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

**Stage Three Questionnaire:**

**Response from the Coalition for Racial Equality and Rights**

**March 2022**

The Coalition for Racial Equality and Rights (CRER) welcomes the opportunity to respond to the review of the operation of the Public Sector Equality Duty (PSED) in Scotland. This response expands upon our earlier submission at stage two of the review.

CRER has been involved in convening the joint letter from 26 equality organisations submitted separately, and would particularly reiterate our shared call for Scottish Government to develop draft regulations in direct collaboration with equality stakeholders with specific expertise in this area.

**Background**

CRER is a Scottish anti-racist organisation which works to eliminate racial discrimination and promote racial justice across Scotland. We have been at the forefront of scrutinising performance and offering support on the Scottish specific public sector equality duties (referred to in the questionnaire as SSD) from their inception. We also played a key role in the original SSD consultation process in 2011 and led efforts against Scottish Government’s plans to adopt a comparatively weak set of draft regulations, resulting in rewriting.

Since then, we have developed several programmes of work around enabling better performance of the SSD. This gives us considerable understanding and insight into not only the detail of the legislation, but how it operates in practice.

Examples of our work on the SSD include:

* Regular research reports on SSD performance in Glasgow, produced on a biennial basis, with associated guidance for public sector bodies to identify recommendations for improvements in practice and to explore challenges in implementing SSD
* Extensive research undertaken on behalf of the Equality and Human Rights Commission which measures performance on key areas of SSD across Scotland’s public sector for the publication cycle 2013 – 2017, including collation and analysis of employee equality monitoring data across Scotland’s public sector
* Research undertaken on behalf of the Equality and Human Rights Commission identifying best practice in the application of SSD
* Working to promote Scottish interests in the UK PSED ‘Red Tape Review’
* Scottish Government funded work on building capacity around SSD, working with voluntary and public sector organisations
* Support for specific public sector bodies on developing approaches to SSD, including through involvement in outcome setting and reviewing approaches to equality impact assessment (EQIA)
* Work to encourage civil society to use the SSD to hold public bodies to account, including guidance and an online portal with links to PSED publications in all listed authorities
* Consultancy support and biennial round table meetings focused on improving SSD performance for public sector bodies in Glasgow, funded by Glasgow City Council’s Glasgow Communities Fund
* A long standing programme of work on the general equality duty requirement to foster good relations, including our recent report [Fostering Good Relations in Scotland: Developing community cohesion through public policy](https://864a82af-f028-4baf-a094-46facc9205ca.filesusr.com/ugd/b0353f_ec32d63f92d541eb91bbc7260586d689.pdf)

**Overarching comments**

As noted in the joint response submitted by equality stakeholders, the proposals are, for the most part, light touch; they do not reflect the extent of reform needed to address deep-seated and long-standing inequalities in Scotland. PSED reform needs to be evidence based and rights based, prioritising effective means of creating change in the lives of people with protected characteristics rather than simply making compliance simpler and marginally more effective

The response stressed that we have serious concerns about the direction of travel of the current consultation on the review of the effectiveness of the Public Sector Equality Duty in Scotland. CRER is keen to work with the Scottish Government in ensuring that any revised duties are as robust as necessary and which will lead to real improvements in the lives of people with protected characteristics.

As stated in the joint letter**, “We call on the Scottish Government to adopt a fully-fledged collaborative process, working with equality stakeholders in drafting the revised regulations. This will be essential if we are to, as Cabinet Secretary Shona Robison outlines in her foreword to the consultation, “create an effective regime and wider implementation environment that will make a stronger contribution to improving the lives of people in Scotland, by embedding equality considerations at the very heart of the public sector”.”**

We once again reiterate our disappointment that Scottish Government has not acted on our recommendation to undertake research into the effectiveness of the duties regarding mainstreaming, equality impact assessment and procurement. These make up a sizable portion of the duties, and in our experience, are some of the least well implemented. Time must be made for this essential work to be carried out in advance of drafting regulations.

The stage 3 consultation paper makes some acknowledgement of issues raised by CRER at stage 2, and throughout discussions from 2018 onwards. However, we do not see significant recognition of the recommendations made in our stage 2 response. All recommendations still stand, and are therefore reiterated where appropriate within our answers to the stage 3 questionnaire below.

**1: Creating a more cohesive regime and reducing perceived bureaucracy**

Question 1.1: What are your views on the proposal outlined above in relation to the substance of reporting?

As set out in our previous response, we do not believe that the nature of the current SSDs can be blamed for the perception within the public sector that the work required to meet the duties is overly bureaucratic. We are therefore concerned as to whether these proposals will materially impact the level of non-compliance and poor compliance that currently exists.

Many of the proposals currently set out for reducing bureaucracy are already permitted by the existing regulations, e.g. aligning to organisational reporting cycles and publishing in a single report. Alignment of equality work to existing strategy and planning is not only permitted by the current SSDs, but arguably required as part of the mainstreaming duty. The reasons why this is not being implemented are unclear, but arguably reflect a reluctance to make the necessary changes to the work of the organisation that would proactively meet the duties and impact the lives of people with protected characteristics.

