



Law Society  
of Scotland

# Stage 1 Briefing

## Gender Representation on Public Boards (Scotland) Bill

November 2017



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors, more than 50% of whom are women. 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 previously responded to the Equalities and Human Rights Committee of the Scottish Parliament's call for written evidence on the Gender Representation on Public Boards (Scotland) Bill and has the following comments to put forward for consideration.<sup>1</sup>

## Comments

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### Principles

Despite developments in gender equality across Scotland and various initiatives in the UK, women remain underrepresented on boards and more widely across the decision making bodies of our society. This Bill aims to increase the representation of women on public boards by setting a legislative objective that 50% of non-executive members on a public board should be women.

The Bill establishes a process to be followed when a board that has not yet achieved that target is appointing a non-executive member. In addition, the Bill sets out requirements to encourage women to apply for board positions, take other appropriate steps towards achieving the objective, and to report on progress.

<sup>1</sup> <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-input-to-parliamentary-bills/bills-201718/gender-representation-on-public-boards-scotland-bill/> and [http://www.parliament.scot/S5\\_Equal\\_Opps/General%20Documents/RM\\_ltr\\_to\\_EHRIC\\_31-10-17.pdf](http://www.parliament.scot/S5_Equal_Opps/General%20Documents/RM_ltr_to_EHRIC_31-10-17.pdf)

## Clarity

The main provisions of the Bill would benefit from greater clarity for those who will be responsible for implementing the Bill.

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 – 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.

As noted by the Equalities and Human Rights Committee in its Stage 1 Report, we believe that specific guidance on how the legislation should operate would be a valuable tool for those who will be implementing these measures.

## 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. We also acknowledge the progress that has been made in Scotland, particularly relating to ministerial public appointments.

However, the evidence base for change being brought about by legislation is also strong, with countries such as Norway successfully implementing laws requiring minimum representation of women on company boards, with regulatory consequences for non-compliance – including a 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.



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