

Scottish Government Consultation Response

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

For Women Scotland

For Women Scotland
4-11-2022

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STAGE TWO QUESTIONNAIRE – RESPONSE FROM FOR WOMEN SCOTLAND

For Women Scotland welcomes the opportunity to respond to this questionnaire as part of our contribution to the review of the operation of the Public Sector Equality Duty (PSED) in Scotland.

However, we are concerned that the questionnaire is not designed in a way that adequately reflects the scope of the duties. In particular, the most potentially valuable aspects of the duties are those aimed at prevention – equality impact assessment and mainstreaming. The questionnaire includes no question on equality impact assessment, or a question relating directly to the mainstreaming duty. These duties, despite generally poor implementation, have the potential to be transformative.

Background

For Women Scotland is a grassroots women's group formed in June 2018 amid growing unease about how women's rights would be affected by the Scottish Government's plans to reform the Gender Recognition Act to allow for self-declaration of sex.

We have grown considerably over the last few years and we continue to speak up for women's rights and to challenge the ongoing push from Government funded lobby groups to overwrite sex-based rights in legislation and public policy with the undefined and unscientific gender identity.

Who we are:

For Women Scotland registered as a not-for-profit company in July 2020 (Company number: SC669393). We do not receive any public money and are not aligned to any political party. We are all volunteers.

Our aims are to:

- Campaign on equality and human rights issues impacting on women and children in Scotland.
- Work closely with central, devolved and local governments across the UK and with each of the main political parties in the UK to promote the interests and rights of women in Scotland.
- Participate in cultural and education activities and seek to raise awareness of cultural, health, social and socio-economic issues specifically associated with ordinary women in Scotland.
- Seek, among other things, to promote the welfare of ordinary women in Scotland in terms of their visibility and recognition and access to health and social services, as well as greater participation in civil society in Scotland.
- We believe that there are only two sexes, that a person's sex is not a choice, nor can it be changed. Women are entitled to privacy, dignity, safety and fairness. Our legal rights should be protected and strengthened.
- We campaign on a positive, pro-women basis and call for evidence based discussion and legislation.

What we do:

Consultations After canvassing women's opinions we submit responses to Scottish and UK Government consultations.

Lobbying and Advocacy

We speak with MSPs and all-party groups to promote women's rights and campaign for consultation and amendments to Bills progressing through Parliament.

Campaigning

We initiated the [#sixwords](#) campaign that led to a change in the Forensic Medical Services Bill to allow victims of rape and sexual assault to request a medical examiner by their sex (and not gender)

[Judicial Review](#) A well-supported crowd-funder allowed us to successfully challenge the redefinition of "woman" in the Gender Representation on Public Boards Act, which we won on appeal in February 2022. The judges restated that the protected characteristic of sex refers to a male or a female and that provisions in favour of women must, by definition, exclude those who are biologically male. It confirms sex is significant in law and that women's concerns about the undermining of the protected characteristic are valid.

| IMPROVEMENT PROPOSAL 1 | RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND | INFORMATION |
|---|--|---|
| Making better use of evidence and data | <p>Links across many of the regulations including:</p> <ul style="list-style-type: none"> - Regulation 5 – assessing and reviewing policy and practices; - Regulation 6 – gather and use employee information. <p>Key part of mainstreaming strategy and a Scottish Government equality outcome.</p> | <p>The Scottish Government in conjunction with key stakeholders are in the process of establishing an Equality Data Improvement Programme (EDIP) which will be designed to improve and strengthen data on the protected equality characteristics collected and utilised across the public sector. This programme will run for the next 18 months, to late 2022. We intend to use the Equality Data Improvement Programme to drive and co-ordinate improvement in this area.</p> |
| <p>Questions:</p> <p>1.1 In your view, which elements of the proposed programme are most important for driving improvement?</p> <p>1.2 Are you aware of other public sector equality networks that this programme could link with?</p> <p>1.3 Are there any additional actions, outwith the EDIP, that you believe would improve the quality of and use of evidence and data?</p> | | |
| <p>Answers:</p> <p>1.2 This programme should link in with For Women Scotland.</p> <p>1.3 The quality of evidence and data would be improved if evidence was subject to academic peer review/ quality assurance to ensure it was robust especially around</p> <ul style="list-style-type: none"> • sample sizes • extrapolation of data • use of clear and specific language and terminology. <p>This should preclude the use of the term gender when referring to male/female, man/woman – when the term sex is legally correct.</p> <p>In particular language should be clear and unequivocal, and should be fully compliant with the law, namely the Equality Act 2010. Consequently, terms such as ‘sex’, ‘man’, ‘woman’, single sex and mixed sex facility, for instance, must be adopted instead of ‘gender’ or other terms that have no meaning in law. In addition, it is essential that when these terms are used, the meaning attached to them remains consistent with that given to it by law.</p> | | |

In relation to the quality of research being used as an evidence base for policy, reliance on the results of survey and other research methods that have not been appraised in light of reliable design principles, ethics and methodology should be avoided.