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Experience strongly suggests that, in many public bodies, these systemic issues of poor implementation are the origin of difficulties in reporting. Without action to improve implementation, bureaucracy will not necessarily be reduced.

Inconsistent and often non-compliant approaches to areas of the duties such as data collection and equality impact assessment suggest that more prescriptive requirements are needed. This could include greater specificity in legislative requirements and provision of templates for reporting where appropriate. There may be value in considering whether the Minister’s Duty provides an avenue to enable the mandating of particular templates.

Within a more prescriptive set of reporting requirements, however, we would support the idea of mandating that all required information should be gathered in a single report. The exception to this would be full Equality Impact Assessments. These must be published in a way (and at a time) that matches up with the policy development they relate to. Information on the Equality Impact Assessments conducted, ideally with a line explaining the action taken as a result, would be useful within the single report. We would also be interested in requiring a schedule of future areas intended for assessment, as required under the previous Race Duty.

We note stakeholder interest in the Welsh concept of strategic equality plans. Whilst we feel that changing the language of the SSDs in this way could be counterproductive, providing an excuse for poor practice due to lack of familiarity with a ‘new’ model, these plans already have an equivalent in informal practice in Scotland. One public body which CRER engages with includes a mainstreaming action plan within their mainstreaming report. This helps them to clearly separate actions related to process and policy (i.e. mainstreaming) from their equality outcomes, which are rightly aimed at creating specific changes in the lives of people with protected characteristics. We feel that mandatory action plans within mainstreaming reports could help to remedy some of the long standing bad practice in outcome setting across the public sector by offering a clearer delineation between the mainstreaming and outcomes duties.

We are broadly in support of the idea that lived experience should better inform practice across the SSDs. However, this has to be done as part of a wider policy making process and delivered with purpose and care. Legislative requirements would need to be tightly worded in order to ensure this is the case, so that any new requirements do not result in a damaging process of involvement for involvement’s sake.

As already required under the duty to set equality outcomes, public bodies should be engaging with people with protected characteristics and those who represent their interests. Those involved should have a direct stake in the public body’s work and their input should make a direct impact on performance of the SSDs.

Service users and staff with lived experience are essential stakeholders, as they can identify the impact of the public body’s action (or inaction) on their lives. However, these groups cannot and should not be expected to deliver systemic solutions to ingrained inequality. Just as people experiencing poverty should not be expected to do the work of an economist, this requires input from stakeholders with strategic equality expertise.

Above all else, engagement with those who have lived experience must be quality assured (for example, looking at compliance with the National Standards for Community Engagement), proportionate, accessible, conducted in safer spaces (in certain cases, trauma informed) and measurably impactful. Impact should be communicated back to those involved.

We would note at this point that if Scottish Government is serious about reflecting lived experience within policy making, it should take immediate action on the issues set out in the joint letter submitted by equality stakeholders with decades of experience, led by and representing the interests of protected characteristic groups.

We recommended the following amendments to the SSD in our response to the stage 2 consultation:

* Setting out more clearly the nature and extent of information required to meet the mainstreaming duty
* Retaining the system of set publication deadlines with a four year cycle, with flexibility to publish earlier if this ties in with corporate reporting deadlines
* Introducing a duty to collect, gather and use equality evidence as suggested in the stage One report, as part of wider reform that more explicitly sets out how evidence should be used as part of a cycle, ensuring evidence informs effective action and can be revisited to demonstrate the change occurring as a result via a performance measurement framework

In terms of non-legislative change, we recommended:

* Undertaking research into how public bodies are complying with the existing mainstreaming duty and its impact before new regulations are drafted
* Providing specific guidance on the need for clear separation of equality outcomes and mainstreaming information relating to education authorities and licensing boards set out within local authority reports (this is a common issue which may be a matter for enforcement by the Commission)
* Supporting public bodies to avoid over-reporting and focus on information which demonstrates their approach to meeting the three needs of the general duty in relation to each relevant protected characteristic group

Following sight of the stage 3 proposals, we would additionally recommend:

* Requiring that the single report contains a list of Equality Impact Assessments
* Retaining the need for individual publication of full Equality Impact Assessments

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

Organisations already have a tendency to slow or stop work towards meeting the duties mid-cycle, returning to this a few months before publication is required and expending much effort in putting together needlessly lengthy reports rather than establishing sustainable mechanisms for implementation and progress monitoring.

We strongly believe that removing the mid-point reporting requirement will worsen this tendency. Based on previous experience, it is inevitable that equality work would be severely deprioritised by those authorities who are less invested in the equality agenda over the mid-period, and that most of those who are more invested would continue to mismanage the monitoring and evaluation process resulting in an untenable workload towards the end of the four year cycle.

As stated in our stage 2 response, CRER recommends:

* Retaining the system of set publication deadlines with a four year cycle (and mid-point reporting requirements), with flexibility to publish earlier if this ties in with corporate reporting deadlines

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

As stated in our stage 2 response, CRER recommends:

* Undertaking a detailed overhaul of the regulations in order to maximise their effectiveness and close loopholes, through consolidation and amendment

**2: Embedding Inclusive communications**

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

As stated in our stage 2 consultation response, we defer to those with relevant expertise on the point of a duty for accessible communication for those with sensory or cognitive impairments. However, we note that there may be a need to consider the interaction of inclusive communications for disabled people within PSED and their existing rights under the Equality Act 2010 to reasonable adjustments.

