluation of progress made on these; and
* to allow the wider community to monitor (and where appropriate challenge) the performance of public authorities in relation to the PSED.[[2]](#footnote-2)

There are ten specific duties set out in the SSD Regulations. These are:

1. Regulation 3 - Duty to report progress on mainstreaming the equality duty
2. Regulation 4 - Duty to publish equality outcomes and report progress
3. Regulation 5 - Duty to assess and review policies and practices
4. Regulation 6 - Duty to gather and use employee information
5. Regulation 7 - Duty to publish gender pay gap information
6. Regulation 8 - Duty to publish statements on equal pay, etc.
7. Regulation 9 - Duty to consider award criteria and conditions in relation to public procurement
8. Regulation 10 - Duty to publish in a manner that is accessible, etc.
9. Regulation 11 - Duty to consider other matters
10. Regulation 12 - Duty of the Scottish Ministers to publish proposals to enable better performance.

The SSD Regulations came into force on 27 May 2012 and have been subsequently amended. Many of the specific duties require information to be reported upon and published on a reporting cycle of either two or four years. As some listed authorities have become subject to the specific duties at different times, the cycles on which they report are different.

***2. Scope of the review of the operation of PSED in Scotland***

Scottish Ministers have committed to reviewing the operation of the PSED in Scotland, which in effect means reviewing

* the effectiveness of the SSDs, for which the Scottish Parliament has legislative competence; and
* the implementation environment for the PSED in Scotland; in recognition of the fact that regulations alone do not deliver equality, but that factors such as leadership, capacity etc. are critical.

This report represents stage one of a two stage process. It brings together what we know already about the PSED regime, and particularly what seeking to discharge the PSED during the Covid-19 pandemic has taught us about the regime. It reaches some interim conclusions and discusses next steps. These will then inform the development of a comprehensive equality and human rights mainstreaming strategy, which will be an important element in the Scottish Government’s equality journey.

This review does not consider the scope of the general PSED as set out in section 149 of the 2010 Act, as that is a matter reserved to the UK Parliament.

There have now been two full cycles of SSD related activity in Scotland: activity related to the 2013-2017 cycle, and activity related to the 2017-2021 cycle, and so there is much experience to draw on in reviewing which aspects of the regime are effective.

The SSD Regulations comprise an important framework for delivering equality in Scotland across the public sector. Whilst there is much to be done to strengthen the framework, the regime also has considerable strengths. The general PSED has been in place for a decade, and is well known; it has provided a positive narrative and helped to create a landscape in which to develop equality. The PSED has raised awareness across all sectors of the need to tackle inequality and to foster good relations, and has provided a structure by which to gather equality data.

Further positive aspects of this regime are that the SSDs have been successful in raising further the awareness of the PSED and collectively have contributed to public authorities’ thoughts about how they can mainstream equality into their organisations; and public bodies have developed processes and approaches which can be built on in future. There is extensive guidance[[3]](#footnote-3) about both the general PSED and the Scottish specific duties, developed and published by the Equality and Human Rights Commission (EHRC), which is both clear and relevant, although perhaps not always used to the extent it could be. During the Covid-19 crisis, the PSED and the SSDs provided useful leverage to keep equality concerns high on public authorities’ agendas or to bring those concerns more sharply into focus where that was needed.

It is for that reason that this report suggests focussing on a pragmatic, evidence-led reform programme, which offers a balance of continuity, by building on and strengthening the current framework, and change, by amending those aspects of the regime which are currently not fully working as envisaged. We propose to take an iterative approach; retaining some of the SSDs, amending some to change their focus and increase clarity of purpose, and consolidating them. We wish to explore, with stakeholders, the possible value of developing new or streamlined guidance and new approaches to capacity building around the retained and redeveloped SSDs.

In all of our thinking about the review we have considered the need both to get the regulatory regime that drives equality right, but also the need to improve the implementation environment. This twin track approach will deliver the real changes for Scotland’s people to which we are committed.

***3. Stakeholder engagement***

Equality stakeholders have played and will continue to play a pivotal role in this review. Likewise, duty bearers can and do tell us much about what works and what is less effective in terms of the PSED regime. Stakeholder evidence has shaped the thinking and conclusions in this paper, as has the Scottish Government’s own experience as a duty-bearer.

The First Minister’s National Advisory Council on Women and Girls (NACWG) has been instrumental in highlighting areas of improvement and providing momentum for improving equality and human rights mainstreaming, particularly within the Scottish Government. Their recommendations have facilitated the establishment of the Directorate for Equality, Inclusion and Human Rights, bringing increased status and renewed focus on mainstreaming equality and human rights in the Scottish Government. The development of the Scottish Government equality and human rights mainstreaming strategy will build on the work of the NACWG and consider how best to implement the remaining mainstreaming recommendations.

Dialogue with equality stakeholders and duty bearers can elicit differing views on the effectiveness of the equality regime. Equality stakeholders tend to offer an insight into the strength of the regulations from the perspective of people and groups who share protected characteristics. Duty bearers, whilst also being mindful of this, tend to offer an insight on the operation of regulations and the practices associated with them. Both of these dimensions are useful in understanding which aspects of the regime are effective and what difference the regime makes.

Scottish Government thinking about the PSED is also shaped by the Scottish National Equality Improvement Project (SNEIP), which was established by the Scottish Government in 2014 to assist public authorities in their implementation of the PSED and the SSDs. SNEIP’s primary purpose is to “advise the Scottish Government in an oversight capacity on the experience of public authorities’ compliance with the PSED; this includes assisting in shaping distinct pieces of work, such as the review of the operation of the Public Sector Equality Duty.”

SNEIP currently meets twice per year, and brings together a wide range of public sector partners, including local authorities, Non-Departmental Public Bodies, Health Boards, Universities and Colleges, plus the Equality and Human Rights Commission, and other duty bearers, to share their experiences of the PSED. We are grateful to SNEIP members for this valuable dialogue on equality matters in Scotland.

In recent years we have engaged with a wide range of stakeholders to learn about the aspects of the PSED which work well, and the aspects which require improvement. Before the Covid-19 pandemic was first felt in Scotland in March 2020 (which is when the decision was taken to pause the review), we engaged in a wide range of consultation and participation work to inform our thinking. We held:

* Workshops with equality partners in 2018
* Workshops with Scottish Government officials in 2019
* A wide range of bilateral meetings in 2019 and 2020, with third sector organisations representing people with protected characteristics, duty bearers, SNEIP members etc.
* Discussions with various equality networks, including Scottish Councils’ Equality Network, the NDPB Equality Forum, and NHS Boards Equality Leads’ Network, in 2019 and 2020
* A roundtable meeting on equality and human rights mainstreaming, with a wide range of partners, in Jan 2021.

***4. Other evidence and research***

As well as the invaluable information provided by stakeholders in discussions, we have considered several other key pieces of evidence and research in drawing together this paper.

This includes a suite of research commissioned by the EHRC on the effectiveness of the PSED in Scotland; including a recent EHRC paper on the impact of Coronavirus on Equality and Human Rights[[4]](#footnote-4), which forms part of the ‘Measuring Up?’[[5]](#footnote-5) series of reports. ‘Measuring Up?’ is a programme of work conducted by the Commission in Scotland since May 2013, to monitor listed authorities’ compliance with the specific duties. This monitoring programme has been carried out in seven stages, each published as a report on the Commission website.

We have also noted research by the third sector organisation Engender on gender mainstreaming[[6]](#footnote-6); and research commissioned by the Scottish Government on equality improvement matters, including a literature review on the use of impact assessments within governments[[7]](#footnote-7), and an audit of equality data collection and usage (to be published on 22 March). Those are referenced at the appropriate points throughout.

As this paper constitutes the first stage of reviewing the PSED, and will be followed by the development of a more detailed set of proposals, we warmly welcome the sharing of further evidence, and would ask that this is shared with relevant officials (see contact information on page 30).