Research conducted for policy formation purposes must abide by principles of transparency, accountability, honesty and rigour. These are the research integrity principles to which the Economic and Social Research Council and other UKRI members apply.

Observance of these key guidelines therefore requires that researchers adopt robust and reliable methods and designs in the framing of their research questions and the structuring of individual projects, to ensure soundness and reliability of findings. The project plans should be subject to peer review before data is gathered and research conducted. In this context, sample size is critical: samples that are too small (such as a small number of participants in a qualitative study) will not lead to findings that can be extrapolated and generalised for the whole population. Too large a sample, instead, will amplify the detection of differences and potentially identify differences that are not relevant to the outcome of the project. Observance of these basic research integrity principles must be at the core of any study commissioned by governmental agencies and public bodies: it is especially fundamental when research findings are taken as evidence for policy.

1.4 FWS believe that the practice of Police Scotland to record male offenders of sexual crimes against women as women if they “self-id” serves to corrupt data and evidence gathering around patterns of male offending.

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

Questions:

2.1 How can the SSD regime be used to strengthen participatory policy making and ensure lived experience is central within the policy making process?

2.2 Are these current requirements are sufficient to ensure evidence of lived experience is taken into account in developing equality outcomes and/or impact assessments?

2.3 If not, what additional steps could achieve this intention?

Answers:

2.1 In order to ensure participatory policy making the Scottish Government should publish a list of organisations that they intend to consult prior to consultation. This will ensure that any other UK organisations are given an opportunity to be added to the list of consultees.

The policy making process in Scotland around these issues has been corrupted by the practice of funded lobby organisations receiving significant money from the Scottish Government to effectively act as an echo chamber for the policy positions that the Scottish Government seeks to build a consensus around. It is reasonable for the Scottish Government to commission advocacy organisations to provide a research in put into consultation and policy making processes. However this practice should be clearly understood to be different from the consultation process itself. It is especially important that when advocacy groups are inputting into consultation around policy that they be required to demonstrate how they have ensured that they are reflecting the views of the constituency that they claim to represent. It is critically important that the Scottish Government listen to the views expressed by advocacy organisations who are genuinely independent of Government funding and political affiliation.

Any consultation should invite participation from organisations that cover each of the nine protected characteristics in the Equality Act 2010 where they are directly affected or impacted by the

proposed policy change. This is to ensure that conflict of rights can be identified and addressed. A robust and effective EQIA process should identify if there are any conflicts of rights at the outset and the subsequent project plan should demonstrate how these will be addressed.

2.2_A robust definition of lived experience should be developed to ensure that the lived experience being presented is authentic and reflective of those that the policy covers. E.g. where a protected characteristic may apply to individuals with a very broad range of experiences and outcomes. The consultation process needs to take account of the diversity of experiences and outcomes. (Please see link to article below which provides an illustration of where this has occurred).

2.3 Consultation should be expanded to ensure representations are received from both established charities and representative groups and from grassroots groups or individuals. Life experience should be sought out from groups who do not receive funding from the Scottish Government and assessments should be made to ensure all voices are heard.

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

Questions:

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

Answers:

3.1 In order to improve the links between equality and human rights frameworks, the Scottish Government must first address its repeated failure to accurately understand and implement the Equalities Act (2010) with specific reference to the Protected Characteristics.

This failure to accept the Protected Characteristics as laid out in the Equalities Act (2010) which is reserved legislation, and therefore not subject to amendment by the Scottish Government, has created significant confusion and has already had serious consequences for the application of the Public Sector Equality Duty currently under review.

The Scottish Government's use of the term gender is inappropriate and misleading in the context of the Public Sector Equality Duty. In the documentation supporting this consultation, the Scottish Government erroneously stated

*"(The PSED) "was developed in order to consolidate specific duties in respect of race, gender and disability that were all previously contained in separate Acts and extended it to other relevant protected characteristics."*¹

*"The PSED replaced the race, disability and gender equality duties"*²

These documents were provided as a background document for the current consultation on the

¹ Public Sector Equality Duty in Scotland: a consultation, Explaining the Public Sector Equality Duty. (SG 2021)

² Review of the Operation of the Public Sector Equality Duty in Scotland: Learning from Mainstreaming Equality during the Covid-10 Pandemic (page 4) What is the Public Sector Equality Duty (SG 2021)

Public Sector Equality Duty and it is a matter of serious concern that they mis-stated the Protected Characteristics.

Section 149(7) of the Equality Act (2010) is explicit – the protected characteristics are age, **sex**, disability, gender reassignment, pregnancy or maternity, race, religion or belief and sexual orientation.

The Scottish Government have also issued Statutory Guidance in respect of the Gender Representation on Public Boards (Scotland) Act 2018 which redefines “women” as people the Equalities Act states are male, while excluding biological women who identify as male.

The Scottish Government and its Agencies collect, analyse and publish equality evidence across a wide range of policy areas and publish these via an Evidence Finder which records the Protected Characteristics as including Gender (not Sex).³

These are given as examples of where the Scottish Government is itself in breach of the Public Sector Equality Duty.