On the point of publications translation in languages other than English, CRER’s stance is that translated materials should be provided on request.

Providing these as standard tends to result in mass production and substantial investment, leading to resources being drawn away from tackling more ingrained inequalities. In our view, language barriers are a result of insufficient availability of English as a Second or Other Language provision. This is the key issue which should be resolved to increase inclusive communications for people with low English language proficiency.

Nevertheless, for those requiring translation, an interim solution is to ensure that translation services are high quality. A centralised service, as suggested within the consultation document, may be a way to achieve this, particularly if it covered both translation and interpretation. There are significant concerns with the reliability and ethical implications of currently available language interpretation services in many areas. We note that this does not currently feature in the proposals, but is a key issue for inclusive communication.

Proposals to provide improved guidance and best practice information are welcome, but will be ineffective without more strategic approaches to provide ESOL and high quality translation and interpretation support directly to those who need it.

In our stage 2 response, we recommended the following amendments to the SSD in relation to the duty to publish accessibly:

* Specify that documents produced for SSD compliance purposes should be published in an easily accessible section of the public bodies’ websites, as well as specifying that alternative formats should be made available, where reasonably practicable, on request

**3: Extending pay gap reporting to include ethnicity and disability**

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

CRER remains certain that, in the vast majority of public sector organisations, it will not be possible to robustly calculate a meaningful ethnicity pay gap. Current employee information publication is patchy. Without a high quality monitoring approach which enables workforce ethnicity to be looked at on a granular level in line with Census categories, an attempt to calculate an ethnicity pay gap is meaningless.

CRER believes that addressing under-representation of Black and minority ethnic people within Scotland’s public sector, including at senior levels, should be the primary focus of any legislative amendments intended to address ethnicity and employment / income issues.

We note that this view was reflected within the contextual information in the stage 3 consultation paper. However, the current proposals do not mitigate our concerns.

In particular, the opportunity has been missed to include measures to tackle under-representation. Strengthening the employee information duty, for example to explicitly require actions with targets to be set and monitored for all inequalities identified through the analysis of employee information, would be a far more impactful approach. We recommended this in our stage two response. For the sake of reducing complexity, we would now amend this to clarify that this is best achieved through requiring the setting of equality outcomes with associated actions and targets on the identified inequalities; this could be a more powerful driver than the current requirement to gather and ‘use’ the data.

We note the view put forward in the potential solutions section that a comprehensive public sector portal could be operated by Scottish Government to hold pay gap information. CRER already operates a Public Sector Equality Duty portal to improve public access to reports produced under the SSDs, and whilst valuable, this is not without its challenges. We would be keen to discuss any potential moves towards Scottish Government taking a more pro-active role in collating PSED data and/or reports.

As reflected in our stage 2 consultation response, we recommend:

* Prioritising measures to tackle under-representation, including an explicit requirement to set equality outcomes on inequalities demonstrated by employee information data with associated targets and actions, over the proposed introduction of pay gap reporting on ethnicity

Question 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 under-representation of minority ethnic people within Scotland’s public sector makes such a threshold largely meaningless.

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

As set out in our stage 2 submission, our research for the Equality and Human Rights Commission demonstrated that the calculation given in the regulations for gender pay gap reporting was often not being used, despite being very clear and well promoted by both the Commission and equality stakeholders such as Close the Gap and CRER.

This fundamental non-compliance requires enforcement action; there is no reason to believe that an expanded pay gap duty would be better complied with, and indeed the relatively greater complexity involved in robustly calculating an ethnicity pay gap may result in more non-compliance.

In our stage 2 consultation response, we recommended:

* Ensuring that the gender pay gap is calculated as a single figure for the entire organisation, using the percentage difference among all employees between men’s average hourly pay (excluding overtime) and women’s average hourly pay (excluding overtime) as required by the legislation, and not by means of another calculation

We also recommended the following amendments to the SSD in relation to the equal pay statement:

* Requiring public bodies to set actions with targets for the reduction of any identified pay gap, alongside specific actions to be taken to achieve this (amended to clarify this should be through an explicit requirement to set equality outcomes on inequalities demonstrated by the data with associated targets and actions)
* Considering whether it would be desirable to require publication of the gender pay gap within grades and occupational groups in larger public sector bodies (in addition to the currently required gender pay gap calculation) in order to better identify persistent or severe gaps and understand the role of occupational segregation

In terms of non-legislative change, we recommended:

* Advising public bodies that structural barriers such as occupational segregation and imbalances in the distribution of caring roles should be addressed through action to mitigate these factors, rather than simply using these to explain the existence of the gender pay gap

In the event that proposals within the current consultation stage are taken forward, we recommend:

* A mandatory formula for calculating pay gaps, with a requirement to disaggregate ethnicity on a granular level in line with Census categories

**4: Assessing and reviewing policies and practices**

Question 4.1: What are your views on the proposal outlined above?