***5. Findings***

***5.1 Cross-cutting issues***

**5.1.1. Making better use of evidence and data**

The Scottish Government vision for the use of equality evidence and data is that Scotland's equality evidence base becomes more wide-ranging and robust, enabling national and local policy makers to develop sound, inclusive policy and measure the impact on all of Scotland's equality groups.[[8]](#footnote-8)

The Covid-19 pandemic amplified the pre-existing need for better use of equality data and evidence to shape decision making.

Issues relating to data and evidence that have been raised by equality partners and networks include a concern that some duty bearers fail to act on data after it has been published; and that some organisations are overly cautious about publishing information which they feel could identify individuals e.g. on job applications. The Coalition for Racial Equality and Rights said in a blog on improving mainstreaming practice, *“We would want public bodies to have a better evidence base and to use the evidence they gather in mainstreaming equality. If public bodies produced detailed intersectional data, this would aid identification of gaps in equality mainstreaming and allow targeted interventions.*”[[9]](#footnote-9)

Engender, in a 2020 paper on gender mainstreaming, said that *the “Collection and use of intersectional data, vital in policy development to target inequalities for disabled, BME, LGBT, older and younger women, women from minority faith backgrounds, and women with insecure immigration status, is virtually nonexistent (sic) in Scotland”* and commented on the lack of evidence that data is informing the equality impact assessment process.[[10]](#footnote-10) It may be the case that employees’ confidence to disclose all of their protected characteristics in monitoring processes is a limiting factor which needs further consideration as part of wider work to improve intersectional data quality and availability.

The EHRC has noted that many listed authorities continue to struggle to produce employee information in relation to recruitment, development and retention; and that most listed authorities have failed to fully meet the new requirements on occupational segregation reporting in relation to race and disability. They also note that publishing of employee information for some protected characteristics remains much lower than for others, and that low reporting rates in employee information for a number of protected characteristics are a concern. This issue appears particularly acute in relation to pregnancy and maternity.[[11]](#footnote-11)

The NACWG has noted the crucial role that intersectional data plays in driving forward equality in all three of their reports provided to the Scottish Government. In its third report the NACWG recommended that, as part of the PSED review, the Scottish Government place additional duties on public bodies to collect and publish a range of equality data including employment, service and gender budgeting information.

The Scottish Government is developing an extensive Equality Data Improvement Programme, which will include updating the Equality Evidence Strategy. However, some important pieces of work have already been undertaken to improve the use of evidence and data.

It became apparent during the Covid crisis that we needed to improve understanding of the collection of equality and socio-economic disadvantage data by Scottish public sector bodies, with the aim of improving understanding of the use of data in policy-making, service design and delivery across public services. This is highly relevant to, but also goes wider than, issues arising from the PSED.

An audit of equality data collection and usage in the public sector was commissioned in September 2020. This research sought to provide the Scottish Government with a good understanding of:

1. what equality data is collected,

2. how it is collected and stored,

3. for what purpose it is collected, and

4. the barriers to collection across all nine protected characteristics as set out in the Equality Act 2010 and the (Specific Duties) (Scotland) Regulations 2012, plus socio-economic disadvantage, as per S.1 of the Equality Act.

This piece of work was undertaken in autumn/winter 2020, and the final report is due to be published shortly. The research identified four key themes:

1. the importance of the mainstreaming equality agenda – including the requirement for regular reporting – as a driver in promoting a focus on, and improving, equality data collection. In addition, it was thought that there was an important role for the Scottish Government in providing more guidance and improving the consistency of the data collected.
2. there was compelling evidence of the importance of ensuring that all those involved in developing equality data systems were clear about why questions are asked, and how the information gathered will be used. This clarity was considered to build trust and improve disclosure.
3. due to the diversity of data collections in terms of subject matter and operational context, the task of improving equality data collection could not take a ‘one size fits all’ approach.
4. equality data collection is a highly complex undertaking. Larger organisations have a variety of internal and external networks and sources of advice they can access on an ongoing basis. By contrast, other organisations, including but not exclusively, smaller organisations, felt there was a lack of a ‘go-to’ place for advice and expertise on equality data collection.

This learning will inform the development of future equality data improvement plans and strategies.

There has been a good deal of interim improvement activity in recent months. The Equality Evidence Finder[[12]](#footnote-12) was updated during the Covid-19 pandemic, with summaries of data for four groups who often experience structural inequality[[13]](#footnote-13); and with vignettes which seek to illustrate the ways in which intersecting characteristics can multiply discrimination and disadvantage[[14]](#footnote-14), with factors such as age, sex, ethnicity and disability layering to create multiple barriers to equality. But we know we need to do more to understand intersectionality and to embed thinking about compound discrimination in our policy-making processes.

**5.1.2 Strengthening participatory policy making: hearing lived experience**

Policy is best when it is shaped by a diverse range of people. This rationale lies behind some of the SSDs having been designed to be participatory, with the outcome setting regulation for example specifying that the development of outcomes should involve people with protected characteristics or groups who represent their interests.

The NACWG has provided recommendations to the Scottish Government ‘to create a genuine effort in co-production of policy-making with evidence of lived experience at its heart’[[15]](#footnote-15). We know we need to do more to hear from those most affected by decisions but often furthest from decision making and least heard. This is a key strand of the September 2020 Programme for Government commitment to develop a new mainstreaming equality and human rights strategy.

During the pandemic we have had regular dialogue with a wide range of equality stakeholders. The Cabinet Secretaries for Social Security and Older People and Communities and Local Government jointly convened a Social Renewal Advisory Board (SRAB), which included people with equality and rights expertise, to make proposals that can renew Scotland once we start to emerge from the pandemic. The SRAB report, “If not now, when?”[[16]](#footnote-16) notes that lived experience was at the heart of the discussions on social renewal, with the Board having developed a programme of engagement to ensure people and communities (of place and of interest) and organisations supporting people affected by the issues could have their say and contribute their ideas.

The SRAB report included a call to action on community participation:

*“We are therefore calling on the public sector to give more control to people and communities over the decisions that affect their lives. This is a central recommendation in this report. To get there, we need increased participation, with decision-making as close to communities as possible, taking full account of equality and human rights and enabling involvement of lived experience experts in policy making, and an extension of participatory budgeting, so that communities of place and identity have more say on how public money is spent. More funding and support is needed to help communities buy land or buildings and run them for the benefit of the community so that they become self-sustaining. We also need to publicly and properly value the contributions of volunteers and take a range of steps to make volunteering easier and more accessible.”*

The Scottish Government is reflecting on the calls to action made by the Board and is expected to share its response in March 2021.

Our next suit of equality outcomes, for the period 2021-25, will include an outcome focused on building lived experience into policy making.[[17]](#footnote-17)

Some stakeholders have mooted re-shaping the specific duties towards more of a community empowerment model, whereby, for example, communities of interest would suggest outcomes and public bodies would have to respond to those imperatives, suggesting that communities of interest are more likely to advance their most pressing concerns than public authorities are to identify those. This is an approach which would need further exploration, and consideration of what has transpired as a result of the Community Empowerment (Scotland) Act 2015.

**5.1.3 Improving the links between equality and human rights frameworks**

During the pandemic, it became more apparent than before that equality and human rights should be seen as inter-connected and indivisible. The policy response to the pandemic was driven by the fundamental requirement for the Government to safeguard the right to life, placing human rights as a central consideration. It was also quickly apparent that groups with protected characteristics under the Act would be affected in different ways, and that policies needed to recognise and respond to different needs. That is why the Scottish Government invested heavily in services for women at risk of domestic abuse, for example, and in food security, and communication support for older and disabled people. Our human rights and equality teams worked closely on joint initiatives during this time.

However, ensuring complementarity of the human rights framework and the equality framework needs continued effort, and the experience of the pandemic has illustrated that we need to do more to make consideration of both equality and human rights integral to policy-making and to drive understanding of how these agendas interconnect.