For Women Scotland Vs The Lord Advocate & Scottish Ministers

For Women Scotland argued that the definition of women used in the Gender Representation on Public Boards (Scotland) Act 2018 did not reflect that used in the 2010 Equality Act and that this alteration went beyond the limit of the Scottish Government’s legislative competence in a reserved matter.

The Court found

- a) The Equality Act 2010 set out sex and gender reassignment as two separate characteristics
- b) The 2010 Act defined sex as relating to women or men, where “woman” referred to a female of any age and “man” referred to a male of any age.
- c) Gender reassignment was defined as a person who was proposing to undergo, was undergoing or who had undergone a process (or part of a process) for the purposes of reassigning the person’s sex. The reassignment was the common factor for the protected characteristic, not the sex into which the person was reassigned.

In delivering the opinion of the Court, the Lord Justice Clerk, Lady Dorian said “By incorporating those transsexuals living as women into the definition of women, the 2018 Act conflates and confuses two separate and distinct protected characteristics.”

Further more Lady Dorian said “The fact that an appropriate percentage for a representation objective in relation to one protected characteristic may not be proportionate and appropriate to another characteristic highlights why it is important to apply an individual approach to the characteristics and to focus in each case on those who share a relevant protected characteristic.”

“In any event, the definition of woman adopted in the legislation includes those with the protected sex characteristic of women, but only some of those with the protected characteristic of gender reassignment. It qualifies the latter characteristic by protecting only those with that characteristic who are also living as women. The Lord Ordinary stated that the 2018 Act did not redefine “woman” for any other purpose than “to include transgender women as another category” of people who would benefit from the positive measure. Therein lies the rub: “transgender women” is not a category for these purposes; it is not a protected characteristic and for the reasons given, the definition of “woman” adopted in the Act impinges on the nature of protected characteristics which is a reserved matter. Changing the definitions of protected characteristic, even for the purpose of achieving the GRO, is not permitted and in this respect the 2018 Act is outwith legislative

³ www.equalityevidence.scot

competence.”

Lack of Clarity around the legal nature and impact of single sex exception

The lack of clarity around the legal nature and impact of the notion of single-sex exception is also visible in public debate, where ‘exception’ is often replaced by the terms ‘exemption’ or, in some cases, ‘exclusion’. This is not correct and risks weakening, if not altogether eliminating one of the key features in the Equality Act 2010 as a means of protecting dignity and privacy of women as a sex category. ‘Exception’ means that a certain provision, namely the duty not to discriminate against those bearing the protected characteristic of gender reassignment, does not apply to the provision of specific services. In this case, it is incumbent on the service provider to assess the nature of the service and to determine how the objectives of protecting the privacy and dignity of women, especially in view of their vulnerability, can be met in a way that is proportionate to the aim being pursued. Should there be a challenge to this decision, it is incumbent on the person challenging the legality of the exception to demonstrate that either the aim pursued is not ‘legitimate’ or that the exception is disproportionate to this aim. An ‘exemption’, instead, presupposes the existence of a preliminary authorisation being given to the provider, as a result of which the latter can exclude the bearers of the protected characteristic of gender reassignment without the legal consequences attaching to an infringement of Section 7 of the Act being triggered by it. This is not what the Equality Act 2010 provides: there is no regime of prior authorisation for the application of para. 26, Part 7 to the Act, nor is it for the provider to make a case for the application of the exception. If the latter is challenged, as explained, it is for the applicant to show that the requirements illustrated above are not fulfilled.

Schedule 3, para 28) allows providers of separate or single sex services to provide a different service to, or to exclude someone who has the protected characteristic of gender reassignment. This includes those who have a Gender Recognition Certificate (GRC) as well as someone who does not have a GRC but otherwise meets the definition under the Equality Act 2010. Application of this exception must be justified as a means of achieving a legitimate aim. An example given in the Explanatory Notes to the Act is that of a group counselling service for female victims of sexual assault where the organisers could exclude someone with the protected characteristic of gender reassignment if they judge that clients would be unlikely to attend the session as a result. Schedule 23 para 3 of the Act also allows a service provider to exclude a person from dormitories or other shared sleeping accommodation and to refuse services connected to providing accommodation on the grounds of sex or gender reassignment. As with para 28 and other exception under the Equality Act, such exclusion must be a proportionate means of achieving a legitimate aim.

The Scottish Government has required womens aid and rape crisis organisations to confirm that they adhere to transgender inclusive policies in order to receive government funding. In doing so, the Scottish Government has ***effectively overridden the right of these organisations as service providers to consult with their service users to identify whether admitting fully intact males identifying as females to refuges, counselling groups or to take up employment as counsellors of women victims of domestic violence and trauma - would have a deleterious impact on the women who rely on these services.*** This has resulted in some confusion with service providers around whether or not they can deliver single sex or separate sex services or protect women only spaces. The Scottish Government should abandon its requirement that domestic violence and sexual violence services to women are transgender inclusive and allow

these organisations to operate within the terms of the Equality Act 2010 and provide women only services as necessary and in circumstances where it is justified by the need to protect access to these services for women. This also relates to the provision of women only sports and swimming sessions/changing rooms etc where Muslim Women would effectively be denied access to services unless they are single sex or separate sex services.

