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

**Stage Two Questionnaire:**

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

The Coalition for Racial Equality and Rights (CRER) 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.

As the questionnaire does not allow for a comprehensive response, we have added both an introduction and, following the questionnaire response, further comments and recommendations. We hope that these will be fully recognised at this stage of consultation despite not fitting into the questionnaire structure. We would particularly urge Scottish Government to consider our request that the draft revised regulations be designed in co-production with equality stakeholders who have relevant expertise.

**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 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)

Please find our response to the stage two questionnaire, plus additional comments and recommendations, below.

| IMPROVEMENT PROPOSAL 1 | **RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND** | **INFORMATION** |
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| Making better use of evidence and data | Links across many of the regulations including:   * Regulation 5 – assessing and reviewing policy and practices; * Regulation 6 – gather and use employee information.   Key part of mainstreaming strategy and a Scottish Government equality outcome. | 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. |
| Questions:  1.1 In your view, which elements of the proposed programme are most important for driving improvement?  1.2 Are you aware of other public sector equality networks that this programme could link with?  1.3 Are their additional actions, outwith the EDIP, that you believe would improve the quality of and use of evidence and data? | | |
| Answers:   * 1. Despite our extensive reliance on Scottish Government equality data and substantial previous engagement with Scottish Government on data improvement, we have not been involved in any discussions regarding the Equality Data Improvement Programme. We are therefore unable to comment on the proposed programme.   2. As we don’t know which of the many networks are already engaged, we cannot comment.   3. We would be broadly in favour of introducing a duty to collect, gather and use equality evidence as suggested in the Stage One report. However, this would have to be 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.   The stage one report reflected our concern “…that some duty bearers fail to act on data after it has been published; and that some organisations are overly cautious about publishing information which they feel could identify individuals e.g. on job applications.” This is just one aspect of the extensive issues around use of equality data, as many organisations are not meeting even the basic PSED requirements on employee information currently in place. Any amendments to the regulations regarding data would therefore need to be structured in a way that can improve compliance and enforcement.  Scottish Government’s recent publication [Understanding Equality Data Collection in the Scottish Public Sector](https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2021/03/understanding-equality-data-collection-scottish-public-sector-main-report/documents/understanding-equality-data-collection-scottish-public-sector/understanding-equality-data-collection-scottish-public-sector/govscot%3Adocument/understanding-equality-data-collection-scottish-public-sector.pdf) (2021) outlined mixed views on whether mandatory data collection would be beneficial in areas outwith the current duties (e.g. regarding service users). It may be possible to improve the level of equality data collected and used in Scotland more broadly by introducing a due regard duty, for example that listed public bodies undertaking any form of data collection must have due regard to whether the use of equality monitoring questions would enable it to better perform the equality duty. It would be important, however, to include a requirement to publish its decision and justification – the current procurement duty is similar, but substantially weakened by lack of a publication requirement. Publication of decisions would also aid enforcement, as failure to comply will be more easily identified (although we note that, given how poorly the current employee information duties are implemented, current levels of enforcement do not appear to motivate compliance). | | |

