Consultation Response

Public sector Equality Duty in Scotland: consultation

11 April 2022

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Equalities Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government consultation: *Public sector Equality Duty in Scotland*[[1]](#footnote-2). The sub-committee has the following comments to put forward for consideration.

Consultation Questions

# 1.1 What are your views on the Proposal outlined above in relation to the substance of reporting?

The proposal to require listed authorities to publish a strategic plan will encourage a cohesive, joined-up and holistic approach to the SSDs which has the potential to be more effective in advancing equality of opportunity in Scotland. The requirement for listed authorities to report on implementation of all the SSDs is to be welcomed as there is no clear rationale as to why a reporting duty presently attaches to only some of the SSDs. Decisions informed by lived experience of relevant stakeholders are more likely to effectively meet the relevant needs and interests. For reasons of accountability and transparency, listed authorities ought to be required to report on how they have used lived experience in their implementation of their duties.

# 1.2 What are your views on the proposal outlined above in relation to the reporting process?

**These are to:**

* **Simplify the regime so that there is only one reporting cycle for all of the duties**
* **Allow listed authorities to satisfy all of their reporting duties in one report, reinforce the flexibility of reporting requirements and encourage listed authorities to report on their duties as part of their own operational reporting cycles.**
* **Ensure that reporting deadlines do not align with the end of the financial year.**
* **Require reports to be published at a minimum of every 4 years.**

The proposed reporting process should cut down on bureaucracy by permitting all reporting obligations to be satisfied in the one report. It is agreed that the current 2-year reporting obligations may place too onerous an obligation on listed authorities and risks them spending time on the process rather than on taking substantive steps to advance equality/address inequalities. Indeed, the suggestion that some listed authorities may have misinterpreted current reporting obligations could indicate a present lack of engagement with the SSDs. We suggest a 3-year reporting period would be more appropriate than a 4-year reporting period.

# 1.3 What are your views on consolidating the previous sets of amending regulations?

Agree. Consolidating the previous regulations would make it easier to comply with the regulations.

**2.1 What are your views on our proposal to place a duty on listed authorities to embed inclusive communication proportionately across their work?**

We are generally in favour of the proposal. Providing ‘a clear definition of what communicating in an inclusive way means’ and ‘a set of national standards and a robust monitoring system’ will be important to support listed authorities. The proposed duty would also need to be supplemented with guidance on proportionality especially with regard to resources.

**3.1 What are your views on our proposal to require listed authorities to publish ethnicity and disability pay gap information?**

Although it is recognised that data on employees’ ethnicity / disability may not be as available to listed authorities as data on gender, it is considered that requiring listed authorities to publish ethnicity and disability pay gap information is an important step for advancing disability and race equality. We would welcome this being rolled out to other protected characteristics in the future.

**3.2 Should the reporting threshold for ethnicity and disability pay gap reporting be the same as the current reporting threshold for gender pay gap reporting (where a listed authority has at least 20 employees)?**

The same threshold (20 employees) ought to be used for disability and ethnicity pay gap reporting. However, there may be a greater risk of breaches to anonymity in reporting on disability and ethnicity pay gaps and, as such, the reporting obligation should include mechanisms to address this risk.

# 3.3 What are your views on the respective formulas that should be used to calculate listed authorities’ gender, ethnicity and disability pay gaps?

It is considered important that formulae are prescribed to ensure consistency in reporting for ease of comparability. It is also important that formulae permit for variations where necessary to ensure anonymity in reporting is maintained. A template for reporting is also welcomed.

# 4.1 What are your views on the proposal outlined above?

We are in favour of this proposal. It is agreed that there is a risk that equality impact assessments are used to address only whether policies/practices have a discriminatory impact. It is agreed that the duty to assess and review policies and practices – as well as strategy - ought also to involve consideration as to how the policy/practice/strategy can advance equality. Being clear that assessments should be carried out early enough to test ideas will help to encourage this proactive and forward-looking approach. The instruction, however, should be crafted in clear terms to enhance its potential effectiveness. It is agreed that it is important for decision makers to be informed by the lived experience of those affected by policies/practices.

# 4.2: The Scottish Government recognises that improving the regime around assessing and reviewing policies and practices will take more than regulatory change. How else could improvements be made?

The requirement to appoint Equality Accountability Officers to ensure a supportive workplace culture would be welcomed. Monitoring/appraisal on a sampling basis of whether policies/practices have been appropriately assessed/reviewed could also lead to improvements.