Case Study

This confusion led to North Lanarkshire Council conducting a “*gender neutral review*” of domestic violence services and resulted in it removing funding from 3 local Women’s Aid groups because they refused to provide “gender neutral” services to women victims of domestic violence - holding to the principle that they do not work with the perpetrators of violence, or admit men to refuges. This was used in the procurement process which resulted in domestic violence services being provided on a “gender neutral” basis by SACRO. As a result women in North Lanarkshire are being deprived counselling, accompaniment and support of a trusted, women-centred, specialist domestic violence service.

The Public Sector Equality Duty should have protected women’s interests in this case and exposed the lunacy of any “gender neutral” approach to a review of domestic violence services - when 96% of victims of domestic violence are women. It effectively took a service founded by women survivors of domestic violence, which was rooted in the local communities of North Lanarkshire for over 40 years and handed it to a male run service which local women do not trust in the same way.

The erroneous reframing of the Equalities Act (2010) by the Scottish Government to change the protected characteristics from sex to gender has proliferated across the public sector and for many has become the lens through which they view the Public Sector Equality Duty.

Case Study

Police Scotland accurately report the protected characteristics (as being sex not gender) however in their [equality-impact-assessment-results-strategic-police-priorities-scotland.pdf](#) they revert to reporting on an equality impact assessment on Gender (including pregnancy and maternity) instead of sex. (page12).

This conflation of sex with gender has had serious consequences for the recording of crime in Scotland. Police Scotland have confirmed that

“If the male who self-identifies as a woman were to attempt to or to penetrate the vagina, anus or mouth of a victim with their penis, Police Scotland would record this as attempted rape or rape and the male who self-identifies as a woman would be expected to be recorded as a female on relevant police systems.”⁴

In a world where sex and gender are conflated – a man can have a penis, rape a woman and declare himself to be a woman. Many women and particularly those who have been the victims of rape and sexual assault find this offensive in the extreme.

A public petition was lodged with the Scottish Parliament’s Citizen Participation and Public Petitions Committee – it contained over 12,000 signatures and called on the Scottish Parliament to urge the Scottish Government to require Police Scotland, the Crown Office and the Scottish Court Service to accurately record the sex of people charged or convicted of rape or attempted rape. The Scottish Government failed to act to ensure that the recording policy of the Police in rape cases reflected the sex of the offender and in so doing breached the terms of the Public Sector Equality Duty.

This is a clear example of the inability or unwillingness of the Scottish Government to ensure that

⁴ [Police-Scotland-FOI-on-recording-rape.pdf \(murrayblackburnmackenzie.org\)](#)

the Protected Characteristics enshrined in the Equalities Act (2010) were actually protected, and where their deliberate misrepresentation around sex and gender has proliferated across the public sector to include the Police, Crown Office and Scottish Court Service amongst others.

Plainly stated, if the Scottish Government are not competent to interpret the Protected Characteristics set out in the Equalities Act (2010) correctly, then they will be ill-equipped to navigate the complexities of integrating Equalities and Human Rights Frameworks and advising other public sector organisations on how to discharge their Public Sector Equality Duty effectively. The recent judgement referred to above requires the Scottish Government to apply the actual Protected Characteristics of the Equalities Act (2010). Failure to do so will inevitably result in further legal challenge and ongoing deleterious impacts particularly on women.

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

Questions:

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

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

Answers:

4. Answers: See also Answer to Section 3 above.

4. There is an urgent need for the Scottish Government to

- Cease to conflate sex with gender and to apply the actual Protected Characteristics enshrined in the Equalities Act (2010).
- provide clear guidance to all Public Sector Organisations and duty bearers which will enable them to fulfil their obligations under the PSED
- provide clear guidance to all Public Sector Organisations and duty bearers around the ability to use exceptions to protect single sex services and separate sex services where this is justifiable in terms of protecting access to these services for women and groups with other protected characteristics (e.g. religion).
- provide a framework and training on how to address the need to balance rights where the rights of one group collide with another to enable appropriate and confident decision making by public sector leaders and duty bearers.

We have some specific concerns around:-

- ad hoc policy development undertaken without due regard to evidence-based decision making or where the evidence base has been weak or compromised
- policy capture and the imposition of sex self-id in advance of legislative change to the detriment of women
- the failure of many public sector organisations to undertake Equality Impact Assessments prior to implementing policy changes which have a significant bearing on women.

Case Study Police Scotland allowing sex self-id in rape cases as an example of ad hoc policy development without due regard to evidence based decision making

The lack of capacity of senior leadership teams in dealing with these issues was in evidence around the response to the public petition cited above. One after another the buck was passed –

the Scottish Government stated “it is for Police Scotland to determine how the sex of people charged or convicted of rape or attempted rape is recorded”, the Crown Agent followed suit, the Scottish Courts and Tribunals Service provided a factual statement to the effect that the information used in criminal proceedings originated from Police Scotland – but conceded that it was willing to improve data accuracy. The Deputy Chief Constable of Police Scotland was “awaiting Scottish Government guidance on that complex issue”.

