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Gender Representation on Public Boards (Scotland) Bill

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Executive Summary

The aim of the Gender Representation on Public Boards (Scotland) Bill is to improve the representation of women in non-executive positions on public boards. Women make up over 50% of the Scottish population, but make up only 42% of public board membership, inclusive of chairs.

In addition to the aim of achieving equality, there is much research evidence to support the benefits of diversity.

There are many examples of voluntary action already taking place, such as the Scottish Government's Partnership for Change: 50:50 by 20/20. There are also examples across Europe where legislation has been used to improve gender diversity on public and private boards.

The Bill introduces the 'gender representation objective' - a target that women should make up 50% of non-executive board membership. The objective applies to certain public bodies, colleges, and Higher Education Institutions. It also applies to Scottish Ministers as they appoint non-executive board members through the Public Appointments process.

The Bill also introduces positive action provisions. These are similar to provisions in the Equality Act 2010 which *permit* action to be taken to increase under-representation from different groups, without resulting in unlawful discrimination. In the Bill these positive action measures are *duties*.

The appointing person, which for public authorities will be a Scottish Minister, will have a duty to give preference to a woman when making an appointment to a public board, but only in certain circumstances. Scottish Ministers must determine who is best qualified for a position. If there are two or more candidates, one of whom is a woman, and they are considered equally qualified, then preference must be given to the woman. This is often referred to as the 'tie-breaker' provision. However, preference may still be given to the candidate who is not a woman, if it can be justified on the basis of a characteristic or situation particular to that candidate.

The appointing person and public authorities must take steps to encourage women to *apply* for non-executive positions. This is because it is recognised that women face particular barriers to becoming non-executive members of public boards. Ways to overcome these barriers include: increasing awareness of these positions through advertising widely, and providing mentoring and social networking opportunities. Where the gender representation objective has not been achieved, steps must be taken to try and achieve it by 31 December 2022.

The positive action provisions of the Equality Act 2010 will not apply to action taken under the Bill.

Public authorities will be required to publish reports on progress, and the detail of this will be set out in regulations.

The Scottish Government consulted on the draft Bill and found wide support for the principle of increasing women's representation on public boards. Issues raised in the consultation included whether:

- more groups should be included
- the Bill is inclusive of transgender people
- higher education institutions should be subject to the Bill
- there should be accountability, such as reporting or sanctions (there was no reporting provision in the draft Bill)
- there should be published guidance on the Bill
- there should be a target date for achieving the objective (this was not in the draft Bill).

Some also viewed the Bill as unnecessary, or that it was not strong enough.

The Scottish Government estimates that there will be minimal costs arising from the Bill.

Introduction

The Gender Representation on Public Boards (Scotland) Bill ('the Bill') was introduced by the Cabinet Secretary for Communities, Social Security and Equalities, Angela Constance MSP, on 15 June 2017 ¹.

The aim of the Bill is to improve the representation of women in non-executive positions on public boards. It sets a target for public boards, the 'gender representation objective', that women should be 50% of non-executive board members. There is a duty to try and achieve the objective by 31 December 2022. At the last census (2011), women made up 51.5% of the Scottish population ². The Scottish Government says that it is committed to improving the representation of women at senior and decision making levels as part of a commitment to women's equality ³.

The Bill extends to certain public sector bodies, colleges, and higher education institutions in Scotland. It does not extend to the boards of private companies or charities, as the Scottish Parliament only has legislative competence in this area in relation to Scottish public authorities.

Scotland Act 2016

The Scottish Government can legislate to increase the number of women in non-executive positions on public boards because of further powers devolved to Scotland under the Scotland Act 2016. This follows the proposal made by the Smith Commission that the Scottish Parliament should have the power to introduce gender quotas for public boards ⁴.

The subject matter of equal opportunities is reserved by schedule 5 of the Scotland Act 1998. This includes the Equality Act 2010 which consolidated anti-discrimination legislation including: the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995.

The Scotland Act 2016, amended the Scotland Act 1998, and devolved further responsibility for 'equal opportunities' to the Scottish Parliament. Section 37 of the 2016 Act includes new exceptions to the reservation contained in the Scotland Act 1998. The Scottish Parliament is now able to legislate about equal opportunities in relation to non-executive appointments to the boards of Scottish public authorities. This provision commenced on 23 May 2016 (under section 72 of the 2016 Act).

The provision in the Scotland Act 2016 is wider than the Smith Commission proposal as it is not restricted to gender. The provision could apply to any protected characteristic in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Efforts to increase diversity on public boards

The Scottish Government has been working to improve the gender balance on public boards for a number of years. On 21 November 2014, a day after being sworn in as First Minister, Nicola Sturgeon announced that the Scottish Cabinet would have a 50/50 gender balance for the first time⁵. This was followed by an announcement of Partnership for change: 50/50 by 2020 in the Programme for Government 2014-15⁶.

The partnership is a network of organisations and individuals who want to improve gender balance and diversity on boards. To date, 210 organisations have signed up, comprising of 100 public bodies and colleges, 69 voluntary organisations and 41 private sector organisations⁷. Some have met the 50/50 target^{8 9 10}.

In its most recent Equality Outcome and Mainstreaming report 2017, required under the Public Sector Equality Duty, the Scottish Government set an equality outcome that:

“ Ministerial public appointments are more diverse reflecting broadly the general population by 2021¹¹ ”

Consultation on mandatory quotas

In April 2014, the Scottish Government published "Women on Board: Quality through diversity", a consultation on the introduction of gender quotas on public boards¹². The consultation referred to data that showed women made up 36% of board places and 21% of board chairs. It sought views on introducing mandatory quotas to ensure a minimum of 40% of women on public boards. It also sought views on whether legislation should be introduced for private boards.