Broadly speaking, we agree with Scottish Government’s view that very poor implementation of this duty is the primary problem, as opposed to the wording of the legislation itself. However, we do believe there are opportunities to strengthen this. We note that our stage 2 recommendation that, where relevant, there should be a requirement to involve those with protected characteristics in equality impact assessments. This would include, for example, service users and equality stakeholder groups.

To date, the more rights-focussed recommendations put forward have not been adopted. As a result, the current proposals are too weak to lead to meaningful change.

We recommended the following amendments to the SSD in relation to equality impact assessment in our stage 2 consultation response:

* Require involvement of service users with protected characteristics and those who represent their interests (where relevant) in equality impact assessments
* Consider creating a pro-active right to request involvement in EQIA processes, with rationales for the decision to be published
* Consider creating a pro-active right to request that an EQIA be carried out on a specific policy or service, with rationales for the decision to be published

Following sight of the stage 3 proposals, we have identified some additional considerations.

CRER would support the proposal that a summary of EQIA activity should be set out within the single report, but would suggest that inclusion of a full list of EQIAs carried out should be required in addition to this overview.

We would also be interested in a return to the requirement to publish a schedule of future EQIAs, as previously required by the Race Duty.

We would further recommend that Scottish Government considers the provision of an Equality Impact Assessment template, or at the very least a set of mandatory minimum considerations to be included.

This could usefully include a requirement to set out whether the policy/service being assessed will be continued without mitigation (where no impact identified), continued with mitigations, halted in order to identify mitigations, or halted entirely as no mitigations are possible. This four-option consideration is paraphrased from previous Equality and Human Rights Commission guidance, prior to their adoption of a non-prescriptive stance. In our view, an approach such as this could substantially reduce the tendency for EQIAs to have no impact on decision making.

We would also support mandating publication of a summary of the evidence used in assessing equality impacts, alongside data gaps limiting the available evidence.

Question 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?

Without further research into the reasons why compliance is so poor, it will be difficult to identify solutions. As previously stated, time must be made to address the lack of evidence on mainstreaming, equality impact assessment and the procurement duty before new regulations are drafted or non-legislative levers put into action.

In terms of non-legislative change, we recommend in our stage 2 response:

* Undertaking research into the extent of compliance with this duty and its impact

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

The requirement to assess existing policies as well as new or revised policies could be clearer. As stated in our stage 2 response, compliance with this could potentially be strengthened by amending the SSD to:

* Require publication of a schedule of equality impact assessments to be completed over each cycle, as required under the previous Race Equality Duty

**5: A new equality outcome setting process**

Question 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?

The intention to drive forward national equality outcomes may have some benefits but, as recognised in the stage 3 consultation paper, also creates risks that local needs will remain unmet. CRER would be in favour of amending the outcomes duty to ensure that public bodies set outcomes to tackle specific key inequalities and that, as with the approach to protected characteristics, justify their decision if any of these inequalities are not included. These specific key inequalities could usefully be specified in terms of national outcomes. However, the involvement process for setting these would have to be extremely robust, and ideally be undertaken in line with co-production principles.

Even with a co-production process, we remain concerned that the national outcome setting process may result in some equality groups faring better than others. As stated in our stage 2 response, we view the poor reflection of race in the Equality and Human Rights Commission’s strategic priorities over the years as an example of how easily the key inequalities facing Black and minority ethnic people can be neglected in cross-strand equality processes.

We would also stress that the need to ensure a balance of strategic expertise and lived experience input must be reflected; both are necessary for a robust understanding of the causes, consequences and solutions to inequalities. This is the case both in relation to national outcomes, and localised outcomes. We firmly believe these will still be needed. However, the provision of national outcomes may make public sector organisations reluctant to set these.

The existing requirement to involve people with protected characteristics and their representatives is already poorly met by many authorities. We cannot be confident that they would robustly identify, and set out to involve people around, localised inequalities.

Our recommendation that voluntary and community organisations should have pro-active rights to put forward equality outcomes for consideration would be an effective way of ensuring localised inequalities are still taken into account in the context of national outcomes. Such a provision could also potentially be extended to staff networks in order to improve the reflection of employment functions in outcome setting, which is often weak.

A revised approach to equality outcome setting could also usefully consider shared outcomes across sectors or across organisations working with the same communities, for example shared equality outcomes between Community Planning Partners which could potentially link to their Local Outcomes Improvement Plans. In our experience, LOIPs, Locality Plans and the work pursued to achieve them often fail to take account of equality and the needs of people with protected characteristics. This may be a matter for non-legislative approaches to improving performance.