When asked, Police Scotland were unable to explain how or when their recording policy came about. Police Scotland were unable to provide any information as to when the policy was introduced, who was consulted, who took the decision, and whether an EQIA was undertaken.

The Scottish Police Authority (SPA) appeared unaware or unconcerned that such a significant policy change had been implemented without any audit trail around the decision making process and failed to inquire whether or not its PSED had been appropriately discharged in this instance. When questioned they stated that they had relied on guidance from the Chief Statistician – despite the fact that the Chief Statistician’s guidance is explicit – it singles out “*the investigation of serious sexual offences as an example where data on biological sex is required*”.

In December 2021, clearly aware that there were serious issues around process, the SPA referred the matter to Police Scotland’s Data Governance Board – some 8 months after the public announcement that the policy had changed was made.

This episode illustrates a serious lack of capability in discharging the PSED from the Cabinet Secretary for Justice, to the Chief Constable of Police and Chair of the Scottish Police Authority. Not one of these individual’s or leadership groups raised a concern that the policy had changed without due process being followed or an equalities impact assessment being conducted, far less any consultation with women who had lived experience of rape or sexual assault.

Case Study – Scottish Prison Service – Housing of male prisoners identifying as women in the female estate as an example of policy capture and failure to consult all affected groups. Policy analysis undertaken by Murray, Blackburn McKenzie raised serious concerns about the unregulated roll-out of gender self-identification across public sector organisations in Scotland where scrutiny was weak or non-existent, a lack of due process in evidence and where policy capture on decision making on sex and gender identity issues had been directed towards the interests of a specific group without due regard for other affected groups or the wider population. The housing of male prisoners identifying as women in the female prison estate provides a case study to illustrate these issues. It points to serious and significant failures to discharge the Public Sector Equality Duty.

In 2014 the Scottish Prison Service (SPS) published its Gender Identity and Gender Reassignment Policy for those in our Custody (Scottish Prison Service 2014). It concerned the safety and wellbeing of two vulnerable groups, decision-making focussed exclusively on the vulnerability of transgender prisoners to the detriment of both female prisoners and prison officers. Two areas in particular raise questions about the impact on female prisoners and staff: accommodation and intimate searches.

Accommodation

The SPS policy determined that the accommodation chosen “should reflect the gender in which the person in custody is presently living” (ibid p6). Living permanently in a new social gender is identified as using “their new name, title and pronoun in all of their everyday social interactions with strangers, service providers, friends and family and having changed the name and gender on documents (except birth certificates) (ibid). Living in a new gender does not require surgery or other physical changes. P26 of the policy states

“A male-to-female person in custody living permanently as a woman without genital surgery should be allocated to a female establishment. She should not be automatically regarded as posing a high sexual offence risk to other people in custody and should not be subject to any automatic restrictions of her association with other people in custody. However, if there is clear evidence that she, as an individual, may pose a sexual offence risk, then this should be dealt with as for any other person in custody posing a risk. Only where a risk assessment determines it is justified, should she be subject to increased staff supervision or restrictions of her association with other people in custody.”

Staff are instructed not to reveal information about a person’s gender reassignment to other prisoners, which means that a woman prisoner will not be told that she is required to share with someone who is physically male, nor will staff be able to confirm whether this is the case if asked.

Intimate Searches

Rubdowns and body searches are to be conducted “in accordance with the gender in which the person in custody is currently living, rather than their physical characteristics” (ibid p6). If staff are concerned about performing such searches, the policy advises that this should be “initially addressed through the provision of additional staff training and information about gender reassignment and equality requirements”. (ibid p26). If a prisoner’s behaviour during searching is inappropriate in any way, this is to be treated like any other breach of the rules, by placing the prisoner on report. (ibid P33). The policy is silent as to whether inappropriate conduct can be grounds for search decisions to be suspended or reversed.

This means that female prison officers have little or no room to refuse to undertake a body search/rub down of a fully intact male prisoner - even when that prisoner behaves inappropriately, and regardless of the impact that conducting such a search has on the female prison officer.

SPS - Policy Capture and Failure to Consult with Women

The policy was written for SPS by James Morton, Director of the Scottish Trans Alliance. The EQIA identified 3 protected characteristics which could be affected - age, gender identity and sexual orientation. Gender identity is not a protected characteristic. The SPS EQIA pro forma uses term gender identity rather than gender reassignment. The form also uses gender rather than sex - and in this case the space for comments was left blank implying that there was no impact or relevance of the policy/practice changes to women prisoners or women prison officers.

The EQIA failed to recognise any sex-specific issues which may arise from having fully intact male prisoners sharing accommodation with women who were vulnerable due to their previous experience of domestic and sexual violence. This is extraordinary given the findings of the Angiolini Report that “women offenders themselves are often the victims of severe and repeated physical and sexual abuse” (SG 2012:3)

Women and Girls Scotland (2019) reported on examples of female prisoners being subjected to sexualised and aggressive behaviour from transgender prisoners transferred to the female prison estate. SPS failed to monitor the impact of housing fully intact male prisoners in the female estate on women prisoners and prison officers. There were press reports that a trade union had to intervene on behalf of its female members when they refused to perform intimate searches on a prisoner with a history of extreme violence held in the men’s estate.