At the time, the Scottish Parliament did not have legislative competence in relation to gender quotas on public boards. Shona Robison MSP, then Cabinet Secretary for Equalities, wrote to the UK Government requesting a section 30 order to transfer the necessary legislative competence to the Scottish Parliament¹³. This request was acknowledged by the UK Government¹⁴. However, the matter was then considered during the [Smith Commission](#) discussions.

Public Sector Equality Duty

The Public Sector Equality Duty is set out in section 149 of the Equality Act 2010, and applies to the protected characteristics of age, disability, gender, gender reassignment, pregnancy and maternity, race, religion or belief, and sexual orientation. It is often referred to as the general equality duty and requires public authorities, in the exercise of their public functions, to:

- eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct

- advance equality of opportunity between people who share a relevant protected characteristic and those who do not
- foster good relations between people who share a protected characteristic and those who do not.

The *specific* equality duty helps listed public authorities in their performance of the *general* equality duty. The requirements of the *specific* equality duty are set out in the [Equality Act \(2010\) \(Specific Duties\) \(Scotland\) Regulations 2012](#) (as amended). The regulations list the public authorities subject to the specific equality duty, and set out what they must report on, and by when, to show how they have met the general public sector equality duty. This includes reporting on mainstreaming the equality duty and publishing equality outcomes, as well as reviewing and reporting on progress. There is also a requirement to gather and publish information on the protected characteristics of staff.

The regulations were amended in 2016 under the [Equality Act 2010 \(Specific Duties\) \(Scotland\) Amendment Regulations 2016](#). The specific equality duty now provides for Scottish Ministers to collect information on the protected characteristics of board members, and to feed this information back to the listed public authorities. The listed public authorities are required to use the information to increase their diversity of board membership and as part of their recruitment and succession planning programmes. From April 2017, public authorities are required to report on the steps they are taking towards increasing diversity on their boards, as well as detailing the number of men and women on the board.

The draft Policy Note accompanying the 2016 regulations said that the Scottish Government would aggregate the data into Scotland-wide figures, allowing the information to be published nationally ¹⁵. The publication of national data is not a requirement of the regulations and there is no indication when such data might be published.

The public authorities listed under the specific equality duty are not entirely the same as those listed in the Bill. The Scottish Government has provided detail to the Equalities and Human Rights Committees showing which public authorities are subject to the specific public sector equality duty, compared with those subject to duties under the Bill ¹⁶.

There are 27 public bodies listed in the Bill that are not subject to the specific public equality duty ⁷. The Equality and Human Rights Commission (EHRC) has suggested that it would be worth considering whether the public bodies in the Bill should now be required to meet the specific equality duty as well, and would welcome further clarity from the Scottish Government ¹⁷.

Ministerial public appointments

The Public Appointments and Public Bodies etc (Scotland) Act 2003 established the office of the [Commissioner for Ethical Standards in Public Life in Scotland](#) and set out a framework for the ministerial public appointments process. It is the Commissioner's role to publish a [Code of Practice](#) and to support [statutory guidance](#) on ministerial public appointments. These are aimed at:

- Scottish Ministers

- the civil servants who implement the public appointment process on behalf of Scottish Ministers
- members of selection panels who select and recommend to Scottish Ministers applicants for positions on the boards of Scotland's regulated public bodies.

The Code of Practice sets out the requirements of the process used to appoint public board members. When the requirements of the Code of Practice are not met, the Commissioner can intervene. The Commissioner has powers to advise the appointing minister so that action can be taken to address the issue. The Commissioner can also report the appointing minister to the Scottish Parliament.

The public appointments' process includes the following principles ¹⁸ :

- **Merit** - all public appointments must be made on merit. Only people judged best able to meet the requirements of the post will be appointed.
- **Integrity** - the appointments process must be open, fair and impartial. The integrity of the process must earn the trust and have the confidence of the public.
- **Diversity and Equality** - public appointments must be advertised publicly in a way that will attract a strong and diverse field of suitable candidates. The process itself must provide equality of opportunity.

The statutory guidance provides further detail on how to appoint the most able candidate, including situations where candidates are assessed as being of equal merit. It promotes the use of positive action, as set out in section 159 of the Equality Act 2010. This is discussed further [below](#) .

To support the Partnership for Change 50/50 by 2020, the Scottish Government's Public Appointments Team was tasked with supporting public bodies through practical changes to the ministerial public appointments process. A range of actions have been taken to increase diversity on public boards, including:

- working with groups representing those with protected characteristics to identify barriers and develop solutions
- targeted advertising strategies and outreach events that challenge perceptions of traditional board members
- the creation of an accessible core skills framework to develop person specifications to ensure that criteria do not inadvertently exclude any groups

The Scottish Government says that this has led to improvements in the gender balance on public boards ³ , in particular:

- In 2016, 43% of applications were from women, ahead of the Commissioner for Ethical Standards in Public Life in Scotland's target of 40%, set out in the Diversity Delivers strategy ¹⁹ .
- In 2015, Ministers appointed more women than men for the first time - 54% of all new appointments went to women.
- At the end of 2016, over 45% of all board positions were held by women.

Higher Education Institutions

The governing bodies of Scottish higher education institutions (HEIs) are known as Courts or Boards. They are not subject to the ministerial public appointment process. Appointments to the governing body of an HEI are not regulated by the Commissioner for Ethical Standards in Public Life in Scotland⁷. They are regulated by the Scottish Code of Good HE Governance, introduced in 2013. The Code requires all governing bodies of HEIs to set goals for equality and diversity and to monitor progress. This extends consideration of diversity to other protected characteristics. Collectively over 350 changes were implemented in the first year of the new Code, and “one of the most noticeable changes has been the impact on diversity in universities’ governing bodies”²⁰.

