Creating a fairer Britain
Equality and Human Rights Commission
Response to Scottish Government’s Consultation on the draft Gender Regulations on Public Bodies (Scotland) Bill

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Contact details:

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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).

The EHRC supports the objectives of the Bill, to ensure that Public Boards are more representative of our communities and reflect the diversity of Scotland. We agree that it is important that Scottish Public Boards are able to draw from the widest pool of talent available to them and that where possible, and lawful, there should be a greater expectation that positive action will be used.

We are concerned however to ensure that this legislation is well-drafted so it is fully compliant with existing EU and GB law and avoids the risk of legal challenge which could undermine the objectives of the Bill. Our comments below and in the consultation response should be read therefore in that light – that the EHRC is supportive in principle but concerned that the Scottish Government could inadvertently frame legislation which is not fully effective in achieving its intended effect.

We note that the Bill refers to “gender” as if it were a protected characteristic under the Equality Act 2010. The correct term is “sex” although this would not of course perhaps bite in the way the Government intends in relation to those who identify as male or female. Sex and gender are not synonymous terms. It is unclear therefore how this Bill interacts with the Equality Act 2010. The further devolution of equal opportunities set out in the Scotland Act 2016 relates solely to “Equal opportunities so far as relating to the inclusion of persons with protected characteristics in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions”. As noted above “protected characteristics” include “sex” and not “gender”. We have concerns therefore that the Bill as presently drafted may not lie within devolved competence.

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.
We note that at this stage the Scottish Government has chosen only to prioritise “gender”, or “sex” for these new requirements, despite there being evidence of other groups who share protected characteristics also being underrepresented – for example disabled people’s participation in public appointments was 11.8% in 2015/16 compared to an average 19.6% of Scotland’s population estimated to be disabled. It should also be noted that disabled people’s participation dropped between 2014 and 2015 by 3.5%.
Consultation Questionnaire

Question 1
What, if any, comments would you make in relation to section 1 [Gender representation objective] of the draft Bill?

Please refer to our covering letter which sets out our concerns about the use of the term “gender” rather than “sex”.

The comments below are based on the assumption that the Government accepts the definitional issue that we have raised and that the intention of the Bill is to reduce the under-representation of women (or men) on Scottish public boards.

EHRC supports the objectives of the Bill, to ensure that our Public Boards are more representative of our communities and reflect the diversity of Scotland. We agree that it is important that Scottish Public Boards are able to draw from the widest pool of talent available to them and that where possible, and lawful, and that there should be a greater expectation that positive action will be used.

Whilst we understand the Government’s rationale for prioritising sex equality over equality for other protected characteristics, the opportunities presented by the extension of devolution of equal opportunities in the Scotland Act 1998 should be kept under review and the impact on equality for people from ethnic minority communities, disabled people etc considered at a future date. (See our response to Q4 below).

Q 2 What, if any, comments would you make in relation to section 2 [Key definitions] of the draft Bill?

In the light of our concerns relating to the use of the word “gender” as opposed to “sex” we recommend that the Government stipulates in the key definitions section what is meant by “identify as female”/ “identify as male”.

In doing so, we recommend that the Government bears in mind that gender identity, unlike legal sex, is not necessarily a fixed or binary concept for all individuals and therefore imposing requirements in relation to it in the Bill may result in practical and legal difficulties.

We recognise that this could have an impact on further definitions set out in the draft Bill, particularly for transgender and non-binary people. Greater clarity from the Government on how these terms will be defined will be essential if Public bodies are fully able to comply with the duty. We recommend that to avoid potential difficulties the Bill should bite only on protected characteristics currently covered by the Equality Act 2010.

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

None

**Question 4**
What, if any, comments would you make in relation to section 4 [Consideration of candidates] of the draft Bill?

To enable this to work effectively Ministers and other appointing persons must ensure that all recruitment exercises
- Develop relevant, justifiable and non-discriminatory appointment criteria
- Have only members on the appointing panel who have received training on equal opportunities in recruitment, and managing tie break situations.
- Should operate inside guidance set out by the Scottish Government

Exceptional circumstances. We recognise that there may be circumstances where appointing a women or man on the basis of their sex may disadvantage a person with another protected characteristic who may also be underrepresented on the Board. For example, it may be preferable in terms of increasing diversity to appoint a black male disabled candidate in circumstances where there are no ethnic minority or disabled board members, even though women are also underrepresented. It would therefore be helpful if the term “exceptional circumstances” were further defined and the Bill were to specifically address circumstances in which it would be preferable not to appoint a man or woman, should this have an exceptionally adverse impact on equality as it relates to other protected characteristics.

We recommend that a review function is built into the Bill in a new section (section 10) which enables the Government from time to time to review the effect of the Act.

**Question 5**
What, if any, comments would you make in relation to section 5 [Encouragement of applications] of the draft Bill?

This would seem to be in keeping with general positive action principles developed in the Equality Act 2010. We do note however that under the Equality Act 2010 positive action is permitted but not required. The Government may want to consider extending this section so that the requirement to encourage applications applies to all protected characteristics.
Question 6
What if any, comments would you make in relation to Schedule 2 (introduced by section 7) [Application of Act to Certain Listed Authorities] of the draft Bill?
No specific comment. Whilst accepting that affirmative procedures are more time consuming. However we believe that given some of the issues raised below (the potential incompatibility of requirements for bodies covered both by The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 and further regulations as set out in this Bill), an affirmative procedure would be preferable to ensure an appropriate level of scrutiny.

Question 7
What, if any, comments would you make in relation to Schedule 1 (introduced by section 2) [Listed Authorities] of the draft Bill?
We note that there are some Public Boards (for example David MacBrane Ltd and the Scottish Fiscal Commission) that are “listed” for the purposes of this legislation but not for The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. This seems anomalous. If bodies such as the Fiscal Commission are now required to take positive action should they not also be required to meet the specific equality duties? We would welcome further clarity from the Scottish Government on how it will align these two pieces of legislation.

Question 8
The draft Bill does not specify any requirement for reporting. Do you have any comments on reporting arrangements under the legislation, including timescales, location and content of reports?
Reporting on the composition of Boards by sex is already required for some bodies by The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. However, as noted above, the difference in the list of bodies covered by this Bill and those subject to the specific duty regulations means some bodies will report and some will not. We would however welcome a specific requirement for Scottish Ministers, and others subject to the Bill, to report on the use of the tie breaker in recruitment without identifying candidates.

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 Ministers’ stated objective of gender balanced
public boards?
Please refer to covering letter.

Question 10
To help with the development our Equality Impact Assessment, please provide any comments on the impact of the draft Bill on people who share certain „protected characteristics“: age, disability, sex, gender reassignment, sexual orientation, race and religion or belief, or any further information you think is relevant.
N/A

Question 11
To help with the development of our Business Regulatory Impact Assessment, please provide any comments on the costs and benefits of the draft Bill, or any further information you think is relevant.
Other than the costs of writing and promoting guidance, and ensuring that all interviewing staff are trained, the new Bill should not impose any significant new costs on public boards in relation to record keeping or recording other than the minor administrative costs of gathering this information.