The SPS policy on transgender prisoners can be best understood as a clear example of policy failure that is explicable through the lens of policy capture. The SPS is currently reviewing this policy and has said that the review results will be published in Summer 2022. Even if the outcome

of the review addresses in full the concerns raised by women - it will be a case of closing the door after the horse has bolted. The SPS transgender policy was allowed to operate for 7 years to the great and obvious detriment of women prisoners and prison officers.

Both of the cases cited above also involve a failure of the organisations to properly undertake an EQIA. In preparing for this submission, it was striking how many public sector organisations had failed to publish EQIAs which related to major policy decisions affecting women. These were not readily available. Those organisations who had published some EQIAs had often used the wrong i.e. protected characteristics - gender instead of sex, and gender identity instead of gender reassignment -or had failed to take account of the impact of policy changes on groups with other protected characteristics i.e.religion.

Improvement Actions

1. Ensure all public sector organisations use the correct protected characteristics when considering EQIAs.
2. Require transparency around EQIAs including - the requirement to publish, to report on organisations involved in the drafting of policies, organisations which were consulted - across each of the protected characteristics, and to publish the statements of concern and mitigation responses to show that due consideration has been given to those organisations representing groups who are concerned that policy change/ practice change could adversely affect their group.
3. Require EQIAs to be undertaken when the policy is proposed, when it is implemented and at monitoring. The EQIA should be a live document which is updated across the project management cycle in the same way as risk registers are updated
4. There should be a requirement to consult beyond funded lobby groups to ensure that the advice provided is genuinely representative and not motivated by a concern of organisations to remain in the good graces of their funders.

| IMPROVEMENT PROPOSAL 5 | RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND | INFORMATION |
|-------------------------------|--|---|
| Reducing bureaucracy | Links across many of the regulations, but mainly relevant including: <ul style="list-style-type: none"> - Regulation 3 - report progress on mainstreaming the equality duty; - Regulation 4 - publish equality outcomes and report progress. | The Scottish Government is keen to consider ways in which to enhance the regime in ways that lessen burden, and support public authorities to get the best possible value out of their engagement with the regime in a way that prioritises delivering meaningful outcomes and impacts rather than processes. |

Questions:

5.1 What do you feel drives the feeling of the bureaucracy of the SSD regime?

5.2 What would be the best method of reducing the bureaucracy of the regime while ensuring the regime still prioritises meaningful outcomes and impacts?

Answers:

5.1 EQUIA can be considered as an onerous task as opposed to an essential and embedded part of best practice in policy development and programme and project management to ensure effective delivery, outcomes and impact.

EQUIA's form an essential part of the suite of programme/project documentation which should be regularly reviewed during the lifetime of each programme/project.

5.2 The Scottish Government should consider if the Programme and Project Management Centre of Expertise should have a wider role in supporting directorates and divisions in building capacity and capability in the SG and wider public sector. This could include building pools of expertise across policy portfolios to ensure that EQUIA's are robust and have appropriate quality assurance frameworks.

EQUIA should be considered at the start of the policy development cycle.

The Scottish Government has a well-established system of Gateway Reviews which form part of the progress and quality assurance frameworks for Programme and project management. It is essential that the EQIA is fully embedded into the Gateway Review process.

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

Questions:

6.1 How could the clarity of the regime be improved?

6.2 How could the proportionality of the regime be improved?
How can smaller listed authorities be supported to meet the duties under the SSDs?

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

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

Answers:

6.1 In considering the proportionality of the regime care must be taken to ensure that proportionality is not used to provide opt-outs. In any case where an opt out might be considered a clear rationale for any exclusion must be stated and be subject to scrutiny. Thus, a simple reference to the (prima facie) alleged compliance with the principle of proportionality, as enshrined in the Human Rights Act 1998 for instance, will not suffice to justify the opt out: any decision to opt out of the regime requires a show that appropriate balancing between the respect of relevant rights and the pursuit of other legitimate aims of public interest, such as the goals of the equality duty, has taken place. In particular, the competent minister must demonstrate that less intense options, short of a fully-fledged opt out have been taken into consideration and seek to justify why these were regarded as being incapable of meeting the legitimate aim pursued as effectively as an opt out. It must also be shown that there is sufficient evidence to demonstrate both the existence of a "mischief", namely that without the opt out the Scottish Government would fall short of its PSE obligations and that this is remedied in a specific and direct way through the opt out. We hasten to emphasise that if the above requirements are not met, the Scottish Government's decision to opt out would lay itself open to challenge on the ground that it would irremediably impair the substance of rights enjoyed by individuals belonging to protected categories.