The Higher Education Governance (Scotland) Act 2016, was introduced to improve and modernise aspects of governance in HEIs. The Scottish Code of Good HE Governance is being updated and will take account of the 2016 Act.

The HEI sector has a commitment to achieving gender-balanced governing bodies at every institution. The aim is to have at least 40% of men and 40% of women among those members who are appointed by the governing body by 2018²¹.

Issues

Benefits of diversity

As well as the moral and legal imperative to achieve equality between men and women, there is also a clear business case for increasing diversity.

The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified by the UK in 1986, requires that State Parties:

“ shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publically elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organisations and associations concerned with the public and political life of the country.”

The Equality Act 2010 provides protection against discrimination across 9 protected characteristics, age, disability, gender reassignment, race, religion and belief, sex, sexual orientation, marriage and civil partnership, pregnancy and maternity. It provides the legislative framework for a fairer society, improved public services and helps businesses perform well ²² . It contains provisions on positive action, similar to those in the Bill, discussed [below](#).

It is widely accepted that diversity is good for the workforce in general, not just because of equality considerations, but because it has benefits for the population. For example, the Institute for Employment Studies states:

“ ...it creates vibrant cultures, improved responsiveness to employee and customer needs, greater innovation and creativity, and helps organisations compete in an increasingly globalised (and thus diverse) marketplace ²³ .”

Lord Davies led a UK Government review, the ‘Davies Review’ (2010), on women on the boards of listed companies:

“ The business case for increasing the number of women on corporate boards is clear. Women are successful at university and in their early careers, but attrition rates increase as they progress through an organisation. When women are so under-represented on corporate boards, companies are missing out, as they are unable to draw from the widest possible range of talent. Evidence suggests that companies with a strong female representation at board and top management level perform better than those without and that gender-diverse boards have a positive impact on performance. It is clear that boards make better decisions where a range of voices, drawing on different life experiences, can be heard. That mix of voices must include women ²⁴ .”

Research commissioned from the Scottish Government on gender diversity for private boards described the significant business benefits of diversity:

“ ...including lower labour turnover, higher levels of commitment and motivation amongst employees, improved reputation (amongst customers and potential employees), better understanding of customer needs and more flexibility and creativity within the business from the increased range of perspectives, skills and capabilities²⁵ .”

Engender refer to international evidence that suggests that lack of a gendered power balance in the wider public domain has a major impact on equality outcomes across government:

“ ...having women around the table changes the substance and outcomes of discussions: increased numbers of women in leadership positions enriches perspectives and increases prospects for public gender-sensitive services. Representative public boards also contribute to challenging gender stereotypes and perceptions around public authority, and send an important message to young women and men within their respective fields²⁶ .”

For further research evidence of the benefits of diversity, see the Policy Memorandum³ and the research commissioned by the Scottish Government on "Overcoming Barriers to Equality and Diversity Representation on Public, Private and Third Sector Boards in Scotland"²⁷ .

Barriers and overcoming them

“ In 2016, a lack of childcare, or caring commitments for older or disabled relatives should not be acceptable reasons for men’s over-representation in positions of authority, not least within public sector bodies whose services and programmes directly affect us all²⁶ . (Engender)”

Women face similar barriers to getting on public boards as they do in employment generally. These are often cited as lack of flexible working, lack of affordable and quality childcare, and occupational segregation²⁸ . There are two types of occupational segregation:

- horizontal segregation - where men and women are concentrated in different types of work, such as women working in caring roles
- vertical segregation where women face progression barriers, often referred to as the 'glass ceiling'.

The Scottish Government held a summit in November 2013 to discuss women on boards, prior to the 2014 consultation¹² . Issues discussed at the summit included how to streamline the application process, how to adopt more flexible and family-friendly practices, fostering partnerships to help shift culture, and promoting positive attitudes to women on boards. Other barriers include:

- a general lack of awareness of public appointments amongst under-represented groups
- the tendency of women to undersell themselves and feel the need to meet all aspects of a person/job specification before applying

- the impact of different publicity strategies, e.g. hard copy press can yield more applicants from white males
- unclear and unfocused person specifications
- the application process itself.

The Scottish Government commissioned research on overcoming barriers on public, private and third sector boards ²⁷. Based on evidence, it suggested a number of ways to overcome barriers including:

- Increasing awareness – advertise widely to ensure a wide range of people consider applying
- Mentoring and social networking opportunities between existing and potential female board members is increasingly viewed as an effective approach to improving board diversity.
- Reporting on gender equality targets and greater transparency on the make up of boards is an effective method for improving compliance with social expectations.
- Improve training – several consultancy firms specialise in creating training packages for women seeking positions on public boards. Support includes:
 - Coaching and workshops on corporate governance
 - Advice on targeting a board appointment
 - Access to mentoring and networking opportunities.

Positive action and positive discrimination

The Bill contains provisions on positive action. These are similar to two existing provisions on positive action in the Equality Act 2010. However, both provisions in the Equality Act 2010 are voluntary and apply to all the protected characteristics.

Section 158 in the Equality Act 2010 covers positive action generally. It means offering targeted assistance to people where they are under-represented or disadvantaged because of their protected characteristic. It can be applied in a range of settings, including employment and the provision of services. Positive action is different to positive discrimination, which is unlawful. For example, in the context of the Bill, choosing a woman for board membership on the basis that she is a woman would constitute direct sex discrimination. Indirect sex discrimination concerns how an organisation applies a provision, criteria or practice which puts women at a disadvantage in comparison to men. For example, if a public body restricted its search for board members through informal 'word of mouth' recruitment, or confined the search to those already in such roles. Positive action is permitted where a board thinks women are under-represented or face disadvantage. It is lawful to take steps to encourage more women on boards ²⁹.