In our response to the stage 2 questionnaire, we recommended the following amendments to the SSD in relation to equality outcomes:

* Create a pro-active right for constituted voluntary and community sector organisations to submit suggestions for equality outcomes (reflecting the change they believe the public body should aim to create in the lives of people with protected characteristics, as set out in the Equality and Human Rights Commission Guidance)
	+ Public bodies should have an obligation to publish a list of these with an explanation of their rationale for accepting, partially accepting or rejecting suggestions
	+ A similar approach may be used to create a pro-active right to have evidence relating to equality outcomes progress reporting and EQIA considered
* In addition to the above, require public bodies to set outcomes to tackle specific key inequalities and, as with the approach to protected characteristics, justify their decision if any of these inequalities are not included
* Increase specificity on what constitutes ‘involvement’ to reflect the Equality and Human Rights Commission’s position that this requires a multi-stage process with a genuine impact on decision making
* Require listed authorities to describe the involvement carried out, any representations received in response to that involvement, and whether and if so how those representations have been taken account of in preparing the outcomes
* Require authorities which have not involved each of the protected characteristic groups to publish reasons (similar to the current requirement for outcome setting)
* Clarify that outcomes must be worded to express a desired change for people with specific protected characteristics and should address a well-defined inequality related to one or more of the three needs of the general equality duty
* Clarify that equality outcomes should not replicate an existing legal duty, for example outcomes focussed on publishing the gender pay gap, conducting equality impact assessment or publishing employee information
* Require public bodies to set equality outcomes to address inequalities identified through equality impact assessment, employee information and the gender pay gap
* Require equality outcomes to be accompanied by a performance measurement framework to enable effective reporting of progress on each outcome, with a focus on demonstrating quantifiable change for people with protected characteristics as expressed in the wording of the outcome
* Clarify that public bodies should set outcomes that relate to change for both service users and staff with protected characteristics (with the exemption of those with no staff)
* Require equality outcomes publications to include details of how each outcome will be resourced including the expected budget, and require that expenditure towards this budget should be included in progress reporting
* Make an amendment to allow public bodies without service users to set outcomes related to their external roles, for example audit and inspection bodies could set outcomes related to the change they wish to support the bodies they scrutinise to achieve in the lives of people with protected characteristics, or could be required to develop equality outcomes relating to employees only and a separate set of strategic equality objectives which would have an indirect impact on people with protected characteristics
* Require public bodies to report on future steps relating to each outcome in the final progress report of the cycle, for example whether these will continue over the next cycle, are not being continued as they have been achieved, or are not being continued as relevant activity towards achieving them has been mainstreamed

In terms of non-legislative change, we recommended:

* Addressing the issues faced by grant aided schools in complying with the equality duties in order to ensure compliance and avoid a situation where grant aided schools are held to a lower standard on equality than schools would be by listed education authorities (this related specifically to content within the stage two consultation paper, which is not replicated in the current stage of the review but undoubtedly has relevance for the new regulations)
* Advising public bodies that involvement should be planned and implemented in a way that meets the National Standards for Community Engagement
* Resourcing to facilitate involvement and community development / capacity building
* Supporting public bodies to develop and utilise performance measurements for individual activities undertaken to support achievement of outcomes, with a focus on identifying the impact of activity on the change for people with protected characteristics as expressed in the wording of the outcome
* Supporting public bodies to avoid over-reliance on describing the delivery of actions and outputs at the expense of a focus on the actual outcome, particularly where these are part of standard activity which may be more usefully reported on under the mainstreaming duty
* Encourage public bodies to:
	+ Include contextual information summarising how the evidence gathered (including from involvement) has influenced outcomes alongside new outcomes, preferably for each outcome individually
	+ Encourage public bodies to involve both individuals and representative groups, and to detail who has been involved and how
	+ Provide explanations or mitigations where evidence has identified key inequalities but no outcome has been developed to address these
	+ Ensure, as far as possible, that all evidence used is applicable to the relevant local, sectoral and organisational context

**6: Improving duties relating to Scottish Ministers**

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

The concerns around data protection set out here are one facet of a broader problem with understanding of, and implementation of, data protection in relation to equality monitoring. We would welcome further consideration of these issues across the board.

We would note that ethnic diversity in public appointments, whilst still requiring action, is arguably the only area of Scottish Government policy on race equality where significant, measurable progress has been made in the years following devolution.[[1]](#footnote-1) Attention is now needed at a more granular level to open up opportunities for under-represented groups beyond those of South Asian heritage, who have been relatively successful in securing better representation so far.

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

These regulations have had an unclear impact so far, but in our view, could be strengthened and used to create better levers for change. For example, it may be possible to create a power for Ministers to mandate the use of reporting templates for employee information and/or equality impact assessment. As stated in response to the question on guidance, CRER is strongly in favour of more prescriptive approaches.

As stated in our stage 2 consultation response, in terms of non-legislative change, we recommend:

* Evaluating the impact of this aspect of the duties, including the work of the SNEIP group
* Ensuring that proposals and progress reports under this aspect of the duties are published accessibly alongside other Scottish Government PSED publications
* That Scottish Ministers should make use of its powers under regulation 11 to prompt consideration where insufficient or poor practices related to SSD are identified, as a means of supporting better compliance

Question 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?

We would be open to further discussion on what a statement and debate could deliver, however this would need to be meaningful and provide opportunities for equality stakeholders to effectively contribute to Parliamentarians understanding of the issues. Such a statement would need to include reflection on weaknesses as well as strengths, and would need to be followed by pro-active work to address any weaknesses identified.

**7: Procurement**

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

Strengthening the procurement duty has significant potential to impact the lives of people with protected characteristics, however this would require a prescriptive approach with support to embed changes. Other financial processes such as grant funding and service level agreements also have significant impacts, and we would like to see this reflected in the new legislation.