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| **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:   * 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)”. |
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| **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** The SSD regime has the potential to strengthen participatory policy making, however the current requirement to involve is not adequate and often poorly implemented.  **2.2** The requirement for the process of setting outcomes to involve people with protected characteristics or groups who represent their interests initially seemed to be a step forward for participatory policy making on equality. However, the wording of the regulations is insufficient to ensure that this ambition is realised. The regulations place a responsibility on public bodies to involve, but confers no rights to be involved to people with protected characteristics or groups who represent their interests.  The regulations also lack specificity on what constitutes ‘involvement’. Whilst the Equality and Human Rights Commission guidance clearly states that this should be a multi-stage process with a genuine impact on decision making, the lack of formal reflection of this within the regulations allows for poor practice which cannot be challenged on legal grounds.  In practice, CRER’s [research on behalf of the Equality and Human Rights Commission](https://www.equalityhumanrights.com/sites/default/files/effectiveness-of-psed-specific-duties-scotland.pdf) exposes a number of weaknesses in the current system:   * The lack of requirement to publish evidence / a summary of evidence from involvement means that the involvement process lacks transparency and it is impossible to determine whether the duty to consider evidence from involvement has been met (i.e. the impact of involvement on outcome setting cannot be identified) * Some authorities which involved people in the setting of their 2013 outcomes re-used this evidence in setting 2017 outcomes rather than undertaking a new process * Some authorities drew on evidence from unconnected involvement processes rather than directly involving people in setting outcomes; this is clearly not involvement as required by the regulations, and was not recognised as such by representative groups named as having been involved when they had not (outwith this research, CRER has been named as a group involved in setting outcomes by at least one organisation that we had no prior contact with at all, highlighting the need for greater transparency) * Very few authorities appeared to be undertaking multi-stage, ongoing involvement as set out in Equality and Human Rights Commission guidance * Evidence gathered from representative groups who have taken part in involvement confirms that their input is best reflected in outcomes where a multi-stage, ongoing process is followed, suggesting that the imperative to undertake this needs to be strengthened * Representative groups are being put at a disadvantage by the fact that involvement is not resourced; in many cases, substantial time in providing advice and input results in little or no impact whilst also taking time away from funded work   There was very little indication that community level involvement was being undertaken by authorities. Some involved staff or particular staff networks, but overall, the involvement of people with lived experience outwith representative groups was unclear. Whilst the intention of proposals to improve this is laudable, we would urge caution. Evidence from lived experience needs to be balanced with a range of quantitative evidence and input from people with specific expertise in structural inequality. Just as people experiencing poverty shouldn’t be expected to become experts in economics, people experiencing discrimination shouldn’t be expected to undertake structural analysis or offer solutions to structural issues. Furthermore, resources to facilitate participation and community development / capacity building are essential to meaningful involvement at community level.  The lack of resourcing of involvement in general creates multiple barriers and disadvantages, and Scottish Government needs to be mindful of the fact that authorities are generally reluctant to invest in this.  **2.3** As reflected in the stage one report, CRER is in favour of increasing the focus on community empowerment within SSD. The current system enables public bodies to overlook the priority areas of ingrained equality when setting outcomes, and this is aggravated by lack of transparency over the impact of involvement. We recommend that, in line with the approach in the Community Empowerment Act 2015 regarding consultation on national outcomes, there should be a requirement for 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.  Again reflecting the spirit of the Community Empowerment Act 2015, we recommend that constituted voluntary and community sector organisations should have a pro-active right 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 each suggestion. It may also be viable to include pro-active rights to involvement in equality outcome reporting, and in equality impact assessment.  This need not create an additional bureaucratic burden, as it can be mitigated through reducing the overall burden of bureaucracy within the duties by setting out more clearly the extent of information required to meet the mainstreaming duty, or by alternating the publication years for particular parts of the duties. At present, the largest source of bureaucratic burden arguably lies in the tendency for authorities to present a range of extraneous information not relevant for the duties within their reports. This should be addressed through more explicit regulations and guidance. | | |

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| **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** CRER would urge caution in attempting to integrate these two linked areas of policy. The legislative framework treats these as two separate areas for a good reason; their provisions and operation in practice differ significantly. To date, some authorities have attempted to link these by undertaking combined equality and human rights impact assessment, however in our experience this simply weakens the focus on protected characteristic groups. (We note again our disappointment that there is no question regarding EQIA in this consultation, one of the least complied with but most promising parts of the regulations.)  **3.2** CRER believes these two areas should be regarded as separate, but complimentary. The best way to align these would be to use 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. We remain concerned that introduction of human rights duties at a time when effective compliance with the SSD is largely absent is almost certain to result in a worsening of compliance, with increasing focus on ineffective, universal approaches that do not target inequalities for protected characteristic groups. | | |