Examples of positive action under Section 158 include:

- Targeting networking opportunities on women

- Offering opportunities for women to shadow existing board members
- Advertising positions in places where women are likely to read them.

Section 159 of the Equality Act 2010 provides a positive action measure specific to recruitment and promotion, often referred to as the ‘tie-breaker’ clause. The term recruitment is defined widely and includes appointment to a public office²⁹. The tie-breaker clause allows employers to use positive action where people with any protected characteristic suffer from some sort of disadvantage or are under-represented. Where an organisation is choosing between two or more candidates of equal merit, it is permitted to offer the position to the candidate with a protected characteristic that is under-represented or otherwise disadvantaged in the workforce²⁹. For example, a nursery with only female staff could employ a male candidate ahead of a female candidate of equal merit in order to create a more representative workforce. Without the tie-breaker clause, this would constitute unlawful direct discrimination.

This clause proved to be controversial when it was first introduced in the draft Equality Bill. Despite concerns about the tie-breaker clause, there is very little evidence of its uptake³⁰.

Mandatory quotas or voluntary targets?

The EHRC defines voluntary targets as aspirational²⁹. They are not backed by sanctions or penalties for failure to achieve within a timescale. Quotas are defined as a fixed proportion, imposed by regulation, and subject to sanction²⁹. Sanctions can vary in their severity, such as a requirement to explain failure, financial penalties, or removal of the board²⁷.

According to research (on both public and private sectors), the use of mandatory quotas to enforce gender diversity on boards has become more accepted internationally as a way to achieve gender balance. The voluntary approach has been criticised for being too slow to achieve change²⁷.

[European Women on Boards](#) published an analysis of the progress that women are making on the Boards of the 600 largest European-listed companies. It reported that:

“ Countries where the government passed legislation introducing mandatory quotas on board gender diversity at listed companies during the years 2011-2015 tended to experience high levels of growth in the percentage of women on boards over this period³¹. ”

Engender refer to the use of gender quotas across Scandinavia,

“ ...where legislative and regulatory quotas have delivered strong results. These have been adopted in all five Nordic countries, and typically apply to all public commissions, committees and boards. In practice, the recruitment process for public appointments must deliver two final candidates, one woman and one man, which enables ministers to make appointments in line with the need for gender balance²⁶. ”

Norway was the first country to introduce a mandatory quota for women on boards, seeking a proportion of 40% of women on boards by 2008. The Norwegian Companies Act 2003 imposed regulation of the gender composition for a wide variety of company boards, public limited companies, state and local government owned companies as well as cooperative companies²⁷.

Another approach has been defined as 'corporate transparency' or 'comply, or explain' in relation to private boards. It requires companies to report on diversity policies alongside financial reporting. This approach is intended to encourage companies to adopt ways to improve gender balance on boards²⁵.

It could be said that the Bill takes elements of all three approaches to improve gender diversity on public boards:

- Voluntary target – The Bill's target that 50% of non-executive public board members are women is not subject to any sanction.
- Mandatory quota – the Bill sets a proportion to be reached, and places duties on public authorities and Scottish Ministers to try to achieve this.
- Comply, or explain – the Bill requires public authorities to report on actions taken under it.

Are mandatory quotas discriminatory?

If the Bill set out mandatory quotas, this could be construed as positive discrimination, which is unlawful. However, the Equality Act 2010, does allow political parties to use all-women shortlists to select candidates for parliamentary elections. This provision has a sunset clause until the end of 2030, but could be further extended.

The Scottish Government has said that the Bill has been framed within the context of EU law. It refers to key principles in EU law that the Bill must take into account³². These are that:

- positive action measures can only be used on grounds of gender where candidates are judged of equal merit, and
- these measures cannot give automatic and unconditional priority to female candidates over male candidates and vice versa.

Reference is made to judgements of the Court of Justice for the European Union (CJEU), where it has defined boundaries between legitimate positive action and unlawful direct discrimination. To date, The CJEU has decided that positive action measures are an exception to the principle of equal treatment and must be interpreted narrowly because they permit more favourable treatment of particular groups³². However, Busby and Robison argue that because the Bill's provisions are limited to non-executive members of public boards, and not employees, there may be scope to use mandatory quotas¹⁷. They said:

“ While it is clear that any such provisions relating to employees would fall within the scope of European law, it could not be said with the same degree of clarity that non-executive members of public boards who are not employees similarly come within the scope of European law. Not all holders of office will be covered by European law, and the election of parliamentary candidates is a good example. If non-executive members of public boards do fall outwith the scope of European law then there are no limits on what the Scottish Parliament can legislate for. In that scenario, the proposals appear very weak indeed. ”

Robison and Busby refer to the example of Norway, which is not in the EU, but did introduce a requirement that a minimum of 40% of members of the boards of all publicly listed companies be women. They said that this initiative "led to a number of other member states of the European Union, including Belgium, France, Ireland and Italy, to impose board quotas on both state controlled and non-state controlled companies, with Austria, Finland and Greece imposing quotas on state controlled countries only" ¹⁷ .

Statistics on board diversity

The Commissioner for Ethical Standards in Public Life In Scotland publishes data on board diversity on an annual basis. The most recent data, from December 2015, shows the demographic profile of board members by five protected characteristics.

