Equality and Human Rights Commission response to the Scottish Government’s consultation on the Socio Economic Duty

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The Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

**QUESTION 1** – The key terms defined in this section are:

- Socio economic disadvantage
- Inequalities of outcome
- Decisions of a strategic nature
- Due regard

Do you agree that the definitions of these are reasonable and should be included within the Scottish Government’s forthcoming guidance on the socio-economic duty?

### Socio Economic Disadvantage

Currently the term socio economic disadvantage is not defined in law. As the new socio economic duty places legal duties on public bodies covered by the Duty it will be important to define clearly what the term socio economic disadvantage means in order to enable public bodies to comply with, and preferably exceed, the requirements of the duty, and for those people potentially affected by it to understand it. A clear definition is also important for the Commission given its role in relation to the Equality Act 2010 and to provide better understanding of its regulatory responsibilities.

We note that the working definition in the consultation has several facets – being income deprived, living in a deprived area, or belonging to a community of interest who disproportionately experience poverty (for example Pakistanis in Scotland) as well as potentially those living in rural and remote areas. We particularly welcome the strong link made in the consultation between poverty and identity, that is the interconnection of inequality (income deprivation) and equality (protected characteristic).

As described below the Commission expects that some form of documentation will need to be published by public bodies to demonstrate that due regard has been paid. The Guidance for the duty should encourage public bodies to clearly set out how they define socio economic disadvantage. This could be done, for example, through documentation showing due regard relating to the development of specific policies, or an overarching socio economic disadvantage statement, as it applies to their employees and to the
those people who do, or could, reasonably be expected to be affected by the decisions. Such a statement would be developed within the context of guidance issued by the Scottish Government. However it is important that the statement is developed and owned by the public body. The flexibility of this approach would enable public bodies to consider the impact of policies in their area of benefit and with respect to those affected by it.

In regard to the definition, whilst we fully recognise that individuals experience socio economic deprivation, as the duty does not confer rights to individuals we think the inclusion of this term in guidance may be confusing and create the impression that the Duty can be used by individuals in the way that having a protected characteristic enables people to challenge discriminatory decisions.

Inequalities of Outcome
With respect to inequalities of outcome we agree that the Scottish Governments definition of inequalities of outcome is correct in all but one regard. The consultation defines inequalities of outcome as being “any measurable differences in what happens to people through their lives”. However the Socio Economic Duty, like the Specific Equality Duty is governed by principles of proportionality. By using the word “..any..” the Scottish Government has in our view inadvertently widened the duty to such an extent that this definition is now in conflict with the definition of strategic decisions below. We would suggest that this section is rephrased perhaps by qualifying it such as “... significant measurable differences..”

Decisions of a strategic nature
The examples cited in the text of the report are helpful in defining what decisions of a strategic nature might be but as in our previous comments it would assist all parties if this terminology were agreed prior to implementation of the Duty. We note that the 3 examples given at the end of the document provide some examples of decisions that could be covered by the duty.

However we do have some observations about the suitability of these examples.

With regard to example 1 whilst the examples of considerations to be taken into account are those that we would expect we would view the development of a small housing site as not the best example of a wider strategic decision. A better example would be the development of the Housing Needs Demand Assessment (HNDA) which sets out the strategic vision and direction of Housing provision in the area, which would be something that was clearly in the scope of the Duty. Developments such as those set out in example one would then be informed by the overarching HNDA.
With regard to Example 2 again we feel that the example cited is more limited as it only involves the creation of 45 jobs. A strategic development plan which sets out the type of industries that the public body wishes to encourage to set up and the likely impact on people who are socially economically deprived would provide a better example of a larger strategic decision.

With regard to example 3, the reprovisioning of a hospital, a better example could be strategic decisions about changes in the way that services are provided across a Local Authority (or Health Board) area. Again the types of considerations are the right sorts of ones that we would anticipate but the strategic nature of the decision needs to be emphasised.

**Due Regard**

Public bodies in Scotland will be acquainted with the concept of “due regard” as it applies to the Equality Duty (EA 2010 Sct 149). We recommend that the definition of due regard as it applies to the socio economic duty should therefore be the same, as both concepts flow from the same legislation. Case law under the EA 2010 has determined that “due regard” requires the “conscious direction of the mind to equality”. The Commission’s own Technical Guidance on the Public Sector Equality Duty in Scotland sets out in detail what “due regard” means and we would suggest that the Scottish Government replicates this rather than try to develop a new definition, which has not been endorsed by the Courts.

The consultation does not set of how “due regard” might be demonstrated. Under the EA 2010 Specific Duties “due regard” is commonly demonstrated by the production of an Impact Assessment (IA), but can also be demonstrated by minutes of a Committee if it demonstrates the “conscious direction of the mind”. Under the EA 2010 those who are making the decision must also give active consideration to the likely impact of their policy on equality and this is normally assisted by the production of an Impact Assessment. We would recommend that the same approach is adopted under the Socio Economic Duty. For most public bodies this should not prove onerous as the existing Equality Impact Assessments could be adapted to also address socio economic inequality. This would be the preferable approach as it would enable a fuller exploration of the cross cutting nature of equality and inequality as it impacts on different groups.

However the critical aspects of due regard is that the likely impacts of the decision are in front of the decision makers at the decision point to enable them to consider them in their decision making. As with the EA 2010 the consideration of the mitigation of policies which are recognised to have unavoidable adverse impacts on equality should also be encouraged.
**Question 2A:** Do you agree that the socio-economic duty should apply to the Scottish public authorities named here? If not, please specify which you do not think it should apply to and why?