In relation to the call from stakeholders to require that award and tender specifications should stipulate that all outputs of any work must meet the requirements of the PSED and specify examples, there are specific instances where this would be entirely proportionate and relevant. For example, the work of ALEOs is generally to fulfil commitments previously held by public bodies, so this would be appropriate in that instance. More broadly, other suppliers may be carrying out public functions as defined by the general equality duty, and this may also be an appropriate instance. CRER would support the designation of specific types of work, and types of organisation, who should be subject to these stipulations.

We recommended the following amendments to the SSD in relation to the procurement duty in our stage 2 consultation response:

* Require publication of procurement duty considerations and their outcomes, and justifications where no action has been taken based on the results of consideration
* Consider amendments to widen this duty, or create similar duties, relating to service level agreements and grant funding

In terms of non-legislative change, we recommended:

* Undertaking research to determine the extent to which the duty is being complied with and its impact

**8.** **Intersectional and disaggregated data analysis**

Question 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”?

1. What are your views on this?

Whilst measures to improve intersectional approaches to PSED are necessary, existing requirements on collecting and using data are often not met. Without action to enforce this, it will not be possible to improve intersectional approaches.

Scottish Government’s own work to report on progress under the National Performance Framework contains very little disaggregated data in relation to ethnicity, and fewer still of these data sources would be suitable for further cross-tabulation by gender to create intersectional data.[[2]](#footnote-2) (We note that the focus in the question above is explicitly on gender, yet the concept of intersectionality arose specifically through critical race theory. This is a common example of the erasure or minimisation of race in cross-strand equality working.)

We believe that the aims of this proposal are laudable. However, stronger measures to compel public bodies to collect and use equality data for each of the protected characteristic groups would be an essential step before any possibility of mandating intersectional data collection. Scottish Government itself has much work to do to ensure robust ethnicity data is produced, and so at this point, we could not support moves to require this level of intersectional data production by public bodies.

1. How could listed authorities be supported to meet this requirement?

If Scottish Government wishes to create the conditions that would be required to introduce this proposal in future, we suggest that our existing recommendations on data should be implemented.

As stated in our stage 2 response, CRER recommends:

* Introducing a duty to gather, collate and use equality evidence as suggested in the stage one report, as part of wider reform that more explicitly sets out how evidence should be used as part of a cycle, ensuring evidence informs effective action and can be revisited to demonstrate the change occurring as a result via a performance measurement framework
* Introducing a due regard duty on data collection, for example that listed public bodies undertaking any type of data collection activities must have due regard to whether the use of equality monitoring questions would enable it to better perform the equality duty with a requirement to publish its decision and justification

We recommended the following amendments to the SSD in relation to employee information:

* Requiring public authorities to use a standard template for recording the number and relevant protected characteristics of such persons in relation to the types of information specified in sections 6(1)(a) and 6(1)(b)
* Requiring public authorities to publish progress reports showing linear change in employee information over time
* Requiring publication of actions with targets for fair representation in employment for each of the protected characteristics where workforce profile information identifies an inequality (we now amend this to recommending an explicit requirement to set equality outcomes on inequalities demonstrated by employee information data with associated targets and actions)
* Addition of detail specifying the types of data to be included (particularly expanding on development and retention but also specifying that recruitment should include applications, shortlisting and appointments)

In terms of non-legislative change, we recommended:

* Developing and promoting the use of resources to support better implementation, including:
* A standard equality monitoring template reflecting Scottish Census categories as far aspossible, allowing for better measurement of progress over time and comparison across sectors
* Guidance addressing the following common issues:
	+ Clarifying that a clear distinction needs made between statistics on the number of staff for whom protected characteristic information is missing and statistics on the number of staff who refused to disclose protected characteristic information (for example by selecting the ‘prefer not to say’ option)
	+ Ensuring that for each protected characteristic, employee information is presented consistently and covers staff within the marginalised part of the protected characteristic group, staff who are not within the marginalised part of the protected characteristic group, those for whom information is missing and those who refused to disclose in as much granular detail as possible
	+ Ensuring that the duty to gather employee information is met by taking action to map and resolve ongoing data gaps across the workforce profile, recruitment, development and retention for all protected characteristics, for example through creation of a SMART action plan
	+ Ensuring that the results of employee monitoring are analysed effectively and the results reported, including use of relevant, locally applicable benchmarks (e.g. Census data for the travel-to-work area)
	+ Ensuring that the duty to use employee information is met by setting out the steps the authority intends to take (or is taking) to address imbalances identified through analysis, including positive action measures where appropriate
	+ Including information on the number of posts recruited for over the relevant time period as part of reporting, to enable transparency in recruitment monitoring
	+ Reinforcing the breadth of information required to cover workforce profile, recruitment, development and retention monitoring adequately and in line with the duty
	+ Clarifying data protection implications and reducing the potential for misapplication of data protection to result in poor compliance / non-compliance

**9. Intersectional gender budget analysis**

Question 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?

As noted in our responses at section 9, whilst measures to improve intersectional approaches to PSED are necessary, existing requirements on collecting and using data are often not met. Without action to enforce this, it will not be possible to improve intersectional approaches.

Question 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.