Table 1

Demographic profile of board members

Target group	Profile of board members as at December 2015 % (inclusive of chairs) ⁱ	Scottish population (Census 2011) %
Women	42	51.5
Disabled people	11.8	19.6
Ethnic minority people	3.5	4
Aged under 50	17.6	54.3 ⁱⁱ
Lesbian, gay and bisexual people	3	6 ⁱⁱⁱ

Table 2 shows that the proportion of women on public boards has increased over the past few years, but that there has been a reduction in the proportion of disabled people on public boards. The Commissioner has not set a target for representation by protected characteristic on boards.

“ It is however recognised that this baseline must be tracked in order to assess whether the Diversity Delivers targets for applications from under-represented groups are making a difference to board demographics ³³ . ”

ii Scottish Population aged 18 to 49 as a percentage of the whole population aged 18 and over.

iii Estimated based on information from Stonewall Scotland website

Table 2

The changing demographic profile of board members (inclusive of chairs)

Target group	2004/06 %	2013/14 %	2014/15 %	2015/16 %	Scottish population (Census 2011) %
Women	34.5	35	38.4	42	51.5
Disabled people	2.4	13.1	15.3	11.8	19.6
Ethnic minority people	2.8	2.2	2.9	3.5	4

Table 3 shows progress against the targets set in Diversity Delivers ¹⁹, in terms of the numbers of applicants, and people appointed to boards, for five protected characteristics. For women, the target was met for the first time. The Table shows mixed progress for the other under-represented groups.

Table 3

Performance against Diversity Delivers Targets

Regulated appointments	2013		2014		2015		Target	Population
	Applicants	Appointed	Applicants	Appointed	Applicants	Appointed	%	%
Women	34.1	34.5	37.9	45.6	40.8	53.6	40	51.5
Disabled people	12.6	10.9	10.4	7.4	12.7	10.3	15	19.6
Ethnic minority people	3.8	*	4.9	*	5.3	5.2	8	4
Aged under 50	24.6	20	29.4	24	27.4	24.7	40	54.3
Lesbian, gay and bisexual people	2.6	*	3.9	*	4.1	5.2	6	6

* values of less than 5 have been suppressed to avoid the risk of disclosure.

For further statistics on women in positions of power more generally, see Engender's [Sex and Power in Scotland 2017](#).

The Bill

This part of the briefing provides a general summary of views expressed in the Scottish Government's consultation on the draft Bill. It then goes on to look at each section of the Bill and what respondents said in relation to these provisions in the draft Bill.

The consultation

The Scottish Government consulted on the draft Gender Representation on Public Boards (Scotland) Bill between 5 January 2017 and 13 March 2017³⁴.

There were 101 responses to the consultation, 66 were from groups or organisations, and 35 were from individuals¹⁷. However, the majority of public authorities listed in schedule 1 of the draft Bill did not respond to the consultation³⁵.

The consultation analysis on the draft bill highlighted the following observations and concerns:

- Widespread support for the principle of increased representation of women on public boards. Of those who did express an objection, around 1 in 5, suggested appointments should be made on merit alone, or that the proposal was discriminatory. The majority of those who objected were individual respondents.
- The omission of other protected characteristics, such as disability and race, was the most frequently raised issue. It was expressed by about 1 in 5 respondents.
- It was argued that a target of 50% might not be achievable, and perhaps it would be better to work toward 40%, or that the 50/50 balance might be taken as an average over several years.
- The inclusion of other board roles, such as executive positions or the Board Chair.
- There were concerns that the draft Bill used a binary definition of gender, and would not include non-binary people
- It was observed that, as Board appointments are managed by the Scottish Government's Public Appointments Team, and their 'appointing person' is a Scottish Minister, the public authority has no responsibility or control over the appointment. Universities and Colleges observed that decisions are made by the Governing Body rather than an individual person.
- Several university respondents expressed a view that HIEs should not be described as public authorities, and therefore should not be covered by the Bill.
- The need for public authorities to report on progress was highlighted by many respondents.
- Several respondents suggested that the legislation should include target dates for achieving the Bill's objective and that there should be some form of sanction for non-compliance.

Gender representation objective

Section 1 of the Bill sets out the gender representation objective for a public board, which is that 50% of non-executive members of the board are women. Where a public board has an odd number of non-executive members, the 50% applies if the board had one fewer non-executive member. So a board of seven members could have 3 women and 4 men and still meet the gender representation objective.

The wording of section 1 has changed following comments on the draft Bill.

The draft Bill used the following wording ¹⁷ :

The “gender representation objective” for a public board is that it has—

- (a) 50% of non-executive members who are female or who identify as female, and
- (b) 50% of non-executive members who are male or who identify as male.

Some submissions (eg Scottish Trans Alliance/Equality Network, Engender and Stonewall) welcomed the phrasing 'who identify as female' and 'who identify as male' as inclusive of transgender men and women ¹⁷ . The Scottish Trans Alliance/Equality Network suggested removing the phrase 'who are female' and 'who are male', so as not to create a legal difference between those 'who are' and those 'who identify as' male or female. The Bill now refers to women, rather than those who are female. This is to reflect the protected characteristic of 'sex' in the Equality Act 2010 ³ . However, it no longer uses the phrase 'who identify as', and no explanation is provided for this.

The consultation response from the Equality and Human Rights Commission raised some concern about the use of the term 'gender' in the draft Bill; pointing out that it does not align with definitions in the Equality Act 2010. The EHRC said that 'sex' and 'gender' are not synonymous terms, and that 'gender' is not a protected characteristic. Further, the EHRC said that:

“ If the intention of the Scottish Government is to include gender reassignment within this definition then we would suggest that this is addressed on the face of the Bill and not left to interpretation.”

The Scottish Government has said that the term 'gender' is used in the title and in the gender representation objective as a descriptive term and will not affect how the provisions of the Bill will operate ⁷ .