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| **IMPROVEMENT PROPOSAL 4** | **RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND** | **INFORMATION** |
| Strengthening leadership and resourcing | Key aspect of equality and human rights mainstreaming strategy | The Scottish Government recognises the importance to strengthen leadership and adequate resourcing on equality across the public sector. While no regulatory changes are envisaged for this improvement proposal, we would welcome views on how this could be better achieved. |
| **Questions:**  **4.1** Do you agree with the position that this is best achieved through routes other than regulatory change?  **4.2** If so, then what do you feel is needed? | | |
| **Answers:**  **4.1** Leadership and resourcing for equality within public bodies is patchy at best, with some of the challenges around this being explored in the stage one report. However, some of these challenges are created by public bodies themselves, who regularly neglect the practical implementation aspects required to meet the duties and report on them, instead expending unnecessary time and energy creating bureaucratic reports of the type discussed in response to question five.  The limited resources dedicated to equality work are therefore being poorly used, and the extent to which the practical implementation of, for example, equality outcomes is being resourced is not clear. We therefore disagree with the presumption against statutory measures.  The stage one report appears to suggest that centralised solutions to this are not suitable: “It is of course for public authorities to make resourcing decisions as they see fit”. However, this seems to be at odds with other policy decisions such as the Scottish Government / COSLA agreement for local authorities to spend a minimum 1% of their budget through participatory budgeting. Participatory budgeting has been demonstrated to often disadvantage protected characteristic groups, yet the Community Choices 1% Framework has been put in place regardless of this (we have been unable to locate a published EQIA for the Framework).  **4.2** The participatory budgeting requirement has shown that, where necessary, Scottish Government is prepared to leverage agreements on expenditure towards activity which would enable public bodies to better meet people’s needs. We see no concrete reason why equality should not be treated in the same way, at a minimum.  However, the overall issue of resourcing transparency will not be resolved without a statutory requirement. We recommend that the regulations should be amended to require equality outcomes to include details of how each outcome will be resourced including the expected budget, and that expenditure towards this budget should be included in progress reporting.  On the matter of leadership, more effective enforcement would be required to address this. 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. | | |

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| **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:   * 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** The stage one report cited “…the diversion of resources to the preparation of reports rather than more meaningful activity” as a barrier. However, practical implementation of the duties would result in the majority of the reporting required by law being extremely straightforward, as it would simply require an explanation of the work being done (e.g. mainstreaming, equality outcomes, equal pay statement) and the evidence base for that work (e.g. employee information, gender pay gap and occupational segregation data).  CRER has repeatedly raised the tendency for PSED reporting to be treated as a purely bureaucratic exercise by public bodies, who frequently produce documents running to one hundred or more pages containing little to no coherent information about equality. The decision to prioritise production of this largely meaningless content comes about because the quality of the practical implementation work is poor, so to create an impression of compliance, vast amounts of effort are put into space-filling. Colleagues working to support the implementation of PSED in a specific sector, during Scottish Government’s 2018 stakeholder meeting, described the production of PSED reports as a ‘marketing exercise’ aimed at collating information which made authorities look good, even if tenuously or completely unconnected to equality.  Poor outcome setting also contributes to bureaucracy. In our research for the Equality and Human Rights Commission, we identified that the most effective outcomes were clearly focussed on a specific inequality for a specific protected characteristic group, expressed as the change the authority wanted to create in people’s lives and accompanied by clear progress measures. For example, one authority aimed to improve educational attainment for two specific groups, achieved this and reported progress simply by referring to the change in attainment rates over time. In contrast, a large number of authorities set impossibly broad outcomes which aimed to achieve a vaguely worded outcome for ‘all’ or an unsuitably large number of characteristics. Lengthy and incoherent progress reporting resulted, with much of the content only tenuously linked to the outcome.  **5.2** We do not believe that the SSD itself is the primary source of bureaucracy. The majority of reporting could be drastically reduced in length and would, in fact, be clearer and more in line with the duties. Improvements to the guidance could be made to stress the types of information which are not relevant for inclusion and to assist in prioritisation of issues to be reflected in outcomes. The wording of some of the duties could potentially also be made more specific in order to ensure that fear of ‘getting it wrong’ doesn’t contribute to unnecessary addition of information not relating to the protected characteristics and needs.  Anecdotally, the tendency to over-report, set poor quality outcomes and focus on reporting rather than implementation is often driven by senior leaders who have a tenuous grasp on the duties and are primarily concerned with appearances rather than impact. It may be possible to target senior leaders with capacity building in order to address this, however in many cases wider issues with workplace hierarchies and the relatively junior position of staff preparing equality reports will continue to limit the quality of implementation and reporting. | | |