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

Questions:

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

Answers:

7.1 - 7.3

Improvement Actions

- Guidance on the Public Sector Equality Duty should include a clear statement of the actual protected characteristics and public sector organisations should be advised to avoid terms which confuse the issue - gender instead of sex and gender identity instead of gender reassignment and should avoid conflating sex, and gender reassignment.
- The EQIA should be a live project document which is updated across the project lifecycle.
- All of the groups with protected characteristics who will be affected by the proposals should be identified at the beginning.
- The EQIAs should be subject to a quality assurance process to ensure a) the protected characteristics are correctly stated b) all the groups with protected characteristics have been correctly identified and none have been left out c) consultation has reached beyond funded lobby/advocacy groups to include organisations where people have lived experience of the protected characteristics/ service area in question d) evidence based decision making is robust and based on evidence and data which is quality assured/peer reviewed, especially around sample sizes, extrapolation of data and terminology used.
- Training should be provided across **all** the protected characteristics - rather than at present where training tends to be provided on one protected characteristics at a time with public sector organisations often providing training in only one/two rather than across all of the protected characteristics. Training should be quality assured to ensure that it accurately reflects the law rather than the advocacy agenda of the organisation providing the training.

| IMPROVEMENT PROPOSAL 8 | RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND | INFORMATION |
|---|---|--|
| Improving the cohesiveness of the regime | Relevant across most regulations | The SSD regime should be seen as a suite of interconnected duties which collectively help public authorities to better perform the PSED. |
| <p>Question:</p> <p>8.1 Can this be improved through mechanisms such as guidance or other means, or do the regulations need strengthened in this respect?</p> | | |
| <p>Answer:</p> <p>8.1 See answer above (7.1 - 7.3)</p> | | |

| IMPROVEMENT PROPOSAL 9 | RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND | INFORMATION |
|--|---|--------------------|
| Consider new approaches to outcome setting, including the setting of shared outcomes | Regulation 4 - publish equality outcomes and report progress. | n/a |
| <p>Question:</p> <p>9.1 Do you support the principle of shared outcomes? In your view, how they would be set and implemented; and how could an improved regulatory regime support this?</p> | | |
| <p>Answer:</p> <p>9.1 .1 This question is poorly framed and needs further clarification before it can be answered. Does it mean a)shared outcomes in relation to multi agency working in which case, so long as the protected characteristics are correctly applied and Equality Impact Assessments undertaken there would be no objection to this; if however, it means that shared outcomes across the protected characteristics, this would be opposed as it fails to expose/address situations where there is are conflicting interests between groups with a Protected Characteristic.</p> <p>In particular, we wish to highlight that the Guidelines on the PSED do not explain what is meant by 'shared outcomes'. We wonder whether this notion refers to those policy outcomes that fall within reserved competences but in respect of which the Scottish Government has some powers to act, for instance with a view to providing higher standards of protection of individual rights—as is the case in relation, for instance, of the recent legislation on gender representation on public boards, which was recently declared incompatible with the Scotland Act 2016.</p> <p>Whatever the meaning, we note that this question is very unclear and poorly framed and as such we cannot provide a meaningful answer to it.</p> | | |

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

Questions:

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

Answers:

10.1 Terminology on gathering and using employee information should be clarified. Under the Equality Act authorities are required to collect data on sex as sex is the protected characteristic. Any pay gap should be described as the Sex Pay Gap in this situation. It is clear that some public sector organisations request an employee’s gender instead of their sex which will result in a poorer quality of data. In addition, many employers allow self-identification of sex or provide non sex based options such as non-binary or genderfluid which have no meaningful criteria resulting in further obscuring of the information collected.

10.2 In order to collect useful data on ethnicity and disability it is important that ethnicity and disability are clearly defined to ensure that those who are impacted by their disability or ethnicity are categorised appropriately. For example, we have seen some political parties allow self-identification of disability which has enabled some allocated positions go to those whose disability has very little impact on their life chances thus taking away opportunities from those whose disability impacts their economic potential and wellbeing.

Any data collection must consider whether new laws and policies will have unintended

consequences on the quality of data that is being collected. For example, the proposed Gender Recognition Reform Act proposes that individuals will be able to change the sex on their birth certificate by statutory declaration therefore allowing a higher number of individuals to apply for a GRC. This in turn will impact the collection of useful sex pay gap data particularly if those applying for a GRC have a different age profile e.g. Older males registering as female, younger females registering as males.

10.3 Consistent definitions and categories should be provided to all authorities to ensure robust and useful data is collected.

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

Question:

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

Answer:

11.1
 The lack of a publication duty in relation to procurement means there is no possible way to study, much less enforce, this aspect of the regulations. Little is known about how this duty operates, but in our experience, it is overwhelmingly neglected. Its usefulness is also limited by the fact that it applies only to procurement and not to other aspects of expenditure such as grant funding. We recommend a strengthening of this duty to require publication of considerations and their outcomes, and justifications where no action has been taken based on the results of consideration. It may also be possible to introduce similar due regard duties regarding other types of expenditure, for example service level agreements and grant funding.

The requirement of the Scottish Government that women’s domestic violence and sexual violence services should be transgender inclusive needs to be immediately rescinded. This does not reflect the scope for the provision of single sex and separate sex services allowed in the 2010 Act. It overrides the provisions of the 2010 Act which permit service providers to exclude people who are covered by the gender reassignment protected characteristic on the grounds of deleterious impact on women.