# 4.3: What are your views on the current scope of policies that should be assessed and reviewed under regulation 5?

There is a lack of clarity surrounding the current scope. The meaning of proportionate and relevant needs to be more clearly expressed and decisions on whether or not to assess/review policies may therefore depend on the subjective judgments of decision-makers as to proportionality and relevance. This risks inconsistency in approach and omissions.

# 5.1: What are your views on our proposal for the Scottish Government to set national equality outcomes, which listed authorities could adopt to meet their own equality outcome setting duty?

There is benefit and pragmatism in leadership from the Scottish Government on national equality outcomes and merit in asking listed authorities to align their approaches accordingly. It is important, however, that the outcomes arising from the action plans of listed authorities feed into the setting of national equality outcomes and that listed authorities are permitted and encouraged to set their own outcomes which meet the needs of their stakeholders.

# 6.1: What are your views on the Scottish Government’s proposal to simplify the regulation 6A process?

The proposal will cut down on unnecessary red tape and may result in action being taken by listed authorities to address inequalities in membership more promptly.

# 6.2: What are your views on the proposal in relation to regulations 11 and 12?

If the Scottish Government is to continue to take a leadership role in relation to the SSDs, regulations 11 and 12 should be retained. It is sensible that if the Scottish Government is to produce national equality outcomes with which listed authorities’ activities are to align, that the Scottish Government retains the power to direct listed authorities to consider certain matters, including what the Scottish Government considers are the most significant inequalities.

# 6.3: In 2019, the First Minister’s National Advisory Council on Women and Girls recommended that Scottish Ministers deliver an Annual Statement, followed by a debate, on Gender Policy Coherence to the Scottish Parliament. In our response to this we said we would: “Consider the merits of aligning the delivery of a statement and debate with the existing legal duty on Scottish Ministers to publish a report on progress to better perform the PSED under the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012”. What are your views on this?

Providing an opportunity for the Scottish Government’s national equality outcomes to be debated in Parliament would have the benefit of increasing transparency.

# 7.1: What are your views on our proposal and call for views in relation to procurement?

It is agreed that listed authorities should be required to report on how they have complied with the present duty pertaining to award criteria and conditions. However, requiring awards and tender specifications to state that all outputs of work should meet the PSED could discourage smaller / third sector suppliers. It is further unclear with whom responsibility for failure to comply would lie. If it is the supplier this would add an additional layer of red tape and burden them with unnecessary accountability and enforcement obligations,

# 8.1: The First Minister’s National Advisory Council on Women and Girls called for the Scottish Government to place an additional duty on listed authorities to “gather and use intersectional data, including employment and service-user data, to advance equality between protected groups, including men and women”? (a) What are your views on this?

The collection and analysis of intersectional data is essential to a better understanding of how inequality is experienced in Scotland and the use of such data by listed authorities is necessary for the advancement of equality of opportunity. As, however, the combinations of intersectional data which may be available to listed authorities are considerable, guidance will need to be provided to ensure the data being collecting is relevant to the most pressing needs. A further consideration is whether this new duty ought to apply to all listed authorities or whether it should, at least initially, only apply to those listed authorities with the capabilities and resources to carry out the required data collection/analysis.

# (b) How could listed authorities be supported to meet this requirement?

Guidelines and examples should be provided as to how this should be done.  
  
8.2: [Question directed specifically to listed authorities]  
  
(a) If there was a requirement for your organisation to “gather and use intersectional data, including employment and service-user data, to advance equality between protected groups, including men and women”, would you be confident your organisation could comply with it?  
  
Yes/No  
  
Routing depending on answer to part (a).  
  
(b) If yes, why?  
  
(b) If no, what would you need to ensure you could comply by 2025?

As this question is directed to listed authorities, we have no comments to make.

# 9.1: The First Minister’s National Advisory Council on Women and Girls’ called for the Scottish Government to integrate intersectional gender budget analysis into the Scottish Budget process, and to place this on a statutory footing. What are your views on this?

Disaggregation of data has led to positive change for women in the past. It is agreed that the disaggregation of gender data now needs to adopt an intersectional lens so that decision makers can better understand and address disadvantage. By requiring only intersectional gender budget analysis, the duty is not overly onerous. It is to be hoped that if this is successful it will be possible to extend it to all protected characteristics in the future.