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| **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 regime be improved? | | |
| **Answers:**  **6.1** CRER believes that, on the whole, the guidance provided by the Equality and Human Rights Commission provides sufficient clarity on the current requirements. Our research suggests that public bodies, however, do not sufficiently match their approach to meeting PSED to the approaches set out in the 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. Non-legislative approaches to encouraging use of the guidance could include increasing the focus on the technical guidance and its potential to be referred to in legal enforcement cases. The broader suite of guidance is useful, however there are many documents involved, which may be off-putting to public bodies. As a basic minimum, all should be following the technical guidance carefully.  The stage one report states that duty bearers would value more advice and support from the Equality and Human Rights Commission, which is unavailable due to capacity issues. These capacity issues are one of issues affecting the Commission’s enforcement work - to an extent which, in our view, results in the Commission’s enforcement role being critically diminished. The practice of focussing enforcement on the Commission’s strategic priorities means that it appears to be almost impossible to secure agreement to enforce on any race equality related breaches. Previous engagement with public bodies has strongly suggested that enforcement is not regarded as a deterrent to non-compliance with the duties as a result of these weaknesses. CRER recommends that Scottish Government should provide additional staff resource to strengthen implementation and enforcement capacity around SSD.  Given that the regulations are Scottish legislation, it might be hoped that the Government Equality Office (GEO) would allow Scottish Government to contribute funding for posts within the Commission in Scotland to strengthen enforcement and support. In the event that this is not accepted by GEO, Scottish Government could potentially second its own staff to support the work of the Commission, or fund civil servant posts to advise public bodies and work closely with the Commission (in so far as is possible) in effectively using its powers of enforcement.  A further concern raised by public sector staff relates to their lack of confidence in varying cycles of PSED reporting to match corporate reporting cycles. This again illustrates the failure of public bodies to understand the practical implementation aspects of PSED; this work should be taking place consistently over time, not left until a few months before the biennial April reporting date. We would urge Scottish Government to emphasise this to public bodies, who should feel confident to take the approach to both practical implementation and collation of information for reports in the way that is most effective for them. However, we would also urge Scottish Government to retain a structured approach to the actual publication of the reports. Non-compliance with the publication dates remains fairly common, suggesting a higher risk of failure to publish would occur without a known and enforceable deadline. The structured approach to publication dates also facilitates effective monitoring, enforcement and research activities, both within the Equality and Human Rights Commission, bodies like CRER and other external researchers.  **6.2** Through our extensive work in researching PSED performance and supporting a wide variety of public bodies on implementation, it is evident to CRER that the current regulations do not work effectively for some public bodies. We recognise that audit and inspection bodies, for instance, struggle to write meaningful equality outcomes as they do not have ‘service users’ in the traditional sense (although many also fail to write meaningful equality outcomes in their role as employers). We would be in favour of an amendment to the regulations to allow public bodies who do not provide services to create equality outcomes expressing the change they wish to create in the lives of employees and/or, in the case of audit and inspection bodies, the change they aim to support the public bodies they audit or inspect to achieve  The position of grant aided schools is also difficult, and we are aware that this is primarily a matter of capacity and resource. However, in order to identify a solution to this, wider action is needed to address overall capacity and resource issues within these schools. CRER understands that, with the exemption of Jordanhill School (which is fully funded by Scottish Government), grant aided schools are facing crisis as Local Authorities become increasingly unwilling to support places within these schools except as a last resort.  More resource is clearly required, but from the point of view of PSED, a change in governance of the grant aided sector may create opportunities. In the event that Scottish Government moved toward funding Local Authorities to oversee schools in this sector, the responsibility for PSED could be taken on by the Education Authority as it is for state schools. | | |
| **Questions:**  **6.3** How can smaller listed authorities be supported to meet the duties under the SSDs?  **6.4** How could the process for adding new bodies to the Regulations be improved?  **6.5** Would consolidating all previous sets of regulations into one new set improve the clarity of the regime? | | |
| **Answers:**  **6.3** The duties are intended to offer some flexibility to ensure proportionality, and in theory, having a smaller workforce and service user profile should mean less work is involved in meeting the duties. It should also be remembered that reluctance to resource equality work means that large authorities who choose not to invest in this also struggle to have enough staff time to meet the duties. Some small authorities cite data protection issues when complying with the employee information duty; additional guidance on what does or does not constitute a data protection risk, as well as how to report on this as a narrative where genuine risks occur, may be of use to this group.  **6.4** Scottish Government has already identified a need for communication prior to adding a new body. This is important, as the body in question requires time to plan and prepare for listing. However, it is important that bodies are listed where ever this would contribute to equality, regardless of the public bodies’ level of enthusiasm for this.  **6.5** CRER is in favour of a detailed overhaul of the regulations in order to maximise their effectiveness and close loopholes. We would therefore be in favour of consolidation and amendment. | | |