The EHRC has noted that there can sometimes be a tension between equality and human rights discourses, in that human rights discourses can frame equality too narrowly as simply about non-discrimination, as opposed to actively advancing equality. The Commission has also noted the Scottish Government’s ambitious agenda on advancing human rights, e.g. via incorporating certain human rights treaties into Scottish law, and have advised that any new equality framework will need to be future proofed to ensure that it complements new human rights imperatives and duties.

Our new equality and human rights mainstreaming strategy will drive improvement in this area.

The government-led National Taskforce for Human Rights Leadership has recently published its recommendations[[18]](#footnote-18) for a bold and ambitious new statutory framework for human rights, to be taken forward in the next Parliamentary term. This includes recommendations for the incorporation of multiple international human rights treaties, including: the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the Convention of the Rights of Persons with Disabilities (CRPD). The Taskforce has also recommended an equality clause which aligns with the Equality Act 2010 and provides equal access to everyone to the human rights contained in the Bill. The Taskforce’s world-leading recommendations demonstrate our clear commitment to reducing inequalities faced in Scotland, in particular by women, disabled people, minority ethnic people, LGBTI people and older people.

**5.1.4 Strengthening leadership and resourcing**

The PSED is about driving social change and creating an equal society. In any change programme leadership is essential, however some public authorities have highlighted to us that they can have challenges in attracting the attention and support of their senior leaders when it comes to equality matters, due to such factors as the wide range of competing priorities and to resourcing pressures.

Some public authorities have also conveyed to us that their staff resource for PSED/equality work is minimal (and was further depleted during Covid-19) with some staff roles having equality as part of a larger portfolio, meaning their focus on equality potentially becomes more marginal than would be ideal. The EHRC has noted that generally, smaller public authorities with more limited resources struggle to meet the requirements of PSED and the SSDs.

It is of course for public authorities to make resourcing decisions as they see fit, but it may be that the specific duties could be shaped in such a way as to convey more clearly the expectation that equality mainstreaming activity is pivotal and must be well supported.

The EHRC, in dialogue with the Scottish Government and at meetings of SNEIP, has conveyed an expectation that the Scottish Government play more of a leadership role in PSED and SSD compliance, for example through shaping shared outcomes across the public sector. This is an option we could explore with the Scottish National Equality Improvement Project (SNEIP) as part of the next stage of the PSED review.

We are also exploring issues of leadership through a race and leadership summit for public bodies to be held in late March 2020 and the learning from that event may help to shape thinking about how the PSED regime could be strengthened in terms of leadership.

**5.1.5 Reducing bureaucracy**

During a pandemic which placed great strain on public bodies, the question of what obligations are placed on public authorities naturally came into focus, and there was some discussion of suspending certain requirements (e.g. the EHRC took the decision in early 2020 to suspend gender pay gap reports for certain public bodies).

Emergency legislation on coronavirus recognised that complying with some statutory duties might be impeded by the response to Covid. In general however, public bodies were able to continue to be guided by the PSED and SSDs and to plan for reporting by the end of the 2017-2021 cycle, perhaps in recognition of the unequal impacts of Covid-19 and the increased need for visibility in making equality considerations central to decision making.

However, prior to the pandemic, discussions about the framework had raised some interest in reducing the bureaucracy associated with the PSED. Public authorities’ concerns about the 2012 Regulations at the time of discussion centred on what they saw as complex reporting requirements, including timescales that do not align with their other obligations (although EHRC guidance offers leeway on this); and the diversion of resources to the preparation of reports rather than more meaningful activity.

The EHRC reminded us in its seventh ‘Measuring Up?’ report that “The focus for public bodies should not be on the completion of monitoring forms or equality impact assessments. The purpose of the Duties is the elimination of discrimination, the advancement of equality and the fostering of good community relations. While the Specific Duties can support bodies in meeting these three requirements, they are not an end in themselves.”[[19]](#footnote-19)

Campaigning groups also highlighted concerns that the regime drives a focus on regulation and compliance, not on meaningful outcomes for people with protected characteristics. It was asserted by one body in an informal consultation discussion that ‘the regime drives collation, not improvement’. The Scottish Government is keen therefore 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 outcomes rather than processes.

**5.1.6 Increasing clarity re: coverage, proportionality, and process**

An issue that arose pre-pandemic was coverage and proportionality (i.e. the matter of which body is listed – e.g. whether it continues to be appropriate for some very small public bodies, such as grant-aided schools with tiny numbers of pupils, to be subject to the PSED alongside large local authorities serving hundreds of thousands of people).

The clarity of the process when a new public body is added to the schedule for the 2012 Regulations and the way in which that obligation is communicated also warrants some further thought. When the Scottish Government seeks to add a public body to the list of those subject to the PSED and impose duties under the Act there is no legal requirement under the 2010 Act to consult with or inform that body (only with the EHRC). It is not clear how effective the communication around the PSED is after a new body is functioning. We could further consider the steps currently taken to add new bodies to the lists of those subject to the PSED and the SSDs to identify if communication could be improved in relation to the duties they will be subject to.

**5.1.7 Improving support and capacity building**

Duty bearers often say the EHRC, as the regulator, has reduced capacity to support development work on equality matters compared with previous years, and that there is a gap in terms of their being a dedicated body from whom they can seek advice, guidance and support. This was a theme that emerged in dialogue pre-pandemic, and is not specifically related to the Commission’s activity during Covid-19.

Another theme which is frequently raised in dialogue on the PSED is that of duty-bearers’ confidence about the regime, for example the confidence to adjust reporting cycles to align with corporate ones. There seems to be a mismatch between duty bearers’ levels of certainty about what is possible within the scope of the current regulations, and the guidance offered by the regulator. It may be that duty bearers need more explicit permission to do what works in their context. If duty bearers felt more able to vary their approach that could in fact be an illustration that they were mainstreaming the equality duty, as aligning outcomes cycles and corporate planning cycles, for example, would demonstrate a relationship between those activities and that equality was becoming integral to the organisation’s work. It may also be useful to further explore the aspects of the regime about which public authorities feel confident through consultation and engagement.

The issue of support for Public Boards in meeting their PSED obligations has also been raised in recent months; and it has been suggested that the guidance for boards may need to be refreshed. This forms part of a wider issue of the value of the current suite of guidance on the PSED and the SSDs, and a need to refresh, bring together, simplify and streamline this guidance. Any future consultation on the SSDs may seek to learn how useful the current suite of guidance remains and how it could be improved.

Another consideration in this is the Scottish Government’s 3-Step Improvement Framework for Scotland’s Public Services[[20]](#footnote-20) which sets out the stages in delivering change programmes, from setting a vision to implementation. We will be guided by this framework as we consider how to strengthen the equality framework in Scotland.

**5.1.8 Improving the cohesiveness of the regime**

The Scottish Specific Duties are intended, collectively, to help public authorities to better perform their general equality duty. However, it has been raised by both equality stakeholders and the EHRC that the duties can sometimes seem disparate, and to drive separate but disconnected processes. For example, equality outcomes are not always informed by the data gathered under the data related duties.

We have noted the remarks in Engender’s paper on gender mainstreaming on the coherence of the regime: they say, *“The different elements of the duty (publishing data, outcome-setting, reporting on mainstreaming, and equality impact assessment) are very poorly articulated in relation to one another. They do not create a clear and systemic approach in which data and evidence drives the selection of outcomes, which are then pursued through an appropriate action plan and subsequently reported on within a mainstreaming report.”[[21]](#footnote-21)*

It may be that amended SSDs could draw stronger links between all the different duties, reinforcing their inter-connectedness, and that they represent a programme of work with the same three needs at their heart. This ‘joining of dots’ could potentially be achieved in a number of ways, including by amending the SSDs, by aligning the wording of specific duty regulations more closely, by introducing new specific duties which connect the existing duties (such as a duty to collect, gather and use equality evidence), by developing more guidance and support materials, or by developing improvement-focused training which builds on the progress made under the current regime but seeks to draw more connections between its strands. This is something which we would propose to explore in further conversations with stakeholders and with SNEIP.