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

Questions:

- 12.1** What would you like to see this duty achieve?
- 12.2** What support is required for public bodies to improve practice on inclusive communication
- 12.3** What are the barriers to improving inclusive communication within the public sector?

Answers:

12.1 The duty should enable the majority members of the public to participate in the PSED framework with clear and precise communication. The public sector should eschew complex terms from academia and policy documents in favour of language that is used by the majority and is understandable to those with learning difficulties or English as a second language. Terms such as pregnant people, people with a cervix often excludes more readers than it includes and focus should be on communicating with as many people as possible rather than changing language to suit special interest groups.

The importance of sexed language in healthcare settings

The conflation of sex and gender and the difficulties that can ensue are clearly laid out in the recently published paper: Effective Communication about pregnancy, birth, lactation, breastfeeding and newborn care: The importance of Sexed Language⁵.

The paper demonstrates that unclear language can result in the exclusion of some vulnerable groups by making communications more difficult to understand.

In addition, avoiding sexed terminology can result in inclusion of other groups who do not share the same issues and whose interests may be in conflict. This point is illustrated by the issue of domestic violence during pregnancy. Domestic violence often commences or increases during pregnancy. When sexed language such as mother is removed in favour of parent there is the potential for the abuser and victim are grouped together making it far more difficult to advocate for the victims unique needs in this circumstance.

The paper also provides examples of where Imprecise or de-sexed language can also result in misreporting of sex specific conditions. We have seen organisations replace the word woman with people and make the incorrect statement that "1 in 10 people" have endometriosis. The correct

⁵ [Frontiers | Effective Communication About Pregnancy, Birth, Lactation, Breastfeeding and Newborn Care: The Importance of Sexed Language | Global Women's Health \(frontiersin.org\)](https://www.frontiersin.org/journal/article/10.3389/fpubh.2022.881111/full)

statistic would be 1 in 20 people have endometriosis, however, this reduces the impact of the statistic because we cannot identify that the specific group of sufferers are almost exclusively female.

Accessible communications should be produced in a timely manner rather than an afterthought.

12.3 The biggest barrier to improving inclusive communication is that those working on producing the communications do not engage with communities that have communication and comprehension difficulties.

- Every year thousands of expectant and new mothers are diagnosed with pre and post-natal depression; many develop more serious conditions, such as post-natal psychosis, often linked to trauma at birth. To assist these mothers, especially in the post-birth period and all the way through baby reaching age 2, peer support has been shown to be extremely effective in normalising these conditions, aiding recovery and encouraging mothers who experience perinatal mental distress to take active steps to get better—often in tandem with other therapies such as psychotherapy.

As the name suggests, peer support is provided by volunteer organisations through group meetings where the discussion is facilitated by volunteers with lived experience of perinatal mental illness. These women are not trained psychotherapists or counsellors: they provide this support to fellow mothers on the basis of what they themselves have experienced in terms of illness and recovery. They are appropriately trained and supervised by qualified professionals. Recently there seems to have been a signal toward introducing “gender-inclusive” language in these meetings. We hold that any move in this direction is dangerous to the continuing, safe and effective provision of these important services: motherhood requires sex-specific language, as it is only a woman as ‘adult human female’ that can give birth. In addition, women who attend these groups are often very distressed and the natural response for them is to have recourse to their natural, instinctive language which is in its nature sex-specific especially when recounting experiences of traumatic events. In this context we hold that it is neither beneficial nor justified to impose on these very traumatised women a duty to “self-censor” their expression or indeed to require facilitators to police other women’s language. We therefore suggest in the strongest terms that any move toward imposing ‘gender-inclusive’ language and expression, ranging from, for instance, the use of the term “chest-feeding” or “human with a cervix” or the demand of “asking the preferred pronoun” and using it should be prevented.

| IMPROVEMENT PROPOSAL 13 | RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND | INFORMATION |
|---|--|--------------------|
| Explore how best to use the duties relating to Scottish Ministers | <p>Regulation 6A - Use of member information</p> <p>Regulation 11 - Duty to consider other matters</p> <p>Regulation 12 - Duty of the Scottish Ministers to publish proposals to enable better performance</p> | n/a |
| <p>Question:</p> <p>13.1 How could the duties under regulations 6A, 11 and 12 be strengthened and/or improved?</p> | | |
| <p>Answer:</p> <p>13.1 13.1 Please see previous responses (7.1 - 7.3)</p> | | |

END OF QUESTIONS

ADDITIONAL COMMENTS

The case studies provided above demonstrate that the Scottish Government lacks the capability or has deliberately subverted the Public Sector Equality Duty.

We therefore would contend that it is not competent to undertake a review of the PSED.

We recommend that the Scottish Government commission a judge-led review of the operation of the PSED by the Scottish Government and across the public sector in Scotland.

We consider that the decision in *FWS Vs the Lord Advocate and Scottish Ministers* provides a solid justification that a judge-led review is both necessary and urgent.