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| **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** The Equality and Human Rights Commission takes the position that it must be non-prescriptive in order to avoid overstepping its responsibilities. This means that the guidance does not include suggested templates or other useful information to aid best practice in complying with the duties. Some public bodies have suggested that a more prescriptive approach would be useful. While this might involve making the legislation itself more prescriptive, there may also be a role for Scottish Government in providing useful resources. 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.  **7.2** There may be a role for capacity building activities, including training and consultancy support, however a limited amount of this has been available to public bodies via third sector partners including CRER and its impact is often limited by the influence of senior leaders and the tendency to favour vague, bureaucratic approaches as opposed to clear and impactful ones. We are not aware of the impact so far of the Scottish National Equalities Improvement Project set up under the Minister’s Duty, however there may be some learning from that project. We would suggest that external support and evaluation may be appropriate to maximise the effectiveness and transparency of any future similar project.  **7.3** In our view, the existing guidance is clear (if generally not as prescriptive as may be ideal). However, it is not well-used. We believe that further investigation is needed to establish the reasons for this and ways to mitigate it. | | |

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| **IMPROVEMENT PROPOSAL 8** | **RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND** | **INFORMATION** |
| Improving the cohesiveness of the regime | Relevant across most regulations | The SSD regime should be seen as a suite of interconnected duties which collectively help public authorities to better perform the PSED. |
| **Question:**  **8.1** Can this be improved through mechanisms such as guidance or other means, or do the regulations need strengthened in this respect? | | |
| **Answer:**  **8.1** The regulations could make the interconnectedness of the duties more explicit, however current provisions which should theoretically achieve this also appear not to be working. For example, employee information is often published on its own as a simple set of tables, when it should appear within the mainstreaming report and include information on how it is gathered and used. Our research for the Equality and Human Rights Commission also demonstrated that employee information does not often inform equality outcome setting, even where stark inequalities are present within the data. CRER would be in favour of creating greater links through, for example, requiring equality outcomes addressing inequalities identified through employee information or equality impact assessment to be set. | | |

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| **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 |
| **Question:**  **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? | | |
| **Answer:**  **9.1** The introduction of shared outcomes could have the potential benefit of ensuring key inequalities cannot be neglected. However, it could equally have a negative impact if this results in public bodies neglecting specific inequalities that apply locally. 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. A measure to ensure local level inequalities are still factored in would be required, but in our view, our suggestion that voluntary and community organisations should have pro-active rights to put forward equality outcomes for consideration could achieve this. 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.  Importantly, however, the key inequalities would need to be set very carefully in order to prioritise the most significant inequalities based on robust evidence. It is likely that some equality groups would fare better than others in this process, which would need to be defensible. It has been suggested during stakeholder discussions that the Equality and Human Rights Commission may have a role in setting out these inequalities, for example through selecting examples from its Is Scotland Fairer publication. Given the absence of meaningful content on race in the Equality and Human Rights Commission in Scotland’s strategic priorities, which is creating barriers to enforcement, we would not be confident in the Commission’s ability to set out these key inequalities. | | |