***5.2 Findings relating to particular duties***

During the pandemic, a number of issues emerged which shed light on the ways in which the specific duties did, and did not, support the delivery of the general duty. This built on evidence which had come to light prior to the pandemic. Remarks on what has been learned about these duties follow.

|  |
| --- |
| **5.2.1 Duty to report progress on mainstreaming the equality duty** |

***a) Purpose and intention of the regulation***

This regulation aligns to the broad purpose of the PSED, which is to integrate consideration of equality and good relations into the day-to-day business of public authorities. Regulation 3, which requires each listed authority to report at intervals of not more than two years “on the progress it has made to make the equality duty integral to the exercise of its functions so as to better perform that duty” aims to make this work more transparent and enhance authorities’ accountability for progress.

***b) Experience of the regulation***

We know from discussions with and feedback from duty bearers and equality stakeholders that the duty to report progress on mainstreaming the general equality duty every two years causes some difficulties.

Despite a decade of progress, mainstreaming – that is, integrating equality into every aspect of a public authority’s work – is still not well understood as a concept. There is sometimes a tendency for equality concerns to be viewed as a matter for dedicated, equality-focused personnel to advance, but not for every team in a public body, with equality not yet being routinely factored into every decision, budget, advisory group or policy, and the three needs of the general duty not yet being central to all public authorities’ functions.

This may be in part because promoting equality mainstreaming presupposes that everyone has the skills to work on equality when in fact they require the requisite skills and awareness to do so effectively.

The fundamental dilemma associated with mainstreaming equality is well articulated in a paper on gender mainstreaming in the EU: “if mainstreaming is everybody's responsibility in general, it's nobody's in particular.”[[22]](#footnote-22) This suggests that there needs to be more corporate accountability for mainstreaming equality - more hard-wiring of equality into systems and practices; and also more local ownership and capacity building - in recognition of advancing equality being a collective endeavour.

In general, in terms of this specific duty, we hear from duty bearers that it generates a significant amount of reporting activity, but, in their view, and those of some equality stakeholders, it is not always clear that the processes it drives lead to meaningful improvement in the lives of people who share protected characteristics. Public bodies have told us that reporting at intervals of not more than two years often creates obligations which sit apart from their corporate planning cycles, and causes bureaucratic difficulties.

The EHRC would like to see research on whether mainstreaming considerations are included in public authorities’ strategic plans, and whether mainstreaming reports are published in the same spaces as those kinds of central strategic documents, whether they are linked or not etc. to better understand how central the equality duty is within authorities’ thinking. This may be an option to further explore as we develop options for improving the PSED regime.

The experience of discharging the PSED during Covid-19 was that some policies and practices effectively embedded (or mainstreamed) equality but others did not, or did so less well. During the crisis we have seen that protected groups experienced the virus, and the response to it, differently; it may be the case that if mainstreaming equality was more central to public bodies’ work there would be less variance. It remains to be seen if examples of effective and less positive practice will be drawn out in public bodies’ 2021 mainstreaming progress reports.

The EHRC tells us that feedback they have received from third sector equality stakeholders is that there should be more focus on mainstreaming more generally in PSED improvement work and in the Commission’s strategy, and the Commission wants to move duty bearers away from a focus on the process of reporting towards thinking more about the changes they want to achieve. It may be that the wording of this duty, with its focus on reporting on progress, impedes the thinking that is necessary in public bodies about how to make equality integral to their business.

|  |
| --- |
| **5.2.2 Duty to publish equality outcomes and report progress** |

***a) Purpose and intention of the regulation***

This duty requires each listed authority to publish a set of equality outcomes

which it considers will enable the authority to better perform the general equality

duty. Regulation 4 specifies that an authority must publish a report on the progress made to achieve its equality outcomes every two years and publish a fresh set of equality outcomes within four years of publishing its previous set.

An equality outcome is a result which the authority aims to achieve in order to further

one or more of the needs in the general equality duty. By focusing on outcomes

rather than objectives, this specific duty aims to bring practical, specific and

identifiable improvements in the life chances of people with protected characteristics.

The outcomes duty sits alongside the duty to report on progress in mainstreaming; with the latter being focused on making equality integral to all day-to-day functions in public authorities; and the former being focused on specific targeted activity. These two strands of work are envisaged in the SSDs as complementary.

***b) Experience of the regulation***

In general, outcome setting appears to deliver less quantifiable change for equality groups than these regulations intend.

Analysis conducted for the EHRC of the outcomes published in 2013 found that many lacked a focus on producing change for people with protected characteristics. The report says, “In most cases, these equality outcomes were largely administrative and aimed at changing policies or processes within the authority. In other cases, they were very broadly expressed, and this may have led to a lack of clarity or focus during implementation.”[[23]](#footnote-23) The report found “very limited evidence of positive change directly impacting people with protected characteristics available from progress reporting on equality outcomes for the 2013-2017 cycle.”[[24]](#footnote-24)

More recent engagement with duty bearers and equality partners would seem to indicate that this lack of clarity and focus continue to be a concern. The EHRC is concerned about outcomes touching on every protected characteristic, which it attributes to public authorities not wishing to exclude any groups, even where it would be more effective to point to local evidence of a specific need. It may be that outcomes which seek to advance equality for everyone are too broad and too unspecific, diluting their effectiveness.

A further consideration is the means by which outcomes are set. The SSDs require the development of SSDs to involve people with protected characteristics, or bodies who represent their concerns. During the Covid-19 pandemic it became apparent that consultation and engagement would need to be very different during this round of outcomes development to the approach taken in previous years. Public authorities have had to grapple with how to manage public and stakeholder engagement in the context of a pandemic which has meant by necessity limited in-person contact. This has both created opportunities for involvement, e.g. of those disabled people for whom digital connectedness overcomes physical barriers to participation; and narrowed them, for those people unable to access digital spaces.

Similarly to regulation three, the matter of publishing timelines arose in dialogue with duty bearers, with many suggesting that the cycle for setting and publishing equality outcomes would be more effective if it were able to be aligned with their corporate planning cycles. Duty bearers have suggested that this would make setting outcomes more meaningful and more connected to other priorities.

Within the Scottish Government we have identified scope to make our own set of equality outcomes for 2021-25 more connected to other strategies and imperatives, and for progress towards the outcomes to be more closely monitored throughout the cycle, and we explore this in our Equality Outcomes 2021-25 publication.

The EHRC has conveyed an expectation that the Scottish Government play more of a leadership role in outcome setting work in the future e.g. in shaping outcomes which could potentially be shared across the public sector, or in sharing evidence of priority inequalities to be tackled through outcomes in specific sectors and working collaboratively to shape them. Public authorities would be at liberty to take a different view on priorities, based on local evidence and data; but there would, in this vision of a different approach to regulation 4, be a stronger sense of national priorities and thereby opportunities for public bodies to consider and develop greater alignment with those. The potential development of shared outcomes was an option under discussion before the pandemic, but the need to respond to that crisis disrupted that consideration. This is an option we may wish to discuss more with the Scottish National Equality Improvement Project (SNEIP) in 2021.

As per section 5.1.1, the theme of the use of equality evidence and data is relevant here. There is presently no specific duty to collect, gather and use equality evidence (although in developing equality outcomes a listed public authority should consider relevant evidence relating to persons who share a relevant protected characteristic); and the EHRC believes there is still limited understanding of measurability across outcome setting work, although they address this in their self-evaluation toolkit[[25]](#footnote-25). More could be done to strengthen the use of evidence in outcome setting; and to more strongly encourage public bodies to think about what makes the biggest difference to people with protected characteristics.

|  |
| --- |
| **5.2.3 Duty to assess and review policies and practices** |

***a) Purpose and intention of the regulation***

This regulation obliges public bodies, to the extent necessary to fulfil the general equality duty, assess the impact of applying a proposed new or revised policy or practice against the needs mentioned in that duty, i.e. the need to advance equality, eliminate discrimination and foster good relations.