The EHRCs understanding is that the Scottish Government is not in a position to vary the public authorities set out in Section 1 of the Equality Act in the application of the Socio Economic Duty. To do so would require an amendment of the primary legislation. However we would encourage the Scottish Government to consider ways of ensuring that Education Authorities (EA) as considered as being part of Local Authorities (LA) for the purposes of the Socio Economic Duty. Many Local Authorities have raised the issue of both EA’s and LA’s being covered separately under the Equality Act 2010 specific duties as an issue of a false separation of power when in reality EA staff are wholly employed by the LA and elected members often make decisions about Education in Committees which look at a wider interpretation of education or welfare, for example Children & Families Committees. We would therefore encourage the Scottish Government to set out how policies developed by EA’s could be treated as part of LA’s for the purposes of the Duty.

The EHRC is aware that some public bodies wish to opt in, or be opted in by the Government, to the Socio Economic Duty. We find this encouraging and where possible if the mechanisms allow we would welcome this. In particular we note that the failure to list the FE and HE colleges under Section 1 of the EA 2010 is a regrettable oversight and one, which if this part of the legislation were fully devolved to Scotland, would be likely to be an area which the Scottish Government would seek to incorporate. In this regard we would therefore encourage the Scottish Government to consider seeking the power to vary the list of bodies covered by Section 1 of the EA 2010 in Scotland to include HE and FE colleges in the light of the contribution they can make to reducing the income gap apparent in Scotland. If this is not possible the Scottish Government may wish to look at another means within devolved legislations capability of achieving the same end.

**Question 2B:** Do you think the duty should apply to any other public authorities, similar to those listed in the Equality Act 2010? If so, please name them and explain why you think the duty should apply.

Please refer to 2A above.
Question 3A: Do you have any comments on the steps set out in section 3?

Question 3B: What other actions could public authorities take to demonstrate that they are meeting the duty?

Question 3C: Could you offer suggestions as to how public authorities could improve budgetary analysis and reporting so as to take better account of inequalities related to socio-economic disadvantage?

Question 3D: Can you offer examples of how public authorities and others have made best use of the expertise of people with direct experience of poverty?

Question 3E: What kind of guidance and support on meeting the duty would be most useful for public authorities?

Question 3F: Do you have a view on whether public authorities should use existing monitoring frameworks to track whether the socio-economic duty is making a difference to outcomes over the long term?

3A. The steps set out in Section 3 of the consultation are proportionate and helpful. Where possible we recommend that inequality analysis is combined with equality analysis to ensure that a full assessment of the likely impact of the policy on both economically deprived people and people who share protected characteristics is achieved, and ensuring that there is no hierarchy of need established.

As with Equality Impact Assessments the absence of data on inequality in a particular context does not indicate a lack of need but a lack of data. Public bodies subject to the Duty will need to identify data gaps early in the process of impact assessment and commission research or consultation to fill those gaps. Often this data will be available to the authority through other means, for example customer satisfaction surveys or service uptake data. As above authorities will need to ensure that due regard is also paid to the nine protected characteristics.

We fully support the Government’s suggestion that community involvement is not just necessary but highly valuable. The voices of people with lived experience of deprivation will be critical to testing solutions.

3B. Please refer to the section on due regard above.

3C. The preparation of a poverty impact assessment and its presentation to the relevant budgetary committee, along with an equality impact assessment, is critical to paying due regard. Unless decision makers are aware of the likely implications of their policies on socially deprived groups they will not be able to either demonstrate due regard or identify mitigating actions should there be an unavoidable detrimental impact.

Public Authorities may also want to consider voluntarily adopting a similar approach to that taken under the Scottish specific duty regulations in the
setting of outcomes which specifically address socio economic deprivation, although these do not replace the need to set equality outcomes every four years. There are however obvious advantages in integrating planning and reporting on these issues.

3D and E. The EHRC would also be interested to hear of examples of positive practice in these areas which might assist us in monitoring the duty over time.

3F. In common with the Equality Act Specific Duties it would be preferable if Public Bodies adopted a mainstreaming approach to inequality using existing reporting mechanisms where possible to ensure that inequality is embedded in core policy considerations.

**Question 4A:** Once the socio-economic duty is introduced, the Scottish Government is keen for public authorities to look strategically across all planning processes in place to maximise their impact. What could public authorities and the Scottish Government do to make sure that the links between the different duties are managed effectively within organisations?

**Question 4B:** Can you offer examples of good practice in taking an integrated approach to issues such as poverty, equality, and human rights?

4A. Public Bodies have been critical of some Scottish Government Departments failure to Equality Impact Assess policies which are developed at Governmental level but intended for implementation and delivery by local Public Bodies. The introduction of the new duty gives the opportunity for greater collaboration between Public Bodies and national government co-producing impact assessments which look both at the national intent of policy and the local effects of it. Initially at least it would be helpful if Government showed leadership by ensuring that all relevant policy for implementation locally goes through this type of process.

The EHRC is currently commissioning research into the existing socio economic duties currently in force under the Children & Young People Act 2014, the Community Empowerment Act 2015 and the Education Act 2016. The purpose of the research is to examine what learning might be available from the operation and impact of these duties. We hope to publish this prior to the likely introduction of the Socio Economic Duty in December 2017. It would also be helpful if the Government could develop a resource which identifies the key social statistics and data that would assist Public Bodies to benchmark their progress. Similarly a gap analysis of current surveys and research could be conducted to establish which areas of policy would benefit from better data similar to the current Equality Evidence Finder.
4B. Public Bodies may wish to reacquaint themselves with the SHRC/ EHRC joint work on Equality & Human Rights Impact Assessment which combined best practice on equality impact assessment with human rights issues covered in International Treaties and Conventions.