



Law Society  
of Scotland

# Consultation Response

Consultation on the draft Gender Representation on  
Public Boards (Scotland) Bill

21 March 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 Government's consultation on the draft Gender Representation on Public Boards (Scotland) Bill. The Sub-committee does not propose to answer all of the questions posed but has the following comments to put forward for consideration.

## General comments

---

The Sub-committee wishes to highlight that many high quality responses were submitted when the Scottish Government previously consulted on this subject in 2014 and would suggest that those responses be revisited as part of this consultation process. There are also models in other jurisdictions, notably, Northern Ireland and Norway which the Scottish Government may find of interest.<sup>1</sup>

The Sub-committee would also note that the concept of gender as used in the draft Bill is a binary approach to the concept. This does not account for people who consider themselves to be genderqueer or a third gender.

Lastly, it is not immediately apparent to the Sub-committee what sanction, if any, is proposed to be used against an organisation that does not comply with the requirements as set out in the draft Bill.

<sup>1</sup> For further reading please see

*Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards available here;* [http://ec.europa.eu/justice/gender-equality/files/gender\\_balance\\_decision\\_making/report\\_gender-balance\\_2012\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf) and

*Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures available here:* [http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive\\_quotas\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive_quotas_en.pdf)

## **Question 1: What, if any, comments would you make in relation to section 1 [Gender Representation Objective] of the Draft Bill?**

---

The Sub-committee support the terms of this draft provision and believe that it is sufficient to achieve equality in the representation of the male and female genders in the non-executive component of public boards in Scotland.

Of course, in our response to the earlier Scottish Government consultation on the introduction of gender quotas on public boards in July 2014, we noted that the weakness of the policy underpinning the Bill is its voluntary nature, since we are of the view that voluntary targets are unlikely to be mainstreamed into an organisation's strategy or plan and unlikely to be prioritised during recruitment procedures.<sup>2</sup> This point is particularly acute during economic recessions.

## **Question 2: What, if any, comments would you make in relation to section 2 [Key definitions] of the Draft Bill?**

---

The various definitions are generally satisfactory, although some of the positions listed in the second column of Schedule 1 to the Bill – each of which fall within the definition of an 'excluded position' – do not strike the Sub-committee as positions that would naturally be considered 'non-executive in nature', e.g. the Lord President, The Lord Justice Clerk, the President of the Scottish Tribunals, etc. As such, there is a question as to whether these positions ought to be included in that column.

## **Question 3: What, if any, comments would you make in relation to section 3 [Duty when appointing non-executive members] of the Draft Bill?**

---

The Sub-committee support the terms of this draft provision.

<sup>2</sup> This response references our response to the Scottish Government's previous consultation on the introduction of gender quotas on public Boards *Women On Board: Quality Through Diversity* which can be accessed here: <http://www.lawscot.org.uk/media/318978/eq1-women-on-board-quality-through-diversity-scottish-government-consultation-on-the-introduction-of-gender-quotas-on-public-boards-law-society-of.pdf>

#### **Question 4: What, if any, comments would you make in relation to section 4 [Consideration of Candidates] of the Draft Bill?**

---

The content of section 4 is generally satisfactory, but it is unclear what happens next when 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? At the very least, it should be clarified that the appointing person is at liberty to appoint that candidate without any consideration of the gender representation objective. 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.

An additional minor point is that there is no definition of 'exceptional circumstances', i.e. what would fall within the coverage of that expression? Of course, this provision is inserted as a 'savings clause' in order to comply with the jurisprudence of the Court of Justice of the European Union in *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051, *Marschall v Land Nordrhein Westfalen* [1998] IRLR 39, *Re Badeck & Others* [2000] All E.R. (EC) 289, *Katarina Abrahamsson, Leif Anderson and Elisabet Fogelqvist* [2000] ECR I-559, *Lommers* [2002] ECR I-2891 and *EFTA Surveillance Authority v Kingdom of Norway* [2003] IRLR 318. Nonetheless, it might be useful to provide examples of what is intended by this term.

#### **Question 5: What, if any, comments would you make in relation to section 5 [Encouragement of Applications] of the Draft Bill?**

---

The Sub-committee support the terms of this draft provision.

#### **Question 6: What, if any, comments would you make in relation to Schedule 2 [Application of Act to Certain Listed Authorities] of the Draft Bill?**

---

The Sub-committee support the terms of this draft provision.

#### **Question 7: What, if any, comments would you make in relation to Schedule 1 [Listed Authorities] of the Draft Bill?**

---

The Sub-committee support the terms of this draft provision. See the comments above in response to question 2.

**Question 8: The Draft Bill does not specify any requirement for reporting. Do you have any comments on reporting requirements under the legislation, including timescales, location and content of reports?**

---

In our previous response, we took the view that consideration should be made to placing an obligation on public boards to report on their progress in achieving the 50% target, what measures they have taken to submit a report to the body appointed with the responsibility of monitoring compliance and, after a period of one year demonstrating the progress they were making to implementing the target within the 2 year period.<sup>3</sup> In addition, we recommended that all public boards be required to monitor and publically report, after a period of 1 year, on their progress towards meeting the initial target of 50% in accordance with their specific equality duties.

**Question 9: Do you have any comments on the draft Bill, not already expressed in response to previous questions, including on how the Bill could be strengthened to deliver the Minister's stated objective of gender balanced public boards?**

---

In our previous response, we raised a number of points which we would reiterate at this stage in the legislative process:

- The absence of any sanction for a public board who fails to meet the 50% target is an obvious weak spot in the Bill. We would make the point that voluntary targets, without sanctions, are rarely effective;
- Steps should be taken to dispel any perception, for both the public and the females 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;
- A further factor to consider is the overlapping of existing quotas and membership requirements which currently exist for public boards and how these all 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, related legislation requires that it has at least one member from England, Scotland, Wales and Northern Ireland, who lives or works wholly or mainly in that geographical area;

- 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 a majority of the public boards. This would allow evaluation of the process and the success rate.

**For further information, please contact:**

Julia Burgham  
Policy Team  
Law Society of Scotland  
DD: 0131 476 8351  
[juliaburgham@lawscot.org.uk](mailto:juliaburgham@lawscot.org.uk)