In making the assessment, a listed authority must consider relevant evidence relating to persons who share a relevant protected characteristic; and must, in developing a policy or practice, take account of the results of any assessment made by it under this regulation.

A listed authority must also publish, “within a reasonable period”, the results of any assessment made by it about a policy or practice that it decides to apply; and make appropriate arrangements to review and, where necessary, revise any policy or practice that it applies in the exercise of its functions to ensure that, in exercising those functions, it complies with the general equality duty.

The regulation is not prescriptive about how this process of assessing the impact of a proposed new policy or practice should be carried out; but in practice, it has given rise to a regime of conducting equality impact assessments, via a complex array of templates and forms.

Although the original policy memorandum on the regulations does not contain a great deal of specific detail on this regulation and its intent, it is generally understood that the purpose of conducting equality impact assessment is to help to identify and guard against potential risks of discrimination; to support the development of better policy; to test policies and proposals; and to deliver quality assurance and help ensure legal compliance.

***b) Experience of the regulation***

This may be the regulation which has come most sharply into focus during the pandemic, as a vast array of policies and decisions were made at great speed to respond to the crisis and develop an approach to recovery and renewal. It quickly became apparent that while we were all in the same storm, we were not in the same boat – in other words, that people’s experience of the Covid-19 crisis was vastly different, depending on a range of factors including ethnicity, age and disability, and as a result of this, responses risk failing to address or even exacerbating underlying inequalities.

This was something the Scottish Government anticipated, noting that international evidence suggests that crisis responses often inadvertently discriminate; and early feedback from the EHRC, the Scottish Human Rights Commission and the Children’s Commissioner for Scotland that they had found “increasing evidence that some groups [were] experiencing disproportionately negative impacts of the virus and some of the responses to it”.[[26]](#footnote-26)

In those circumstances, equality proofed policy was more important than ever – particularly given the high stakes, with serious illness and death an ever-present threat and decisions seeking to protect the right to life. However, the feedback from the EHRC and from equality stakeholders is that the practice of reviewing and assessing decisions appeared variable.

The concerns that have been raised about levels of compliance with this duty can be summated as relating to:

* **A focus on** **process** – people think of this duty as being about completing a form or a template
* **Timing** – assessments and reviews are often done too late, or not at all; and are often backward looking rather than forward looking, assessing likely or possible impact, not waiting until something has been implemented to see if is detrimental. Needs to be used to test ideas and shape them.
* **The use of evidence and data,** including qualitative evidence based on lived experience of inequality – assessments can sometimes use little evidence, or involve little engagement of people with lived experience
* **Ambition** - often being used to check on possible discrimination but too rarely to identify opportunities to positively advance equality, as per the spirit of PSED
* **Level** – an issue which often arose during Covid-19 was whether impact assessment is routinely completed for strategies or whether this step is missed, with the expectation that the individual policies which collectively contribute to a strategy will be assessed in due course. This misses the point that a strategy is a decision that will impact on people, and should be reviewed and assessed for its likely impact on people with PCs. However, the guidance on this is felt to be unclear.
* **Transparency** – impact assessments are not always published or published late or are not easy to find; and different public bodies take different approaches, with some integrating different assessments. EHRC note that publishing the results of the assessment is about transparency and accountability but that one should be able to see that an EQIA has been completed in the relevant policies.

Fundamentally, a good equality impact assessment relies on an optimal policy making process, with equality integrated at every stage, from thinking about policy possibilities, to testing ideas, to developing policy, to consultation etc. However, the reality of how policy is often developed in government and across the public sector, where decisions may have to be made quickly, with many different considerations in play, is a process which has some challenges. Any thinking about this regulation will need to also consider the reality of the policy making environment and culture we need to shift.

It appears that this regulation needs to change to make it clearer that it is forward looking and that it is about testing ideas and making better policy; there is a need to make a conceptual shift in terms of assessing and reviewing policies and practices. It may also be important to update guidance around this duty.

In 2020, the EHRC published a report on the Home Office’s compliance with PSED, which contains recommendations specific to the Home Office, but which may have more general application. For example, in terms of effective impact assessment the report recommended that officials “prioritise, act early and use a range of sources and evidence to understand the equality impacts of its policies and practices – particularly through proper engagement with affected groups.” The approach described would seem to be a helpful summary of best practice in equality impact assessment (EQIA), and involves:

*.*

* Giving active consideration to, and gathering evidence of, potential impacts - including possible unintended ones – from the concept stage and at each stage of decision-making.
* Focusing on understanding the scale and the severity of the potential impacts, taking into account existing inequalities and avoiding assumptions about these effects, and prioritising more thorough understanding where these are more prevalent and / or severe.
* Setting up systems and processes for maintaining, communicating and using institutional knowledge to identify and analyse the cumulative equality impacts of any policy with other relevant current and past policies.
* Taking active proportionate steps to help make policymakers fully aware of potential and actual human impacts of policies, by using a range of sources, including qualitative evidence.

The report also recommends that ministers and other decision-makers receive and consider detailed equality information, including options for mitigating any negative impacts, at an appropriately early stage to inform the policymaking process. Much of the content of that report will be of use as we refine our thinking about what will assist in improving assessment of the impact of proposed policies and practices.

In the interim, the Scottish Government has updated its own internal guidance on equality impact assessment, both issuing guidance on ‘Promoting Equality and Safeguarding Human Rights: Assessing Developments for Potential Impact during COVID-19’ early in the pandemic, and also updating our more substantive guidance on the EQIA process.

***Wider impact assessment issues***

We have learned a great deal about impact assessments from internal improvement activity within the Scottish Government. Internal Audit are undertaking a review of the governance arrangements surrounding impact assessments (including equality impact assessments) as part of their scheduled 2020/21 Scottish Government annual plan. Findings from this work were not available at time of writing this report but we expect to be able to utilise these findings to strengthen and develop existing arrangements. We also commissioned a literature review, conducted by Prof Riki Therivel, on the usage of impact assessments in five countries (Ireland, Netherlands, New Zealand, Sweden & Wales)[[27]](#footnote-27). This looked at the effectiveness of a range of types of impact assessments, and concluded that their effectiveness is mixed. In terms of changes to policies, assessment effectiveness is mixed/limited; but they often create learning for policy-makers, with consequent long-term organisational change. The review concluded that “even where an impact assessment does not lead to changes in a policy, it can have benefits in terms of improved transparency and accountability of decision-making, increased awareness of the public, and increased trust between stakeholders.” While this is not sufficient to meet the needs of the PSED, it provides useful contextual information as we consider how we might improve regulation five and the activity that derives from it.

Of particular value is the information in the review on the preconditions for effective impact assessment, which are:

* High-level commitment and supportive organisations
* Policy-makers' willingness to learn and change in response to the assessment findings
* Legal requirement for the impact assessment to be carried out
* Oversight and quality review of the assessments
* Fitting the assessment to the decision in terms of timing, types of alternatives considered, recommendations etc.
* Involvement of the public/stakeholders
* Starting the impact assessment early in the policy-making process
* Adequate funding
* Adequate data and expertise
* Collaboration and information sharing between assessors and government departments
* Follow up to check whether the policy incorporated the assessment recommendations, whether the assessment adequately identified impacts, and how the assessment process can be improved.

There is limited case law on equality impact assessment, but it is worth noting the ruling in one 2020 case in which the Inner House of the Court of Session opined on an appeal brought by a prisoner (“S”) against a decision to refuse him permission to proceed with a judicial review. The court noted that the document relied on by the prison authorities to demonstrate that they had carried out an Equality Impact Assessment of the guidance relevant to the prisoner’s situation failed to comply with the requirements for an impact assessment as set out in the 2012 Regulations. This demonstrates that although the jurisprudence on the PSED in Scotland is not well developed[[28]](#footnote-28), there is potential legal risk associated with not carrying out a thorough equality impact assessment when developing and implementing a policy.