# 9.2: The First Minister’s National Advisory Council on Women and Girls’ called for the Scottish Government to place an additional duty on listed authorities to integrate intersectional gender budget analysis into their budget setting procedures.

###### **(a) What are your views on this?**

**(b) How could listed authorities be supported to meet this requirement?**

There is merit in considering when implementing this duty how listed authorities can best draw on the experiences of the Scottish Government in integrating intersectional gender budget analysis into the Scottish Budget process. This might mean the duty on listed authorities is implemented at a later date from the duty on the Scottish Government referred to above at 9.1. There may also be benefit in trialling the duty in one listed authority initially with a view to attaining a better understanding of the implications. Guidance and training would also be required.to support the listed authorities meet the requirement. As noted above, it is hoped that if this duty is successful, it will be extended to all protected characteristics in the future.

# 9.3: [Question directed to listed authorities] (a) If an additional duty was placed on your organisation to integrate intersectional gender budget analysis into its budget setting procedures, would you be confident your organisation could comply with it?

###### **Yes/No**

###### **Routing depending on answer to part (a).**

###### **(b) If yes, why?**

###### **(b) If no, what would you need to ensure you could comply by 2025?**

As this question is directed to listed authorities, we have no comments to make.

# 10.1: (a) In your view, are there any Scottish public authorities who are not subject to the PSED or the SSDs that you think should be? Yes/No

We are not aware of any Scottish public authorities who ought to be subject to the PSED and who are not.  
  
(b) If Yes, please give detail on which Scottish public authorities you think should be subject to the PSED or SSDs.

Not applicable

# 10.2: The Equality and Human Rights Commission (EHRC) has expressed the view that regulatory bodies, as part of their own compliance with the SSDs, should be encouraged to do more to improve PSED performance within their sector. What are your views on this?

It is unclear what would be required of regulatory authorities in this respect. Would this amount to encouragement and support or policing and enforcement? If the latter, we are of the view that the enforcement role should be retained by the EHRC.

# **11.1: The Scottish Government will consult on the issues in this section further through the mainstreaming strategy. However, if you think any of these matters could be addressed through the PSED review, please give details here**

The PSED should include issues of training and Equality Accountability Officers.

Consultation on the suggestion of protected budgeting is welcome. It is observed that whilst this is an interesting idea, it is unclear how it would operate in practice, given the uncertainties surrounding projection of need and resource.

# 12: What would you like to see in improved revised guidance for the SSDs?

Good, prescriptive guidance will be beneficial. It will be important that listed authorities are supported by technical guidance on collection, analysis and use of intersectional data.

# 13: EHRC has expressed the view that listed authorities should report on how they have used positive action under section 158 of the Equality Act 2010, as part of their reporting obligations. What are your views on this?

It is important to require this reporting. There is currently very limited empirical data on the use by organisations of positive action pursuant to the Equality Act (“EA”). It is difficult, therefore, to assess the effectiveness of these provisions. Increased transparency regarding listed authorities’ use of s158 EA is, accordingly, welcome. It could, moreover, have the beneficial effect of encouraging employers and service providers in the private sector to take positive action as a means to advancing equality in their own organisations. For comment on the lack of empirical evidence of employers’ use of ss158 & 159, its importance and for the findings of a study conducted by Davies and Robison exploring employers’ perceptions of the positive action provisions in the EA, see C Davies & M Robison ‘*Bridging the Gap:  An exploration of the use and impact of positive action in the UK*’[[2]](#footnote-3)

# 14.1: Overall, what are your reflections on the proposals set out by the Scottish Government and the further areas explored?

We are generally very positive about the proposals set out by the Scottish Government and, in particular, the proposals pertaining to the duties on listed authorities to produce a strategic plan, collect/use intersectional data, and report on disability/ethnicity pay gaps.

# 14.2: Please use this box to provide any further information that you think would be useful, which is not already covered in your response.

We have no further comments to make

1. <https://www.gov.scot/publications/public-sector-equality-duty-scotland-consultation/> [↑](#footnote-ref-2)
2. 2016 IJDL Vol 16(2)-(3), 83-101. [Bridging the gap: an exploration of the use and impact of positive action in the UK (openrepository.com)](https://chesterrep.openrepository.com/handle/10034/600634?show=full) [↑](#footnote-ref-3)