There was also concern that the wording in the draft Bill would not allow non-binary people to be represented on public boards (Scottish Trans Alliance/Equality Network, Engender and Stonewall). Non-binary is a term which describes people who do not identify with either gender. It was argued that the wording in the draft Bill would only allow men or women to be represented. The Scottish Government has changed the phrasing of section 1. It has removed the requirement for 50% of non-executive board members to be male. This has been done to “eliminate the perceived barrier created through the use of a binary definition of gender, for people who do not identify as either male or female” ³ .

The most common issue raised, by around 1 in 5 respondents was that the Bill is only focused on gender. The EHRC notes that the focus of the Bill is on women, but that other

protected characteristics are also under-represented¹⁷. The Scottish Government has chosen to focus on gender, despite having the power to address diversity for other protected characteristics. There are several reasons for this approach. One is that women make up more than half the population and are not a minority group. Further, many women will have other protected characteristics, for example, they may be disabled or from an ethnic minority³⁶. It is also suggested that public authorities will be able to learn from the progress they make on achieving the gender representation objective and apply it to other protected characteristics:

“...the Scottish Government feels that the promotion of women’s representation on public boards gives a platform for public authorities to test their recruitment structures and through addressing the barriers that women face, they can use the learning to help make their board positions more accessible to all potential candidates, irrespective of their protected characteristics.”

The EIS said that while some may criticise the Bill for focusing on women and not the other protected characteristics the gender representation objective is a ‘sensible approach’. They said:

“...it is important to take positive action to redress the imbalances that have arisen from centuries of historical disadvantage... The reality is that institutionalised inequality and sexist attitudes stop most women from reaching their full potential in public life. Sexism is endemic in our society. Financial barriers, income inequality, the gender pay gap, sexist attitudes, gender stereotyping, women’s disproportionate share of caring responsibilities, the undervaluing of women’s paid work, and media portrayals of women, to name but a few influences, all play a role in the sexism that prevents a fair number of women being involved in public life.”

Definitions of where the Bill applies

Section 2 provides definitions of the key terms used in the Bill.

Appointing person

The 'appointing person' is the person who has the function of appointing a non-executive member of a public board. This is most often Scottish Ministers, but also the governing body of a university, either a Court or Board.

Some respondents to the consultation did not support the inclusion of HEIs in the Bill. The Committee of Scottish University Chairs (CSC) said they did not feel the Bill was necessary to achieve the objective, as the actions are already standard practice across the sector. Further, that HEIs should not be included in the Bill because they

“...are not part of the public sector, but autonomous non-profit institutions. This status is officially recognised by the Office for National Statistics, with important implications for our institutions’ financial and operational capabilities.”

The Policy Memorandum notes that the Office for National Statistics (ONS) is undertaking a classification review of universities in the UK. It says that the inclusion of HEIs in the Bill had previously been raised as a concern by the sector as possibly giving weight to the case for their reclassification by ONS. However, the Policy Memorandum states that the

Bill is not expected to impact on the classification of HEIs as it is not making changes to the structure of their governing bodies.

Excluded position

An 'excluded position' is a position that is listed in column 2 of Schedule 1 of the Bill. It applies to positions that do not qualify as a non-executive member position for the purposes of the Bill. For example, elected positions. The reasoning for this is to avoid interfering with elections. Ex-officio members, where a person holds the position by virtue of holding another position in a separate organisation, are excluded because it would affect the appointments process for the other organisation. Excluded positions are discounted for the calculating of the gender representation objective ⁷.

Non-executive member

For the purposes of the Bill, a 'non-executive member' refers to a position on a public board that is 'not an excluded position', or positions held by employees of the public authority. Non-executive board members act in an advisory capacity, providing leadership, direction and guidance to the organisation ⁷.

Some respondents to the consultation felt that the gender representation objective should apply more widely than just to non-executive members, otherwise it would be hard to achieve gender balance on boards ³⁵.

Public bodies

For the purposes of the Bill only, 'public authority' means those which are listed in Schedule 1 of the Bill. The Bill does not extend to all public authorities in Scotland. A public authority is described in the Scotland Act 1998 as follows:

“*Scottish public authority*” means any public body (except the Parliamentary corporation), public office or holder of such an office whose functions (in each case) are exercisable only in or as regards Scotland (Schedule 1, 126).”

The Bill applies to 78 public bodies out of 122 listed in the National Public Bodies Directory. The most common reason for a public body not to be included is that it is effectively a single post ³⁷.

A public body is an organisation which generally receives at least 50% of its funding from central government. Public bodies vary depending on their functions and relationship with Scottish Ministers, and/or the Scottish Parliament. Executive agencies, such as Transport Scotland and the Students Awards Agency for Scotland, constitute parts of the Scottish Government with a stronger focus on operational management and direct delivery of public services.

Some public bodies operate at arm's length from Scottish Ministers, and are not part of a Scottish Government directorate. These public bodies are generally referred to as Non-

Departmental Public Bodies (NDPB) and are managed by a Board whose members are appointed by the Minister.

- *Executive NDPBs*: have a national remit, and carry out administrative, commercial, executive or regulatory functions at arm's length from Government. Normally established by statute, Royal Charter or as companies limited by guarantee. Most NDPBs have boards appointed by Scottish Ministers which are subject to the Commissioner for Ethical Standards in Public Life in Scotland.
- *Advisory NDPBs*: have a national remit and carry out advisory functions providing specialist advice to Ministers and others.
- *Tribunals*: are responsible for tasks and advice relating to specialist areas of law, carrying out judicial functions, but are separate from the formal court system.
- *Public Corporations*: industrial or commercial enterprises under direct control of Ministers.
- *National Health Service (NHS) Bodies*: provide management, technical or advisory services within the NHS.
- *Non-Ministerial Departments*: are headed by a statutory officer holder and operate at arm's length from Government.