A recent English case underlines this; the Judge ruling on a decision informed by an EQIA found that the assessment produced by Transport for London did not meet the required standard of a "rigorous" and "conscientious" assessment conducted with an open mind. Rather, it was "inconsistent and irrationally underrated the risk". As the Judge said, "Most worryingly of all, the EqIA read as if its purpose was to justify the decision already taken".[[29]](#footnote-29) This reminds us that supporting rigorous and conscientious assessment which considers risk to people with protected characteristics are key considerations in reforming the approach to reviewing and assessing policies in line with the three needs of the PSED.

|  |
| --- |
| **5.2.4 Duties to gather and use employee information; to publish gender pay gap information; and to publish statements on equal pay, etc.** |

***a) Purpose and intention of the regulations***

Duties relating to data and evidence were intended to encourage public bodies to make more evidence-based decisions but also to deliver transparency and accountability. These duties, in regulations 6,7 and 8, oblige the collection and reporting of certain types of information, at regular intervals, such as information on the percentage difference among its employees between men’s average hourly pay (excluding overtime) and women’s average hourly pay (excluding overtime), in authorities with more than 150 employees.

***b) Experience of the regulations***

There is variable practice in gathering and using employee information, and on the publishing of equal pay statements. Much of this relates to wider issues about the use of evidence and data as discussed at section 5.1.1.

In its seventh ‘Measuring Up?’ report the EHRC concluded that “whereas publication rates have remained consistently high across the cycle, underlying difficulties are still prevalent”, noting that many listed authorities continue to struggle to produce employee information across the employment areas of recruitment, development and retention; most listed authorities have failed to fully meet the new requirements on occupational segregation reporting in relation to race and disability; and that publishing of employee information for some protected characteristics remains much lower than for others.

They suggest that this “raises questions about why performance to date has been so varied. Is the issue resource, commitment or capability?”[[30]](#footnote-30) The audit of equality data mentioned above in 5.1.1. seeks to address some of those questions; and they are also noted in the section above on leadership and resourcing.

A 2020 paper by the Fawcett Society on Gender Pay Gap reporting[[31]](#footnote-31) notes that “A success of the British legislation has been its high levels of compliance – with 100% of eligible employers reporting in 2019”; but also makes a number of recommendations for improvement. The paper recommends lowering the minimum employee threshold, which is above the median for countries studies for the report;

more obligations on Action Plans, e.g. “an approach similar to that seen in other jurisdictions in which employers must not only develop plans, but report on progress towards their implementation”; and the development of specific proposals on Ethnicity Pay Gap Reporting.

On the latter point, it should be noted that in late 2020 the Equalities and Human Rights Committee, in its race and employment report (Race Equality, Employment and Skills: Making Progress?), made a recommendation on ethnicity data, saying “The Committee recommends that all public authorities subject to the Scottish specific Public Sector Equality Duty should, as a minimum, voluntarily record and publish their ethnicity pay gap and produce an action plan to deliver identified outcomes. This piece of work will help organisations to understand the reasons behind the gap and to take targeted action. By not doing so, the Committee believes not only is there a greater risk of reputational damage to the public authority but also the potential for loss of talent to other more progressive workplaces.”[[32]](#footnote-32)

The Scottish Government response to this inquiry noted that all public authorities subject to the Scottish Specific Duties have a duty to publish a policy on equal pay amongst their employees including staff who fall into a minority racial group and those who do not; and that we will seek confirmation from public sector leaders on how they will address this at the planned race equality in employment leadership summit in March 2021. The summit will provide an opportunity to understand the challenges in publishing this data and how they can be addressed as well as discuss processes to monitor this in the future.

Regulation 6 (a) also requires further consideration. This Regulation requires Scottish Ministers to gather information on the relevant protected characteristics of board members of a listed authority and to provide this information to the listed authority in question. In turn, listed authorities must use this information to better perform the public sector equality duty. Because of the small numbers involved, this data can inadvertently disclose protected characteristics associated with individuals. We have previously engaged with stakeholders on how best to gather the required data on board members, to ensure buy-in for any process we put in place, but consideration of the implementation of Regulation 6 (a) needs to take place within the wider context of the equality framework.

In summary there is clearly scope for improvement related to these duties, in terms of their interrelation with other aspects of the regime, as discussed at section 5.1.8 (Coherence) and their overall effectiveness in supporting the general duty.

|  |
| --- |
| **5.2.5 Duty to consider award criteria and conditions in relation to public procurement** |

***a) Purpose and intention of the regulation***

This regulation is essentially about leveraging public sector purchasing power in the advancement of equality. It states that when a listed authority proposes to enter into a relevant agreement, and stipulate conditions on that agreement, it must have due regard to whether the award criteria and the conditions should include considerations to enable it to better perform the equality duty. There is an exception clause, which states that the regulation does not pose a requirement on a listed authority “where in all the circumstances such a requirement would not be related to and proportionate to the subject matter of the proposed agreement.”

***b) Experience of the regulation***

The Scottish Government undertook some rapid procurement exercises during Covid-19, e.g. for sanitation facilities for Gypsy/Traveller encampments. The SSD Regulations neither assisted nor impeded in meeting people’s needs via procurement of services during the pandemic; it could be said that the PSED sat in the background of those exercises. This links to wider issues about this duty.

Equality partners and duty bearers feel this power is not effectively leveraged. The EHRC view is that there are opportunities to make the duty more real and more effectively used.

Some of the issues that have been raised in relation to this duty include:

* The wording of the regulation – it could be said to be weak or to appear optional
* The guidance may need a refresh or to be more prominent
* Bids for contracts have been seen which do not refer to current equality law, suggesting the specific duty has not been considered in terms of the general duty
* Weighting for equality considerations in bid evaluation can be low or not scored at all (although evidence on this is lacking)
* Invitations to tender could be more robust on equality matters. When authorities are developing ITTs they should be much more explicit about this duty and the three needs of the PSED.

Whilst we further develop our thinking about this regulation, including reviewing evidence of its effectiveness, there are interim steps which could be taken to improve its usage. We will explore the possibility of making changes to the Public Contracts Scotland website[[33]](#footnote-33), which could potentially include content on this SSD and explore how better to disseminate the relevant guidance.

It should also be noted that in 2020, the Scottish Government refreshed its internal guidance on procurement and strengthened the equality aspects.

|  |
| --- |
| **5.2.6 Duty to publish in a manner that is accessible, etc.** |

***a) Purpose and intention of the regulation***

This duty requires a listed authority to publish information required by regulations 3 (mainstreaming report), 4 (outcomes), 7 (gender pay gap information) and 8 (equal pay statement) in a manner that makes the information published accessible to the public.

***b) Experience of the regulation***

Although relatively narrow in scope, this regulation has been considered in the context of the wider discussion currently underway on inclusive communication.

Public bodies making information available in accessible, inclusive ways was a consistent theme during the pandemic, when vital public health information was being rapidly created and disseminated. It also became further apparent that there could be improvement in the perception and understanding of inclusive communication as a 2-way process, in which everyone in Scotland can access information and express their views and needs on an equal basis.

Some successes, such as the prominence of BSL interpreters at key briefings, were welcomed by stakeholders. But it was also apparent that the ability of public bodies to rapidly communicate across different languages and formats did not always match the needs of people with protected characteristics. Groups at risk of having difficulty accessing appropriate information include Gypsy/Traveller community members, disabled people, people who speak languages other than English, and asylum seeking and refugee teenagers.

Some stakeholders are keen to explore whether the PSED could be the right vehicle for improving inclusivity in communications, and others have advanced the possibility of discrete legislation. The Scottish Government has been actively considering the need to improve Inclusive Communication as effectively as possible.