1. What are your views on this?

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

See above

**10.** **Coverage**

Question 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

The primary issue identified by CRER in relation to this is the outsourcing of public authorities’ work to ALEOs and external agencies. We therefore feel that using the procurement duty to leverage PSED compliance may be a more useful measure than expanding the listed bodies. This includes expanding the duty to cover other expenditure mechanisms, for example grant funding and Service Level Agreements. However, we would welcome a continuing focus on which bodies are listed, in order that the rights of people with protected characteristics do not ‘fall through the cracks’ where a public body is unlisted.

1. If YES, please give detail on which Scottish public authorities you think should be subject to the PSED or SSDs.

See above.

Question 10.2: 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?

There would be significant capacity building and resource requirements if regulatory bodies became more responsible for PSED performance within their sector. We are also concerned that this may weaken the focus on the Equality and Human Rights Commission as the enforcement body. Care would be needed to ensure that any further role for these bodies was within their capability, appropriate, proportionate and effective. There may be opportunities for these bodies to work more closely with the Equality and Human Rights Commission on flagging issues of potential non-compliance and facilitating improvements in practice.

**11. Strengthening leadership and accountability and enhancing capability, capacity and culture**

Question 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.

In our view, more effective enforcement is vitally needed to address the lack of leadership and accountability currently in place. Scottish Government may also wish to consider the role of equality objectives for senior leadership, and whether the regulations could provide a route to mandate these. We believe that further consideration is needed on potential statutory means of ensuring leadership and accountability. Experience to date suggests that without strong legislation, accountability and enforcement many bodies will not effectively meet their legal obligations. The critical issues of adequate resourcing of equalities work and improved organisational / staff capacity to implement this also tie into leadership and accountability.

**12. Guidance**

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

Our research suggests that public bodies do not sufficiently match their approach to meeting PSED to the approaches set out in the current guidance. We do not accept that there is a lack of awareness about the guidance, or that the guidance is unclear; both arguments which are often put forward by public bodies. Further research would be needed to establish why public bodies are not motivated to follow the guidance more closely, however in our view, increasing the prescriptiveness of the guidance could aid compliance considerably.

The Equality and Human Rights Commission has long taken the position that guidance should not extend to templates on the grounds that this could create a tick box approach to compliance. However, our research has shown that overt non-compliance and poor compliance are already extremely widespread, and in our view more prescriptive approaches including templates would be useful. Some public bodies that we have engaged with over the years agree with this. CRER has developed a range of guidance and tools used in our face-to-face work with public bodies and would be pleased to be involved in any future work in this area.

In our stage 2 consultation response, we recommended:

* Stronger guidance with more prescriptive detail, including recommendations for planning and use of evidence based approaches to meeting the duties throughout and templates for planning and implementing the duties (if the Equality and Human Rights Commission feels that this overstretches its powers, Scottish Government could potentially undertake this as part of the Scottish Ministers’ duty)
* Providing clarity within the guidance regarding common practices which may constitute or lead to non-compliance

**13. Positive action**

Question 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?

We would support this measure. Levers for positive action are crucial to addressing inequalities for many protected characteristic groups. However, these need to be meaningful and any reporting requirement would need to include short, medium and long term evidence of impact rather than simply reporting on action taken.

Considerable capacity building may be needed to build the confidence and understanding needed within public bodies to implement effective approaches to positive action. It is crucial that additional reporting requirements do not lead to tokenism or meaningless value-signalling interventions which waste the time and effort of minority ethnic people.

**Overall reflections**

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

The majority of the recommendations set out within our response are unchanged from our submission to the stage 2 consultation. Where relevant, we have added specific commentary or recommendations in light of the new proposals.

Additionally, in the intervening time between stage 2 and 3, the following potential considerations have arisen which do not fit neatly into the current proposals:

* Considerable work is being undertaken by Scottish Government’s Race Equality and Anti-racism in Education Programme (REAREP). CRER has been extensively involved in this, and it is clear that although the will is there in central Government and Education Scotland to drive forward change, the education system as a whole is not sufficiently motivated to tackle the significant and ingrained issues of discrimination and prejudice facing learners (for one example in relation to anti-bullying policy and practice, see the 2017 report by the Scottish Parliament’s Equality and Human Rights Committee).[[3]](#footnote-3) Opportunities exist to strengthen the statutory impetus for action on equality in schools through amendments to the SSDs, for example:
	+ Schools becoming listed public bodies for the purposes of specific parts of the regulations; currently in Wales, under the Equality Act 2010 (Specification of Relevant Welsh Authorities) Order 2011 schools are required to produce equality objectives and strategic equality plans and it may be possible to, for example, require schools to set and report on their own equality outcomes
	+ Requiring Education Authorities to produce their own set of equality outcomes, rather than these being included in the broader Local Authority outcomes; compliance with the duties by Education Authorities is currently weak due to the fact that the Local Authority generally takes the lead on work required to meet the SSDs, usually with limited input from Education Authorities
	+ Creating a duty for schools to record and report prejudice based incidents for each protected characteristic, and for Education Authorities to report the results to Scottish Government, with recording and reporting to be carried out in a manner specified by Ministers (giving leeway to create an improved mechanism for this to happen via SEEMiS, the national education sector information system)
* Whether greater alignment between the SSDs and Community Empowerment Act requirements could be of benefit in ensuring important strategic developments such as Local Outcome Improvement Plans and Locality Plans actively embed equality
	+ Opportunities that should theoretically benefit ‘communities of interest’ within the Community Empowerment Act have not yet done so widely
	+ There are potential links to be explored in terms of, for example, rights to involvement in Equality Outcome setting and rights to make participation requests

Question 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.