In addition ⁷ :

- *Parliamentary Commissioners and Ombudsmen*: have a range of roles including safeguarding rights of particular groups and monitoring and handling complaints about the activity of public organisations. Commission Members, Commissioners and Ombudsmen are appointed by the Scottish Parliamentary Corporate Body. They are accountable to and report directly to the Scottish Parliament.
- *Other significant bodies*: these bodies do not fall within the recognised categories of public bodies set out above, but they have a direct relationship with either the Scottish Government or Parliament and operate within a framework set by Ministers. They include inspectorates with Chief Inspectors appointed by the Crown.

The webpage for [Public Appointments](#) provides detail on the different types of public bodies as well as information on public appointments.

'Public board' means:

- if the public authority is a company, the directors, eg [David MacBrayne Limited](#) and [Highland and Islands Airports Limited](#)
- if the public authority has a statutory board or other equivalent statutory management body, that board or body, eg, Highlands and Islands Enterprise, Visit Scotland, and the Scottish Qualifications Authority
- in relation to any other public authority, the membership of the authority.

In a submission ⁷ to the Equalities and Human Rights Committee, the Scottish Government has provided further details of the public bodies and HEIs covered by the Bill

- 78 Public bodies, of these:
 - 37 Executive NDPBs
 - 23 Health bodies
 - 6 Non-ministerial departments
 - 4 Public Corporations
 - 4 Advisory NDPBS
 - 2 Commissioners and Ombudsmen
 - 2 Other significant bodies
- 25 colleges
- 18 HEIs
- 7 regional transport partnerships
- 1 is the National Confidential Forum

The way in which non-executive board members are appointed varies across public bodies. Many non-executive members of public bodies are appointed by Scottish Ministers. Other non-executive members are nominated or appointed by an individual or authority other than Scottish Ministers. The Scottish Police Authority is one example where all non-executive board members are appointed by Scottish Ministers.

Other public bodies will have non-executive board members appointed by Scottish Ministers, as well as those who have been elected and/or nominated by another authority. For example, Loch Lomond and Trossachs Park Authority has 17 board members, 5 elected by the community, 6 appointed by Scottish Ministers, and a further 6 appointed by Scottish Ministers following nomination by local authorities ⁷.

The non-executive boards of health bodies are all formally appointed by Scottish Ministers. However the board membership is made up of various designations of members. Some come through a regulated appointment process, and others are nominated by local stakeholder groups ⁷.

The University and College Union (UCU) and EIS welcomed the inclusion of HEIs in the Bill. However, the UCU also noted that the Bill only applies to board members appointed by the governing body, and not excluded positions. This means that the majority of HEI positions on boards will not be subject to the gender representation objective. “As a result the bill will not come close to ensuring that the governing body as a whole meets the gender equality objective of the bill.”

Positive action - 'tie-breaker'

Sections 3 and 4 of the Bill place duties on the 'appointing person', eg Scottish Ministers, when appointing non-executive members to public boards. It is similar to positive action

provisions in the Equality Act 2010, which relate to employment, also referred to as the 'tie-breaker' provision (as described [above](#)).

Where there is a vacancy on a public board and there is at least one woman, and someone who is not a woman applying, the appointing person must determine who is best qualified for that position. If no particular candidate is best qualified, the appointing person must identify candidates it considers equally qualified. Subject to section 4(4) (described below) the appointing person *must* give preference to a woman candidate if appointing her would result in the board achieving, or making progress towards achieving, the gender representation objective.

Where there is more than one appointment being made, each of the appointments must be taken into account in identifying the number of non-executive members. The appointing person must act with a view to achieving the gender representation objective, once all the appointments have been made.

Several respondents to the consultation suggested that the Bill needs to be more explicit about what is meant by 'best qualified' and 'equally qualified' ³⁵.

Section 4(4) provides that an appointing person must consider whether an appointment of a candidate who has been identified as equally qualified, and is not a woman, is justified on the basis of a 'characteristic' or 'situation'. If so, preference may be given to that candidate. This *might* mean that where a man and a woman are equally qualified, the man may be given the position if he has another under-represented protected characteristic.

This exception to the tie-breaker has changed since the draft Bill was consulted on, which referred to 'exceptional circumstances'. The change in drafting may be in response to comments on the draft Bill. The Scottish Legal Complaints Commission gave the following example of a situation in which the Scottish Government might want to consider other under-represented characteristics:

“...two candidates are rated as equal – one is gender A (which is under-represented), but one is gender B who has a disability, is from a remote rural area of Scotland, and is a young person. The person of gender A must be appointed, although in many aspects other than gender this may limit the overall diversity of the Board rather than improve it.”

This provision has been included because it "is required by the jurisprudence of the European Court of Justice (ECJ) which provides that such a requirement cannot be absolute" ³⁸. The Explanatory Notes refer to a number of ECJ cases where positive action has been applied, but found to be at the expense of other factors.

Section 10 of the Bill states that the positive action provisions of the Equality Act 2010 do not apply to any action undertaken in this Act. This means that when appointing board members, the appointing person will follow the Bill's provisions on positive action, and not those in the Equality Act 2010.

However, the Commissioner for Ethical Standards in Public Life in Scotland's guidance on ministerial public appointments promotes the use of positive action, as set out in section 159 of the Equality Act 2010:

“Ministers may take positive action and select on the basis of a protected characteristic in accordance with section 159 of the Equality Act 2010 ³⁹.”

The Equality Challenge Unit said that their experience of supporting HEIs and colleges to implement positive action measures shows that guidance and support is crucial to its success. They also said that it may be necessary to differentiate between the provisions of the Bill and the Equality Act 2010 more clearly.

