



Law Society
of Scotland

Written Evidence

Gender Representation on Public Boards (Scotland) Bill

August 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Equalities Law Sub-committee welcomes the opportunity to consider and respond to the Scottish Parliament's Equalities and Human Rights Committee's call for evidence on the Gender Representation on Public Boards (Scotland) Bill. The Sub-committee has the following comments to put forward for consideration.

General comments

In 2017 across the EU, five countries have mandatory quotas on female board membership (Belgium, France, Germany, Italy, and Norway) and 10 have either an optional quota or a comply-or-explain best practice recommendation concerning board gender diversity (Gender Diversity on European Boards Realizing Europe's Potential: Progress and Challenges). Denmark, Greece, Austria, Slovenia and Finland had already introduced gender diversity requirements in legislation for the composition of what might be seen as equivalent to public boards in Scotland, namely boards of state-owned companies (European Commission, Women in economic decision-making in the EU: progress report, 2012).

Equality between women and men is one of the European Union's founding values and core aims seeking to eliminate inequalities, and to promote equality, between men and women in all its activities (Directives 2006/54/EC and 2010/41/EU)

Despite developments in gender equality across Scotland and various initiatives in the UK, public boards in Scotland do not represent our society.

Against the evidence that existing alternate methods in the UK are failing to achieve significantly broader representation on public boards reflecting Scottish society, we welcome this Bill.

Specific comments

Impact on people applying for an appointment as a non-executive member of a public board

The impact on people applying will vary in different situations. Where one candidate is best qualified, the appointment process will not be further affected by the provisions of the Bill.

In situations where a person applying is identified as equivalently qualified with one or more other candidates, the procedure set out in section 4 will affect the outcome and potentially the candidates' perception of the appointment process. In this situation, the requirement to give preference to a candidate who would result in progress towards meeting the gender representation objective will apply. Section 4(4) allows for exemptions to be made if appointment of a candidate who is not a woman can be justified by reference to a characteristic or situation particular to that candidate.

Steps should be taken to dispel any perception, for both the public and the women candidates concerned, that appointments are made only to fulfil a quota and not on merit. It is suggested that a transparent application process should be required for positions on boards to ensure confidence, both from the public and from other members of the board, that the women concerned are appropriately qualified for the position.

Impact for those public authorities and appointing persons responsible for encouraging and recruiting women to public boards as non-executive members

The process set out in section 4 for the consideration of candidates is generally satisfactory. However, it is unclear what happens if section 4(1) applies, i.e. how is the appointing person instructed to act if he/she determines that a particular candidate is best qualified for the appointment? We believe that further clarification of the fact that the appointing person is at liberty to appoint the one best qualified candidate without any consideration of the gender representation objective would be beneficial. Otherwise, there is the possibility that the provision could be interpreted to permit the appointing person to appoint another candidate to achieve the gender representation objective, which would constitute positive discrimination and would thus be unlawful.

The ability to apply discretion in exceptional circumstances, as set out in section 4(4) is necessary. However, greater clarity on what would justify departing from the preference set out in section 4(3) would be helpful.

Another relevant factor to consider is the overlapping of existing quotas and membership requirements which currently exist for public boards, and how these interact with each other. For example, the General Dental Council (Constitution) Order 2009 requires the composition of the Dental Council to be divided

equally between lay members and registrant members, and related legislation requires that it has at least one member from each of England, Scotland, Wales and Northern Ireland. Public authorities may find themselves in an increasingly complex landscape of requirements. This could create confusion if it is not clear how different quotas and requirements may interact, and may impact on the ability to make progress on the gender quota if the potential range of applicants is narrowed in an appointment process in order to meet other requirements.

Reporting requirements

We support the requirement for public authorities to report on the operation of the Act. However, detail on what this will mean in practice has been left for regulations. As set out in our previous submissions on this topic, we continue to believe that reports to a designated monitoring body should be required after a period of one year and include a statement of progress made towards achieving the target, and what measures have been taken to ensure that the target will be met by 31 December 2022. In addition, we recommend that all public boards be required to monitor and publically report on their progress towards meeting the initial target in accordance with their specific equality duties.

Penalties for non-compliance

As stated in our previous responses on this subject, a weakness of the underpinning policy of this Bill is the voluntary nature of the quotas. We remain of the view that voluntary targets are unlikely to be an effective method of achieving gender balance on public boards.

It is recognised that some EU countries have succeeded in achieving comparable gender representation on a voluntary basis, Netherlands and Spain, for example, have introduced targets which are neither binding nor accompanied by sanctions.

However, the evidence base for change being brought about by legislation is strong. In 2003 the Norwegian government passed a law that requires companies to have at least 40% of company board members to be women. In place since 2006, it stipulated dramatic regulatory measures for non-compliance. After an initial grace period of two years for existing companies, a failure to achieve the 40% quota would lead to the company being delisted.

In the UK (and thus Scotland) we have almost 10 years of experience of corporate governance codes seeking to drive changes in behaviour. In *The Coalition: our programme for Government*, produced shortly after the 2010 election, the then UK Government committed to promoting gender equality across Boards and appointed Lord Davies of Abersoch to lead a review into how obstacles to the participation of women on boards could be removed. In his March 2011 report Lord Davies advocated a voluntary approach and set out a number of recommendations, including that companies should set targets for the number of women on their boards in 2013 and 2015, with the aim of a minimum of 25% female board representation

by 2015. While in the 2015 five year summary of the Davies Review, it was indicated that the 25% target had been met with a target raised to one third by 2020 the Equality and Human Rights Commission's Inquiry into fairness, transparency, and diversity in board appointments expressed concern that the headline figure masked considerable variation at company level, with most individual companies actually failing to reach the 25% target. In addition, where improvements to representation had been made, the EHRC found that this was as much due to reducing board sizes as it was to new appointments of women. Of companies that had increased the proportion of women on their boards, 31% had done so simply by reducing the number of men.

Recent reports suggest that, in 2017, despite encouraging backdrop on gender diversity; including gender pay regulation, initiatives such as the Women in Finance Charter and the important, independent review by Helen Alexander and Sir Philip Hampton, gender diversity on at senior executive level is largely unchanged from the previous year, and by some measures is digressing.

Given the lack of progress achieved to date in the UK on the basis of voluntary schemes, we remain sceptical as to the effective impact of the Bill in its present form absent it expressly stating that the duties can be enforced in the court with appropriate remedy and providing penalties for non-compliance.

Other comments

We note that the concept of gender as used in the Bill is a binary approach to the concept. This does not account for people who consider themselves to be genderqueer or a third gender.

Over time, consideration should be given to the possibility of introducing quotas for people with other protected characteristics. However, we suggest that this be carried out once the 50% gender quotas have been achieved by the majority of the public boards. This would allow evaluation of the process and the success rate.



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