In addition to the recommendations which apply to the current proposals and the more recent considerations above, we reiterate the following recommendations from our stage 2 consultation response:

* Addressing the critical issue of under-enforcement through partnership working between Scottish Government and the Commission to strengthen compliance and enforcement, with potential contribution of resources by Scottish Government
* Using the PSED review process and the innovation occurring around development of the new human rights legislation to identify ways to limit loopholes and provide effective, robust and most of all enforceable duties for each of these, adopting a cautious approach to limit the risk of dilution
* Considering the potential role of equality objectives for senior leadership, and whether the regulations could provide a route to mandate these

We wish to make an additional point regarding the content of the stage 3 consultation paper, and associated proposals.

We note with disappointment that the only reference made to the Expert Reference Group on Covid-19 and Ethnicity within the paper was a quote used to bolster the importance of intersectionality.

The recommendations of the First Minister’s National Council on Women and Girls have rightly had a strong influence on these proposals, inspiring specific proposals and consultation questions at proposals 8 and 9 and being referenced frequently throughout the document. In contrast, the aspects of the ERG on Covid-19 and Ethnicity which link to PSED are not reflected here.

Within the ERG’s report on systemic issues and risk,[[4]](#footnote-4) the following recommendations have clear links to PSED reform. These should have been considered, and could arguably have been used to develop specific proposals:

* Recommendation 10 on corporate accountability: “An anti-racist progress measure should be included in the performance objectives of all Scottish Government Directors and Chief Executives (or equivalent) of every public body in Scotland. This will help ensure that addressing systemic racism gets the leadership it requires and senior public sector managers will be accountable for actions taken.”
* Recommendation 15 on employment: “All public bodies should develop action plans with annual progressive targets for public sector employment at all levels of seniority in relation to minority ethnic groups – workplaces must share the diversity of the communities they serve and also set a positive leadership example.”

The additional report providing recommendations on improving data and evidence on ethnic inequalities in health[[5]](#footnote-5) has a range of relevant recommendations, for example on data collection (e.g. recommendations 1, 5 and 8), linkage of ethnicity data to CHI records (recommendation 3) and on workforce monitoring (recommendations 10, 11 and 12). These also have an obvious linkage to PSED. Recommendation 14 on accountability and governance specifically references the general equality duty – “Each public body that has duties under the Equality Act should publish its scheme of governance to ensure adequate data recording, analysis and presentation of information to demonstrate their commitment to monitoring and tackling inequalities.”

The lack of cognisance of these links supports our general view that, following two decades of largely ineffective stop-start policy making, race equality is arguably now the most over-evidenced and under-impacted area of equality policy in Scotland.

The renewed interest in race equality following the publicity surrounding Black Lives Matter within certain Directorates of Scottish Government is welcome. However, the emergence of a Black Lives Matter movement in Scotland was neither the beginning nor the end of the struggle to secure the rights of Black and minority ethnic people in Scotland.

If mainstream equality policy reforms, perhaps particularly this Review, fail to implement recommendations made from a race perspective, Scottish Government will inevitably continue to take narrow approaches to tackling racial inequality which fail to create sustainable change.

As well as our race-specific concerns, however, we reiterate that there are significant shared concerns in regard to this review across the equality sector. We therefore call on Scottish Government to take urgent action on the issues set out in the joint letter from equality stakeholders. The most meaningful way to address these issues would be by drafting regulations in direct collaboration with equality stakeholders.

**For more information on this response, please contact:**

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1. CRER (2021) [Anti-racist Policy Making: Lessons from the first 20 years of devolution](https://www.gov.scot/publications/crer-ant-racist-policy-making-scotland-review/) [↑](#footnote-ref-1)
2. CRER (2020) [Scotland’s National Performance Framework: Measuring outcomes for minority ethnic communities](https://www.crer.org.uk/s/02_Scotlands_National_Performance_Framework.pdf) [↑](#footnote-ref-2)
3. EHRiC (2017) [It is not cool to be cruel](https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2017/7/6/It-is-not-Cool-to-be-Cruel--Prejudice-based-bullying-and-harassment-of-children-and-young-people-in-schools) [↑](#footnote-ref-3)
4. Expert Reference Group on Covid-19 and Ethnicity (2020). [Systemic Issues and Risk: Initial Advice and Recommendations](https://www.gov.scot/publications/expert-reference-group-on-covid-19-and-ethnicity-recommendations-to-scottish-government/) [↑](#footnote-ref-4)
5. Expert Reference Group on Covid-19 and Ethnicity (2020). [Improving Data and Evidence on Ethnic Inequalities in Health: Initial Advice and Recommendations](https://www.gov.scot/publications/expert-reference-group-on-covid-19-and-ethnicity-recommendations-to-scottish-government/) [↑](#footnote-ref-5)