The Scottish Government does not intend to produce additional guidance on recruitment to public boards and the use of positive action, given the existing guidance available⁴⁰ :

- The Commissioner for Ethical Standards in Public Life in Scotland – [2013 Code of Practice and Revised Guidance on Application of the 2013 Code of Practice](#)
- The Commissioner for Ethical Standards in Public Life in Scotland - [Diversity Delivers](#)
- The [Scottish Code for Good Higher Education Governance](#), which is under review and currently being consulted on
- College Sector Board Appointments: [2014 Ministerial Guidance](#)
- The Equality and Human Rights Commission – [How to improve board diversity: a six step guide to good practice](#)
- The Equality and Human Rights Commission - [Appointments to Boards and Equality Law guidance](#)
- Scottish Government Public Bodies Unit - [Guidance on Succession Planning for Public Body Boards](#).

Encouraging women to apply for membership on public boards

Provisions of section 5 of the Bill are similar to the *general* positive action provision in section 158 of the Equality Act 2010. The Bill requires the appointing person and the public authorities listed in schedule 1, to take steps to encourage women to *apply* to become non-executive board members.

This briefing, in the section on overcoming barriers, has already indicated a range of examples where action is being taken to encourage more women on boards. It includes increasing awareness through different advertising techniques, providing mentoring and social networking opportunities, and training for women seeking positions on public boards.

The consultation submission from Engender provided further detailed examples:

“ • Use at least one mechanism to facilitate board renewal, including, but not limited to, term limits; • Establish written policies describing how the agency plans to increase the number of women on its board; • Review board recruitment strategies and policies, and consider introducing a requirement that women, including women from diverse communities, comprise at least 50 percent of board candidates and/or 50 percent of the interview pool; and • The creation of a national pool of candidates who have been skilled and prepared for public appointments, rendering a set of equally-qualified candidates for selection by public authorities. ”

The Coalition for Racial Equality and Rights suggested that this section could be expanded to include wider representation considerations ¹⁷ .

Section 6 of the Bill requires the appointing person and public authorities listed in schedule 1 to take *other steps* to try to reach the objective by 31 December 2022. It applies when the gender representation objective has not been achieved.

The target date was not in the draft Bill and has been added in response to comments from the consultation. Engender argued that including a target date would incentivise public boards to comply with the legislation. They referred to other international examples where target dates have been set:

“ ...France set out targets for gender balancing measures on boards. Its legislation provided that 20 percent of board members be women by 2013 and that 40 percent of board members be women by 2016. In 2016, women accounted for approximately 60 percent of board nominations in France. In addition to France, other countries, like Norway and Canada, have also relied on targets when implementing gender balancing measures. Given the successful use of targets to achieve gender parity on boards, Engender strongly recommends that the Scottish Government introduce targets in its legislation. ”

A number of respondents commented on the need for sanctions to ensure compliance ³⁵ . The Scottish Government does not consider sanctions appropriate in the context of public appointments, and has instead included a provision to report on progress ³ .

Reporting requirement

The draft Bill did not include a provision requiring public authorities to report on the gender representation objective, but views on this were sought during the consultation. In response, the Scottish Government has included a duty to report on the provisions of the Bill. Further detail on this is to be set out in regulations.

Many of those who responded to this question noted the importance of reporting on compliance. While reporting will not ensure compliance, it was felt that it would provide a level of transparency and accountability and help identify the sectors that face the greatest challenge ³⁵ .

Some suggested that public authorities could report under the reporting requirements of the Public Sector Equality Duty. However, the public authorities subject to that duty, and those listed in the Bill, are not exactly the same. There were further comments about what should be reported on, and how often ³⁵ .

Regulations

The Bill provides for regulations to be made to amend the list of public authorities subject to the gender representation objective, as well as the reporting requirement. Both sets of regulations will be subject to the negative procedure. The EHRC commented that an affirmative procedure would be preferable to ensure “an appropriate level of scrutiny” ¹⁷ .

Schedule 2

Special provision is made for certain public authorities:

- Judicial Appointments Board for Scotland
- Regional Board for Glasgow Colleges
- Regional colleges
- Scottish Criminal Cases Review Commission

The Explanatory Notes state:

“ An example of the need for such provision would be where there is more than one appointing person. This is the case with the Judicial Appointments Board for Scotland where the Lord President makes appointments of judicial members and Scottish Ministers make appointments of legal or lay members. ”

The special provision for the Scottish Criminal Cases Review Commission provides that Scottish Ministers are to be treated as the appointing person, rather than Her Majesty the Queen ¹⁴ .

Financial implications

The Scottish Government has said that any additional costs arising from this Bill are likely to be minimal ⁴⁰ .

The Scottish Government, with the support of the Scottish Government Public Appointments Team, already has a recruitment process for regulated non-executive board members. Many public authorities have signed up to the Partnership for change 50/50, and the University sector aims to achieve a 40:40:20 split of Court members by 2018. The guidance listed [above](#), in the section on positive action - tie-breaker, provides advice on increasing diversity.

In response to the consultation, public bodies, including universities and colleges, said there would be minimal additional costs ³⁵ .

Other organisations suggested there could be costs in areas such as training for staff, writing and promoting guidance and the administrative cost of gathering information ³⁵ . The Scottish Government does not envisage extra costs for these tasks, as they are not required by the Bill.

However, the Scottish Government does note some additional costs for the following:

- Encouraging applications/outreach work – the total costs could range between £184,100 and £241,500 a year.
- Provision of childcare – the Bill does not make provision for childcare expenses for board members. However, the Scottish Government estimates annual costs at just under £25,000.

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