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| **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 | Regulation 6 – Duty to gather and use employee information  Regulation 7 – Duty to publish gender pay gap information  Regulation 8 – Duty to publish statements on equal pay etc.  New regulations also required. | 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** Yes, the duty to gather and use employee information could be improved. For example, by specifying the types of data to be included (particularly expanding on development and retention as these are the least well complied with, but also specifying that recruitment should include applications, shortlisting and appointments). It could also be improved by requiring equality outcomes to be set for the inequalities identified.  **10.2** 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. Additional support and guidance has been provided by Close the Gap, and our own work highlights the need to follow the statutory calculation, so in our view there is no excuse for this fundamental non-compliance. Enforcement action is needed to tackle this.  **10.3** At the current time, CRER is not convinced that an ethnicity pay gap could be produced robustly in the vast majority of public sector organisations due to the under-representation of minority ethnic people in the workforce. We would therefore instead prioritise measures to address the severe under-representation of minority ethnic people. | | |

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| **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. | | |

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| **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** In our experience, the meaning of ‘accessibly’ within this part of the regulations is not well understood. Some public bodies still fail to publish accessibly in the simple sense that it should be easy to find, ‘burying’ the reports within committee papers. It may be advisable to amend the regulations to specify that they 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. We defer to those with relevant expertise on the point of a duty for accessible communication for those with sensory or cognitive impairments. However, on the point of publication in languages other than English, CRER’s stance is that translated materials should be provided on request. Providing these as standard tends to lead to resources being drawn away from tackling more ingrained inequalities, and 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. | | |

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| **IMPROVEMENT PROPOSAL 13** | **RELEVANT TO WHICH REGULATION(S) AND/OR WORK STRAND** | **INFORMATION** |
| Explore how best to use the duties relating to Scottish Ministers | Regulation 6A - Use of member information  Regulation 11 - Duty to consider other matters  Regulation 12 - Duty of the Scottish Ministers to publish proposals to enable better performance | n/a |
| **Question:**  **13.1** How could the duties under regulations 6A, 11 and 12 be strengthened and/or improved? | | |
| **Answer:**  **13.1** We have been unable to find published proposals made by Scottish Ministers following 2013, or progress reports on this following 2015. We therefore cannot comment in detail on this aspect of the duties. We are aware that the work of the Scottish National Equalities Improvement Project was significantly connected to the Scottish Ministers duty. An evaluation of the impact of this project would be of use to the PSED review process. We are aware that part of this work included a project co-ordinated by the Equality and Human Rights Commission on improving equality outcomes. However, the problems identified in the 2015 summary report of its outcomes had not been substantially rectified by the time of our research covering the 2013-17 reporting cycle, and the same issues can be seen in the most recent 2021-2025 outcomes. We find no evidence to suggest that the Scottish Ministers’ duty has had any significant impact. This may be more a result of the proposals made being inadequate, or inadequately implemented, than a result of the regulations themselves. | | |

**END OF QUESTIONS**

**Additional comments**

We are disappointed that, despite raising this repeatedly, 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. On completing our research on behalf of the Equality and Human Rights Commission regarding the effectiveness of the duties regarding equality outcomes, employee information and the gender pay gap, we first raised the gaps in existing research with Scottish Government at the 2018 stakeholder meeting on the PSED review, and have raised it again during further engagement. We continue to stress that this review process cannot effectively identify solutions to poor implementation without this evidence base. Our recommendations (below) are therefore, by necessity, light on detail regarding these aspects.

As mentioned previously, we are similarly disappointed that this initial consultation 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. The set of questions presented here is quite restrictive and not reflective of the scope of the duties, hence the need for further comments and the recommendations provided below.