The September 2020 Programme for Government[[34]](#footnote-34) noted that “Inclusive communication is a crucial aspect of our approach to equality” and that the Social Renewal Advisory Board recommended work should be stepped up within Scottish Government and the wider public sector to promote accessible, inclusive communications for all. The Scottish Government’s Equality Outcomes for the period 2021-25 will include an outcome focused on Inclusive Communications. This outcome and the actions which will support its achievement will draw from relevant recent work in Social Security Scotland, including work on measures of success.

Whilst we consider this further, we have, in the meantime, developed new internal Scottish Government guidance on developing inclusive communications and publishing information in various formats.

|  |
| --- |
| **5.2.7 Duties relating to Scottish Ministers** |

***a) Purpose and intention of the regulations***

Regulation 11 obliges public authorities to “consider such matters as may be specified from time to time by the Scottish Ministers.” This regulation has never been invoked, and there is no specific learning about it arising from the period of the pandemic; but there are more general questions about how it could be effectively used in the next cycle of PSED-related activity. This is one of the areas we would propose to explore in stage two of this review.

Regulation 12 obliges Scottish Ministers to publish proposals for activity to enable a listed authority to better perform the equality duty at regular intervals. The next set of proposals is due to be published not later than December 2021. The experience of seeking to discharge the PSED during the pandemic will inform the proposals.

The Scottish National Equality Improvement Project (see reference at page 7) is one of the fora which could be used to support the development of proposals to enable performance.

***6. Interim conclusions***

Based on a wide range of evidence, and valuable dialogue with equality stakeholders and networks over many months, for which we are grateful, we conclude that the overall framework of a general, positive duty, supported by the scaffolding of specific duties, is worthwhile and can be an effective driver for progress; but that its full potential has, thus far, been unrealised.

It is clear that more could be done to:

* Ensure more effective use of evidence and data
* Strengthen participatory policy making and ensure that lived experience informs policies and decisions
* Improve the links between equality and human rights discourses
* Strengthen leadership related to the equality framework
* Reduce bureaucracy associated with the PSED regime
* Increase clarity re: coverage, proportionality, and processes
* Improve support and capacity building, considering also the question of resourcing
* Improve the cohesiveness of the regime with duties more obviously connected and mutually reinforcing
* Improve the understanding of and approach to mainstreaming
* Consider new approaches to outcome setting, including the setting of shared outcomes
* Strengthen the current approach to assessing policies, including by recasting this as a forward-looking obligation which tests ideas and is done early
* Support the gathering, use and reporting of a wider range of employee data
* More effectively leverage purchasing power in procurement processes
* Enhance the accessibility of PSED related publications, and consider the scope of the SSDs to advance progress on inclusive communication more generally
* Explore how best to use the duties relating to Scottish Ministers.

Ultimately the Scottish Government wishes to see a regime which more clearly drives progress and positive outcomes for people with protected characteristics and which supports the delivery of the National Performance Framework.

However, the current regime is relatively well known and embedded, and replacement of the current SSDs is likely to be more burdensome than beneficial; especially as public authorities enter a renewal and recovery phase post-pandemic. It is the view of the Scottish Government that it would be more pragmatic and effective to amend and update the current SSDs, whilst also developing a programme of work to support the implementation environment.

This could include new or refreshed guidance on a range of matters; new resources making the interconnections between duties clearer; a support function for public authorities; as well as regulatory changes, such as amendments to certain duties. This may also include research on aspects of the regime about which more needs to be known.

***7.*** ***Next steps***

This paper constitutes the first stage of a two-stage review process. The next stage will be the development of detailed proposals, which will align with the development of a new strategy for more effectively mainstreaming equality and human rights. Detailed proposals will be subject to public consultation, which will be published on the consultation hub: [Scottish Government - Citizen Space (consult.gov.scot)](https://consult.gov.scot/)

Should these proposals result in proposed changes to the SSD Regulations, these changes will need to go through the standard parliamentary processes for Scottish Statutory Instruments, and so will be subject to parliamentary scrutiny.

Duty bearers and equality stakeholders will be kept abreast as these developments unfold. We will regularly update SNEIP, equality stakeholders and networks; and expect to continue regular dialogue with the EHRC, which as the regulator of compliance with the PSED has a keen interest in PSED improvement activity.

We are mindful that there is a Scottish Parliament election in May 2021. Post-election, it will be for responsible Ministers to decide how to progress this work.

***8. Contact information***

For more information about any aspect of this report, please contact:

Jenny Kemp

Team Leader, Equality Policy and Mainstreaming

Equality, Inclusion and Human Rights Directorate – Scottish Government

Email: [Jenny.Kemp@gov.scot](mailto:Jenny.Kemp@gov.scot)

Phone: 0131 244 3637

***9. Bibliography/references***

Effectiveness of the PSED Specific Duties in Scotland – EHRC, August 2018

<https://www.equalityhumanrights.com/sites/default/files/effectiveness-of-psed-specific-duties-scotland.pdf>

Public authorities’ performance in meeting the Scottish Specific Equality Duties 2017: Measuring Up? Report 7

<https://www.equalityhumanrights.com/en/publication-download/public-authorities%E2%80%99-performance-meeting-scottish-specific-equality-duties-2017>

How coronavirus has affected equality and human rights - EHRC

<https://www.equalityhumanrights.com/en/publication-download/how-coronavirus-has-affected-equality-and-human-rights>

Engender paper: Improving Gender Mainstreaming

<https://www.engender.org.uk/content/publications/WHAT-WORKS-FOR-WOMEN---improving-gender-mainstreaming-in-Scotland.pdf>

National Performance Framework

<https://nationalperformance.gov.scot/>

National Performance Framework – paper on impact of Covid on Scotland’s wellbeing

<https://nationalperformance.gov.scot/scotlands-wellbeing-impact-covid-19>

Programme for Government 2020-21

<https://www.gov.scot/publications/protecting-scotland-renewing-scotland-governments-programme-scotland-2020-2021/>

Impact Assessments Literature Review

<https://www.gov.scot/publications/literature-review-impact-assessment-governments/pages/1/>

PSED assessment of hostile environment policies – EHRC, Nov 2020

<https://www.equalityhumanrights.com/en/publication-download/public-sector-equality-duty-assessment-hostile-environment-policies>

Social Renewal Advisory Board report – ‘If Not Now, When?’ – Jan 2021

<https://www.gov.scot/publications/not-now-social-renewal-advisory-board-report-january-2021/>

Three Step Improvement Framework for Scotland’s Public Services

<https://www.gov.scot/publications/three-step-improvement-framework-scotlands-public-services/>

Gender Pay Gap Reporting: A Comparative Analysis - Fawcett Society, 2020: <https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=e67112b9-b01a-4852-9340-139e42585ae1>

National Advisory Council on Women and Girls (NACWG) 2019 - report and recommendations: Scottish Government response:

[National Advisory Council on Women and Girls (NACWG) 2019 - report and recommendations: SG response - gov.scot (www.gov.scot)](https://www.gov.scot/publications/scottish-governments-response-first-ministers-national-advisory-council-women-girls-nacwg-2019-report-recommendations/pages/8/)

1. [Equality Act 2010 (legislation.gov.uk)](https://www.legislation.gov.uk/ukpga/2010/15/contents) [↑](#footnote-ref-1)
2. See policy memorandum: EXECUTIVE NOTE - EQUALITY ACT 2010 (SPECIFIC DUTIES) (SCOTLAND) REGULATIONS 2012 [Microsoft Word - sdsien\_20120012\_en.doc (legislation.gov.uk)](https://www.legislation.gov.uk/sdsi/2012/9780111016718/pdfs/sdsien_9780111016718_en.pdf) [↑](#footnote-ref-2)
3. [EHRC Guidance](https://www.equalityhumanrights.com/en/advice-and-guidance/guidance-scottish-public-authorities) for Scottish public authorities [↑](#footnote-ref-3)
4. How coronavirus has affected equality and human rights - EHRC

   <https://www.equalityhumanrights.com/en/publication-download/how-coronavirus-has-affected-equality-and-human-rights> [↑](#footnote-ref-4)
5. [Measuring Up?](https://www.equalityhumanrights.com/en/public-sector-equality-duty-scotland/scotland-public-sector-equality-duty-projects/measuring) [↑](#footnote-ref-5)
6. Engender paper: Improving Gender Mainstreaming:

   <https://www.engender.org.uk/content/publications/WHAT-WORKS-FOR-WOMEN---improving-gender-mainstreaming-in-Scotland.pdf> [↑](#footnote-ref-6)
7. Impact Assessments Literature Review:

   <https://www.gov.scot/publications/literature-review-impact-assessment-governments/pages/1/> [↑](#footnote-ref-7)
8. Scotland’s Equality Evidence Strategy 2017-21: [Scotland's equality evidence strategy 2017-2021 - gov.scot (www.gov.scot)](https://www.gov.scot/publications/scotlands-equality-evidence-strategy-2017-2021/pages/2/) [↑](#footnote-ref-8)
9. Carol Young, CRER, on the Engender blog, Nov 2020: <https://www.engender.org.uk/news/blog/guest-post-mainstreaming-spotlight---crer/> [↑](#footnote-ref-9)
10. Engender, What Works for Women, Nov 2020. [DAWR (engender.org.uk)](https://www.engender.org.uk/content/publications/WHAT-WORKS-FOR-WOMEN---improving-gender-mainstreaming-in-Scotland.pdf) [↑](#footnote-ref-10)
11. Page 18 - [Public authorities’ performance in meeting the Scottish Specific Equality Duties 2017: Measuring Up? Report 7 | Equality and Human Rights Commission (equalityhumanrights.com)](https://www.equalityhumanrights.com/en/publication-download/public-authorities%E2%80%99-performance-meeting-scottish-specific-equality-duties-2017) [↑](#footnote-ref-11)
12. [www.equalityevidence.scot](http://www.equalityevidence.scot/) [↑](#footnote-ref-12)
13. See <https://www.gov.scot/collections/equality-evidence/#covid-19andequality> - slide packs on Inequalities by age/disability/ethnicity/gender in the context of Covid-19. [↑](#footnote-ref-13)
14. <https://data.gov.scot/coronavirus-covid-19/equality.html> [↑](#footnote-ref-14)
15. [National Advisory Council on Women and Girls (NACWG) 2019 - report and recommendations: SG response - gov.scot (www.gov.scot)](https://www.gov.scot/publications/scottish-governments-response-first-ministers-national-advisory-council-women-girls-nacwg-2019-report-recommendations/pages/8/) [↑](#footnote-ref-15)
16. If not now, when? - Social Renewal Advisory Board report: January 2021 [If not now, when? - Social Renewal Advisory Board report: January 2021 - gov.scot (www.gov.scot)](https://www.gov.scot/publications/not-now-social-renewal-advisory-board-report-january-2021/) [↑](#footnote-ref-16)
17. [Equality Outcomes 2021-25 (www.gov.scot)](https://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2021/03/equality-outcomes-mainstreaming-report-2021-mainstreaming-report/documents/equality-outcomes-2021-25/equality-outcomes-2021-25/govscot%3Adocument/equality-outcomes-2021-25.docx) [↑](#footnote-ref-17)
18. National Taskforce for Human Rights Leadership Report, March 2021: <https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/> [↑](#footnote-ref-18)
19. [Public authorities’ performance in meeting the Scottish Specific Equality Duties 2017: Measuring Up? Report 7 | Equality and Human Rights Commission (equalityhumanrights.com)](https://www.equalityhumanrights.com/en/publication-download/public-authorities%E2%80%99-performance-meeting-scottish-specific-equality-duties-2017) [↑](#footnote-ref-19)
20. [247767\_PubServ\_Imp-p11.indd (www.gov.scot)](https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2013/04/three-step-improvement-framework-scotlands-public-services/documents/three-step-improvement-framework-scotlands-public-services-pdf/three-step-improvement-framework-scotlands-public-services-pdf/govscot%3Adocument/The%2Bthree-step%2Bimprovement%2Bframework%2Bfor%2BScotland%2527s%2Bpublic%2Bservices.pdf) [↑](#footnote-ref-20)
21. S2.2.1 - [DAWR (engender.org.uk)](https://www.engender.org.uk/content/publications/WHAT-WORKS-FOR-WOMEN---improving-gender-mainstreaming-in-Scotland.pdf) [↑](#footnote-ref-21)
22. Pollack and Hafner-Burton, 2000: 452 - <https://www.researchgate.net/publication/261681246_Mainstreaming_Gender_in_the_European_Union> [↑](#footnote-ref-22)
23. Effectiveness of the PSED Specific Duties in Scotland. EHRC. [Effectiveness of the PSED specific duties in Scotland (equalityhumanrights.com)](https://www.equalityhumanrights.com/sites/default/files/effectiveness-of-psed-specific-duties-scotland.pdf) [↑](#footnote-ref-23)
24. Effectiveness of the PSED Specific Duties in Scotland. EHRC. [Effectiveness of the PSED specific duties in Scotland (equalityhumanrights.com)](https://www.equalityhumanrights.com/sites/default/files/effectiveness-of-psed-specific-duties-scotland.pdf) [↑](#footnote-ref-24)
25. <https://www.equalityhumanrights.com/en/publication-download/equality-outcomes-self-assessment-tool-public-authorities-scotland> [↑](#footnote-ref-25)
26. [Joint letter: Equality and Human Rights and the Coronavirus in Scotland - The Children and Young People's Commissioner Scotland (cypcs.org.uk)](https://cypcs.org.uk/resources/joint-letter-equality-human-rights-coronavirus/) [↑](#footnote-ref-26)
27. [Impact assessment in governments: literature review - gov.scot (www.gov.scot)](https://www.gov.scot/publications/literature-review-impact-assessment-governments/pages/5/) [↑](#footnote-ref-27)
28. [Intervening for equality | Law Society of Scotland (lawscot.org.uk)](https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-12/intervening-for-equality/) [↑](#footnote-ref-28)
29. [High Court Quashes the Mayor of London's Streetspace Plan and TfL’s Bishopsgate Traffic Management Order | Francis Taylor Building (ftbchambers.co.uk)](https://www.ftbchambers.co.uk/news/high-court-quashes-mayor-londons-streetspace-plan-and-tfl%E2%80%99s-bishopsgate-traffic-management) [↑](#footnote-ref-29)
30. [Public authorities’ performance in meeting the Scottish Specific Equality Duties 2017: Measuring Up? Report 7 | Equality and Human Rights Commission (equalityhumanrights.com)](https://www.equalityhumanrights.com/en/publication-download/public-authorities%E2%80%99-performance-meeting-scottish-specific-equality-duties-2017) [↑](#footnote-ref-30)
31. Gender Pay Gap Reporting: A Comparative Analysis - Fawcett Society, 2020: [Download.ashx (fawcettsociety.org.uk)](https://www.fawcettsociety.org.uk/Handlers/Download.ashx?IDMF=e67112b9-b01a-4852-9340-139e42585ae1) [↑](#footnote-ref-31)
32. [Race Equality, Employment and Skills: Making Progress? | Scottish Parliament](https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2020/11/15/Race-Equality--Employment-and-Skills--Making-Progress-#The-ethnicity-pay-gap) [↑](#footnote-ref-32)
33. [Home - Public Contracts Scotland](https://www.publiccontractsscotland.gov.uk/Default.aspx) [↑](#footnote-ref-33)
34. [Protecting Scotland, Renewing Scotland: The Government's Programme for Scotland 2020-2021 - gov.scot (www.gov.scot)](https://www.gov.scot/publications/protecting-scotland-renewing-scotland-governments-programme-scotland-2020-2021/) [↑](#footnote-ref-34)