In addition, the questionnaire seems to reflect the stage one report but not subsequent engagement with equality stakeholders. The stage one report missed a number of important factors, possibly due to a relatively narrow and selective evidence base. In particular, we did not feel that the work undertaken by CRER on behalf of the Commission to [review performance of a selection of the duties](https://www.equalityhumanrights.com/sites/default/files/effectiveness-of-psed-specific-duties-scotland.pdf) over the 2013-2017 cycle, which is perhaps the most detailed piece of research undertaken on the duties to date, was reflected within the stage one report.

We remain concerned that the PSED review process may not be ambitious enough to create meaningful change. The SSD regulations currently in place have not made significant progress in the lives of people with protected characteristics, and so require fundamental revision. Stakeholders within the equality sector have extensive expertise to offer, but the engagement process so far has not been designed in a way that makes best use of our expertise. Given an appropriate level of involvement, we could support Scottish Government to create a set of duties which are both more effective and more enforceable than the current regulations. We therefore urge Scottish Government to develop a revised set of duties in co-production with equality stakeholders. The recommendations set out below are indicative of the issues we would hope to explore through such a process.

**Summary of recommendations**

The following recommendations have been identified based on our substantial research into PSED performance, both nationally and at local level in Glasgow. They include additional recommendations which may not have been suitable for inclusion in our responses to the specific questions asked in this survey. They include recommendations on both legislative and non-legislative matters. This is necessary to provide the full picture of our view on what needs to change.

**Overarching**

We recommend the following amendments to the SSD:

* 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
* Introducing a due regard duty on data collection, for example that listed public bodies undertaking 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
* Undertaking a detailed overhaul of the regulations in order to maximise their effectiveness and close loopholes, through consolidation and amendment

In terms of non-legislative change, we recommend:

* 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)
* Provide 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
* Providing clarity within the guidance regarding common practices which may constitute or lead to non-compliance
* 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
* Further research on the mainstreaming and equality impact assessment duties in order to develop a holistic view of public sector equality duty performance and to better understand the relationship between performance on these duties and the duties examined through previous research
* 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

**Regulation 3 - Duty to report progress on mainstreaming the equality duty**

We recommend the following amendments to the SSD:

* Setting out more clearly the nature and extent of information required to meet the mainstreaming duty

In terms of non-legislative change, we recommend:

* Undertaking research into how public bodies are complying with this duty and its impact

**Regulation 4 - Duty to publish equality outcomes and report progress**

We recommend 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 recommend:

* 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
* 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

**Regulation 5 - Duty to assess and review policies and practices**

We recommend the following amendments to the SSD in relation to equality impact assessment:

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

In terms of non-legislative change, we recommend:

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

**Regulation 6 - Duty to gather and use employee information**

We recommend 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 targets for fair representation in employment for each of the protected characteristics where workforce profile information identifies an inequality
* 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 recommend:

* 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

**Regulation 7 - Duty to publish gender pay gap information**

We recommend the following amendments to the SSD in relation to the gender pay gap:

* 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 recommend:

* Strengthening guidance to ensure 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
* Prioritising measures to tackle under-representation, including a requirement to set and monitor targets, over the proposed introduction of pay gap reporting on ethnicity

**Regulation 8 - Duty to publish statements on equal pay, etc.**

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

* Requiring public bodies to set targets for the reduction of any identified gender pay gap, alongside specific actions to be taken to achieve this

In terms of non-legislative change, we recommend:

* 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

**Regulation 9 - Duty to consider award criteria and conditions in relation to public procurement**

We recommend the following amendments to the SSD in relation to the procurement duty:

* Require publication of 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 recommend:

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

**Regulation 10 - Duty to publish in a manner that is accessible, etc.**

We recommend the following amendments to the SSD in relation to the duty to publish accessibly:

* Specify that they 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

**Regulation 11 - Duty to consider other matters**

In terms of non-legislative change, we recommend:

* That Scottish Ministers should leverage this aspect of the duties to prompt consideration where insufficient or poor practices related to SSD are identified, as a means of supporting better compliance

**Regulation 12 - Duty of the Scottish Ministers to publish proposals to enable better performance.**

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

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

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